

SOUTH AFRICA / JUDGMENT

Swart v University of the North (J986/03)

[2007] ZALC 180; [2007] 11 BLLR 1088 (LC); (2007) 28 ILJ 2821 (LC) (3 August 2007)

[2007] ZALC 180

COURT
Labour Court

BEFORE
Francis

CASE / FILE NUMBER
J986/03

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IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG
CASE NO: J986/03

In the matter between: MARTIN SWART Applicant
 and
 THE UNIVERSITY OF THE NORTH Respondent

JUDGMENT

FRANCIS J

Introduction

1. The applicant was employed by the respondent, the University of the North, as a lecturer at its main campus in the Department of Physical Science and Mineral Sciences. He brought an application seeking an order for specific performance in terms of a contract

entered with the respondent on 16 August 2000 and payment in the sum of R202 098.75.

2. The application was opposed by the respondent.

The background facts

3. The applicant was employed by the respondent on 1 January 1985 until his resignation on 31 July 2001.

4. On or about 15 August 2000 the respondent acting through its vice principal and chancellor, professor N Golele (Golele), made an offer to all permanent members of staff of the respondent, in terms of which they were offered the following voluntary severance package: “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.

4. On or about 15 August 2000 the respondent acting through its vice principal and chancellor, professor N Golele (Golele), made an offer to all permanent members of staff of the respondent, in terms of which they were offered the following voluntary severance package:

“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. On 16 August 2000, the applicant completed the acceptance of voluntary retrenchment offer by signing it and submitted it to the respondent’s human resources department. It reads as follows: “I, M SWART Employee No. 9907769, 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 University of the North SGD WITNESSES:
STAFF MEMBER NAME NAME ACKNOWLEDGE RECEIPT

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. On 16 August 2000, the applicant completed the acceptance of voluntary retrenchment offer by signing it and submitted it to the respondent’s human resources department. It reads as follows:

“I, M SWART Employee No. 9907769, 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 University of the North

SGD WITNESSES:

STAFF MEMBER NAME

.....

NAME

ACKNOWLEDGE RECEIPT

..... HUMAN RESOURCES DEPT.”

6. The respondent issued a circular dated 4 September 2000 that reads 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.”

.....

HUMAN RESOURCES DEPT.”

6. The respondent issued a circular dated 4 September 2000 that reads as follows:

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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.”
 7. The applicant responded to the aforesaid circular on 6 September
2006. He stated inter alia that he had handed in his acceptance of the voluntary retrenchment offer on 16 August 2000 and was given an acknowledgement of receipt. He had on 24 August 2000 received a second document with information regarding the voluntary retrenchment. He advised that he would be terminating his services on 30 November 2000 and requested that all his benefits due to him in terms of the circular dated 22 August 2000 be made available to him on 30 November 2000.
8. In a letter dated 12 September 2000 addressed to the respondent, the applicant stated inter alia that he did not accept the repudiation of his contract in any respect whatsoever and that he would terminate his services on 30 November 2000 in terms of his contract. He indicated that he would take all and any legal steps necessary to ensure that the respondent complied with its obligations in terms of the said contract.
 9. The applicant on 23 November 2000 wrote the respondent the following letter: “Dear Sir & Madam WITHOUT PREJUDICE VOLUNTARY 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.
7. The applicant responded to the aforesaid circular on 6 September
2006. He stated inter alia that he had handed in his acceptance of the voluntary retrenchment offer on 16 August 2000 and was given an acknowledgement of receipt. He had on 24 August 2000 received a second document with information regarding the voluntary retrenchment. He advised that he would be terminating his services on 30 November 2000 and requested that all his benefits due to him in terms of the circular dated 22 August 2000 be made available to him on 30 November 2000.
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9. The applicant on 23 November 2000 wrote the respondent the following letter:

“Dear Sir & Madam

WITHOUT PREJUDICE

VOLUNTARY 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, I will continue to fulfill my normal academic duties with the University, but as stated above, without any prejudice to my rights in terms of the said agreement. 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), I will still continue with my normal duties, but I will obviously have to reconsider my options for the future”.

10. The applicant sent the respondent a letter dated 22 February 2001 repeating that a contract had been concluded, that he had not accepted the respondent’s repudiation and demanded that the respondent comply with the said contract on or before 26 February 2001 failing which he would institute the necessary legal proceedings to enforce such compliance. The applicant was advised in a memorandum dated 28 February 2001 that the respondent was in the process of obtaining legal advice about the validity and enforceability of the offer and certain other matters. It would also be lodging an appeal against the judgement of Jammy AJ in the matter of Franks and others versus the University.

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, I will continue to fulfill my normal academic duties with the University, but as stated above, without any prejudice to my rights in terms of the said agreement.

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), I will still continue with my normal duties, but I will obviously have to reconsider my options for the future”.

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which he would institute the necessary legal proceedings to enforce such compliance. The applicant was advised in a memorandum dated 28 February 2001 that the respondent was in the process of obtaining legal advice about the validity and enforceability of the offer and certain other matters. It would also be lodging an appeal against the judgement of Jammy AJ in the matter of Franks and others versus the University.

11. In a letter dated 17 July 2001, the applicant informed the respondent that he was resigning with effect from 1 August 2001,

without prejudice and without waiving any of his rights in terms of the retrenchment agreement concluded on 16 August 2000. He indicated that he was holding the respondent to the said agreement and would enforce it once there was an outcome in the appeal. He pointed out that he had stayed on in the respondent's employ and had hoped that the retrenchment would be settled and that his short notice of resignation would be accepted. His resignation was accepted by the respondent. In his replying affidavit the applicant stated that he resigned because the working conditions at the respondent had become intolerable and he consequently elected to resign, in the light of the respondent's continued refusal to honour its contractual obligations towards him.

12. The Labour Appeal Court found on 29 May 2002 in *University of the North v Franks & others* (2002) 23 ILJ 1252 LAC (hereinafter referred to as the Franks & others matter) that the voluntary severance packages offered to the employees during August 2000 was valid and the offer could not be revoked before its expiration date. The acceptance of the offer by the second respondent was therefore valid.
13. On or about 19 June 2002, the applicant sent the respondent a letter confirming the judgment in the Franks & others matter and demanded that the respondent give effect to the retrenchment offer within seven days failing which he would apply to this Court for appropriate relief, since the judgment also applied to him.
11. In a letter dated 17 July 2001, the applicant informed the respondent that he was resigning with effect from 1 August 2001,

without prejudice and without waiving any of his rights in terms of the retrenchment agreement concluded on 16 August 2000. He indicated that he was holding the respondent to the said agreement and would enforce it once there was an outcome in the appeal. He pointed out that he had stayed on in the respondent's employ and had hoped that the retrenchment would be settled and that his short notice of resignation would be accepted. His resignation was accepted by the respondent. In his replying affidavit the applicant stated that he resigned because the working conditions at the respondent had become intolerable and he consequently elected to resign, in the light of the respondent's continued refusal to honour its contractual obligations towards him.

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13. On or about 19 June 2002, the applicant sent the respondent a letter confirming the judgment in the Franks & others matter and demanded that the respondent give effect to the retrenchment offer within seven days failing which he would apply to this Court for appropriate relief, since the judgment also applied to him.
14. On or about the 18 July 2002, the applicant received a letter from the respondent informing him that in terms of the judgment of the Labour Appeal Court, the severance package would be paid to him. The letter contained a pro forma settlement agreement that was blank. There was an annexure with certain calculations made by the respondent. The applicant refused to sign the blank document since he was advised that by completing the document he would be making an offer of settlement to the respondent.
15. On 14 May 2003 the applicant instituted these proceedings. The parties contentions
16. The applicant contended that a valid agreement was concluded between the parties on 16 August 2002. The respondent repudiated

the agreement which repudiation he refused to accept. He had notified the respondent that he would terminate his services in

terms of the Golele offer.

14. On or about the 18 July 2002, the applicant received a letter from the respondent informing him that in terms of the judgment of the Labour Appeal Court, the severance package would be paid to him. The letter contained a pro forma settlement agreement that was blank. There was an annexure with certain calculations made by the respondent. The applicant refused to sign the blank document since he was advised that by completing the document he would be making an offer of settlement to the respondent.
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The parties contentions

16. The applicant contended that a valid agreement was concluded between the parties on 16 August 2002. The respondent repudiated

the agreement which repudiation he refused to accept. He had notified the respondent that he would terminate his services in

terms of the Golele offer.

17. The applicant contended that the respondent's contention that he has failed to comply with the obligation of the agreement

was baseless. The respondent had indicated in no uncertain terms to him that it did not intend complying with its obligations in terms of the agreement and as a result thereof, he was entitled not to perform his obligations in terms of the agreement until the respondent evinced an intention to comply with its obligations in terms of the agreement. The applicant's continued employment was under protest, without prejudice, and pending the outcome of litigation between the respondent and other employees regarding the validity of the agreement. The respondent had threatened any person in the applicant's position who would stay away from work without resigning as having absconded. He did not accept the repudiation and at all times insisted on the agreement being complied with. He is therefore entitled to specific performance.

18. The respondent contended that there are material disputes of fact. The applicant should not have proceeded by way of motion but by way of action. This Court is unable to resolve the material disputes of fact. The application should be dismissed with costs.
19. The respondent contended further that there was no contract concluded between the parties. Should it however be found that

there was a contract concluded between the parties, the applicant is not entitled to specific performance in terms of the agreement since it is clear from his own version that he did not comply with the strict terms of the agreement in that he did not terminate his services on 30 November 2000 but only did so on 1 July 2001. He should have made an election either to keep the contract in existence or cancel it. If he chose to cancel the contract, he was confined to a claim for damages. If however he elected to keep the contract in existence, he was required to comply with his own duties and confined himself to a claim for specific performance. Analysis of the facts and arguments raised

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Analysis of the facts and arguments raised

20. Some issues that arise in this matter have already been dealt with by the Labour Appeal Court in the Franks and others matter. These relate to whether this Court has jurisdiction to hear the matter, and whether a valid agreement was concluded between the parties after the applicant had accepted the offer made on 15 August
2000. The Labour Appeal Court found that this Court has the requisite jurisdiction and that a valid agreement was concluded after the respondents had accepted the offer. I am satisfied that this Court does have jurisdiction to hear the matter and that the respondent was bound by the offer made by Golele. Golele was properly authorised to make the offer and a valid agreement was concluded between the applicant and the respondent on 16 August 2000.
21. There is also no substance in the respondent's contention that there is a material dispute of facts that prevent this Court from adjudicating the dispute.
22. It is not necessary to deal with the respondent's application to strike out paragraphs 24 and 25 of the applicant's

founding affidavit and with the offer of settlement made by the respondent on 18 July 2002. This is so because the applicant's

claim before this Court is for specific performance based on the agreement concluded on 16 August 2000. It is not based on an

undertaking made on 18 July 2002 which undertaking was in any event rejected by the applicant.

23. The remaining issue that needs to be decided by this Court is whether the applicant has complied with the terms of the agreement.

To put it differently did the applicant's failure to terminate his services on 30 November 2000 prevent him from seeking specific performance. The facts in the Franks and others matter are somewhat similar to the facts in this case save that the applicant in this matter only resigned on 31 July 2001 as opposed to 30 November 2000. The other employees did not continue to work. The Labour Appeal Court was not required to deal with this issue and did not deal with it.

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24. It is trite that a party suing for specific performance must himself either perform or tender performance of his side of the bargain. The respondent has raised the defence of exceptio non adimpleti contractus, contending that the applicant has not performed his side of the bargain and is not entitled to claim specific performance. When a defence of exceptio non adimpleti contractus is raised, the party seeking specific performance must prove that he or she has performed in terms of the agreement.
24. It is common cause that the applicant did not terminate his services on 30 November 2000, but did so on 31 July 2001. The

reason that he advanced on affidavit for resigning on 31 July 2001 was that he found the continued employment relationship intolerable

given the respondent's continued repudiation of the agreement. He had stated in his previous correspondence that he did not accept the respondent's repudiation and reserved his rights under the agreement. He would be remaining in the employ of the respondent until litigation in the Franks and others matter was finalised. He contended that because the respondent has indicated in no uncertain terms to him that it did not intend complying with its obligations in terms of the agreement, he was as a result thereof entitled not to perform his obligations in terms of the agreement until the respondent evinced an intention to comply with its obligations in terms of the agreement.

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25. The applicant is suing for specific performance of an obligation which is conditional upon performance by himself of a reciprocal

obligation owed to the respondent. The performance by him of this latter obligation is a prerequisite of his right to sue and should have been pleaded by him. The reasons given by the applicant on affidavit for resigning are not that he has accepted that an agreement was concluded but were those as referred to in paragraph 24 above. He had also resigned before the Labour Appeal Court gave judgment in the Franks and Others matter.

26. Had the applicant resigned on 30 November 2000, he would have acted in terms of the agreement and would have been able to sue successfully for specific performance. He continued to work for eight months and received benefits which other employees who had terminated their services did not receive. He wanted to have "his proverbial cake and eat it". His conduct and correspondence clearly shows that he had some doubts in his own mind

whether a valid agreement was concluded. In his letter of 23 November 2000 he stated why he had decided to remain on and what options he would take once the outcome of the judgment in the Franks and others matter was known to him. A golden opportunity was presented to him in July 2002 when he a settlement offer was made to him. It would appear that he was wrongly advised not to accept the offer. The irony is that he is seeking R202 098.75 plus interest when he was offered R202 250.15 without interest. It is not clear why he was not part of the group in the Franks and others matter who had approached this Court for relief. He obviously wanted to see where the wind was blowing. This is fatal to his case.

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27. It would appear that the respondent’s rationale for offering its employees the severance package was due to a drastic

reduction in government subsidy. This was a cost saving exercise and employees were required after accepting the offer to terminate

their services either on 30 September 2000 or 30 November 2000. The applicant in not resigning on 30 November 2000 received R127 546.72 which defeated the purpose of the offer.

28. The applicant has not complied with his obligations in terms of the agreement and is therefore not entitled to specific performance.

His application stands to be dismissed.

30. There is no reason why costs should not follow the result.
31. In the circumstances I make the following order: 31.1 The application is dismissed with costs FRANCIS J JUDGE OF THE LABOUR COURT OF SOUTH AFRICA FOR THE APPLICANT : DU TOIT MARITZ INSTRUCTED BY NELSON BORMAN & PARTNERS INC FOR RESPONDENT : C GEORGIADES INSTRUCTED BY HLATSHWAYO DU PLESSIS VAN DER MERWE NKAISENG DATE OF JUDGMENT : 3 AUGUST 2007

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31. In the circumstances I make the following order:

31.1 The application is dismissed with costs

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : DU TOIT MARITZ INSTRUCTED BY NELSON BORMAN & PARTNERS INC

FOR RESPONDENT : C GEORGIADES INSTRUCTED BY HLATSHWAYO DU PLESSIS VAN DER MERWE NKAISENG

DATE OF JUDGMENT : 3 AUGUST 2007

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