



THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Not Reportable
Case No: DA23/2023

In the matter between:

UNIVERSITY OF ZULULAND

Appellant

and

SIPHO WILSON DLONGOLO

Respondent

Heard: 12 November 2024

Delivered: 21 January 2025

Coram: Savage ADJP, Van Niekerk JA, Govindjee AJA

JUDGMENT

GOVINDJEE, AJA

Introduction

[1] Concluding contracts via an email exchange can be risky. The language used may be overly informal, ambiguous, contradictory or shorn of the details necessary for the intended contract. A poorly worded email might also be interpreted in a manner contrary to what was intended. As the facts of this matter illustrate, the peril is heightened when the subject matter of an offer involves various permutations

couched in technical language. The cross-pollination of employment jargon with terminology contained in pension fund rules in an offer and acceptance by email resulted in the claim that is the subject of this appeal.

[2] The respondent (Mr Dlongolo) was employed by the appellant (the University) as Director: Physical Planning. Following death threats due to his role in implementing the University's insourcing process, and a period of absence from work, Mr Dlongolo, who was only 57 years of age at the time, requested permission to take early retirement. Various discussions ensued. Given the unusual circumstances, the University indicated that it was prepared to deviate from standard practice. It was willing to compensate Mr Dlongolo for 'pension penalties' imposed by the University's pension fund (the fund) as a result of the early retirement.

[3] On Mr Dlongolo's pleaded case, the following occurred:

'12. On or about December 2017, and as a result of the negotiations, Mr RT Ngcobo, the Executive Director Human Resources and on behalf of the respondent made a written offer to the applicant to take early retirement with effect from 31 December 2017 and that his pension and other benefits to be paid by the University ... in one of the three following scenarios:

- a. A full withdrawal from the Pension Fund by the Applicant with the Respondent to pay the Applicant R850 006.06 [as compensation for the early retirement penalties less] ... his leave days amounting to R271 780.72;
- b. A monthly pension amount; or
- c. The Applicant to be paid a third of his pension benefit, and the remaining benefit to be paid [as] a reduced monthly pension.

13. On or about December 2017, the Applicant duly accepted the Respondents first offer in writing, the terms of which were as follows:

13.1 The Applicant would take early retirement from employment with effect from 31 December 2017.

13.2 That the Respondent was to pay to the Applicant a full withdrawal of his pension benefit [as well as] the amount of R578 225.34 comprising of the

Applicant's compensation benefit and leave days [as compensation for the penalties suffered due to early retirement]; and

13.3 The agreed amounts were to be paid on or before 31 December 2017.'

[4] In effect, Mr Dlongolo elected to withdraw from the fund so that he received his full account balance of R5,1 million, without any penalty deduction being imposed by the fund. The University subsequently refused to make any payment to Mr Dlongolo on the basis that he had opted to withdraw from the fund rather than select voluntary early retirement in terms of the fund rules (the rules). Mr Dlongolo instituted a claim in terms of section 77(3) of the Basic Conditions of Employment Act.¹ The University's pleaded defence was that Mr Dlongolo's '*withdrawal of his share of the pension fund did not constitute an early retirement option in terms of clause 4.3 of the pension fund rules but rather a voluntary withdrawal in terms of clause 7 of those rules.*'²

The Labour Court judgment

[5] The Labour Court determined the dispute on the basis of quasi-mutual assent, also referred to as the reliance theory:³

'...I find that the applicant was misled to believe that he would be compensated by the university, irrespective of which option he exercised on his retirement. The undertaking by the university to financially compensate the applicant for the penalties suffered by early retirement, in the large sum of R824 700.00, in my view would most certainly induce and influence any reasonable person in the circumstances of the applicant to take the early retirement. I find that that misrepresentation indeed induced the applicant to take early retirement ... Ngcobo created the impression that the parties were

¹ Act 75 of 1997.

² It is also pleaded that Mr Dlongolo did not exercise the option of early retirement before the time stipulated by the University.

³ *Van Huyssteen N.O. and another v Milla Investment and Holding Company* (593/16) [2017] ZASCA 84 (2 June 2017) at para 23: '*the doctrine of quasi-mutual assent constitutes an application of the reliance theory in cases of dissent*', enabling '*the 'contract assenter' to contend that the 'contract denier' misled him or her into the reasonable belief that the contract denier had actually assented to the contractual terms in question*'.

ad idem on the material terms of the agreement. I find that the applicant has discharged the onus and has established the necessary animus contrahendi on the part of both parties.'

[6] The court held that Mr Dlongolo had been misled by the University to believe that he would receive separate compensation for the loss of pension benefits occasioned by the early retirement. He had also been persuaded by this offer of compensation to take early retirement. A reasonable person in his position would also have been misled, according to the court:

'The fact that Ngcobo's inclusion of the option of withdrawal in the options to the applicant to receive his retirement benefit clearly demonstrated to any lay person that it formed part of the special arrangements and negotiations between the applicant and the respondent relating to his early retirement due to these particular special circumstances of his case. In my view, the university was being disingenuous to suggest the same and it appears the university was attempting to renege on the agreement with the absurd contentions that it intended to pay the benefits to the fund and not the applicant ... when these contradict the very wording [of] Ngcobo's emails.'

[7] The question to be answered in this appeal is whether the parties concluded a contract on the terms suggested by Mr Dlongolo, or based on quasi-mutual assent, in which event he would be entitled to the contractual damages, interest and costs awarded by the Labour Court based on the university's repudiation.

Consensus?

[8] A contract is an agreement entered into with the intention of creating a legal obligation or obligations. The definition postulates an agreement (a meeting of minds or mutual understanding) between two or more persons as the basis of a contract. Without agreement in this sense there can, generally speaking, be no contract. The parties must not only be of the same mind, but know that this is the case. Agreement is reached when parties have come into 'conscious accord' on the fact that they

intend to create between them an obligation (or obligations) with a specific content. Persons cannot be said to be in agreement unless there has been a complete meeting of their minds, that is, unless the intention of the one corresponds exactly to that of the other.⁴

[9] Mr Dlongolo's case is based on acceptance of an offer made by Mr Ngcobo, on behalf of the University. The offer in question is contained in the following email sent by Mr Ngcobo on 14 December 2017 (the offer) and requires repetition in full, including the emphasis contained in the original:

'As discussed at our last meeting on Friday 8th, the scenario is as follows:

1. If you retire as at 31 December 2017 without penalties, as if you were aged 60, the university has to pay in R1 614 644,63 to buy out the outstanding service. It was made clear that because of budgetary constraints this cost is unaffordable.
2. If you retire as at 31 December 2017 with penalties (see Clause 4.3 of the fund rules attached), the penalties amount to R824 700.00. The university can consider this as a contribution towards your retirement.
3. Your leave credit as at 31 December 2017 is 102 days, which in value is R297 086.78.
4. However there is a capping of 90 days (in terms of the leave policy, upon termination of service, the university only pays out leave days up to a maximum of 90 days), the value of which is R271 780.72. This amount will not be paid out to you but set-off against the penalty of R824 700.00.
5. You then requested that the difference of 12 days – R25 306.06 in leave values (R297 086.78 less R271 780.72) be paid out to you.

In summary, at the end of the meeting, this was the understanding:

- That you will retire as at 31 December 2017 with penalties amounting to R824 700.00.

⁴ ADJ Van Rensburg 'Contract' in *The Law of South Africa* (3rd Ed) (vol 9) (LexisNexis) (2014) paras 295 – 305.

- That the university will compensate you for the penalties suffered because of early retirement. You will contribute your 90 days leave pay-out of R271 780.72 towards the penalties.

- That the leave difference (12 days) of R25 306.06 will be paid out to you.

- It is your option how you receive the retirement benefits as reflected on the quotation issued by Absa directly to you, i.e.,

- full withdrawal (estimated R5 117 233.79)

OR

- monthly pension without commuting a third (estimated R21 463.41)

OR

- commuting a third (estimated R1 213 568.66) AND then receive a reduced monthly pension (estimated R14 308.94).

NOTE THAT ALL OF THE AMOUNTS QUOTED ABOVE ARE BEFORE APPLICABLE STATUTORY DEDUCTIONS.

THERE MAY BE SMALL VARIATIONS DEPENDING ON FINAL DATE OF CALCULATIONS THESE VALUES (sic).

May I also point out to you that

- the undertaking by the university to compensate you for the penalties suffered is not standard practice but is done to reach an amicable solution to the predicament (your circumstances) that presents.

- The undertaking by the university is only valid if exercised in the 2017 financial year as there is no budget for it in 2018.

It is, therefore, imperative that you communicate your decision to management before 12h00, Friday 15 December 2017, in order for the amounts to be accrued.

If anything is unclear, please do not hesitate to contact me. Urgency is of essence in this matter.'

[10] The rules were attached to this correspondence. Clause 4 deals with retirement and clause 7 with withdrawal, as follows:

4.1 Retirement Benefits

On receipt of satisfactory proof of the retirement of a MEMBER and subject to the provisions of RULE 13.13, a MEMBER shall retire in terms of RULE 4.2 or 4.3 as the case may be.

4.2 Normal Retirement

A MEMBER who retires on the NORMAL RETIREMENT DATE shall be entitled to an annual pension equal to such MEMBER'S SCALE PENSION.

4.3 Voluntary Early Retirement

Subject to the written consent of the EMPLOYER, a MEMBER may retire at any time after attaining the age of 55 (fifty-five) years. In this event no further CONTRIBUTIONS shall be payable by or in respect of the MEMBER. The MEMBER shall receive an annual pension from the date of such early retirement and equal to such MEMBER'S SCALE PENSION. Such annual pension shall be reduced by 0,4% for each month by which the MEMBER'S RETIREMENT DATE precedes the date on which such MEMBER would attain 60 (sixty).

4.4 Cash Option

4.4.1 A MEMBER shall be entitled to take up to one-third of such MEMBER'S pension in cash...

7 Withdrawal

7.1 Withdrawal benefits

If a MEMBER leaves the service of the EMPLOYER before reaching NORMAL RETIREMENT DATE and is not entitled to any other benefit in terms of the RULES ... the MEMBER shall be entitled to one of the options available under RULE 7.2, 7.3 or 7.5 as the case may be...

7.2 Cash benefit

7.2.1 If a MEMBER leaves the service of the EMPLOYER, due to any reason other than retrenchment, a lump sum benefit shall be payable...

7.3 Preservation benefit

7.3.1 In lieu of the cash benefit in terms of RULE 7.2, a MEMBER may elect to transfer such benefit to another APPROVED FUND chosen by the MEMBER...'

[11] The record reveals that the parties each intended to make a contract, but on different sets of terms. The university was willing to make a contribution to negate the anticipated penalty, to be imposed in terms of the rules, due to early retirement. That penalty amounted to 0,4% for each month by which Mr Dlongolo's retirement preceded the date on which he would attain the age of 60.⁵ Importantly, the effect of the penalty would be to reduce the *annual pension* he would receive after retirement.

[12] By way of illustration, Mr Dlongolo's annual scale pension was calculated to be R342 202,39 if he took normal early retirement at the age of 57, without any additional university support, given the imposition of the prescribed early retirement penalty. Allowing Mr Dlongolo to retire without imposing this penalty would result in an annual scale pension of R454 909,72. On this scenario, he would effectively have been deemed to be 60 years of age, so that no penalty was applicable, and taken to have made the necessary additional contributions to the fund, thereby qualifying for the higher annual amount. To achieve that result at age 57 required Mr Dlongolo's fund credit to be bolstered to the tune of R1,6 million, comprising actuarially-calculated additional service contributions as well as the cost of reversing the early retirement penalty. The university was only prepared to contribute the latter to the fund, less 90 days' leave pay-out due to Mr Dlongolo, to enhance the annual scale pension.⁶

[13] Mr Dlongolo, by contrast, wanted to leave the university's service early, withdraw from the fund and personally receive the early retirement penalty contribution promised by the university. As a result, despite the purported acceptance of the offer, there remained dissensus in respect of the intended

⁵ The calculation provided by ABSA reflected the reduction factor as 14,4%, being calculated as follows based on retirement three years prior to the age of 60: $(0,40\% \times 12) \times 3 = 14,4\%$.

⁶ Mr Ngcobo's hand-written, signed note that appears on Mr Dlongolo's letter dated 29 November 2017 confirms this: the university was willing to 'pay in amount to buy service once costs determined and approved'. The reference to 'pay in' and subsequent engagement with the fund to clarify the amounts confirms the intention. Mr Dlongolo had requested the Vice-Chancellor of the University to '*buy the time left between now and sixty years and compensate me for 60 years retirement benefit*' as well as '*buy my leave days towards my pension / retirement fund*'.

obligations.⁷ There was therefore no agreement between the parties and, on the standard theory, Mr Dlongolo failed to prove the contract on which he relied.⁸

Quasi-mutual assent?

[14] On a strict approach to the pleadings that would be the end of the matter. It is generally for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.⁹ Mr Dlongolo's case was poorly pleaded. He did not rely on any oral variation of what was contained in the offer¹⁰ despite it being obvious that he failed to accept within the strict time period indicated, so that the written offer had lapsed.¹¹ The pleaded case is simply that there was an express offer in writing containing three options, one of which was properly accepted. That aside, he also did not plead a contract concluded with the University based on quasi-mutual assent.¹² On appeal, however, he relied exclusively on this argument. It seems fair to adopt a lenient approach and to consider the point given the equally imprecise state of the University's pleadings and considering that this dispute was fully ventilated before the Labour Court and determined on this basis.

⁷ This is also readily apparent from the University's response, on 20 December 2017, to Mr Dlongolo's selection, emphasizing that the selected option was not 'early retirement' in terms of clause 4.3 and highlighting, that there would be no compensation for penalties that would have been suffered because of early retirement and that the maximum 90-days leave payout would be made to Mr Dlongolo. There is also a further basis to arrive at the same conclusion: Mr Dlongolo did not unconditionally accept the whole offer (including voluntary early retirement and receipt of a penalised annual pension in terms of clause 4.3 of the rules) and effectively made a counter-offer to be accepted or rejected by the University.

⁸ *Vincorp (Pty) Ltd v Trust Hungary ZRT* (061/2017) [2018] ZASCA 35 (27 March 2018) (*Vincorp*) at para 25.

⁹ *Fischer and another v Ramahlele and others* 2014 (4) SA 614 (SCA) at paras 13–14; *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) (*Novartis*) at para 11.

¹⁰ Cf *Novartis* above n 9 at para 11.

¹¹ *Laws v Rutherford* 1924 AD 261 at 262. Mr Ngcobo's evidence was that he agreed, at the meeting on 15 December 2017, that Mr Dlongolo and Khan, his financial advisor, could respond by 18 December 2017, but this was not the pleaded basis of the claim. Mr Dlongolo's suggestion, during cross-examination, that Mr Ngcobo had offered to pay the penalties directly to him, instead of to the fund, was similarly not the basis of the pleaded claim.

¹² See: GB Bradfield *Christie's The Law of Contract in South Africa* (8th Ed) (LexisNexis) (2022) at 36–37; *Constantia Graswerke BK v Snyman* 1996 (4) SA 117 (W) at 124I–J cited in *Vincorp* above n 8 at para 32. Also see *Vincorp* above n 8, especially at paras 27–33.

[15] In cases of quasi-mutual assent, a party is precluded from denying the existence of an agreement based on their own conduct and the circumstances.¹³

The established test builds on the sentiments expressed in *Smith v Hughes*:¹⁴

‘If, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon the belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.’

[16] A three-fold enquiry is usually applied prior to accepting a contract on this basis:¹⁵

‘...firstly, was there a misrepresentation as to one party’s intention; secondly, who made that representation; and thirdly, was the other party misled thereby?...The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?’

[17] As is often the case, the answers to the first two questions are readily apparent.¹⁶ Mr Ngcobo’s main error was to include in the offer the ‘full withdrawal’ amount from the fund (in the amount of R5,1 million), as received from ABSA, as an option linked to early retirement with penalties. That was contrary to the rules, which were provided to Mr Dlongolo, which made it clear that withdrawal from the fund was treated differently to retirement. Including that option was unintended and amounted to a material mistake on the part of the University.¹⁷

¹³ *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA) at para 9: ‘contractual liability, however, arises not only in cases where there is consensus or a real meeting of the minds, but also by virtue of the doctrine of quasi-mutual assent.’

¹⁴ *Smith v Hughes* (1871) LR 6 QB 597 at 607.

¹⁵ *Sonap Petroleum (SA) (Pty) Ltd (formerly known as Sonarep (SA) (Pty) Ltd) v Pappadogianis* 1992 (3) SA 234 (A) (Sonap) at 239J–240B.

¹⁶ See for example: *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 (4) SA 345 (SCA) (*Constantia*) para 18.

¹⁷ See: *Botha v Road Accident Fund* 2017 (2) SA 50 (SCA) at para 10.

[18] The decisive question is whether the University, whose actual intention did not conform to the common intention expressed in its offer, led Mr Dlongolo, as a reasonable person, to believe that the declared intention represented its actual intention.¹⁸ Answering this question inevitably requires a detailed examination of the factual matrix.¹⁹ As will be illustrated, the reasonableness of Mr Dlongolo's belief turns on the information provided to him in and with the offer, as well as information he had requested and received prior to the purported acceptance of the offer.

[19] The terms extracted from the bullet-point summary contained in the offer received by Mr Dlongolo is a useful starting point:

19.1 Mr Dlongolo would '*retire*' on 31 December 2017 '*with penalties amounting to R824 700.00*'.

19.2 He would be compensated by the university for the penalties that would be suffered due to early retirement.

19.3 He would himself contribute 90 days leave pay-out of R271 780.72 '*towards the penalties*'.

19.4 The 12-day leave difference of R25 306.06 would be paid to him.

19.5 Mr Dlongolo could select to receive '*retirement benefits*' in one of three ways: full withdrawal; monthly pension or commuting a third and then receiving a reduced monthly pension.

[20] This summary followed, and must be read together with, the five paragraphs that explained the parties' discussions, quoted in paragraph 9 above. In particular, the repeated reference to '*penalties*' in this synopsis must be construed in the light of what is contained in the preceding portion of the offer. As that portion of the correspondence indicates, two broad scenarios had emerged during the meeting on 8 December 2017. To retire '*without penalties*' would require a 'pay in' of R1,6 million '*to buy out the outstanding service*', which was unaffordable from the University's perspective. But retirement '*with penalties*' in terms of clause 4.3 of the rules would

¹⁸ *Sonap* above n 15 at 239I–J.

¹⁹ *Novartis* above n 9 at para 35. This includes all the facts proven that show what the intention was in respect of entering into a contract: the contemporaneous documents, the conduct in negotiating and communicating with one another and the steps taken to implement the contract.

be possible, the University agreeing to contribute to the penalty amount, less the value of the leave pay-out due to Mr Dlongolo. As framed in the offer, that leave amount (in the amount of R271 780,72) was to be forfeited by Mr Dlongolo as his contribution '*towards the penalties*'.

[21] The University specifically drew Mr Dlongolo's attention to clause 4.3 of the rules in explaining this option, and attached the rules to the offer to emphasise its importance. By attaching the rules the University expected Mr Dlongolo to read at least that particular clause when construing its offer. His cross-examination suggests that, rather than not having understood it, he had failed to give any consideration to the clause, let alone the rules in their entirety, prior to communicating his acceptance.²⁰ Considering the circumstances that was an error.²¹ Had he done so he would have immediately understood that the '*penalties*' referred to the 0,4% per month fund deduction from the annual pension due to him because of the voluntary early retirement. Given the discrepancy between an annual pension and a lump-sum payment, a reasonable person would have proceeded to query the terms of the offer.

[22] Such indifference was not in evidence when Mr Dlongolo either telephoned an ABSA financial advisor (Mr Mncube) from his hospital bed to obtain a retirement benefit quotation (the quotation) and / or left hospital to visit him to clarify the contents of the quotation received. Mr Dlongolo's evidence in this respect is unclear, contradictory and lacking in detail. That aside, it must be noted that Mr Dlongolo was initially adamant, during cross-examination, that his request for a quotation was nothing more than a rote, annual enquiry, unrelated to his impending early retirement. Only later did it transpire that this was far from the case given his interaction(s) with Mr Mncube.

²⁰ 'Mr Cassells: '*... that sentence, the member shall receive an annual pension from the date of such early retirement and equal to such member's scale pension. It clearly indicates that if you elect early retirement, you remain a member of the university's pension fund.*

Mr Dlongolo: '*But what was given to me by Mr Ngcobo, he said it is up to me how I want to receive my pension. So now, if I'm reading this, it's totally different from what Mr Ngcobo gave to me.*'

²¹ See, for example, *Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002 (4) SA 681 (SCA).

[23] The quotation was received by Mr Dlongolo on 6 October 2017, some two months prior to receipt of the offer, coupled with Mr Mncube's details. A paragraph below the quotation, prominently headed '*please note*', contained the following information:

'You are currently in a defined benefit fund, which means that your final retirement benefit is based on your highest average salary multiplied by your years of service in the fund multiplied by the scale of pension.'

[24] Mr Dlongolo maintained that he had failed to read the note. This is implausible considering that he was seriously considering early retirement, had requested the information personally and engaged with Mncube on the retirement benefits due to him. His version was that his interest was exclusively on the figures contained in this quotation. Even accepting this to be the case, Mr Dlongolo must have appreciated that early retirement, in so far as fund benefits were concerned, was restricted to one of only two easily understandable options: either a monthly pension of R21 463,41; or one-third commutation in the sum of R1,2 million coupled with a monthly pension of R14 308,94.²² There was no mention of any possibility of a lump-sum payment until a separate ABSA quotation based on withdrawal from the fund reflected the amount of R5,1 million. On the probabilities, Mr Dlongolo received this second quotation at the meeting on 8 December 2017. The offer made explicit reference to '*the quotation issued by ABSA directly to you*'. This can only relate to the withdrawal benefit memorandum from ABSA dated 21 November 2017, which contained no reference to monthly or annual benefits or penalties.

[25] For this reason too, the subsequent expression in the offer of a full withdrawal option, coupled with the monthly pension estimates and reference to compensation for penalties, should have raised a flag. The various options emanated from two separate ABSA quotations, one provided following Mr Dlongolo's request for information about early retirement benefits, the other containing information about withdrawal from the fund. It may be added that Mr Dlongolo recalled during cross-

²² An ABSA employee had sent him the quotation, including the details of a financial advisor, containing pension estimates based on a 1 January 2018 retirement date.

examination that Mr Ngcobo had advised him during the meeting of 8 December 2017 that there would be penalties for early retirement payable to the fund. He also conceded that withdrawal from the fund implied that he would no longer be a member of the fund so that there would be no penalties payable to the fund.

[26] The options contained in the offer must be considered with this in mind. If Mr Dlongolo realised (or should have realised as a reasonable person) that there was a real possibility of a mistake in the offer, he would have had a duty to speak and to enquire whether the expressed offer was the intended offer. Only thereafter could he accept.²³

[27] Leaving aside the inconsistencies highlighted above, I am prepared to accept that Mr Dlongolo probably did not realise the University's mistakes. The conduct of both Mr Ngcobo and a financial advisor, Mr Iqbal Khan, supports this approach. Mr Ngcobo, by his own admission, was uncertain about the information he conveyed to Mr Dlongolo at the meeting on 8 December 2017. His lack of clarity is also reflected in the offer and continued at the meeting of 15 December 2017. He could not explain why the commutation amount was not one third of the withdrawal amount, despite that being the reason for the meeting. He resorted to calling the ABSA consultant who had arranged the actuarial penalty calculation so that she could explain the matter to Mr Khan. He also appears to have simply copied and pasted the various figures received from ABSA without appreciating the impact of the promised 'contributions' (on the part of both the University and Mr Dlongolo) towards reducing the penalty. This is the only plausible explanation for the offer containing identical monthly pension figures to what was already provided in the October quotation. Given the special arrangement proposed, those figures were outdated and wrong. To make matters worse, Mr Dlongolo was pushed to make a quick decision without an updated actuarial calculation reflecting the penalty contributions.

[28] Mr Khan was engaged to provide financial advice to Mr Dlongolo since November 2017. The offer containing both the monthly pension estimates and the withdrawal amount was received by Mr Dlongolo and shared with Mr Khan a day

²³ *Sonap* above n 15 at 240J–241B.

before they met with Mr Ngcobo to clarify the figures on 15 December 2017. He was consulted on various occasions before and after receipt of the offer for his '*calculation*', '*quotes*' and '*further advice*'. Despite this, he restricted his focus mainly to accessing and investing the lump sum to be withdrawn from the fund. There was little consideration of the broader picture and seemingly no appreciation of the rules provided to him or the manner in which the compensation towards the penalties would impact on the two monthly pension options. He had seen the quotation and, on the probabilities, perused a letter drafted by Mr Dlongolo before this was sent to the University at the end of November 2017. He clearly understood that the promised contribution was something separate from the lump sum amount under consideration but acknowledged that the offer was unclear to him in respect of what would happen to the penalties in the case of a full withdrawal. He appeared not to have any understanding of the meaning of a defined benefit fund or the notion of penalties. This is surprising, to say the least, considering his years of experience as a financial advisor.

[29] Considering these circumstances, as well as the underlying reason for his hospitalisation and need for early retirement, there must be a measure of sympathy for Mr Dlongolo's position.

[30] In the final analysis, the appeal turns on whether Mr Dlongolo had a '*duty to speak and to enquire*' based on the facts of the case.²⁴ He was a senior employee who proactively engaged with ABSA about the retirement benefits due to him and who solicited advice from both Messrs Mncube and Khan. The quotation received in October afforded two clear, easily understandable early retirement options, both resulting in a monthly pension. Yet the summarised options contained in the offer conflated those options with full withdrawal from the fund, based on an amount contained in a separate actuarial calculation received from ABSA.

[31] The requirement of reasonableness implies that a party asserting a contract should not be negligent but must exercise proper care in concluding that the parties have reached consensus. The contradiction in the offer was evident: on the one

²⁴ *Ibid.*

hand, the University and Mr Dlongolo would each contribute to negate the penalties associated with the annual benefit amount to be received, with or without one-third commutation, upon early retirement; on the other, Mr Dlongolo could withdraw from the fund, suffer no penalty in terms of the rules yet receive the equivalent penalty amount in cash.

[32] A reasonable person would have read the offer in its entirety, noting the cross-reference to clause 4.3 of the rules. Considering that clause, the contrast between receipt of an annual benefit as opposed to a lump-sum withdrawal was glaring and a reasonable person would have realised the real possibility of a mistake in the framing of the offer.²⁵ The conclusion is that Mr Dlongolo acted unreasonably in construing the offer as he did, by selectively relying on part of the offer and by ignoring information previously gleaned, without any further enquiry. Moreover, he communicated acceptance despite his own financial advisor being unable to make sense of a key component of the offer. Borrowing from *Sonap*, Mr Dlongolo snatched at a bargain in circumstances where a reasonable person would have acted more carefully by enquiring into the matter, having realised the real possibility of a mistake in the framing of the offer.²⁶

[33] There was, therefore, no consensus, actual or imputed and, reading Mr Dlongolo's pleadings generously, the alleged contract is of no effect. The Labour Court erred in concluding to the contrary, based on its limited assessment of whether a reasonable person would have been misled by the offer. The appeal succeeds. Given the circumstances already described, it is appropriate that there be no order as to costs.

[34] The following order is made:

Order

²⁵ *Constantia* above n 16 para 22.

²⁶ *Sonap* above n 15 at 241D: '*the snapping up of a bargain, however, in the knowledge of the possibility that the declared intention did not represent actual intention, would not be bona fide.*'

1. The appeal is upheld, with no order as to costs.
2. The order of the court below is set aside and substituted with the following:
 - ‘1. The applicant’s claim is dismissed.
 2. There is no order as to costs.’

Govindjee AJA

Savage ADJP *et* Van Niekerk JA concur.

APPEARANCES:

FOR THE APPELLANT: G Cassells of Maserumule Inc

FOR THE RESPONDENT: NSV Mfeka
Instructed by TL Mbili Attorneys