

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

Case no: JA

34/01

In the matter between:

MBEREGENI JOSEPH MAADA

APPELLANT

and

**MEMBER OF THE EXECUTIVE
COUNCIL OF THE NORTHERN
PROVINCE FOR FINANCE
AND EXPENDITURE**

FIRST

RESPONDENT

**PROVINCIAL SERVICE COMMISSION SECOND
RESPONDENT**

JUDGEMENT

ZONDO JP

Introduction

[1] This is an appeal from a judgement of the Labour Court in which it dismissed with costs an application that had been brought by the present appellant against the respondents for an order the effect of which would have been to set aside his dismissal by the first respondent. The Court a quo granted leave to appeal.

The facts

[2] The facts in this matter are largely common cause. In August 1996 the appellant was employed by the Venda Government as a clerk. By 1994, when that Government ceased to exist, he had risen to the position of Deputy Director-General in the Department of Public Works. Upon the re-incorporation of the Venda homeland into South Africa, the appellant became Deputy Director-General in the Department of Finance and Expenditure: Northern Province. He held that position until the end of August 1997 when his services were terminated in the circumstances described below.

[3] On 22 May 1996 the Department of Public Service and Administration issued a circular known as circular 10/12/26. The subject of the circular was a special initiative by the Government to reduce the number of public servants. The heading of the circular was: “ **Application of the special initiative whereby serving officials are afforded the option to request that their services be terminated on a voluntary basis.**”

[4] Clause 2 of the circular was to the effect that, in order to give effect to the Government’s objective of rationalising the public service, an agreement had been reached between the government and employee organisations admitted to the Chamber of the Public Service Bargaining Council at central level which made provision for the “**right-sizing**” of the public service and the implementation of a voluntary severance

package. It was stated that the purpose of the circular was primarily to convey to departments or administrations information pertaining to the implementation of the severance package.

[5] Clause 4 provided that on the recommendation of the Public Service Commission in terms of sec 3(2)(a)(i) and 42 of the Public Service Act, 1994, it had been decided that with effect from 1 May 1996 **“serving officials be afforded the option to request that their services be terminated on a voluntary basis and that a special severance package be paid to those officials whose applications are approved.”**

Clause 8 of the circular stated that, **“(i)n view of the aims of the voluntary severance package, departments / administrations are also requested to put a hold on all employer-initiated retrenchments which would require the application of sec 17(2)(b) or (c) of the Public Service Act, 1994.”**

[6] Sec 17(2)(b) and (c) of the Public Service Act, 1994 read thus: **“Every officer, other than a member of the services or an educator or a member of the Agency or the Service, may be discharged from the public service-**

a) -----

b) **owing to the abolition of his or her post or any reduction in or reorganisation or re-adjustment of departments or offices;**

- c) **if, for reasons other than his or her own unfitness or incapacity, his or her discharge will promote efficiency or economy in the department or office in which he or she is employed, or will otherwise be in the interest of the public service;"**

Clause 8 further stated that the freeze on such employer - initiated retrenchments took effect on the date of the circular and would remain in place until further notice. It stated that these measures had been recommended by the Public Service Commission in terms of sec 3(2)(a)(i) and 42 of the Public Service Act, 1994 and would be incorporated in the Public Service Staff Code. Clause 10(c) of the circular was to the effect that personnel who were interested in applying for the severance package should be assisted by the departments and administrations with the calculation of the benefits and privileges that they would be accorded if their requests were approved. The last sentence of clause 12 was to the effect that the departments/administrations could not be held responsible for any miscalculations which occurred.

[7] Various annexures were attached to the circular. Annexure **"A"** contained **"measures governing voluntary termination of service"**. Clause 2 (8) of annexure **"A"** required requests to be made in writing on the pro - forma given in annexure A1. Clause 2(9) provided that candidates who identified themselves for the voluntary termination of service under this special initiative should not be re-appointed in the

Public Service in terms of the Public Service Act, 1994 and that they **“relinquish any claims to benefits payable under any other provision of the Public Service Act, 1994, Public Service Regulations, Service Staff Code, or, any other act, regulations or prescripts.”**

[8] Clause 2(10)(a) of annexure **“A”** provided that individual requests in terms of that provision had to be approved by the executing authority or his/her delegate, and, that, for the purpose of the initiative, **“the Public Service Commission has delegated its powers to recommend the discharge of officials who have applied for voluntary termination of service up to and including the level of Deputy-Director-General, to heads of department at national level.....”**

Clause 4(c)(viii) of annexure **“A”** provided that the notice period to be given in respect of the discharge of employees was to be the period of remuneration (e.g a week’s notice if the employee was paid weekly and a month’s notice if the employee was paid monthly). It was also provided therein that instead of keeping a person in service for the full period of notice, his or her services could be terminated with his or her consent at the beginning of, or, during, the notice period. It provided further that in such an event a further package which covered the unexpired period of notice up to the date of discharge could be calculated additional to the normal package and be paid in the form of a once - off and all-inclusive amount to compensate for various benefits therein set out including pensionable salary and pro-rata service bonus. Annexure C to

the circular provided, among other things, that severance pay would be equal to one week's remuneration for each completed year of continuous service within the Public Service. It also invited anyone interested to know more about the package including the specific amount he would receive to contact his/her personnel office immediately.

[9] Some time during 1996 the appellant became aware of the circular. In July 1997 he asked for a quotation of the severance package that he would receive if he requested to be discharged on a voluntary basis in terms of the circular and if the request was approved. He was informed that he would receive a severance package totalling R1 353 567,86. On the 20th June 1997 the appellant signed a request addressed to the Director-General that he be discharged from the public service in terms of the provisions of the circular. The body of the request reads thus:

**“REQUEST TO BE ALLOWED TO BE DISCHARGED
VOLUNTARILY FROM THE PUBLIC SERVICE IN
TERMS OF THE PROVISIONS OF ANNEXURE A OF
THE DEPARTMENT OF PUBLIC SERVICE AND
ADMINISTRATION CIRCULAR 10/12/26 DATED 22
MAY 1996.**

**I, MAADA MBERGENI JOSEPH..... Deputy-
Director-General Persal No/Pay No 80054480 do
hereby request to be allowed to be discharged**

from the Public Service in terms of the provisions of Annexure A of the Department of Public Service and Administration circular 10/12/26 dated 22 May 1996.

I hereby declare that this request is made voluntarily and that I am familiar with the conditions and severance benefits as set out in the relevant Annexure.”

[10] On the 19th August 1997 Mr Badenhorst, who was a Deputy Director-General in, and, Head of, the Department of Finance and Expenditure of the Northern Province, wrote a letter to the appellant advising him that the quotation of severance package that he had been provided with was incorrect. He wrote that the quotation was based on the appellant's full pensionable service since he joined the public service on the 3rd August 1976 whereas it should have been based on the appellant's pensionable service from 1 March 1992. This related to the fact that, although the appellant had joined the public service in 1976, he had been paid a package in 1992 covering the period 1976 to February 1992 when the Venda Pension Fund was liquidated. The suggestion was that in calculating the severance package that the appellant would be entitled to, the period from 1976 to February 1992 had to be disregarded and only the period from the 1st March 1992 and thereafter had to be taken into account. A quotation dated the

19th August 1997 was attached to the letter and was said to be the correct one. That quotation reflected that the appellant would be entitled to a severance package totalling of R483 223,04.

[11] The appellant says he was shocked and upset at the second quotation. On 25 August he addressed a letter to Mr Badenhorst in which he purported to withdraw his request to be discharged. The body of the letter read thus:-

“ Voluntary termination of service on the basis of severance package: self your

s4/6/2 dated 19th August 1997 refers.

1. **When I applied for severance package I based my application on the quotation dated 08 July 1997 and not on the quotation of 19th August 1997.**
2. **My quotation was based on the circular minute 1/3/25 dated 2 May 1997 issued by the Department of Public Service and Administration whereby my services on the voluntary package is (sic) supposed to be taken into account from the date of my appointment which is August 1976 and not March 1992.**
3. **On the basis of paragraphs 1 and 2 above I therefore withdraw my application until**

such time I will benefit and be treated in terms of circular minute 1/3/25 dated 02 May 1997 from the Department of Public Service and Administration”.

[12] Circular 1/3/25 of 2 May 1997 was attached as annexure “D” to the answering affidavit. It was from the Director-General of the Department of Public Service and Administration. It read thus:-

**“TO HEADS OF ALL DEPARTMENTS/PROVINCIAL
ADMINISTRATION/OFFICES OF PROVINCIAL
SERVICE COMMISSIONS**

**APPLICATION OF THE SPECIAL INITIATIVE
WHEREBY SERVING OFFICIALS ARE AFFORDED
THE OPTION TO REQUEST THAT THEIR SERVICES
BE TERMINATED ON A VOLUNTARY BASIS**

- 1. During a recent meeting of the Central Chamber of the Public Service Bargaining Council it was brought to the attention of the representatives of the State as employer that certain departments do not recognise years of service in the former TBVC states when granting personnel the voluntary severance package. Consequently, the representatives of the**

employer undertook to issue a circular on the matter to clear up any possible incorrect application of the relevant measures.

- 2. Section 2(5)(b) of the Public Service Act, 1994, stipulates that all persons who immediately before the commencement of this Act were, by virtue of a law repealed by this Act, officers or employees in an institution referred to in section 236(1) of the Constitution, 1993, shall remain in employment and shall from that commencement be deemed, without break in service, to be officers or employees, as the case may be, and the provisions of this Act shall apply to or in respect of those officers or employees.**
- 3. Continuous service in the Public Service of the former TBVC states before 10 June 1994 thus must be recognised for purposes of the voluntary severance package in respect of those personnel who remained in the service of the new Public Service after the said date.**

DIRECTOR-GENERAL”

[13] It will be noted that the last paragraph of circular 1/3/25 was to the effect that continuous service rendered in the public service of the former TBVC states (which included Venda where the appellant had served) before 10 June 1994 had to be recognised for purposes of the voluntary severance package in respect of those personnel who remained in the service of the new Public Service after that date. On the 28th August 1997 Mr Badenhorst responded to the appellant's letter in the following terms:

“APPLICATION FOR VOLUNTARY SEVERANCE PACKAGE

Your letter dated 25 August 1997 refers.

You indicate, as [the] main reason for your request to withdraw the application, that you are not treated equitably in terms of [the] contents of DPSA Circular 1/3/25 dated 2 May 1997 which instructs Departments to take all service in previous administrations into considerations when calculating severance packages.

You, furthermore, indicate that you withdraw your application *‘until such time as I will benefit and be treated in terms of circular*

minute 1/3/25 dated 2 May 1997.....'

I wish to point out to you that you are, in fact being treated very equitably in terms of the contents of the above circular. All your benefits, with the exception of pension lump sum have been calculated based on a service period of 21 years.

As far as pension benefits are concerned, you are well aware of the fact that the ex Venda pension fund was liquidated in 1992 and benefits paid to members, which you also were at that point in time. Thereafter, a new fund was established which was eventually taken over by the National Government and incorporated into the GEPF.

The second calculation thus, quite correctly, reflects your membership to the pension fund as having commenced in 1992 and not 1976 as previously stated. The reason for this is that you have already received your pension benefits for the period 1976 to 1992 and that you only qualify for pension benefits from the date you joined the '*new Venda*' pension fund.

You are, thus, informed that your statement of

withdrawal is not accepted and that your services will officially be terminated, in terms of the voluntary severance scheme, on 31 August 1997.

Allow me to thank you for your contribution to the Department of Finance and Expenditure”.

[14] It will be seen from the penultimate paragraph of Mr Badenhorst’s letter that he informed the appellant that his **“statement of withdrawal”** of the request to be discharged was not accepted and that his services would officially be terminated in terms of the voluntary severance scheme on 31 August 1997. Prior to this letter the appellant had not as yet been told the outcome of his request to be discharged. On the 1st September 1997 the appellant left the public service in the light of Mr Badenhorst’s letter dated 28 August. He subsequently instructed attorneys to take his matter up with the Department because he was unhappy that he had been dismissed despite his letter of the withdrawal of his request.

Proceedings in the Labour Court

[15] In due course the appellant launched an application in the Labour Court for an order inter alia reviewing and setting aside the first respondent’s decision not to accept the appellant’s withdrawal of his application for a voluntary severance package, declaring the appellant’s services to have been terminated unlawfully on 31 August 1997 and ordering the appellant’s reinstatement and the payment of his costs.

[16] One of the matters that the appellant dealt with in his founding affidavit was the allegation made by the Director of Legal Services on behalf of the appellant's erstwhile employer in a letter dated 13 January 1998 addressed to his attorney. In that letter it was alleged that the appellant had **"voluntarily accepted a severance package offered to him"** which was then approved and he was accordingly paid the benefits due to him. The appellant dealt with the contents of that letter in par 3.9.4 of the founding affidavit. There he said that the allegations in the letter were **"clearly wrong"**, that the second quotation was submitted to him after Mr Badenhorst, the Director-General and the Provincial Service Commission had recommended the approval of his request but before it had been finally approved by the first respondent, and that no benefits it had been paid to him but, on the contrary, that he had ensured the return by his attorneys to the Department of a cheque that the Department had sent to him.

[17] In the answering affidavit filed on behalf of the first respondent, the first respondent associated himself with the contents of the letter of the 13th January from the Director of Legal Services of the Northern Province. In par 23.3 of the answering affidavit it was said in part:.

"As far as the allegation of a voluntary acceptance of the severance package is concerned, the whole measure was structured upon a first step by the employee to identify himself as a possible candidate for a discharge from service by the employer. The act of self-identification was the sole voluntary step that the employee had to take to be taken into consideration for this measure. The

[appellant's] belated refusal to accept the severance package after the second quotation submitted to him, is therefore of no relevance. The fact is that after his self-identification for the application of this measure, he qualified for that severance package and did not need to formally **'accept' it thereafter. His entitlement thereto flowed from his own voluntary act of stepping forward and indication that he wished to be discharge[sic] from the Public Service."**

The first respondent admitted that the second quotation was brought to the appellant's attention after Mr Badenhorst and the Director-General had made their recommendations but before he (the first respondent) could approve the request.

[18] The appellant makes the following submissions as to his case in paragraph 4.1 of the founding affidavit:

- a) in applying to be discharged, he had acted upon an erroneous representation negligently or otherwise made to him in the first quotation,
- b) had he been aware of the true facts, he would not have requested to be discharged,
- c) he never accepted the second quotation which was submitted to him before the executing authority had approved his request,
- d) the decision not to accept the withdrawal of his request for a severance package and to terminate his services was taken unlawfully in circumstances where the Deputy Director-General was in any event not authorised to take

such a decision, and

- e) his services were terminated in circumstances where no legitimate reason existed for such termination and that his services were accordingly unlawfully terminated.

[19] In response to the submissions made by the appellant in paragraph 4.1 the first respondent took the attitude that the contents thereof were legal submissions and argument to which he did not need to respond. However, he proceeded to say the following in par 25.2 of the answering affidavit:.

“For the convenience of the Honourable Court, however, I wish to point out that the [appellant] is apparently trying to bring in some principles of the law of contract and misrepresentations so as to purportedly set aside an agreement in terms whereof his services were terminated. This line of thought is with respect misconceived, because the [appellant] was at all relevant times dealt with within the parameters of section 17(2)(c) of Act 103 of 1994. This is not a case where the parties have reached a bilateral agreement that the services of the [appellant] be terminated; this was an exercise in terms whereof the employer after consultation with the employees’ organisation and with the co-operation of the employee exercised a power of dismissal entrusted to it by the relevant provision.”

[20] In par 25.3 the first respondent submitted that the procedure that was followed was fair and objectively above board. He submitted further that the appellant was not prejudiced because he ultimately received what he was entitled to. He went on to say that **“(w)hat [the appellant] is trying to do now, is to benefit from a bona fide error on the PERSAL - system which was fortunately detected by Badenhorst in time. If Badenhorst did not so detect this error, the [appellant] would in any event have remained liable to re-pay any such unlawful remuneration in terms of section 31 of the Public Service Act 103 of 1994.”**

[21] The basis for the decision of the Court a quo was that the appellant was not entitled to withdraw his request or application once he had made it. In this regard the Court a quo upheld the contention which Counsel for the first respondent pursued before us, namely, that the special initiative contained in the circular was only voluntary at the initial stage when an employee made the request to be discharged but that, once the employee had made that request, he could not withdraw it.

The appeal

[22] In a nutshell the appellant's case was ultimately the following:-

1. the government announced a special initiative in terms of which officers and employees in the public

service could request to be discharged from the public service on a voluntary basis in return for the payment of a special severance package;

2. he asked his employer what his severance package would be if he requested to be discharged and was discharged in terms of the special initiative;
3. he was advised by the employer of a huge severance package that he would get in such a case;
4. he then requested that he be discharged in terms of the special initiative;
5. he was subsequently advised that the huge severance package quoted to him earlier was incorrect and that in fact the amount he would get was a much smaller amount;
6. he then wrote a letter to the employer withdrawing his request before his request was approved or before any decision thereon was conveyed to him but that, notwithstanding this, the employer proceeded to give effect to his request by discharging him;
7. the employer had no right to proceed to dismiss him because he withdrew his request, and,

8. therefore, the dismissal was without any legitimate reason and, was, therefore, unlawful.

The appellant's complaint is essentially the respondent's failure to give effect to his letter of withdrawal.

[23] The first respondent's defence is that the appellant's discharge was not by agreement but was a unilateral exercise of power by the first respondent to discharge an officer or an employee in terms of sec 17(2)(c) of the Public Service Act, 1994. The first respondent took the attitude that the special initiative did not require that the discharge be effected by agreement between the employer and the employee but only required that the employee take the initial step of identifying himself for such discharge and that once an employee had taken that step, he could not reverse the process and the employer was then empowered to proceed to discharge the employee even without the employee's agreement. However, in paragraph 23.3 of the answering affidavit the first respondent takes a somewhat different line, namely, once an employee had taken the first step of requesting to be discharged, he qualified to be discharged in terms of the special initiative. This is obviously incorrect because the circular made it clear that the final decision would be that of the employer and not that of the employee or official.

[24] The appellant, having alleged in his founding affidavit that his discharge was without any legitimate reason and having

read the first respondent's defence in the answering affidavit, said in paragraph 2.5 of his replying affidavit.: **"If I understand the submissions made on behalf of the First Respondent correctly, it is the First Respondent's contention that I have been discharged from the public service in terms of sec 17(2)(c) of the Public Service Act, 1994, after having voluntarily identified myself for a dismissal in terms of that section....."**. He proceeded to say that he failed to understand how this submission could be a proper defence to his claim. He highlighted, among other things, the fact that the provisions of the circular were to the effect that serving officers were afforded an opportunity to request that their services be terminated **"on a voluntary basis"**. In paragraph 2.5.3 of his replying affidavit the appellant conceded that he had identified himself for consideration for a discharge in terms of the special initiative but pointed out that, as stated in his founding affidavit, he had withdrawn such identification after having been informed that **"the severance package would entail a much lesser amount"**.

[25] In paragraph 2.5.4 of his replying affidavit, the appellant then said: **"The validity of my claim, therefore, depends on the question whether I was..... entitled to withdraw my application to be considered for the severance package offered in Circular Minute 10/12/6 of 26 May 1996."** In paragraph 2.5.5 he said further: **"It would appear to be the contention of the First Respondent that, if**

regard is had to paragraph 16.2 of the answering affidavit, that the power exercised in terms of section 17(2)(c) of the Public Service Act 1994 was a unilateral power of dismissal and that my services were not terminated by consensus or agreement.” In par 2.5.6 he said: **“This submission is clearly against the spirit of circular Minute 10/12/6 of 26 May 1996 which provides, as appears from its heading, for the termination of the services of certain officers ‘on a voluntary basis’.”** The appellant further stated that the allegation that he was discharged in terms of a unilateral power of dismissal was clearly wrong. In paragraph 18.2 of his replying affidavit, he repeated his averment that the real issue in this matter is whether he was entitled in the circumstances to withdraw his request and whether the first respondent was entitled, despite the withdrawal of his request, to discharge him **“from the service or terminate my services on (sic) an involuntary manner.”**

[26] In his replying affidavit the appellant also states that, when the Department gave him the second quotation indicating that he would receive a much lesser package, he was entitled also to change his mind. He said the Department was entitled to change the quotation and that he did not seek to hold it to the first quotation and that that is why he withdrew his request. He said that, if his attitude was to hold the Department to the first quotation, he would not have withdrawn his request.

[27] There was some suggestion from the first respondent’s

Counsel during argument that the first respondent was not bona fide in regarding the first quotation as correct and that he may have misled the relevant official which led to him being quoted a wrong figure. I need not express a view on the correctness of this argument because the appellant does not seek to hold the first respondent to the first quotation but merely seeks to withdraw his own reaction to it. The issue before us is whether he is entitled to do so.

[28] On appeal Counsel for the appellant argued the appellant's case simply on the basis that the appellant was entitled to withdraw his request before the first respondent's decision was conveyed to him, that he withdrew it before the first respondent's decision approving the request was conveyed to him and that thereafter the first respondent had no right to proceed to give effect to that request and to dismiss the appellant. Counsel for the first respondent argued that the appellant had no right to withdraw the request once he had made it, that in any event his letter of purported withdrawal did not have the effect of withdrawing the request because the condition that he put to his withdrawal, namely, that he was withdrawing the request until he would benefit and be treated equitably in terms of the circular of 2 May 1997, had been met as he was being treated equitably in terms of the circular.

[29] In dealing with this matter it is important to bear in mind that in the letter of the 28th August, the appellant was informed that his services were being terminated in terms of the voluntary severance scheme. This being the case, the first respondent has to show that the dismissal was within the terms of the special initiative. The first question to consider is whether

the discharge of employees and officers provided for in the circular was one that had to be by agreement between the employee or officer and the employer. It seems necessary to consider this question because a very important part of the first respondent's defence is that it did not, and the appellant has challenged this in his replying affidavit.

[30] The first respondent did not in his answering affidavit refer to any part of the circular or any other document to substantiate his allegation that the discharge that was contemplated by the special initiative did not need to be by mutual agreement. The first respondent's Counsel was also invited during argument to point to any part of the circular or of the papers that supported the first respondent's contention in this regard but did not do so. By contrast, when the appellant responded to the first respondent's answering affidavit, he referred in his replying affidavit to the specific wording used in the circular to support his allegation that the dismissal had to occur by agreement.

[31] In my judgement the first respondent's contention that the circular contemplated dismissals that were unilateral as opposed to dismissals by agreement between employer and employee is not justified by the contents of the circular read with its annexures. I shall point out some aspects of the circular and its annexures which support this. They are: the heading which reads: **“application of the special initiative whereby serving officials are afforded the option to request that their services be terminated on a voluntary basis”** (my underlining), clause 2(b) which refers to the **“implementation of a voluntary severance package”**, clause 3 which also refers to the implementation of the **“voluntary severance package”**, clause 4 which is to the effect that it was decided

that with effect from 1 May 1996 **“serving officials be afforded the option to request that their services be terminated on a voluntary basis”**, clause 2(5) of Annexure A to the circular which falls under **“measures governing voluntary termination of service”**, clauses 2(9) and 2(10) which also contain the words **“voluntary termination”**, the heading of annexure B which refers to **“personnel whose services are terminated voluntarily”** and clause 1.1 which refers to personnel who are allowed **“voluntary termination”**.

[32] The next question to consider then is whether the appellant had a right to withdraw the request at the time that he purported to do so. Through the special initiative the employer issued an invitation - not an offer - to its serving officials or employees who wished to be paid the severance pay provided for in the special initiative to request or to offer to be discharged, but the employer reserved the right to approve or accept the request or offer. If it approved the request or accepted the offer, the employee would then be discharged and be paid the special severance package. However, the employer could reject the offer or request in which case the employee would not be discharged and would, therefore, not be paid the special severance package.

[33] The general principle in our law is that an open offer - that is one which the offeror has not bound himself to keep open for a specified period - can be withdrawn at any time before it is accepted. (**Phillips v Aida Real Estate (Pty)Ltd 1975(3) SA 198(A) at 207H**); **Lowe Morna v Commission on Gender Equality (2001) 22ILJ 352 (W)**). A decision by the offeree to accept the offer does not constitute an acceptance of the offer if it has not yet been conveyed to the offeror. An acceptance

must be communicated to the offeror for it to be effective
**(Bloom v The American Swiss Watch Company 1915 AD
100 at 102-3; Amcoal Collieries Ltd v Truter 1990(1) SA
1(A) at 4D.)**

[34] Mr Oosthuizen, who appeared for the first respondent, conceded during argument that at common law a party to a contract may offer to the other that they terminate their contract by agreement. He conceded further that the former would be entitled to withdraw such an offer before it was accepted by the latter party. He conceded further that that principle is also applicable to a contract of employment. When it was suggested to him during argument that what the appellant sought to do in this case through his request was effectively to obtain the consent or approval of the employer that the two terminate their contract of employment by agreement on the terms provided for in the special initiative, Mr Oosthuizen sought to distinguish this case from those where that principle would apply by contending that in this case the appellant's request to be discharged was not an offer and that, therefore, there was no case of acceptance of an offer but simply approval.

[35] Is there any difference between the acceptance of an offer and the approval of the request or application within the context of this case? I see none. In my view in law it makes no difference that the special initiative referred to

an “**approval**” of the request and not to an acceptance of an offer. In effect the appellant offered that he be discharged in return for the payment to him of a special severance package. The first respondent was entitled to accept or reject the offer. If he was happy with the offer, he could approve or accept it and, once that approval or acceptance had been conveyed to the appellant, the two

parties would have had an agreement. If he was opposed to the appellant being discharged in terms of the special initiative, he could reject the request and there would have been no agreement.

[36] Since the appellant's request to be discharged constituted an offer which the first respondent was free to accept or reject, there can be no doubt that the appellant was entitled to withdraw his offer/request at the time that he purported to do so because, although the first respondent had made the decision to approve/accept the appellant's request/offer, that decision had not as yet been conveyed to the appellant when he conveyed his withdrawal.

[37] Mr Oosthuizen, also submitted that the appellant had no right to withdraw his request to be discharged once that request had been conveyed to the first respondent unless the first respondent consented to such withdrawal. In this regard he relied on a long line of cases starting with **Rustenburg Town Council v Minister of Labour & Others 1942 TPD 220** for the proposition that a notice of resignation or termination of a contract of employment - or even of a lease - is a unilateral and final act which becomes effective upon communication and does not need acceptance. Some of the other cases he referred to were **Potgietersrust Hospital Board v Simons 1943 TPD 269**, **De Vos v Monnik and Visser 1944 CPD 30**, **Froneman v Lartz 1949(1) SA 977 (O)**, **Marnitz v Stark 1952(2) SA 144 (N)** at 147 A-D, **Bulawayo Municipality v Bulawayo Indian Sports Ground Committee 1956(1) SA 34 (SR)**, **Collins v Meiring NO 1958(4) SA 420 (C)**, **Jaffer v Falante 1959 (4) SA 360(C)**, **Rosebank Television and Appliances**

Co (Pty) Ltd v Orbit Sales Corporation (Pty)Ltd1969(1) SA 300 (T). The Court a quo also relied on the Rustenburg Town Council case in support of its decision that the appellant had no right to withdraw his request.

[38] The Rustenburg Town Council case related to an employee's notice of termination of his contract of employment or a resignation by the giving of a contractual notice. It was held in that case that, where an employee gives notice of the termination of his contract of employment, he has no right to withdraw such notice unilaterally once it has been communicated to the employer but may only do so with the consent of the employer. It was held that such notice of resignation or of termination of the contract of employment did not require an acceptance by the employer. The other cases referred to above followed the Rustenburg Town Council decision, most of them within the context of a contract of lease.

[39] Mr Oosthuizen's reliance on the Rustenburg Town Council case and the cases referred to above is flawed. The flaw is that in those cases the notices were notices terminating contractual or other legal relationships and not notices requesting recipients thereof to agree to the termination of such. In this matter the undisputed facts disclose that the special initiative as explained in the circular and annexures thereto provided that an employee or officer who wished to be paid the special severance package had to make a request to the employer that he be discharged and it was up to the employer to approve or reject the request. That being the case, there can simply be no basis for any suggestion in this case that the employee's request was a unilateral and final act which was binding on the employer or which the employer had no right to reject. Accordingly, I conclude that all the cases on which Mr Oosthuizen relied in this regard are distinguishable on the facts from the case before us and have no application to it.

[40] Mr Oosthuizen also sought to argue that the form which the appellant signed to convey his request to be discharged was such that by signing it the appellant expressly or impliedly

dispensed with the normal requirement that the offeree - in this case the first respondent - communicate the acceptance of the request or offer to him. He submitted that the form had “**a space to record the final (unilateral) decision**” of the discharge of the appellant by the first respondent. I do not agree. The mere fact that the document containing the offer has a space for the offeree to sign if he accepts the offer does not in any way mean that the acceptance of the offer by the offeree need not be conveyed to the offeror. Before a document containing an offer could be construed in such a way, it would have to contain clear and unequivocal words to that effect. The document in this case contained no such words.

[41] The next question to consider is whether the purported withdrawal by the appellant of his request to be discharged constituted an effective withdrawal. Counsel for the first respondent submitted that the appellant’s purported withdrawal was not effective. The basis for this submission was that the appellant’s letter of the withdrawal of his request was to the effect that he was doing so until such time that he would “**benefit and be treated in terms of circular 1/3/25 dated 2 May 1997 from the Department of Public Service and Administration**” and, according to the first respondent, he was being treated equitably in terms of that circular in that his service at Venda was treated as part of his continuous service.

[42] The first respondent’s stance was that whether the appellant was entitled to the severance package in the first or

second quotation depended on the length of his pensionable service. It took the attitude that, as the appellant had been paid his pension for the period 1976 to February 1992, his pensionable service was to be calculated from March 1992 and not from 1976. In his heads of argument Counsel for the first respondent submitted that at best for the appellant and without conceding that the appellant was entitled to withdraw his request, his letter of withdrawal was a conditional withdrawal of his request **“which conveyed an intention that the efficacy of the [withdrawal] was suspended for the time being...”** He submitted that there was no total and effective withdrawal of the said application. Whether one uses the word **“suspend”**, to say the appellant’s application or request to be discharged was suspended, or, whether one uses the word **“withdraw”**, to say such application was withdrawn, makes no difference in this matter. What both words convey is that the withdrawal was not effective.

[43] The appellant’s withdrawal of his request to be discharged was, in his words, **“until such time I will benefit and be treated in terms of Circular 1/3/25 dated 2 May 1997 from the Department of Public Service and Administration.”** What did the appellant mean by these words? To understand what he meant, one must read his letter quoted in paragraph [11] above as a whole. In paragraph 1 of his letter the appellant categorically stated that his request to be discharged was based on the quotation dated 8 July 1997. That is the quotation providing for a severance package of over

one million rand if he requested to be discharged and this was approved. In

the first paragraph of his letter of withdrawal the appellant says that his request to be discharged was not based on the quotation of the 19th August. That is the quotation that provided for a lesser severance package. In paragraph 2 of his withdrawal letter he said that his request was based on circular minute 1/3/25 of May 1997. Although he does not say so in so many words, it is as clear as daylight that what the appellant was conveying was that his understanding was that his entire service from 1976 to 1997 was supposed to be taken into account in calculating his package. Circular 1/3/25 was to the effect that the service in the so - called TBVC states should be taken into account.

[44] In adjudicating matters a court is required to have due regard to substance rather than form and is not to elevate form above substance. While it may be true that the appellant was being treated in terms of circular 1/3/25, in substance what he was saying in his letter was that he was withdrawing his request to be discharged until he would be dealt with on the basis that he would be paid the amount quoted in the first quotation. His attitude was that, if that was not done, he was not benefitting. Whether he was right or wrong in that conclusion is besides the point. The fact of the matter is that what he was conveying was that he was not benefitting and was not being treated equitably and, because of that, he did not want to be discharged. The only known reason why the appellant put in a request to be discharged in terms of the special initiative was the huge amount of severance package in the first quotation and the only known reason why he decided to withdraw that request was the

smaller amount given in the second quotation. Technicalities and matters of form aside, there can be no doubt that in writing the letter of withdrawal what the appellant intended to convey - and I think did actually convey - is that he did not want to be discharged if he would not be paid the amount given in the first quotation.

[45] Mr Badenhorst understood the appellant's letter to be one of withdrawal. That is why he referred to it in his letter of 28 August as **"a statement of withdrawal"** and did not suggest that the withdrawal had lapsed or had not been effective. The Head of Personnel Administration also understood the appellant's letter as a letter of the withdrawal of his request. That is why the heading to his letter of 26 August 1997 to the Deputy Director-General, which was attached to the answering affidavit, read: **"Withdrawal of the application for Termination of Service on the basis of severance package."** The body of the letter, consistent with the heading, read: **"Kindly receive letter (sic) dated 25 August 1997 from Mr MJ Maada indicating his withdrawal of his application to terminate his services from the civil service on the basis of Severance Package for your attention"**. The first respondent never agreed to pay the appellant the only severance package that he required. For that reason the appellant's request to be discharged remained withdrawn and was never reinstated. There can be no suggestion that the appellant ever considered any lesser amount as sufficient to justify his discharge. I conclude, therefore, that the request to be discharged was withdrawn before the decision to approve it was conveyed to the appellant and such withdrawal was effective.

[46] There was an attempt on the part of Counsel for the first respondent to argue that, since the reason upon which the appellant's decision to withdraw the request was not valid or sound, he was not entitled to withdraw the request. I do not agree. The question whether the appellant was entitled to withdraw is not dependent on whether he had a valid reason to do so. If he was entitled to withdraw his offer, he could do so with or without a sound reason, or, indeed, for no reason at all.

[47] Once it is accepted that the appellant was entitled to withdraw his request or offer and that he did withdraw it, it follows that the first respondent had no right to give effect to the request and dismiss the appellant. Counsel for the first respondent sought to argue that, if that is the legal position, the dismissal was voidable from the date of the judgement of this Court. I do not agree. The result is that the dismissal is invalid ab initio and the appellant is to be treated as if he was never dismissed. With regard to costs, both Counsel submitted that costs should follow the result. I agree.

[48] In the result I make the following order:-

1. The appeal is upheld.
2. The first respondent is ordered to pay the appellant's costs of the appeal.
3. The order of the Court a quo is set aside and is replaced with the following order:
 - “(a) **The applicant's dismissal is hereby declared unlawful, invalid and is set aside.**
 - b) the applicant is hereby reinstated in his employment as Deputy Director - General: Department of Finance and Expenditure, Northern Province.**

c) the first respondent is ordered to pay the applicant's costs."

Zondo JP

I agree.

Goldstein AJA

I agree.

Mlambo AJA

Appearance:

For the Appellant: Adv P.C. Van der Byl SC
Instructed by: Mathobo, Rambau & Sigogo Attorneys
For the Respondent: Adv M.M. Oosthuizen
Instructed by: The State Attorney's Office
Date of judgement: 19 March 2003

