IN THE LABOUR COURT OF SOUTH AFRICA

Before Landman J **Case Number: D498/98**

In the matter between:

DEPARTMENT OF LABOUR **Applicant**

and

M G COWLING NO **1st Respondent**
MADELEINE VAN ZYL **2nd Respondent**

PRESIDING JUDGE:

Landman J

ON BEHALF OF APPLICANT:

Advocate I Moodley *instructed by* the **State Attorney**

ON BEHALF OF 2ND RESPONDENT:

Mr D H Gush *of* **Shepstone & Wylie Tomlinsons Inc.**

DATE OF HEARING:

20 August 1998

PLACE OF HEARING:

Durban

DATE OF JUDGMENT:

24 August 1998

JUDGMENT

[1] Madeleine van Zyl was the head of the Labour Centre at Ladysmith, KwaZulu-Natal until her employment relationship with the Department of Labour came to an end on 30 November 1996. She had worked for the Department for 17 years. Ms Van Zyl was dissatisfied with the situation. She applied for a conciliation board. A board was not convened. She apparently referred a dispute to the CCMA. The CCMA was unable to resolve the dispute and issued a certificate to this effect. She then filed a written application (form LRA 7.13) requesting the CCMA to arbitrate her dispute with the Department of Labour. She defined the issues still in dispute in the following way:

Forced retrenchment/dismissal of Labour Centre Head whilst a freeze on Forced retrenchments was placed.

She sought the following resolution:

Financial compensation in terms of the Labour Relations Act no 66 of 1995 section 194. My dismissal was automatically unfair. I therefore claim 24

Months remuneration calculated at my rate of remuneration on the date of my dismissal (30.11.96) Section 196 LR Act 1995. 18 weeks severance pay.

[3] In the normal course of events the applicant would have referred the dispute concerning her dismissal to the Labour Court, for the Labour Court has jurisdiction regarding dismissal for operational requirements and as regards automatic dismissal, see s 181(5)(b) of the Act. The applicants seems to have elected to rather have the matter arbitrated by the CCMA. She could not make this choice unilaterally. S 141(1) provides that if a dispute remains unresolved after conciliation, the CCMA must arbitrate the dispute (a) if a party to the dispute would otherwise be entitled to refer the dispute to the Labour Court for adjudication and (b) instead "all the parties agree to arbitration under the auspices of the Commission".

[4] Arbitration proceedings were enrolled for 4 December 1997 before a senior commissioner, Prof M G Cowling (the first respondent). They were postponed until 3 February 1998 and, after heads of argument had been prepared, an award running to some 30 pages was issued on 10 March 1998.

[5] The Department was represented at the arbitration proceedings by

Mr Ndlala assisted by Mr Potgieter (a Deputy Director). No objection was taken at any stage to the jurisdiction of the CCMA or the commissioner to entertain the matter.

[6] The Department, in Potgieter's affidavit of 13 July 1998 filed in support of an application to review the award, alleges that it did not consent to the jurisdiction of the commissioner and the commissioner did not mero motu raise the point.

[7] The Department is the custodian and administrator of the Labour Relations Act 66 of 1995. One may assume that both representatives of the Department, at the arbitration hearings, were aware that the commissioner was requested to deal with an alleged dismissal founded on a retrenchment alternative one which was automatically unfair. I go further, in the absence of a statement to the contrary, I find that the representatives they did know this. They do not deny that they knew this. Why then did the Department continue with the arbitration, file heads of argument and argue the matter on its merits? The inescapable conclusion is that, until the award materialised, the representatives of the Department were content to have a matter which fell within the Labour Court's jurisdiction arbitrated by the CCMA by tacit agreement or consent.

[8] Mr Moodley, who appears for the Department, sought to argue that s 141 of the Act requires an express consent. It is common cause that there was no express consent. The section does not require express consent. Implied consent will suffice. There is no public policy reason why a party who is aware of its rights may not tacitly consent to such a matter being arbitrated.

[9] There is therefore no merit in this point. I turn however to the following ground of review, which is also based on an alleged absence of jurisdiction. It can also be construed as an excess of power and a gross irregularity.

[10] Prof Cowling's award showed that he wrestled earnestly and long with the niche into which Ms Van Zyl's dismissal fell and the cause of her predicament. He found that there had been a constructive dismissal. He then went on, correctly, to ascertain whether, having regard to the onus, the dismissal was fair. However when he reached the end of the award he had departed from this premise. He found that the termination of employment was not a dismissal but that the Department's treatment of Ms Van Zyl, which he found, resulted in the termination of the employment relationship between them "was an unfair labour practice from both a substantive as well as a procedural point-of-view". For this he awarded her

6 months' remuneration as compensation.

[11] I return to the jurisdictional aspect. The parties could have agreed tacitly that the commissioner arbitrate an alleged residual unfair labour practice, if unresolved, as it is a dispute which would otherwise be adjudicated by the Labour Court. See item 2(a) of Schedule 7 to the Act read with item 3(4)(a) and s 141. Ms Van Zyl did not seek to have this type of dispute arbitrated nor did the Department intend to agree to such an arbitration. It follows that the commissioner had no jurisdiction to make the award which he did. He exceeded his powers and the award is reviewable on this ground.

[12] The review application was out of time, far out of time. However taking into consideration the test laid down in **Melane v Santam Insurance Ltd** 1962 (4) SA 531 (A) I am of the opinion that this is a case where the late application should be condoned although Ms Van Zyl acted reasonably in opposing it.

[13] In the premises the arbitration award in case number KN9202 dated 10 March 1998 is reviewed and set aside. The matter is remitted to the CCMA for the alleged unfair dismissal to be arbitrated by a commissioner other than the first respondent. The application under case number

D282/97, to make the award an order of this court, which was heard simultaneously with the review is dismissed. There will be no order for costs.

SIGNED AND DATED AT DURBAN ON THIS 24TH DAY OF AUGUST 1998

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A A Landman

Judge of the Labour Court