



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JS 941/12

BOIPELO SHIRLEY JARVIS

Applicant

And

AIRPORTS COMPANY SOUTH AFRICA

Respondent

Heard: Stated case

Delivered: 4 March 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] This matter was by agreement, determined on the basis of the parties' pleadings, the agreed bundle and written heads of argument. The applicant had approached the court to seek an order that;

- (i) The settlement agreement concluded on 4 June 2012 be made an order of Court;
- (ii) Payment of such amount it was found was not paid by the respondent to the applicant when giving effect to the back-pay

due to her in terms of the settlement agreement concluded on 4 June 2012;

- (iii) Declaring the termination of the applicant's employment on 31 August 2012 to be an unfair dismissal;
- (iv) An order of reinstatement.

Background:

- [2] The respondent operates both the terminal and customer care departments at the OR Tambo International Airport. It employed the applicant with effect from 1 July 2007 until 31 August 2012 in the position of Head of Department – Terminal Operations. The termination of the applicant's services was as a result of operational requirements.
- [3] The respondent took a decision to realign the two departments, which exercise commenced in February 2011. The aim of this exercise was simply to avoid duplication of functions between the two departments and was not aimed at reducing the number of staff employed in those departments. It is common cause that no proceedings in terms of section 189 of the LRA were undertaken during this initial process.
- [4] The effected employees were offered alternative positions within the realigned structure. It is common cause that the applicant's position was redundant as a result of the re-alignment, and that she had refused to accept an alternative position that was offered to her. It was not in dispute that the alternative position was on the same status level and remuneration rate. She had rejected the alternative position on the grounds that she considered it to be a demotion.
- [5] The applicant referred an Unfair Labour Practice Dispute to the CCMA under case number GEAK 6902/11. The respondent thereafter gave the applicant notice of its intention to engage in section 189 consultations as a result of which the applicant's employment was eventually terminated on 14 October 2011. As a result of this dismissal, the applicant had referred another dispute

to the CCMA under case number GEAK 7060/11. The two disputes were subsequently consolidated under case number GEAK 7060/11 and were resolved by way of a settlement agreement signed at the CCMA on 4 June 2012. The terms of the settlement agreement were as follows;

- (i) *The applicant is reinstated with full benefits without loss of income and benefits from the date of dismissal.*
- (ii) *The applicant would be remunerated her lost salary from the date of dismissal to the date of reinstatement.*

[6] By agreement between the parties, the applicant was supposed to report for duty on 5 June 2012. This was however extended to 12 June 2012. The applicant was however called to a meeting on 11 June 2012 where she was informed that her previous position as Head of Department: Terminal Operations had been made redundant as a result of the realignment, and accordingly the respondent wished to engage with her in terms of section 189 of the LRA.

[7] This retrenchment process was initiated by way of issuing the applicant with a formal section 189(3) notice in the meeting of 11 June 2012. In the notice, it was reiterated that her position and those of her subordinates had become redundant as a result of the realignment process. She was further informed that as her previous position was at level 4, she was to be offered four alternative positions at that level.

[8] On 12 June 2012 the applicant was placed on special leave with full remuneration, and informed that she did not have to report for duty except for purposes of engaging in consultation processes. The consultations with the applicant were due to commence on 12 June 2012 and to continue on 18; 19 and 20 June 2012. It is common cause that the applicant did not attend any of the consultation meetings despite reminders from the respondent.

[9] On 20 June 2012, the Respondent resolved to offer the applicant the Duty Manager position. Correspondence was sent to her on 21 June 2012 advising her that she had failed to report for duty. She was further advised of the

decision to offer her the Duty Manager position, which was at the same remuneration grade and at the same level as her previous post. This was the only vacant position at her level that could be offered to her. She was requested to respond to the offer by 22 June 2012 and informed that if she declined the position, the retrenchment process would follow. On 22 June 2012 the applicant again failed to report for duty.

- [10] The applicant was of the view that the respondent had not properly reinstated her because she had not been placed in her previous position as per the settlement agreement, and accordingly the respondent could not engage in section 189 consultations. The respondent averred that it was impossible to place her in that position as it had been made redundant and no longer existed in the current structure, which the applicant was aware of, and further contended that it had complied with the settlement agreement. It was in the light of this position that the applicant launched an application on 29 June 2012 in terms of section 158 (1) (c) of the LRA to make that settlement an order of court. This respondent opposed this application.
- [11] On 23 July 2012, the applicant sent an e-mail to the respondent, advising it that she was denied access to her employment area; that she was still not reinstated and further that she would avail herself for the consultation process once properly reinstated. She further rejected the offer of the position of Duty Manager.
- [12] On 25 July 2012 the applicant was advised in writing that she had declined to attend consultation meetings or make any representations. She was again invited to a further meeting to be held on 30 July 2012, and another one scheduled for the next day. She again failed to attend those meetings.
- [13] It is common cause that the applicant was issued with a retrenchment letter on 31 July 2012 notifying her that her employment would be terminated on 31 August 2012. The letter further advised that due to her unreasonable refusal to accept a reasonable alternative position within the respondent's structure she would not be paid a severance package.

The submissions:

(i) *Should the settlement agreement be made an order of court?*

- [14] In her statement of claim, the applicant's main contentions were that despite being paid her outstanding salary, the respondent nevertheless failed to reinstate her in her position even though she had reported for duty. She contended that she was simply placed on special leave and informed to avail herself for consultation meetings. Her view is that the respondent failed to comply with the terms of the settlement agreement, and that the agreement was not entered into on the understanding that the respondent would engage with her in terms of section 189(3). She contended that she could not be engaged in section 189 proceedings in the absence of full compliance with the settlement agreement.
- [15] Submissions further advanced on behalf of the applicant were that after the conclusion of the settlement agreement, and when the respondent informed her that her position no longer existed, it repudiated the settlement agreement, and consequently, she was entitled to approach the Court in terms of section 158 (1) (c) of the LRA. Thus, it was submitted that once her position no longer existed, she could no longer be reinstated in that position and therefore the respondent could not fully comply with the settlement agreement.
- [16] It was further submitted an employer could not negotiate with an employee in terms of section 189 in circumstances where that employee's position no longer existed and that employee was not reinstated in terms of a settlement agreement. It was contended that any engagement with the applicant in restructuring or re-alignment procedures was not "*bona fide*" as she was subsequently demoted with an offer of the alternative position. This was evident from the fact that in terms of the new position, a number of employees who previously reported to her were elevated to higher levels, and thus no one reported to her. Furthermore, the new position entailed a loss of benefits she previously enjoyed.

Evaluation:

- [17] Section 158 (1) (c) of the LRA simply provides that the Labour Court may make an arbitration award or any settlement agreement an order of Court. It is trite that section 158 (1)(c) must be read with and subject to s158 (1A)¹. As the Labour Appeal Court in *Greef v Consol Glass (Pty) Ltd*² stated, section 158(1A) describes what settlement agreements are being referred to in s158(1)(c), and thus properly interpreted, in terms of s158(1)(c), read with s158(1A), the Labour Court may make any arbitration award an order of court and may only make settlement agreements, which comply with the criteria stated in s158(1A), orders of court.
- [18] Flowing from the decision in *Greef*, it follows that not every settlement agreement will be made an order of court, even if that settlement agreement complies with the criteria's stated in s158(1A). Ultimately, whether an order in terms of section 158 (1) (c) of the LRA will be granted or not is at the discretion of the court, which discretion must be exercised in a judicial manner, taking into account all the relevant facts and circumstances.
- [19] In this case, I did not understand the respondent's argument to be that there was a dispute about the settlement agreement itself. The only issue is whether it had complied with its terms or not by reinstating the applicant. The LRA does not define what the term 'reinstatement' is. It can however be accepted that the Constitutional Court judgment in *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*³, is authority on what it is meant by reinstatement. Nkabinde J (as he then was) in giving meaning to the term within the context of section 193 (1) (a) of the LRA held that;

¹ *Bramley v John Wilde t/a Ellis Alan Engineering and another* [2003] 4 BLLR 360 (LC). The section provides that A settlement agreement that may be made an order of court by the Labour Court in terms of s158(1)(c), must (i) be in writing, (ii) be in settlement of a dispute (i.e. it must have as its genesis a dispute); (iii) the dispute must be one that the party has a right to refer to arbitration, or to the Labour Court for adjudication, in terms of the LRA; and (iv) the dispute must not be of the kind that a party is only entitled to refer to arbitration in terms of s22(4), or s74(4) or s75(7).

² (2013) 34 ILJ 2385 (LAC) at para 19. See also *South African Post Office Ltd v CWU obo Permanent Part-Time Employees* (2014) 35 ILJ 455 (LAC) where the LAC, per Wagley JP held at para 21 that; "Section 158(1)(c) of the LRA provides that the Labour Court has the jurisdiction to make any settlement agreement, concluded in respect of a matter arising within the scope of the LRA, an order of court. This does not mean that the order is there for the taking. The Labour Court has a discretion to make it an order of court even if it otherwise meets the criteria provided in section 158(1A), read with section 158(1)(c) of the LRA"

³ 2009 (1) SA 390 (CC)

*'The ordinary meaning of the word 'reinstate' is to put the employee back into the same job or position he or she occupied before the dismissal, on the same terms and conditions. It is aimed at placing an employee in the position he or she would have been but for the unfair dismissal. It safeguards workers' employment by restoring the employment contract. Differently put, if employees are reinstated they resume employment on the same terms and conditions that prevailed at the time of their dismissal. As the language of s 193(1)(a) indicates, the extent of retrospectivity is dependent upon the exercise of a discretion by the court or arbitrator.'*⁴

- [20] The respondent's contention was that whether it had complied with the agreement or not needs to be assessed within the context leading to the agreement of 4 June 2012. In this regard, the Respondent submitted that the settlement had been entered into pursuant to an accepted settlement proposal it had made to the applicant and her representatives in its correspondence of 29 May 2012, wherein the following was stated:

"When it became evident by September 2011 that your client would not accept redeployment to a position in the realigned structure, which in the opinion of our client was a reasonable redeployment, it realised that the realignment process may, notwithstanding its best endeavours and intentions, result in the possible dismissal of your client and gave your client notice on 23 September 2011 of its intention to engage your client in consultation regarding her possible operational dismissal. Your client did not participate in those operational dismissal consultations as she, in her view, still had an outstanding grievance which had to be resolved. Whilst our respective clients have different views as to whether our client was entitled not to participate in the consultations regarding her possible operational dismissal, our client is prepared to reinstate your client on the same terms and conditions employment that regulated her employment at the time of those consultations to afford her the opportunity of engaging our client fully in consultation regarding her possible operational dismissal on account of her position as Head of Department: Terminal Operations having become redundant as a result of the realignment of existing function dealing with customer care in the Customer Care and Terminal Departments." (Underlining own emphasis).

⁴ at para 36

[21] In the light of the above, the respondent holds the view that it had fully complied with the settlement agreement, and that there was no basis for the court to make that settlement an order of court. It contended that it could however not reinstate the applicant in her previous position as it no longer existed. On 1 June 2012, the union representing the applicant had responded to the correspondence and the proposed settlement by stating that; -

“This serves to confirm that our member will accept your reinstatement without loss of benefits...”

[22] In the light of this response, it was contended that the court should not turn a blind eye to the context of the settlement agreement and the correspondence between the parties. It was further submitted that the union's acceptance of the offer of settlement was unconditional, and no reservations were recorded therein. To that end, it was the respondent's contention that the parties clearly understood that when the applicant would be reinstated, the respondent would have the right to revisit the retrenchment process

[23] In SAPO, the LAC had further held that;

“.....In exercising the discretion, the Court must take relevant facts and circumstances into account, such as are necessary to satisfy the demands of the law and fairness. Necessarily, each case must be decided on its own facts and circumstances. There is, otherwise, no closed list of factors to be taken into account....”⁵

[24] In this case, a number of factors militate against a discretion being exercised in favour of the applicant for the following reasons;

- (a) The respondent's attorneys' correspondence of 29 May 2012 outlining the proposed settlement of the dispute is detailed, and more importantly, it indicated that the proposal was made against the background of the realignment process, with emphasis being placed on the fact that the respondent did not intend to dismiss the applicant or any other employee as a result of the realignment

⁵ at para 22

- (b) In the above correspondence, it was made abundantly clear that the applicant's previous position had become redundant as a result of the realignment exercise.
- (c) The applicant's union in response simply accepted the offer, and failed to raise any concerns surrounding the terms of the reinstatement. At no point in the acceptance letter was it disputed that the applicant's position had not become redundant, nor was there any issue raised in regards to the realignment exercise. Thus the offer was accepted without any reservations.
- (d) There is nothing that indicates that the applicant could have had a different understanding of the basis of terms and conditions of the settlement agreement, and I am in agreement with the submissions made on behalf of the respondent that the Court cannot ignore the background against which the settlement agreement was entered into and blindly grant the applicant her wishes.
- (e) The fact that the underlying basis for the settlement is not specified with any particularity in the agreement itself does not detract from the fact that the applicant and her union were indeed aware of the basis of the settlement, more particularly the fact that her previous position was redundant and the retrenchment process was anticipated. It can thus also not be correct that when the applicant was informed that her position had been declared redundant, the respondent had repudiated the agreement. The applicant was well aware of that fact, and the correspondence of the respondent was merely to reiterate that fact.
- (f) When the applicant reported for duty on 12 June 2012, it was not practically possible to reinstate her in exactly the same position that she previously occupied as that position had been declared redundant. She was however reinstated as per the settlement agreement and however placed on special leave pending the finalisation of the consultation process.

- (g) Nothing can be read into the fact that she was placed on special leave, as it was apparent that her position was redundant, and she could not be allocated any tasks whilst the retrenchment process and the offer of an alternative position was up for consideration. The fact that she was placed on special leave does not imply that she was not reinstated at all.
- (h) It was not disputed that the applicant was offered reinstatement in an alternative position, which was at the same level as her previous one. Her refusal to accept the alternative position in the light of her previous one having been declared redundant was grossly unreasonable. A reinstatement could clearly not be feasible on the terms dictated by the applicant when such terms were clearly unreasonable.
- (i) The applicant's demand that she be reinstated at a higher position when she was not suitably qualified for it was equally unreasonable and unrealistic.
- (j) As the LAC in *SAPO* observed, the purpose of making an agreement or award an order of the Labour Court is to compel its enforcement, or enable its execution and not for some other purpose⁶. In this case, it appears that the applicant seeks not only to be reinstated in a position that does not exist, but for the Court to be party to her elevation to a position which she is not suited for. The court cannot countenance an abuse of its process.
- (k) No purpose would be served in making the settlement agreement an order of court when it is apparent that the applicant cannot be reinstated in a position, which does not exist, or where there was compliance as the respondent had reinstated her in a reasonable alternative position, which the applicant had declined.
- (l) Inasmuch as reinstatement implies the restoration of the status quo, where this is not possible as a consequence of changes necessitated by operational requirements of an employer, the latter cannot be found

⁶ At para 22

to be at fault where the employee as in this case, unreasonably declines a reasonable alternative position, which does not in any manner prejudice her.

- (m) There is no merit in applicant's contentions that the alternative position is a demotion. In these circumstances, it cannot be said that the respondent failed to comply with the terms of the settlement agreement, and accordingly her application in terms of section 158 (1) (c) of the LRA should be dismissed.

(ii) *The dispute surrounding the fairness of the dismissal:*

- [25] The respondent's main contention was that the applicant was given an opportunity to make representations as to why her position prior to the realignment should not have been made redundant. She had however failed to make submissions relating to the reason her previous position should not have been made redundant, and further refused to accept the alternative position offered to her.
- [26] It was further submitted on behalf of the respondent that during the realignment exercise, a number of the applicant's previous subordinates were promoted into positions in the new structure that were at the same level as the alternative position offered to her. The applicant accordingly held the view that the position was not appropriate but that she should have been offered the position of Manager: Customer Care, which was at a higher level than the alternative position offered to her. The respondent however held the view that the position of Manager: Customer Care was not suitable for her as *inter alia*, it was at a higher level, and her qualifications and experience were not sufficient for the requirements of the position.
- [27] The respondent further contended that the applicant was informed of the need to retrench as per its notice of 11 June 2012 to her, and complied fairly with the retrenchment criteria as outlined in that correspondence. It also contended that it was not precluded by virtue of the settlement agreement to engage the applicant in retrenchment consultations. In regards to the selection criteria, the respondent further submitted that there was no one else that ought to

have been retrenched, and that the applicant did not at any stage contend that anyone else should be retrenched.

[28] The applicant submitted that her dismissal on account of operational requirements was both substantively and procedurally unfair on the basis that she was not reinstated properly in accordance with the terms and conditions of the settlement agreement.

[29] She further held the view that there was no general need to retrench, and that the respondent ought not to have engaged her in terms of section 189, as she was not properly reinstated. Furthermore, she also contended that the respondent did not follow the required retrenchment process in terms of section 189 to terminate her employment. The applicant further held the view that there was no selection procedure followed, and that to the extent that she was not reinstated, the respondent could not have engaged her in a retrenchment process

Evaluation:

[30] The main issue for determination in this regard as per the parties' pre-trial minute is whether the respondent was entitled to engage the applicant in retrenchment consultations when it did so. In this judgment, it has been concluded that given the facts of this case, and following upon the settlement agreement of 5 June 2012, the applicant was indeed reinstated in accordance with that agreement. It therefore follows that once there was reinstatement, the respondent was entitled to engage the applicant in regards to the retrenchment process, and not simply on the terms as dictated by the applicant.

[31] It is trite that for the purposes of retrenchment, an employee is entitled to be properly consulted in terms of the provisions of section 189 (1) of the LRA, with a view of reaching consensus on the items identified in section 189 (2) of the LRA. Furthermore, it was not seriously contested in this case that the notice issued to the applicant on 11 June 2012 was in compliance with the requirements stated in section 189 (3) of the LRA.

[32] The issue that arises in this case is what was to be expected of the respondent in circumstances where the applicant flatly and unreasonably refused to engage with it in regards to the consultation process. The Labour Appeal Court in *Johnson & Johnson (Pty) Ltd v CWIU*⁷ dealt with this particular scenario in the following terms;

“The achievement of a joint consensus-seeking process may be foiled by either one of the consulting parties. The employer may obviously frustrate it by not fulfilling its obligations under s. 189(1), (3), (5), (6) and (7). The other consulting party may do it by refusing to take part in any of the stages of the consultation process, or by deliberately delaying the whole process.

It may also appear that any one of the parties simply went through the entire formal process with no intention of ever genuinely reaching agreement on the issues discussed.

These different possibilities depend on the facts of each particular case. The important implication of this is that a mechanical, “checklist” kind of approach to determine whether s. 189 has been complied with is inappropriate.

The proper approach is to ascertain whether the purpose of the section (the occurrence of a joint consensus-seeking process) has been achieved. If that purpose is achieved, there has been proper compliance with the section. If not, the reason for not achieving the purpose must be sought. If the employer alone frustrated the process in some way or another, there can be no compliance. If the employer was not at fault and did all it could, from its side, to achieve the kind of consultation referred to above, the purpose of the section would also have been achieved.”

[33] In this case, consultation meetings were scheduled for 12, 18, 19 and 20 June 2012; 16, 30 and 31 July 2012. The applicant, clearly holding an incorrect view that she had not been reinstated as per the settlement agreement, had unreasonably refused to participate in those consultation meetings. It was further not in dispute that she was made aware of the alternative positions that the respondent had offered her. She was equally aware that her previous

⁷ [1998] 12 BLLR 1209 (LAC) at 1216J-1217A

position had been declared redundant as a consequence of the realignment exercise, and that the alternative position of Duty Manager was offered to her. Her contention that the alternative position was a demotion was clearly misplaced if not spurious in that the alternative position was on the same level as the one she had previously occupied save for some changes necessitated by the realignment process. It is trite that the fact that the alternative position offered entails a variation of the employee's original terms and conditions of employment does not justify a refusal by the employee to accept the offer⁸.

[34] As it has been repeated throughout this judgment, the only basis upon which the applicant had declined to participate in the consultation process was her incorrectly held view that she had not been reinstated. Having steadfastly held on to that view, and thus persisting with her obstinate attitude, it cannot be said that the respondent did not take all reasonable means to engage meaningfully with her in order to reach consensus on the retrenchment process.

[35] Once it was apparent that the applicant had no intention whatsoever to engage with the respondent on the consultation process, and it was further apparent that the alternative position had been rejected, there was nothing in law nor in fairness that obliged the respondent to compel or convince her to either avail herself to the consultation process or to accept the alternative position⁹. The respondent took all reasonable steps in achieving consensus, and the applicant unreasonably rebuffed those overtures. The applicant made her choices, *albeit* foolhardy, and must therefore come to terms with the consequences of those choices.

[36] The applicant's obstinance therefore left the respondent with no option but to effect her retrenchment. Her persistent refusal to participate in the consultation process clearly frustrated that process, and in effect, it should be concluded that she waived her rights in that respect. She can therefore not run to this court and complain about non-compliance with the provisions of

⁸See *Entertainment Catering Commercial & Allied Workers Union of SA & others v Shoprite Checkers t/a OK Krugersdorp* (2000) 21 ILJ 1347 (LC)

⁹ See *LC Steinmuller (Africa) Ltd & others v Shepherd* (2005) 26 ILJ 2359 (LAC)

section 189, when she had in fact turned her back on the very process envisaged in terms of those provisions.

- [37] In the light of her refusal to either engage the respondent in the consultation process, and further unreasonably refusing to even consider the offer of an alternative position which would have slightly varied her original terms and conditions of employment, it follows that her retrenchment cannot be construed to be either procedurally or substantively unfair, nor can she be entitled to any relief in that regards.

(iii) *The issue pertaining to payment of amounts due in terms of the settlement agreement:*

- [38] It is not clear on what basis the applicant alleged that payments in terms of the settlement agreement were still due to her. This issue was not raised in the written heads of argument submitted on her behalf. Furthermore, in her statement of case¹⁰, the applicant averred that once she had launched her application in terms of section 158 (1) (c) of the LRA, *'they paid my outstanding salary but refused to reinstate me'*. In its opposition to the applicant's statement of claim, the respondent averred that the applicant was informed on 6 July 2012 that all arrear payments would be made on the next payroll being 13 July 2012. The applicant chose not to attend to this averment in her replying statement.

- [39] In the parties signed pre-trial minute, one of the issues raised for determination was whether the applicant had received payment of the amounts due to her in terms of the reinstatement order¹¹. However, this is at odds with the contents of paragraph 3.10 of the same minutes where it is recorded that *"The applicant was paid in lieu of notice and received payments due to her up and including 31 August 2012"*.

- [40] Other than the difficulties raised above, it is not clear from the applicant's allegations of non-payment as to what these amounts are neither are they quantified. Be that as it may be, the respondent had made reference to Annexure 62 A that showed that the applicant was indeed paid remuneration

¹⁰ page 7 of index to pleadings

¹¹ Para 4.5 of the pre-trial minutes

until August 2012. In these circumstances, there is no basis for a conclusion to be reached that there is merit in the applicant's allegations that payments are still due to her in terms of the settlement agreement. Accordingly, her claim should be dismissed.

- [41] The respondent had sought a cost order in the event that the applicant's claim failed. Having had regard to this issue, even though I am of the view that the application in terms of section 158 (1) (c) was clearly ill conceived, and there is clearly no merit in the applicant's other claims, considerations of law and fairness militate against such a cost order.

Order:

- (i) The applicant's application in terms of section 158 (1) (c) of the Labour Relations Act is dismissed.
- (ii) The applicant's claim in respect of alleged non-payments of amounts due in accordance with a settlement agreement entered into between the parties on 4 June 2012 is dismissed.
- (iii) The termination of the applicant's employment consequent upon the respondent's operational requirements was procedurally and substantively fair.
- (iv) There is no order as to costs.



Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

Representatives of record:

On behalf of the Applicant:	Mr. Steve Dawson (of WEPU)
On behalf of the Respondent:	Adv F A Boda
Instructed by:	Mervyn Taback Inc

LABOUR COURT