

LOM Business Solutions t/a Set LK Transcribers

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: JA31/2006

2008-03-12

10 **In the matter between**

THE UNIVERSITY OF THE NORTH

Appellant

And

J M WILTSHIRE & OTHERS

Respondent

J U D G M E N T

DAVIS JA:

[1] In this matter, the respondents were members of the administrative staff of appellant. On 15 August 2000, the appellant, by way of

20 Professor N C Golele, produced a memorandum which was distributed to all of appellant's staff in which a voluntary retrenchment package was offered ('the Golele offer'). The offer read as follows:

“The council of universities approved that voluntary retrenchment be offered to all permanent members of staff. This offer is made with effect from

15 August 2000 which shall expire on
15 September 2000.

The severance/retrenchment package offered is as set out in policy G5 and T4 of the personnel policy and procedure manual. In addition, council has approved that staff over the age of 55 may elect to retire as well as accept a retrenchment. Document explaining this policy will be circulated shortly.

10 Before you decide to accept this offer, you must carefully consider all the implications it may have on you, these include the possibility of finding alternative work, the income tax effects and the fact that once you accept this, the university will not consider reemploying you for a minimum of two years and only under extreme circumstances thereafter.

Other factors you should consider are financial position of the university, the staff levels of the department/section etc. Should you elect to accept this offer and you are a staff member working under
20 academic conditions, you will terminate services after the required three months, i.e. 30 November 2000. However, should you have no teaching load this semester or not direct student contact, this may be shortened at your request and agreement (in writing) by your HOB, dean and directorate. If you are an

administrator service staff member, you will terminate services on 30 September 2000.

In order for the necessary process occur, including obtaining tax directives, you are requested to put in your application as soon as possible. The university cannot guarantee that all the necessary payments (i.e. severance package) will be made by the termination date but all attempts will be made to do so. Should you wish to accept this offer, you are requested to complete the attached form at your earliest convenience and submit personally to the human resources department.”

[2] A further document was attached, entitled acceptance of voluntary retrenchment offer. It read to the extent necessary, for the purposes of judgment:

“I employee number hereby accept the council's offer of voluntary retrenchment as set out in the personnel policy and procedure manual (of retirement over 55). I have given serious consideration of the implications to the acceptance and will seek financial advise ...[indistinct] utilisation of the funds I receive. I further acknowledge that by accepting this offer, I have taken irreversible step and once this acceptance is acknowledged by the

university, it cannot be reversed unless by mutual agreement”

[3] All of the appellants furnished an acceptance of the voluntary retrenchment offer to the human resources department in terms of this document. On 22 October 2000, the appellant circulated a further memorandum in which the appellant sought to set out its approach to restructuring in greater detail. On 4 September 2000 and after respondents had accepted the voluntary retrenchment package in terms of the completion of the document to which I have made
10 reference, appellant circulated a further memorandum to appellant's staff members in which it purported to withdraw and indeed rescind the previous offer. This document read thus:

“Reference is made to the two circulars on the above subject matter dated 15 and 22 August 2000. At extraordinary meeting of 31 August 2000, exco result to visit all the issue of retrenchment. It is therefore with great regret that the two circulars mentioned above are hereby withdrawn and rescinded forthwith for the following reasons, they:

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1. Erroneously did not comply with council resolution on the matter;
 2. Offend the principles enshrined on the personnel policy and procedure of this institution;
 3. Did not consider inputs from structures which contributions have now been taken into account;

4. The above position having being clarified, an external agency will properly embark on this process and therefore a further circular will follow in due course, to inform the university accordingly;
5. However, the university is the final auditor (SRC) will consider and decide on the applications already submitted.”

[4] One final document deserves mention. On 2 October 2000, the appellant circulated the following memorandum:

10 “A circular from the acting chairperson of council dated 4 September refers.

Subsequent to the circular, some staff members took the university to the Labour Court, the court ruled that the matter was not urgent and the application was therefore not successful. The circular referred to above is still valid.

We have since noticed that some of the staff members submitted their “acceptance of voluntary offer” forms and decide to leave the employ of the university
20 without a valid resignation. These staff members will be considered to have absconded from the university unless they provide an acceptable explanation.”

[5] It is common cause that all of the employees continued in the employ of the appellant, beyond the date of 30 September 2000.

The first respondent retired from the employ of the appellant during September 2001. The second respondent retired in July 2001 and third respondent in July 2002. It is also common cause that until their retirement each of the respondents continued to earn their full salaries and other benefits.

[6] The question of the validity of the severance agreement is then the subject of the litigation which culminated in a judgment in the court *a quo*. In that judgment the following conclusion is reached:

10 “I accept the evidence of the applicant that they had accepted the offer made by the respondent that they have communicated their accepted in accordance with the respondent’s requirements and that therefore a valid agreement was entered in to.

20 The respondent argued there was no agreement between the parties, averse that the offer and acceptance of voluntary retrenchment must be interpreted to mean, it was merely an invitation to all university staff to apply for voluntary retrenchment and early retirement and that the acceptance, the offer was an application to respondent’s counsel which would consider all applications with particular regard to retention of necessary skills.

The respondent’s counsel argued this interpretation based on the evidence of Mr Negota, clearly established that there had not been an

acknowledgement the application and as the applications had not been considered and approved, accordingly no agreement was concluded.”

[7] It was against this finding that the respondents were entitled to rely on the severance agreement, that an appeal was lodged against the judgment of the court *a quo*.

[8] In the application for leave to appeal to this court was clear a range of arguments were raised regarding the question of the validity of the severance agreement. In the heads of argument which were prepared by the appellant, a range of arguments were put up as to why the judgment of the court *a quo* was incorrect, including the fact that the offer was not unequivocal and unambiguous that the appellant lacked the *animus contrahendi*, that there was a lack of *bona fide* and reasonable belief by the respondent, that the council of appellant had acted *ultra vires*, that the court *a quo* had considered inadmissible evidence and not admissible evidence.

[9] All of these questions which essentially turned on the issue of the validity of the agreement and whether the respondents had completed the form, to which I have made reference, had therefore accepted an offer, as a result of which a binding agreement between the parties had been concluded, were the subject of intense previous litigation, which culminated in a judgment of Van Dijkhorst AJA, in *The University of the North v Franks and Others*, 2002 (23) ILJ 1252 (LAC). In a comprehensive and typically

studious and well researched judgment, Van Dijkhorst AJ, in which judgment, Zondo JP and Nicholson JA, concurred, examined each of these arguments which I have listed.

In summary, the court there found:

“Counsel mandated exco to restructure and implement voluntary retrenchment. Exco left the voluntary retrenchment discretion of management ...

One must therefore conclude that the offer was properly authorised and was a valid offer.” Para 41.

10 [10] To the extent that the court took the approach that that construction of the resolution was incorrect. Van Dijkhorst AJ, applying the so called Turquand rule in *Royal British Bank v Turquand*, (1856) 6E&B 327, held that this doctrine did not only apply to companies but to all corporations including universities. On that basis the appellant was bound by the offer which it had made, to which I have already made reference.

[11] Insofar as the question of whether the offer could be withdrawn was concerned, after carefully analysing the applicable law, Van Dijkhorst AJA made two points which are relevant for the present dispute. In the first place, he offered a jurisprudential
20 insight into the nature of this area of law:

“The law must be clear, it must also be effective and practical and in as far as possible conform to the sense of justice of the community which it is intended

to regulate. If it conforms to logical theory so much the better. The law is a vibrant system, ever changing to adapt to the needs of society. Should a situation arise where a choice has to be made in the efficacy and pure theory, the latter will have to be ...[indistinct]. This is in my view such a case.”

The learned judge then went on to say:

“It must therefore be held that the offer could not be revoked before its exploration date. The acceptance
10 to the offer by the second respondent after 5 September 2000 and before 15 September 2000, was therefore valid.” Paras 54 to 56.

[12] Wisely, Mr Woudstra, who appeared on behalf of the appellant together with Mr Hulley, did not seek to pursue any of these arguments. However, I should say the following: this court examined each and every one of these arguments in preparation for the hearing. This was a time consuming exercise which required the careful thought and research by three judges of this court. It was clear that there was no possibility that any of these arguments
20 could meet to success, given the judgment of the Labour Appeal Court in the Franks case. I regret to say that we were not informed prior to this hearing that none of these arguments were to be abandoned. I place it on record that this practice of informing the court of an abandonment of arguments of this kind, should indeed be resurrected. If possible, the court should be informed timeously

of these changes which will alleviate considerable measure of pressure placed upon a court dealing with many appeals.

[13] I turn to deal with the arguments which were raised by Mr Hulley in particular on behalf of the appellants. The essence of this argument which was pursued vigorously in this court was that nothing precluded the respondents from instituting action prior to the disposal of the Franks matter, which was evident in the fact that the respondents only demanded relief on 19 June 2002, after the Labour Appeal Court handed down its judgment in the Franks case.

10 Furthermore, Mr Hulley submitted that the court *a quo* should not have found that the conduct of the respondents after rescission was reasonable or could, on any reasonable basis, be interpreted as amounting to more than an acceptance to the repudiation. All three of the respondents had continued in their employment and consequently, in Mr Hulley's view, at their risk. He submitted that there was no reason why the appellant should be penalised or prejudiced as a result of the actions of the respondents in continuing to tender their services and be paid accordingly, after September 30, 2000.

20 [14] In a somewhat bold statement, he submitted the respondents' conduct best be described as "cynical and opportunistic". I shall return to opportunism presently.

[15] In dealing with this particular issue, the court *a quo* held as follows:

“In the face of the respondents purported decision of all of the agreement reached in its stated intention not to be bound by it as evidence, vic the defence of the Franks application, coupled with the threat issued by the respondent’s acting vice chancellor and principal Machette, I am of the view that the applicants were entitled to and justify in deciding to continue to tender their services.” At para 84.

[16] The argument as it evolved in this court could be described thus:

10 unlike the Franks case, where the employees all terminated their services by 30 September 2000 pursuant to the severance agreement, in this case all of the respondents continued in the employ of the appellant. Each of them was obliged to perform in terms of the agreement which they allege was valid and accordingly they should have left the employ of the appellant by 30 September 2000. They failed to perform their side of the bargain and to comply with the obligations which were imposed upon them. Accordingly they were now no longer entitled to rely on the severance agreement which they allege was valid.

20 Furthermore, they did not, on the evidence, provide sufficiently cogent evidence to indicate that they did not accept the appellant’s repudiation of the severance agreement.

[17] I shall deal first with that question: it is correct that if one examines the record, the attitude of the respondents is not articulated with

the jurisprudential precision which can be expected by lawyers. But, as an example of their approach, the following passage from the evidence of first respondent is in my view illuminate:

10 "Now Mr Wiltshire, why did you continue with the university after you had accepted that retrenchment offer? Why did you not as Franks and Steyn had done also just leave and issue or institute an action against the university immediately? Because there was a loyalty to the university, it was not you know, it had taken a long time to get to the stage, you had a job to do, you continued in your job but you also made it plain that there was no ruling on this and we were waiting for the court ruling to see whether this was valid or not. If the court had ruled it valid, obviously you would have had to rethink but we stayed there waiting for the court ruling and that was made perfectly plain to everyone.

20 Did you at any stage indicate to the university or to the members of the executive council, executive committee or council that you did not intend pursuing this matter any further? Absolutely not."

[18] Similar approaches can be found in the evidence of the other two respondents who indicated that they too did not accept the fact that the severance agreement had been properly repudiated. Second respondent for example said this:

“En wat sê u toe vir Makwela? Dat ek gaan volstaan waar ek staan, hulle het die ding aangebied, hulle het die pakket aangebied en ek gaan nie van my standpunt af weg vat nie.”

[19] There was no evidence to gainsay the insistence by the respondents that they were intent on relying on the severance agreement. Mr Hulley also relied in considerable detail on the failure of the respondents to perform their side of the bargain of an agreement which they claimed to be valid.

10 [20] I earlier mentioned a notion of opportunism which was levelled against the respondents. The facts in this case indicate the following: A severance agreement was proposed by the appellant, was accepted by the respondents. Admittedly, two days after the expiry of the period for termination by the employee, the circular of 2 October 2000 was generated informing any employee that a failure to perform would be treated as if that employee had absconded, the severance offer notwithstanding. There is also evidence which was produced, that rumours to this effect had been circulating through the university prior to the generation of that memorandum.

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[21] The appellant had taken the view that it was entitled to repudiate the agreement. It took the decision of the Labour Appeal Court in the Franks case to put an end to this approach and find it to be convinced that its approach was incorrect. Therefore, employees

were faced; 1) with an employer insisting on the validity of a repudiation and; 2) circulating a clearly worded threat which put them in a very difficult position: Had the employees left on 30 September, as Mr Hulley insists they had to, and the appellant had been successful in the Franks case, they would have been left with nothing for their efforts. The appellant in effect said this: you must perform your side of a bargain at a time when I deny that there was a bargain and failure to perform your side of a bargain, when I insist there is no bargain, is fatal to any rights that you may have pursuant to that bargain.

[22] There is no case from the researches that I have been able to conduct in the limited time available to me, nor was Mr Hulley able to point to any in his argument which deals with a case of a severance agreement and reciprocal obligations attendant thereon. There are only two obligations when a severance agreement is concluded, 1) an employee must leave and; 2) an employer must pay. In this case, the employer announced prior to the period in terms of which the employees were obliged to leave, that it was not going to pay. The employees took the attitude that there was no reason for them to perform their side of the bargain.

[23] When all the authorities which had been placed before this court, are stripped to their essence, the following remains the law: An innocent party may withhold performance only in circumstances where his or her obligations are reciprocal to those of the guilty

party who refuses to perform, ie where he cannot perform without the co-operation of the repudiating party. See *GNH Office Automation CC v Provincial Tender Board*, Eastern Cape 1998 (3) SA 45 (A) at 51F. See also *Erasmus v Pienaar*, 1984 (4) SA 9 (T) at 24D-E, *Moodley & Another v Moodley & Others*, 1990 (1) SA 427 (D) at 431D-I.

[24] In this case, the respondents were put in a position where their obligations to terminate were reciprocal to those of the appellant, which was to pay pursuant to the severance agreement. The
10 appellant having announced that it refused to perform, it appears to be that the authorities which I cited support the proposition that, in the specific context of the present dispute, respondents were entitled to withhold performance in circumstances where they did not lose their rights.

[25] To the extent that this may be a slightly novel proposition, for which there is no direct authority, I again refer to the passage that I cited from the judgment of Van Dijkhorst AJA, at para 54, namely (the law) “must also be effective in practical, it must as far as possible conform to the sense of justice of the community which it is
20 intended to regulate.” I consider that particular statement to be congruent with the conclusion to which I have arrived.

[26] In summary, the appellant repudiated the agreement and prior to any of the respondents being able to enforce their rights, after electing to abide the agreement, placed the respondents under a

threat of sanction for absconding should they leave the employ of the appellant without tendering a formal resignation. In my view, under such a threat the respondents were entitled to continue in the employ of the appellant and having taken the attitude, that they continued to insist that their rights were guaranteed under a contract, subsequent events proved them to be correct. The appellant was the sole author of this entire state of affairs. It cannot in effect approbate and reprobate and then be heard to rely on its conduct, which resulted in the very circumstances which gave rise to the respondents conduct.

[27] In my view, the respondents were entitled to claim specific performance. The court *a quo* found correctly that they were so entitled and its order was correctly and legally granted.

In the result the appeal is dismissed with costs.

JAPPIE & TLATETSI AJJA: Concur.

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On behalf of the Appellant: Advocate Woudstra/Mr Hulley

20 On behalf of the Respondents: Advocate Kruger