IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

Case No.: JR442/08

REPORTABLE/ NOT REPORTABLE

In the matter between:

ATWELL DANIEL GQOKOMA	**APPLICANT**
And	
COMMISSIONER FOR CONCILLIATION, MEDIATION AND ARBITRATION	**First Respondent**
P J VAN DER MERWE	**Second Respondent**
DEPARTMENT OF FOREIGN AFFAIRS	**Third Respondent**

HEARD ON:	29 September 2009
JUDGMENT BY:	C.J. MUSI, AJ
DELIVERED ON:	27 November 2009

[1] This is an application to review and set aside a ruling made by the second respondent (the Commissioner) in terms of which the applicants' claim was dismissed. The third respondent also

applies for condonation for the late filing of its opposing affidavit.

[2] I propose to deal with the issue of condonation before dealing with the merits of this matter.

[3] The third respondent's opposing affidavit was supposed to have been filed on 5 December 2008. It was delivered to the applicant on 22 December 2008. It was 11 days late. The third respondent's explanation for the delaying is that the applicant sought original documents wish were more than 11 years old. Although documentary records are normally kept for five years it was endeavoured to trace these documents. The applicant for condonation is not opposed.

[4] The delay is not inordinately long. Although the explanation given is not convincing it is acceptable. The third respondent has good prospects of success. There is no prejudice. This matter is clearly of importance to both parties and might even have far reaching consequences in respect of other ex employees of the third respondent. Condonation is therefore granted for the late filing of the opposing affidavit.

[5] The applicant referred an unfair dismissal dispute to the first respondent (the Commissioner for Conciliation, Mediation and Arbitration (CCMA)). He alleged that he was constructively dismissed by the third respondent (the Department of Foreign

Affairs). His request for a voluntary severance package (VSP) was approved by the third respondent with effect from 1 April 1997. The notice period commenced, on 1 March 1997. He requested the CCMA to annul the VSP and order his reinstatement. The conciliation proceedings were conducted on 7 January 2008 in the absence of the third respondent. On 14 January 2008 the commissioner published his ruling wherein he dismissed the applicant's claim.

[6] The applicant was employed by the Department of Foreign Affairs of the Ciskei from 1 July 1984 to 30 November 1994. As part of the integration process whereby the former "Independent States" viz Transkei, Bophuthatswana, Venda and Ciskei (TBVC States) were integrated into the Republic of South Africa he was transferred to the Department of Foreign Affairs (the Department) Pretoria with effect from 1 December 1994. He was a director in the Directorate for Regional Economic Organisation until 31 March 1997.

[7] As a result of the rationalisation process within the Department, he and at least 7(seven) other directors were offered posts of deputy – director which was one rank lower than the posts that they were in. These demotions were not confined to directors. Deputy Directors, assistance directors, senior state accountants and assistant state accountant were also demoted as part of the rationalisation process. The applicant alleges that only ex – TBVC employees in the Department were targeted. They were

unfairly demoted and some of his colleagues were unfairly dismissed. He also stated that when a colleague, Pitzer, was posted to the South African Embassy in Canada another official was recruited to perform Pitzer's duties whilst he was over looked. He therefore remained idle in the work place.

[8] He applied for a voluntary severance package in terms of an agreement between employee organisations in the Public Service, Bargaining Council and the Department of Public Service and Administration. On 1 April 1997 he was advised by the Department that his request for a VSP was approved from 1 April 1997. He received benefits as prescribed by circular 10/12/26 dated 22 May 1996 issued by the Department of Public service and Administration.

[9] The applicant applied for reinstatement by letter dated 30 November 1998. On 3 February 1999 the Department respondent as follows to his application:

"2. The Department of Public Service and Administration has indicated in its circulation Minutes 10/12/26 dated 22 May 1996 that officials who have indentified themselves for the voluntary severance package and terminated their services under this provision shall not be re – appointed in the Public Service Act, 1994.

3. It is regretted that your request could not be considered in view of the above mentioned prescripts…"

[10] On 12 February 2002 the applicant lodged a complaint at the Human Rights Commission, The Human Rights Commission responded by *inter alia* stating that :

"Your complaint, on proper analyses relates to constructive dismissal by your employer. It is therefore our considered opinion that your complaint would be more effective and expeditiously dealt with by the CCMA…"

[11] The applicant referred the dispute to the General Public Service Sectoral Bargaining Council and different CCMA offices without success. It was ultimately allocated to the commissioner (first respondent) to deal with.

[12] The commissioner found that the CCMA does not have jurisdiction to ignore, annul or amend the agreement that existing between the Department of Public Service and Administration and employee organisations in the Chamber of the Public Service Bargaining Council at the time of the voluntary termination of the services of the applicant.

[13] The applicant launched a multi pronged attack on this finding. He contends, firstly that the ruling should not have been made in the Department's favour because it absented itself from the proceedings, secondly that the commissioner did not sufficiently consider the primary issue viz constructive dismissal and lastly that the commissioner erred in not finding that he should have been reappointed. He attached numerous *annexures* to his papers without drawing the Department's attention thereto in his

founding affidavit. That is impermissible. The founding affidavit should make reference to the *annexures* attached thereto. See **PORT NOLLOTH MUNICIPALITY v XHALISA and OTHERS; LUWALALA and OTHERS v PORT NOLLOTH MUNICIPALITY 1991 (3) SA 98 (C) at 111.** The applicant is a lay person, who conducts his own case. There is no objection by the Department. There is also no prejudice to the Department. I will accordingly have regard to all the material placed before me by the applicant.

[14] The applicant's contention that the absence of the Department during the conciliation proceedings entitles him to an order or award in his favour is misplaced. A commissioner is duty bound to have regard to all the facts placed before him/her before making a decision in any matter. Even where one party is in default the commissioner must still consider whether he/ she is in law entitled to give the relief sought. There is a well – thumbed body of precedent of this court to the effect that commissioners are obliged to ask themselves whether they have the necessary jurisdiction to entertain disputes referred to the CCMA. See **Polokwane Local Municipality v SALGBC & Others** (2008) 8 BLLR 783(LC) at paragraph 13, **Northern Cape Provincial Administration v Hambidge NO & Others** (1999) 7 BLLR 698 (LC) at paragraph 8.

[15] The pivotal question before the commissioner was whether there was a dismissal. The commissioner found that there was

no dismissal because the applicant on his own initiative identified himself for voluntary termination of his service. I can find no fault with the commissioner's reasoning.

[16] It is clear that circular 10/12/26 was addressed to heads of all departments/provincial administrations/office of provincial service commissions. It was not limited to the Department nor was it limited to ex TBVC officials in the department. This was a special initiative whereby serving officials were afforded the option to request that their services be terminated on a voluntary basis. Annexure A to circular 10/12/26 reads as follows:

> "Special initiative whereby serving officials are afforded the option to request that services be terminated on a voluntary basis and a prescribed special severance package be paid."

Special severance packages were to be paid to those officials whose applications were approved.

[17] The applicant admits that he applied for a voluntary severance package. He admits that his application or request was approved and that he was subsequently paid benefits in terms of the policy governing voluntary severance packages.

[18] The applicant alleges that he took the decision to exit from the public service but that the VSP was the only method used to permit anyone to leave the public service. This cannot be true.

As the department stated in its opposing affidavit, the applicant always had the right to resign. He always had the right to unilaterally terminate his employment contract. Which he did not do.

[19] The applicant was a senior official. He chose to request that he be given a voluntary severance package. There is no evidence of any pressure being exerted on him by the employer. There is also no evidence of an ultimatum from the employer. His request was considered and approved by the Department. When it was approved, an agreement came into existence between the applicant and the Department. In terms of that agreement he voluntarily terminated his service; in return he received substantial benefits. The employment contract of the applicant was terminated by agreement. There was therefore no dismissal. That being the case the CCMA had no jurisdiction to entertain the matter.

[20] The applicant presented a very gaunt case to establish constructive dismissal.

[21] Constructive dismissal means that an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee – See section 186 (1) (e) of the Labour Relations Act 66 of 1995.

[22] **In Solid Doors (PTY) LTD v Theron NO and Others** at paragraph 28 and the following was said

"It should be clear from the above that there are three requirements for constructive dismissal to requirements for constructive dismissal to establish. The first is that the employee must have terminated the contract of employment. The second is that the reason for termination of the contract must be that continued employment has become intolerable for the employee. The third is that it must be the employee's employer who had made continued employment intolerable. All these requirements must be present for it to be said that a constructive dismissal has been established. If one of them is absent constructive dismissal is not established. This, there is no constructive dismissal if an employee terminates the contract of employment without the two other requirements present...

[29] Having established what the requirements are for a constructive dismissal, it is necessary to make the observation at this stage of the judgement that the question whether the employee was constructively dismissed or not is a jurisdictional fact that – even on review – must be established objectively. That is so because if there is no constructive dismissal – the CCMA would not have jurisdiction to arbitrate. A tribunal such as the CCMA cannot give itself jurisdiction by wrongly finding that a state of affairs necessary to give it jurisdiction exists when such state of affairs does not exist… The question in a case such as this one - even on review – is simply whether or not the employee was constructively dismissed."

[23] The applicant did not terminate his employment contract. He applied for permission to terminate it by agreement. The termination of the contract only took effect when his request was approved by the Department. The applicant could not surmount the hurdle of showing that he terminated the employment contract. That being the case there was no constructive dismissal and the CCMA had no jurisdiction to entertain the dispute.

[24] It is therefore not necessary to deal with the applicant's perception of why he says the employer made the work environment intolerable.

[25] The commissioner correctly in my view did not consider the refusal to reemploy the applicant. The applicant had no right to be reinstated. In fact paragraph 29(a) of annexure A to circular 10/12/26 specifically states that:

> "Candidates who identify themselves for voluntary termination of service under this provision –
>
> > "a) Shall not be reappointed in the Public Service in terms of the provision of the Public Service Act, 1994 and
> >
> > b) Relinquish any claims to benefits payable under any other provision of the Public Service Act,1994, Public Service Staff Code or any other act, regulations or prescripts"

[26] Paragraph 2 (a) of annexure A was a term of the agreement between the applicant and the Department. He accepted that term when he requested the VSP. The commissioner was correct in finding that the CCMA does not have jurisdiction to amend annul or vary the express conditions agreed to between the parties. His application for reinstatement was in any event dealt with in terms of the prescripts prevailing at the time. Whether the effective date of termination was 1 March 1997 or 1 April 1997 was also not for the commissioner to consider and decide. Likewise the refusal by the Department to give him his original request for VSP application was not for the commissioner to consider and pronounce upon. If the applicant wants information that is or supposed to be held by the Department he has other remedies. The Department in any event stated that the documents could not be traced because they are more than eleven years old. He referred a constructive dismissal dispute and that is what the commissioner had to decide, which he did.

[27] I am of the view that no order as to costs should be made in this matter. A costs order against the applicant would, in the light of the circumstances of this case, not be fair.

[28] In the circumstances the following order is made:

a) The application is dismissed.

b) No order as to costs is made.

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C.J. MUSI, AJ

On behalf of the Applicant:	In person
On behalf of the Respondent:	Adv F M M Snyman Instructed by State Attorney