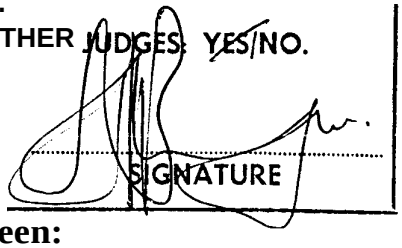
**IN THE HIGH COURT OF SOUTH AFRICA**
**(TRANSVAAL PROVINCIAL DIVISION)**

**CASE NO: 26147\04**

DELETE WHICHEVER IS NOTAPPLICABLE
**(1) REPORTABLE: /NO.**
**(2) OF INTEREST TO OTHER JUDGES: YES/NO.**
**(3) REVISED.**




27/6/05

**In the matter between:**

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|---|---|
| **DANIEL PAPA SITHOLE** | **APPLICANT** |
| **VS** | |
| **INGWE COLLIERIERS L** | **1st RESPONDENT** |
| **TD KHUTHALA COLLIERY** | **2nd RESPONDENT** |

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**JUDGMENT**

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**SHONGWE, J**

[1] The applicant, Mr Papa Sithole, appears in person in an application wherein he claims the following relief:

"(a) That the unilateral termination of the Applicant's contract of employment by the Respondent on 05 February 1999 be declared null and void to the extent that it was unlawful and legally irrelevant in terms of the law of Contract .

(b) That the conduct of the Respondent when terminating the Applicants contract of employment was inconsistent with The Constitution of The Republic of South Africa Act 108 of 1996 in terms of Chapter 2 Section 10.

(c) That the Applicant's contract of employment be therefore reinstated with retrospect.

(d) That in addition, constitutional remedies, as will be determined by this court be awarded to the applicant as relief for constitutional damages". [Sic]

[2] The 1st Respondent is Ingwe Collieries Ltd, a mining company. The Second Respondent is cited as Khutala Colliery. I am reliably informed that infact the Second Respondent is not a legal persona but a division of the First Respondent. It is common cause that there is no Second Respondent as this was an erroneous citation.

[3] Against the orders prayed for by the Applicant the Respondent raises two major defences namely that the applicant's right of action has become prescribed by virtue of the provisions of Section 11 of the Prescription Act 68 of 1969, and that the applicant's founding Affidavit does not disclose a cause of action .

[4] The factual backdrop is that the applicant was employed by the Respondent as from 1 October 1992 up to 5 February 1999 as senior store clerk in the Administration Department. He had been transferred on promotion from another sister mine of the Respondent, namely Douglas Colliery which he joined in 1984 as a clerk.

[5] It is common cause that in 1999 the Respondent made it known to employees that it was prepared to pay voluntary retrenchment packages to employees. The applicant's understanding was that the Respondent is engaging in a restructuring exercise intending to retrench a certain number of employees. This opened the option of voluntary retrenchment to all employees who wished to take that option. On the other hand the Respondent contends that the voluntary retrenchment package were for those employees who applied for such a package and whose services and skills were not required by the company.

[6] The Applicant decided to apply for the voluntary retrenchment after considering that he had fourteen years of service with the Respondent and also that a retrenchment 'payout' benefit is higher in pension fund contributions as opposed to a lower resignation 'payout' benefit when one, merely resigns from the company. He approached the relevant office in January 1999 to file his application .

[7] On the 5 February 1999 he was called to the payroll office where he was handed a cheque of R40-000 as his severance pay. He enquired about the pension retrenchment payout whereupon he was advised to apply for same, after three months of his retrenchment, at the Pension Fund offices.

[8] After the suggested three months he indeed applied at the Pension Fund offices. He was asked to produce a letter from his employer explaining the circumstances under which he left the Respondent. He obtained the letter (See Annexure "AB3") dated 28 May 1999 which in essence stated that the applicant 'took a voluntary separation package on the 5 February 1999, which was open to employees, to alleviate forced retrenchment due to operational requirements'.

[9] The applicant was "very angry, disappointed and frustrated" in his own words because the pension office told him that according to the letter (dated the 28 May 1999) he did not qualify for retrenchment payout benefit because he resigned and did not take a voluntary retrenchment. He felt helpless and with no recourse.

[10] Prayer (a) of the notice of motion requests a declaratory order nullifying the 'unilateral termination' of his contract of employment as it was unlawful and legally irrelevant. The applicant contends that the Respondent had a duty to inform him of the terms and conditions of

the voluntary retrenchment package to enable him to make an informed decision. He contends further that the Respondent was supposed to have made an offer to him which he would accept or not. In the absence of such offer and acceptance, the termination of his contract of employment is accordingly unlawful, according to him.

[11] The Respondent maintains that the applicant's contract of employment was terminated by virtue of the Respondent's acceptance of the Applicant's application for voluntary retrenchment package. Therefore according to the Respondent the termination of his employment was lawful. It is said that he resigned on the terms and conditions contained in the voluntary retrenchment package. I interpose to mention that no terms and conditions were placed before the applicant nor before the court.

[12] In May 2003 the applicant approached the Person Fund Adjudicator who apparently informed him that an offer should have been made to him by the Respondent, and it was then open to him to accept. The applicant thereafter communicated with the Human Resource Manager, Mr De Beer, in January 2004, to which letter he received no response.

[13] The, sense that I get from the applicant's version is that the Respondent should have made an offer to him and disclosed all the overt and covert terms and conditions of the retrenchment package. It

appears from the applicant's founding affidavit that he considered the invitation, he did not just on the spur of the moment apply for the voluntary retrenchment. He was aware of a higher retrenchment payout benefit in pension fund contributions as opposed to a lower resignation payout benefit. What was left for him to do was to approach the relevant office to obtain more information and clarification. One would argue that as an employee he should have been guided by his employer without him having to make enquiries.

[14] The Respondent did not misrepresent facts to the applicant. It is not the applicant's case that facts were misrepresented to him. The applicant argued that his case is based on 'lack of consensus' My interpretation or understanding of lack of consensus is that there was no meeting of minds between the applicant and the respondent. What is significance is that the applicant applied for a voluntary retrenchment package which the respondent accepted and granted as applied for. This to me implies an offer and acceptance. The offer made by the applicant and the respondent accepting. The applicant's argument is that the respondent should have offered and for him to accept.

,,;,,,J0.

[15] It is not without significance to note that the respondent did not unilaterally terminate the applicant's contract of employment. The

applicant voluntarily responded to an invitation by the respondent. I

am therefore unable to accept that the respondent's conduct was unlawful. The facts presented before me do not and cannot be construed to justify a declaration of nullity.

[16] I am of the view that the letter dated 14 August 2003, (Annexure B to Applicant's replying affidavit) addressed to the applicant from the MPF Management Services which deals with the Pension Fund is very important and its contents should be carefully considered. I pause to say that perhaps the applicant needed to join the MPF Management Services as a party to this application. On page 4 paragraph 8 of the aforesaid letter the following is said:

*"8. On* 28 *May* 1999 *you (meaning applicant) applied for a benefit at the Fund's Witbank information office, which is apparently when our Mr Janneke advised you that you are not eligible for a retrenchment benefit. You then elected to take the withdrawal benefit. This benefit less tax, was subsequently paid to you'~*

[17] This simply mean that already in May 1999 the applicant made a second decision after he was not satisfied with what his employer, the Respondent, did to him. This decision was to elect 'to take the withdrawal benefit'. It is true that the Rules of the pension fund were not" made available to the applicant before he committed himself to take up the retrenchment package. This does not, however, entitle the applicant to weigh his position alone and decide to apply for the

retrenchment package without enquiring the full extent of the implications. It takes two to a contract. The applicant is reasonably enlightened. It is reasonably expected of him to have enquired whether his sums that he made alone made sense or were in accordance with the rules. He argued that he was bargaining from a weaker position as an employee subservient to his employer. His argument cannot hold water because the employer simply issued an invitation with no restrictions or limitations. Employees were free to apply or not to apply. In my view the applicant took a chance because he had big noble ideas of becoming an entrepreneur, which is commendable, but his plan did not work out.

[18] Prayer (b) of the applicant's notice of motion seeks an order declaring the Respondent's conduct of terminating the applicant's contract of employment to be inconsistent with the provisions of Section 10 of the Constitution Act 108 of 1996. Section 10 provides:

> *''Human dignity*
>
> *10 Everyone has inherent dignity and the right to have their dignity respected and protected':*

It is my respectful view that reference to Section 10 was made out of context and without any allegation of facts that would point to an infringement of the applicant's right to dignity. As soon as the applicant realised that the R40 000 offered to him was not what he bargained for he was free to approach the respondent to make his intention clear.

Even after this three months he was free not to elect to take the withdrawal benefit.

[19] The applicant's prayer (c) is also untenable because he seeks an order to have his contract of employment re-instated with retrospective effect. However, the applicant is not prepared to tender the restoration of all the benefits he has already received. **(See Extel Industrial (Pty) Ltd &r. Another vs Crown Mills (Pty) Ltd 1999 (2) SA 719 (SCA) at 731-3, Feinstein vs Niggli & Another 1981 (2) SA 684 (A) at 700F-701F.** The rule that parties ought to be restored to the respective position they were in at the time they contracted is founded on equitable principles. The applicant has most probably used the money he received as part of his benefits. He might not be having any left as a considerable time period has lapsed between 1999 and now, which is understandable. It would obviously be unfair and iniquitous to expect the Respondent to re-employ the applicant on the same terms without him restoring what he has received. On this ground alone the application is substantially wanting.

[20] It is my respectful view that the applicant employed an incorrect cause of action. Declaring the termination of his employment a nullity is inappropriate as no adequate grounds exist to do so. I am consciously aware that the applicant is a lay person in law, however, I must commend the applicant in the manner in which he presented his case

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before me. I was greatly impressed by his professionalism and would suggest, with all honesty, that he takes up law as a career. I honestly believe that he would make a great advocate.

[21] I find it unnecessary to deal with the question of prescription. It is a technical point recognized by our statute. In view of the conclusion I have reached it would be academic to adjudicate on whether or not the applicant's right to pursue this matter has prescribed. The Respondent's case does not stand or fall on this point. Suffice to say that the applicant failed on the merits to make out a proper case.

[22] Prayer (d) of the notice of motion of application is difficult to understand, to say the least. It is, with respect, inelegantly stated and was not adequately substantiated by the evidence. Section 39 of the Constitution provides:

> *"Interpretation of Bill of Rights*
>
> 39. (1) *when interpreting the Bill of Rights, a court, tribunal or forum-*
>
> *(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;*
>
> *(b) must consider international law; and*
>
> *(c) may consider foreign law.*

*(2) When interpreting any legislation, and when developing common law or customary la~ every cowt tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.*

*(3) The Bill of Rights does not deny the existence of any other rights of freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill. "*

[23] The above provisions do not! by any stretch of imagination! suggest that Section 36 of the Constitution should be ignored or be restrictively interpreted as it is also part of the Bill of the Rights. The applicant did approach the court with his dispute and was given a fair hearing by an impartial court, however, his case did not attract the verdict intended by him. In my view, no constitutional remedies were shown to exist to assist the applicant. I am therefore unable to award any constitutional damages (in whatever sense the applicant meant it).

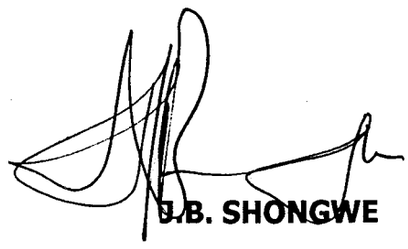
[24] In conclusion the applicant applied for a voluntary retrenchment package! the Respondent accepted and granted the application. I am unable to find, with the facts before me! that the Respondent had a duty to inform the applicant any more than it did. I am, however, of the view that the terms and conditions of the retrenchment package,

" including the implications attached to the payout of the pension fund

should have been in writing. This method would have allowed applicant or employees in general an opportunity to consult lawyers and obtain legal advice before they elected to proceed or not.

[25] As regards costs I feel constrained to depart from the normal principle that 'costs will follow the results'. The basic reason being that I empathize with the applicant's position. As an individual he was courageous to take up, in a court of law, a big company like the Respondent, to exercise his rights which he bona fide believed had been violated. He made an incorrect move, in my view, and was unable to make out a proper case. I believe that in the promotion of the spirit, purport and objects of the Bill of Rights each party should pay its own costs.

[26] **In the result I make the following order, the application is dismissed, each party to pay its own costs.**



**J.B. SHONGWE**

**JUDGE OF THE HIGH COURT**

FOR THE PLAINTIFF: IN PERON
INSTRUCTED BY: IN PERSON
FOR THE DEFENDANT: ADV B.C. STOOP
INSTRUCTED BY: BRINK COHEN LE ROUX INC
DATE OF JUDGMENT:
HEARD ON: 1 JUNE 2005