

IN THE LABOUR COURT OF SOUTH AFRICA

In the matter between:

PETER HAMILTON FRANKS	First Applicant
MOSHE MOSES KEKANA	Second Applicant
NELIA PATRICIA STEYN	Third Applicant
and	
THE UNIVERSITY OF THE NORTH	Respondent

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JUDGMENT

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JAMMY AJ

- 1.On 15 August 2000 the Respondent, over the signature of its Acting Vice-Chancellor and Principal, Prof M C P Golele, issued a memorandum to its staff recording its Council's approval of an offer of voluntary retrenchment to all permanent staff members. The offer was stated to expire on 15 September 2000 and recorded the "severance/retrenchment package offered" as being that set out in the relevant sections of its Personnel Policy and Procedure manual.
- 2.A form of "Acceptance of Voluntary Retrenchment Offer" was annexed to the memorandum. It recorded the employees' acceptance of "the Council's offer of Voluntary Retrenchment" as well as the fact that "by accepting this offer, I have taken an irreversible step and once this acceptance is acknowledged by the University it cannot be reversed unless by mutual agreement."
- 3.The First Applicant in this matter, was the Executive Director:Human Resources of the Respondent and the acceptance form was signed by him on 14 August 2000 and was duly acknowledged by the Respondent's Human Resources Department.
- 4.The Third Applicant, the Respondent's Director:Research Development and Administration, signed the acceptance form on 21 August 2000 and it too, was duly acknowledged.

5. The Second Applicant, the Deputy Director:IT Division, signed the acceptance form on 5 September 2000, but received no acknowledgment thereof.
6. A second memorandum, described as a "follow-up" to the circular of 15 August 2000, was issued by the Acting Vice-Chancellor and Principal of the Respondent on 22 August 2000. It purported to clarify the retrenchment process, its material consequences and other aspects of the prevailing restructuring programme.
7. A radical upheaval of what, until then, had been a relatively straight-forward process, occurred however on 4 September 2000. On that date the Acting Chairperson of Council issued a communique addressed to "the University Community" in which reference was made to the two earlier circulars and which gave notice "with great regret" that "the two circulars mentioned above are hereby withdrawn and rescinded forthwith for the following reasons." Briefly stated, those reasons were that the offer made "did not comply with Council Resolution on the matter", that it offended "the principles enshrined in the Personnel Policy and Procedure of this institution" and that certain inputs and contributions to the restructuring process had not been taken into account.
8. The three Applicants, together, it is stated in the papers, with 136 other employees of the Respondent who timeously accepted, with due acknowledgment, the offer of voluntary retrenchment from the Respondent, dispute the Respondent's right unilaterally to rescind and withdraw that offer, contend that it is legally binding on the Respondent and, as indicated, seek a declarator to that effect. They will, they contend, suffer irreparable financial harm in the context of their future career opportunities, financial responsibilities and other commitments if the agreements which they contend are legally in force, as constituted by the offer and its acceptance by them, are not honoured by the Respondent. What they precisely seek is an order declaring the offer in question to be valid and one which they were entitled to "exercise or accept..... on or before 15 September 2000, alternatively until 4 September 2000" and a further order to the effect that they are "entitled to their retrenchment benefits as provided for and in terms of" that offer.
9. The Respondent's opposition to this application is based in the first instance on a point taken *in limine*. The issues for determination by this Court, it contends, concerning as they do the validity of an alleged contract constituted by the offer and purported acceptance of certain severance benefits to the Applicants and the right of the Respondent to withdraw that offer before its expiry date, are not within the Court's jurisdiction. They do not arise, it is submitted, either from the

Labour Relations Act 66 of 1995 ("the Act") or from any other law that confers jurisdiction on the Labour Court. It is, argued Mr Maserumule for the Respondent, a purely contractual matter which, whilst it may be justiciable elsewhere, is not one with regard to which this Court can issue a declarator. The Court's power inter alia to make declaratory orders is restricted to matters over which it has jurisdiction in terms of s157 of the Act which, subject to the Constitution and s173, (the section which defines the jurisdiction of the Labour Appeal Court) confers exclusive jurisdiction on this Court -

..... in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court."

10.This is not such a matter, it is submitted, and if the Applicants wish to test the validity of the alleged contract and their entitlements arising therefrom, they must do so in another forum.

11.Those submissions are rejected by Adv M Moyses, representing the Applicants, as taking no account of the provisions of s77(3) of the Basic Conditions of Employment Act No 75 of 1997. That Section reads thus:

our Court has concurrent jurisdiction with the Civil Courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract."

12.The argument that the instant dispute does not concern a contract of employment cannot, she submitted, be sustained and there is no valid basis upon which the jurisdiction of the Labour Court to adjudicate and determine the matter can be called into question.

13.The Respondent's further substantive arguments regarding the alleged lack of authority of its Acting Vice-Chancellor and Principal to have signed and issued the memoranda of 15 and 22 August 2000 cannot moreover, the Applicants argue, assist the Respondent. Whether the formulation of that offer was not in compliance with the relevant Council Resolution, cannot in the circumstances in which it was made and conveyed, affect its validity and nor can the fact that the formal drafting of the document was done by the First Applicant in his official capacity, notwithstanding that he was also a recipient thereof. The First Applicant, simply stated, contends that he did exactly what he was instructed to do.

14.The disputes of fact regarding the First Applicant's role in this saga, do not in my view bear upon the basic issues before this Court to a degree which precludes their determination on the papers submitted. The cardinal averments on both

sides relate to the deliberations of the Respondent's Council, the directions and instructions emanating therefrom, the authority of the Acting Vice-Chancellor to have acted as she did and the consequences flowing therefrom. For the reasons which follow, I do not consider it necessary to traverse those aspects of the matter in any detail and indeed, in the face of the point *in limine* to which I have referred, they were not vigorously argued by the representatives of either side.

15. The Respondent's challenge to the jurisdiction of this Court to deal with the matter is, in my opinion, without substance. At the time that the offer of voluntary retrenchment was made, the Applicants were in a contractual employment relationship with the Respondent. The effective withdrawal of the circulars of 15 and 22 August 2000 did not alter their status as such. They continued to be employees and indeed, it is the Respondent's submission that there was nothing in the then prevailing circumstances to compel them to leave its employ on 30 September 2000. On the other hand, if, as the Applicants contend, the Respondent is bound on a contractual basis by a proper offer and its valid acceptance, their contracts of employment would in due course, **ipso facto**, terminate. The Respondent's argument in these circumstances that the dispute is not one which, in the context of s77 of the Basic Conditions of Employment Act, concerns a contract of employment, any breach of which would vest the Civil Courts with jurisdiction to adjudicate it, cannot be sustained and if, as would then be the case, the Civil Courts enjoy such jurisdiction then, concurrently as the statute provides, so does this Court. The Respondent's submissions *in limine* must accordingly fail.

16. Turning therefore to the validity of the contract itself, the basic principles of the common law of contract negate the challenge to it which the Respondent seeks to mount. The offer, on the face of it, emanated from its highest administrative authority, through the Acting Vice-Chancellor and Principal of the University. There was nothing either in the formulation of the offer or in the circumstances in which it was made, to suggest to the recipients thereof any question of lack of authority on the part of that senior executive officer of the Respondent to have presented it. The Applicants, and any other of the body of employees who in good faith accepted the offer, were clearly entitled immediately thereafter to take appropriate steps to secure their economic futures and career paths - to their considerable prejudice if the representations upon which they justifiably so acted, were subsequently sought to be placed in issue. I am left in no doubt whatsoever, for the reasons more fully dealt with hereunder, that in these circumstances, the Respondent is estopped from denying, on any basis, the validity of those representations, or of the contract resulting from the acceptance of the offer which they incorporated and the entitlement of the Applicants,

including the Second Applicant, whose acceptance of the offer the Respondent was in the circumstances obliged to acknowledge, to their respective retrenchment benefits flowing therefrom.

17.The Respondent argues that the doctrine of estoppel cannot operate to the benefit of the Applicants in the circumstances of this matter for two reasons. In the first instance it cannot have application where the conduct to which it is directed is **ultra vires** which, it contends, would be the case if the acting Acting Vice-Chancellor or his delegatee was not so mandated by the Respondent's Council. Secondly, it submits, the principle of legality would be thereby undermined.

18.Whilst it is correct that an institution such as the Respondent cannot be estopped from resiling from a contract which was beyond its power to make and that it cannot be bound by estoppel to do anything beyond its legal capacity, this is not such a case.

19.The position of the Respondent here was precisely akin to that of the local authority in -

Mossel Bay Municipality v Ebrahim. 1952(1) SA 567 (C)

in which, at **573**, it was held that the application of the doctrine of estoppel -

ould not be such as to lead to the Council being bound "to do something beyond its powers:....There was nothing in law to prevent the Council from granting the certificate in this case...The only effect of the Council's decision was that it was in conflict with the general policy which had prevailed since 1936..

20.That "general policy", it was held, could not have operated **per se** to preclude the Council from deviating therefrom in its discretion, -

ost it must be regarded as a general principle by which the Council could legitimately be guided or influenced in dealing with applications...

21.The Respondent's submissions moreover, take no account of the sworn averments by the Acting Vice-Chancellor of the Respondent unequivocally denying the Applicants' allegations questioning her authority to make the offer of voluntary retrenchment set out in the circular of 15 August 2000. In my view, the probabilities emphatically favour acceptance of that denial. It is inconceivable that, if the communique of 15 August 2000 did not correctly reflect the mandate

given to her, the subsequent memorandum of 22 August 2000 would be allowed to follow with apparent impunity and no suggestion of any inaccuracy or error in that which preceded it and to which specific reference was made therein.

22. Finally, with regard to the contested nature of the relief sought by the Applicants, the authority cited by the Respondent in support of its contention that the issue of a declarator would be superfluous and academic in the context that the proper remedy available to the Applicants if, as they allege, the contract upon which they rely is a valid one, is to seek its enforcement, does not in my view support that contention.

23. The case cited, **Gibbs v Nedcor (1998) ILJ 364**, stipulates the prerequisite of proof of some infringement of the rights alleged to be held by an applicant before he is entitled to claim a declaration thereof. For the reasons which I have stated, I am satisfied as to the validity of the contract in question in this matter and that the right and entitlement of the Applicants to the benefits properly accruing to them thereunder have been established. It is common cause that the Respondent has repudiated that liability and those rights have therefore been infringed. There is, in my opinion, no reason whatsoever why, prior to any action to enforce those rights which may ultimately become necessary, the Applicants should not seek a formal declaration by this Court that they exist. Indeed, the issue of a declarator to that effect may **ipso facto** obviate the necessity for any such future course of action.

24. I have concluded therefore that the Applicants are entitled to the order which they seek and which I accordingly make in the following terms:

Offer of voluntary retrenchment contained in the Respondent's memorandum to its staff of 15 August 2000 is valid and the Applicants were entitled to accept that offer in the manner prescribed therein. First, Second and Third Applicants are accordingly entitled to the retrenchment benefits provided for therein. Respondent is ordered to pay the Applicants' costs of this application.

Our Court

Date of hearing: 19 December 2000

Date of Judgment: 6 February 2001

Representation:

For the Applicants: Adv M E D Moyses, instructed by Botha Horak Attorneys

the Respondent: Mr P Maserumule: Maserumule & Partners, Attorneys