

SOUTH AFRICA / JUDGMENT

## Olivier v University of the North (J535/03) [2014] ZALCJHB 287 (30 July 2014)

[2014] ZALCJHB 287

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhamajie

CASE / FILE NUMBER

J535/03

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J535/03

JANA OLIVIER Applicant

and

UNIVERSITY OF THE NORTH Respondent

Heard: 13 June 2013 & 24 March 2014

Delivered: 30 July 2014

TLHOTLHALEMAJE, AJ

**Introduction:**

[1] The Applicant had approached the Court for an order for specific performance in the following terms;

1.1 ‘The Applicant’s non-compliance with section 157 (4) of the Labour Relations Act, No 66 of 1995 (The LRA) be condoned.

1.2 That the Respondent pay to the Applicant the amount of R155 431, 25 plus interest thereon pursuant to the terms of the agreement entered into between the Applicant and the Respondent on 16 August 2000’.

- [2] The matter initially came before the Court on 13 June 2013, and its merits were heard. Prior to judgment being delivered, the Respondent had approached the Court by way of application, and raised two preliminary points, viz; that the prosecution of the application amounted to an abuse of court process, and secondly, that the Applicant's claim had become prescribed by virtue of the provisions of section 15 (2) read with section 17 (2) of the Prescription Act, 68 of 1969. This application was opposed by the Applicant and was heard on 24 March 2014.

### Background:

- [3] The Applicant was employed by the Respondent with effect from 1 July 1994 as associate professor in its Geography Department in the Faculty of Science. She retired on 31 December 2000.
- [4] On 15 August 2000 the Respondent's Acting Chancellor & Principal, Prof NCP Golele issued a memorandum to University staff which read as follows:

'Subject: VOLUNTARY RETRENCHMENT.

The Council of the University has approved that retrenchment be offered to all permanent members of staff.

This offer is made with effect from 15 August 2000 and shall expire on 15 September

2000. The severance/retrenchment package offered is 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 the retrenchment package. A document explaining these policies will be circulated shortly.

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 re-employing 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 your department/section etc.

Should you elect to accept this offer, and you are a staff member working under Academic Conditions, you will terminate services after the required three months i.e. 30th November 2000. However, should you have no teaching load this semester, or no direct student contact, this may be shortened at your request and agreement (in writing) by your HOD, Dean and Rectorate. If you are an Administrative/Service Staff member, you will terminate services on the 30th September 2000.

In order for the necessary process to occur, including obtaining tax directives, you are requested to put your application as soon as possible. The University cannot guarantee that all the necessary payments (i.e. Severance Package and Leave pay) will be made by the termination date, but all attempts will be made to do so.

Should you wish to accept the offer, you are requested to complete the attached form at your earliest convenience, and submit it personally to the Human Resources Department’.

[5] The Applicant had accepted the offer on 16 August 2000 by completing a form of ‘Acceptance of Voluntary Retrenchment Offer’ which was annexed to the memorandum. The Respondent’s Human Resources Department had acknowledged receipt thereof. This acceptance form read as follows:

‘I, JANA OLIVIER Employee No. 9921664, hereby accept the Council’s offer of Voluntary Retrenchment as set out in the Personnel Policy and Procedure Manual (and of retirement of over 55). I have given serious consideration to the implications of this acceptance and will seek financial advice with regard to the utilization of funds I receive. I further acknowledge 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.

Signed this 16 Day of August 2000 at SOVENGA’

[6] On 4 September 2000, the Respondent’s Acting Chairperson of Council, Mr. GM Negota had issued a communiqué which read as follows;

‘Reference is made to the two Circulars on the above subject matter dated 15 and 22 August 2000.

At its Extra-ordinary meeting of 31 August 2000 EXCO resolved to revisit whole 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:-

1. Erroneously did not comply with Council Resolution on the matter;
2. Offend the principles enshrined in the Personnel Policy and Procedure of this Institution;
3. did not consider inputs from structures which contributions have not been taken into account;
4. the above position having been clarified, an External Agency will properly embark on this process and therefore a further Circular will follow in due course to inform the University community accordingly;
5. However, the university, as the final arbiter, will consider and decide on the applications already submitted.”

Yours faithfully

- [7] On 2 October 2000, the Acting Vice-Chancellor & Principal, Professor Machete issued a circular, noting that that since the communiqué of 4 September 2000, some staff members had taken the Respondent to this Court; that some staff members who had accepted the offer and submitted forms in that regard have decided to leave the employ of the University without valid resignations, and these would be considered as having absconded unless they provided an explanation.
- [8] On 7 November 2000, the Applicant had notified the Respondent in writing that she did not accept its repudiation. Her letter read as follows:

**‘WITHOUT PREJUDICEVOLUNTARY RETRENCHMENT AGREEMENT**

I regard the ‘Voluntary Retrenchment Agreement’ concluded between the university and myself on 16 August 2000 as valid and binding and I therefore do not in any way waive any of my rights in terms of the said agreement and I do not accept the University’s repudiation of September 5, 2000 of the agreement mentioned.

Pending the outcome of the legal dispute between the University and its affected employees concerning the validity of the said agreement, whether by way of settlement or by way of Court or other procedure, this letter be regarded as sufficient notice to the University of my retirement on 31/12/2000 in terms of the concluded retrenchment agreement mentioned above. I should therefore not be regarded as having ‘absconded’.

Should the outcome of the dispute be in favour of the validity of the retrenchment agreement, I expect the retrenchment agreement to be implemented without delay, but should the outcome of the dispute be against the validity (ie that the said agreement was not valid and binding), this letter then be regarded as a proper notice of my retirement (on 31 December, 2000).

Sincerely’

- [9] On 19 June 2002, and after some of the labour disputes had reached the Labour Appeal Court[1], which had decided that the agreements with the Respondent were valid and binding, the Applicant through her attorneys of record, addressed a letter to the Respondent demanding compliance in terms of the agreement. The Respondent on 18 July 2002 made an unequivocal

undertaking to pay her severance package as calculated on 31 December

2000. Attached to the undertaking was a draft settlement agreement with the quantified amounts due to the Applicant.

- [10] The Applicant refused to sign the settlement agreement on the basis that she was entitled to take early retirement and retrenchment package, with interest on the amount of R155 431.25. The Respondent resisted the Applicant’s claim on various grounds which will be dealt with once the preliminary points raised have been disposed of.

[11] In regard to whether this Court has jurisdiction to determine the claim, this issue was decisively dealt with by the Labour Appeal Court in Franks[2] in the following terms:

‘There is no indication that section 77(3) of the BCEA was enacted solely to solve the so-called dual claims problem. Section 77(1), with certain exceptions, grants exclusive jurisdiction to the Labour Court “in respect of all matters in terms of this act”. The Act seeks “to give effect to the right to fair labour practices referred to in section 23(1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment...” In those matters exclusive jurisdiction is conferred. Section 77(3) goes much wider. It expressly also deals with employment contracts which have no statutory basic conditions and thus fall outside the scope of the Act. Consequently the legislature had in mind that the Labour Court should also have jurisdiction in such matters. Even if there is no dual claims problem. In short, the Labour Court is to have jurisdiction in respect of all employment contracts and exclusive jurisdiction in respect of some. But the jurisdiction is even wider. It is in respect of any matter concerning a contract of employment.

And

‘....The termination of an employment contract and the terms and conditions upon which this is to occur are clearly matters concerning such contract. The Labour Court correctly held that it had jurisdiction’[3].

The preliminary issues:

[12] In its notice of application, the Respondent sought to raise two issues, one in respect of prescription, and the second in respect of the contention that the Applicant’s application was an abuse of the court process. At the commencement of the hearing of that application, the preliminary point in respect of prescription was abandoned.

The issue surrounding abuse of court process:

[13] The Respondent’s main contention in this regard was that the Applicant’s delay in prosecuting her claim was excessive and/or unreasonable. It called upon the Court to exercise its discretion to prevent an abuse of process in the form of ‘frivolous or vexatious litigation’, occasioned by the fact that the Applicant delayed in prosecuting her claim, and having taken no steps to prosecute the matter from the time of the filing of her replying affidavit during April 2003 until January 2012, when she filed her heads of argument. It was contended that this took a period of 8 years and 8 months. In this regard, it was submitted that the application should be dismissed. Reliance in this regard was also placed on the decision in Cassimjee v Minister of Finance[4].

[14] The Respondent had submitted that the Notice of Motion was delivered on 4 March 2003 in respect of the agreement reached on 16 August

2000. It submitted that from the date of filing of the Replying affidavit until January 2012 when the Applicant's heads of argument were filed, no action was taken to prosecute the application, and no apparent reason exists for such an unreasonably long period of inaction. It was contended that the delay in prosecuting the application had extremely adverse effect of accumulating interest against the Respondent in the event that the claim was upheld and was accordingly severely prejudicial to the Respondent. It was further contended that allowing the application to proceed would be tantamount to allowing an injustice to be visited upon the Respondent and the administration of justice in general.

[15] In opposing the application, the Applicant submitted that the delay in prosecuting the matter was attributable to a number of factors, including that she and 50 other employees had raised a similar if not identical dispute pertaining to the retrenchment offer. In a similar matter involving 'Franks and others', which was heard by both this Court and the Labour Appeal Court, the Respondent's defences were rejected, and following from that matter, she had proceeded to claim from the Respondent the relief she seeks as per her Notice of Motion in the hope that a settlement could be reached.

[16] There were negotiations held with the Respondent and the other 50 claimants, and when no settlement was reached, she had approached the Court with her claim. There was another matter involving "Wiltshire"[5] in respect of the same issues which also came before the Labour Appeal Court ending with the same results. Following from the LAC

judgments on these matters, she had hoped that the Respondent would settle with her but this proved not to be the case.

[17] The Applicant further submitted that the Respondent was equally entitled to approach the Court in terms of Uniform Rule 14 to proceed and request that the matter be enrolled and could have prosecuted the matter itself. She submitted that the prejudice caused was not attributable to her but due to the conduct of the Respondent in failing to concede defeat and persisting with its defence.

[18] The question of abuse of court process was addressed by this Court per Basson J in *Indwe Risk Services (Pty) Ltd v Hester Petronella Van Zyl*[6] as follows:

'The Supreme Court of Appeal stated in respect of the abuse of civil process, the following in *Philips v Botha* 1999(2) SA 555 (SCA) at 565:

*"A terse but useful definition of abuse of civil process is to be found in the judgment of Isaacs J in the Australian High Court case of Varawa v Howard Smith Co Ltd [1911] HCA 46; (1911) 13 CLR 35 at 91:*

*'... (T)he term "abuse of process" connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate they are regarded as an abuse for this purpose. ...'*

In *Solomon v Magistrate, Pretoria, and Another* 1950 (3) SA 603 (T) Roper J (at 607F--H) remarked:

'The Court has an inherent power to prevent abuse of its process by frivolous or vexatious proceedings (Western Assurance Co v Caldwell's Trustee 1918 AD 262; Corderoy v Union Government 1918 AD 512 at 517; Hudson v Hudson and Another 1927 AD 259 at 267), and though this power is usually asserted in connection with civil proceedings it exists, in my view, equally where the process abused is that provided for in the conduct of a private prosecution.'

'Where the Court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice it is the Court's duty to prevent such abuse. This power, however, is to be exercised with great caution and only in a clear case. (See Hudson v Hudson and Another (supra at 268).)'[7]

- [19] Emanating from Indwe and the authorities referred to by Basson J, it cannot be doubted as correctly pointed out on behalf of the Respondent that indeed this Court has inherent jurisdiction to prevent abuse of its process. This power however ought to be sparingly exercised and only in very exceptional circumstances[8]. Furthermore, in determining whether conduct constitutes an abuse of process, the court has to have regard to the circumstances of each case.
- [20] Having had regard to the circumstances of this case, it is my view that a case has not been made out that indeed the Applicant has abused the court process. In this regard, it is taken into account that firstly, the point raised by the Respondent is belated. The Respondent does not explain the reason that it had raised this point after the merits of the main application were heard. The explanation that other than that it could not have brought the application sooner, since the matter has effectively been dormant for a number of years, and was unexpectedly enrolled by the Registrar in May 2013 is not sufficient at all.
- [21] In my view, if the Respondent was concerned about the delays prior to the set down date, nothing prevented it from approaching the Court in terms of Rule 11 to dismiss this application, or to request a set down date after the written heads of argument were filed. As it clearly failed to raise the point at the time or before the merits were heard, it is clear that this point is merely an afterthought.
- [22] The reasons this matter took a protracted nature has to be looked at within the context of its own facts and circumstances. In bringing this application, it is also clear that the Respondent lost sight of its own role in the protracted course the matter took. Firstly, it had at some point in July 2002 made an unequivocal undertaking to pay the Applicant. In this regard, it is apparent that the Respondent had acknowledged its liability towards the Applicant. Furthermore, it was faced with a number of the same legal disputes, two of which ended up in the Labour Appeal Court and where its defences were rejected. In the light of these developments, including discussions over time to attempt to resolve the matter, it is indeed opportunistic for the Respondent at this belated state to bring this application. The prejudice it complains of is clearly out of its own making, as this matter should not have reached the point it had. The delay in prosecuting this matter is indeed unreasonable. However, this delay cannot in my view be regarded as an abuse of the court process. There is

no evidence to suggest that the Applicant brought her claim for some ulterior motive, or for any purpose other than to be granted what she viewed to be entitled to her. In these circumstances, it is found that there is no basis for a conclusion to be made that the main application ought to be dismissed on account of it being an abuse of the court process.

The main claim regarding specific performance:

[23] In resisting the claim, the Respondent's contention was that:

23.1 The Applicant had not made out a case for the relief she seeks.

23.2 Secondly, that the Applicant was not entitled to specific performance in circumstances in which she had not complied with her own obligations under the contract. In this regard, it was submitted that the Applicant had terminated her services after 30 November 2000, and was not entitled to refuse to accept repudiation and yet remain in the employ of the Respondent until 31 December 2000.

23.3 Thirdly, no agreement came into existence between the parties due to the reason that the acknowledgement of receipt by the Respondent's Human Resources Department was not an acknowledgement of acceptance of the retrenchment offer as envisaged by the voluntary retrenchment offer.

23.4 In the event that it was found that the Applicant had made out a case for specific performance, it was further submitted that the court should exercise its discretion against the grant of specific performance; or that it should grant an order of payment in the amount of R118 964.87, or alternatively, an amount of R130 723.87. The submissions in this regard pertained to whether the Applicant was entitled to further payments in respect of notice pay and bonus.

[24] The Applicant's main contentions were as follows:

24.1 A number of decisions in regard to the retrenchment process in this case and the conclusion of the agreement between the Respondent and its various employees to those proceedings have been decided by this Court and the Labour Appeal Court. These matters are:

24.1.1 University of the North v Franks & others (2002) 23 ILJ 1252 (LAC)

24.1.2 Franks & others v University of the North (2001) JOL 7919 (LC)

24.1.3 Wiltshire & others v University of the North (2005) 26 ILJ 2440 (LC)

24.1.4 University of the North v Wiltshire & others (JA 31/2006)

24.1.5 Swart v University of the North [2007] 11 BLLR 1088 (LC)

24.2 In Franks, the principle that an offer which is stated to be irrevocable for a given period and communicated to the offeree becomes irrevocable upon receipt unless the offeree rejects irrevocability. The Wiltshire cases confirmed the principle that an innocent party may withhold performance only in circumstances where his or her obligations are reciprocal to those the guilty party who refuses to perform.

[25] A number of legal points which were raised in this case were equally dealt with by the Labour Appeal Courts in Franks and Wiltshire, and for the sake of convenience, I will merely state what the legal position is in regards to those issues as determined by the LAC in Franks and also summarised by the LAC in Wiltshire by Davis JA;

‘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.[9]*

‘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.’[10]

‘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 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 to the offer by the second*

Respondent after 5 September 2000 and before 15 September 2000, was therefore valid.” Paras 54 to 56.’[11]

[26] The conclusions reached in Wiltshire and Franks by the LAC disposes of the Respondent’s second and third contentions as pointed out in paragraphs 23.2 and 23.3. The only issues for determination are whether the Applicant is entitled to claim specific performance in the light of material facts pertinent to her case after the offer was made and accepted. It was common cause that the Applicant had accepted the offer on 16 August 2000. In terms of the retrenchment agreement, her services were to be terminated on 30 November 2000. She had however retired with effect from 31 December 2000, having given notice by way of her letter of 7 November 2000. Contrary to the Respondent’s contentions, the Applicant had on 16 August 2000, merely accepted the offer of retrenchment, and had not given notice of termination of her services.

[27] The Respondent’s contention that the Applicant was not entitled to specific performance was based on averments made by her in her replying affidavit. These mainly pertained to the reason she had retired on 31 December 2000 instead of leaving 30 September 2000 in terms of the offer made. In my view, these contentions lack substance and should be rejected for the following reasons:

27.1 The offer made is valid and binding. In the offer, it was stated inter alia that:

‘This offer is made with effect from 15 August 2000 and shall expire on 15 September 2000. The severance/retrenchment package offered is 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 the retrenchment package. A document explaining these policies will be circulated shortly.’

27.2 The fact that the Applicant effectively retired on 31 December 2000 is immaterial for the purposes of determining whether she is entitled to specific performance in that the offer when made gave employees choices. She had elected to retire on 31 December 2000 and accept the retrenchment package as she had already done on 16 August 2000.

27.3 Furthermore, similar arguments were dealt with by Davis JA in Wiltshire in the following terms;

‘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.[12]

27.4 In my view, in retiring on 31 December 2000, the Applicant's continued employment until then cannot be a bar to the enforcement of the retrenchment agreement in the light of the conclusions reached by the LAC in Wiltshire; the acceptance of the offer; the Respondent's own repudiation and threats to deem those employees who left earlier as having absconded.

[28] To the extent that it has been concluded that the offer of the retrenchment package was valid and binding, and further to the extent that it is found that the Applicant is entitled to specific performance, the only issue to be determined further is the quantum she is entitled to. The Applicant seeks an amount of R155 431.25 comprising of the following payments

a) Three months basic salary = R38 484.00

b) Severance pay =

R82 313.00

c) Car allowance =

R6000.00

d) Long service Allowance = R543.00

e) Pension Fund Contributions = R8 274.06

f) Medical Aid Contributions = R1584.00

-----

Total = R1 37 198.06

[29] The only issue that appears to be in dispute between the parties is whether the Applicant is entitled to notice pay and the annual bonus. Two documents are relevant in this regard. The first is Annexure 'A3' (Severance Package upon Retrenchment) which was attached to the offer made on 15 August 2000. It provides that:

The severance package shall be set out as below.

1. Notice Pay

One (1) month full salary, including all benefits shall be paid to all employees on termination. Such notice period shall not be worked.

2. Severance Pay.

All employees shall receive three (3) months basic salary irrespective of service plus one (1) month basic salary per year of service with a limit of twelve (12) months. Therefore the maximum Severance pay to an employee may receive its fifteen (15) months basic pay. (Sic)

[30] The second document relevant for the resolution of the issue surrounding notice pay is the Industrial and Labour Relations 'Policy G5' which provide that;

'4.2 Notice period.

Shall be the period from the first day first day of formal notice of termination of service/ declaration of redundancy over a period of one month. The last day of the notice period shall be the effective date of determining years of service, age period of service and service contract expiry.'

'4.6 Last Working Day

It further provides that the last working day shall be the employee's last working day on the expiry of the formal service contract, or normal termination of service, where applicable, as determined by the employer.'

[31] In terms of the offer of voluntary retrenchment, two dates were envisaged for termination. These were captured in the wording of the offer which read:

In this regard, it was common cause that the Applicant was a member of the academic staff. It was further common cause that she had formally accepted the offer on 16 August 2000, but had retired on 31 December 2000, rather than leaving on 30 November 2000. On a strict interpretation of the retrenchment offer and the above clauses, the Applicant was supposed to leave on 30 November

2000. She had however given her formal notice of retirement on 7 November 2000. Thus if she stayed until 31 December 2000 as she had, she could not have been entitled to more than what the policy or the offer envisaged, and her notice period, and entitlement in that regard should have been calculated from 7 November 2000 to 7 December 2000. However, since she left on 31 December 2000, effectively her notice period on the strict interpretation of the above clauses would have been from 30 November to December to 31 December, with 31 December 2000 being her last date of employment. The severance package offer specifically stated that 'Such notice shall not be worked'. Thus if she chose to leave on 31 December 2000 and had worked and was paid accordingly, she could not have been entitled to more.

[32] Furthermore Annexure 'G' to the Applicant's founding affidavit a severance package was prepared and offered to the Applicant. This entailed notice pay of one month, three months' basic salary irrespective of period of service, and one month's basic salary per year of service with a limit of 12 months. Accordingly, it is concluded that the Applicant is entitled to a severance pay as computed in that annexure. This implies that she is entitled to three months, without an addition of a further month for the period 1 to 31 December 2000 since

she was paid for that period in any event. In this regard the correct severance package is that as computed by the Respondent in its answering affidavit[13]

[33] In regards to the issue of bonus pay, this was provided for in the letter of offer and severance package as follows:

9. Annual Bonus.

The Annual Bonus, as defined in Policy G5 point 4.9, shall be paid out on a pro bono basis, calculated from the end of the notice period.

Clause 4.9 of the Policy G5 provides that:

4.9 Annual Bonus.

This shall be the so-called 13th cheque as defined in the employee's letter of appointment; that is, one twelfth of the employee's basic annual salary i.e one months basic salary (Sic)

[34] The Respondent's contention was that the Applicant's letter of appointment did not make any reference to any bonus or the thirteenth cheque, and to that end, she was not entitled to a bonus. It however contended that if indeed she was entitled to a bonus, it had to be a pro rata portion of her basic salary, not her gross salary. In my view, this matter was resolved by the same Annexure 'G' attached to the Applicant's founding affidavit, and it is not clear as to the reason the Respondent seeks to contest whether the Applicant is entitled to a bonus or not. In that annexure, the Applicant's severance package reflected that she was entitled to a long service bonus calculated or payable on a pro rata basis. To this end, she is entitled to an amount equal to R11 759.00, which is 11/12ths of her basic salary. In total, the Applicant is entitled to R148 957.06 plus interests on that amount calculated from 19 June 2002 when she made a demand in that regard.

Costs:

[35] It is my view that this matter should never have reached the stage it reached, more particularly following from the decisions of the Labour Appeal Courts in Wiltshire and Franks. Most of the legal points raised in those matters, and which are pertinent to this matter were decisively dealt with and there was clearly no reason for the Respondent to vigorously defend this matter in the manner it had, and also at huge expenses to it and to the ordinary tax payer. It is my view that the Respondent's conduct in approaching this matter in the manner it did acted in a vexatious manner. In *Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others*[14], Nicholas J, (as he then was) in considering the meaning of vexatious proceedings, inter alia, referred to the meaning given to that word in the Shorter Oxford Dictionary where the following appears at 1339 E – F:

'In its legal sense, 'vexatious' means 'frivolous improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant.'

[36] In my view, by defending this claim even in circumstances where all odds were against it, and more specifically after it had made an unequivocal offer to pay the Applicant on 18 July 2002, the Respondent merely sought to either frustrate the Applicant or cause her annoyance. To compound matters, the Respondent also brought an application to dismiss the main claim after it was already heard. Not only that, it had raised a point relating to prescription only to abandon it at the hearing of that application without sufficient notice to either the Court or the Applicant. In these circumstances, considerations of law and fairness dictate that the Respondent should be burdened with a punitive cost order.

Order:

- i. The preliminary points raised by the Respondent are dismissed.
- ii. The Applicant is entitled to specific performance, and an amount of R148 957.00, with interest on that amount at the rate of 15.5% per annum from 19 June 2002 to the date of final payment.
- iii. The Respondent is ordered to pay the costs of the application heard on 24 March 2014, as well as costs in respect of the main application on a scale as between attorney and client.

-----  
Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. AJ Daniels

Instructed by: Frese Moll Inc

For the Respondent: Adv. P Biurski and Adv. G I Hulley

Instructed by: Hlatshwayo Du Plessis Nkaiseng Inc

[1] University of the North v Franks & Others

(2002) 23 ILJ 1252 LAC

[2] At para 29

[3] At para 30

[4] [2012] JOL 29561 (SCA)

[5] University of the North v Wiltshire & others (JA 31/2006)

[6] (2010) 31 ILJ 956 (LC)

[7] At para 24

[8] Western Assurance Company v Caldwell's Trustee 1918 AD at 274

[9] Wiltshire at para 9

[10] At para 10

[11] At para 11

[12] At para 26

[13] Under paragraph 38.2

[14] 1979

(3) SA 1331 (W)

---

### Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

**ORIGINAL SOURCE**      <https://www.saflii.org/za/cases/ZALCJHB/2014/287.html>

**CASE PAGE**              <https://chat.esheria.ai/case-law/south-africa/olivier-v-university-unknown-topic-alcjhb-2014--6a3ea51a3b1caa9129811118>

Prepared on 13 October 2026 · Esheria