IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Case No: JA 11/01

Labour Court Case No: J 4122/00

In the matter between:

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

JUDGMENT

VAN DIJKHORST, AJA:

1. This appeal is against a declaratory order by the Labour Court which held that an offer of voluntary retrenchment contained in a memorandum of 15 August 2000 by the appellant to its staff was valid and that the respondents were entitled to accept it in the manner prescribed therein and were accordingly entitled to the retrenchment benefits provided for therein.

2. The appellant, respondent in the Labour Court, is the University of the North, established in terms of section 2 of the University of the North Act, 47 of 1969. The respondents were all employed by the appellant: the first respondent as the Executive Director: Human Resources, the second respondent as Deputy Director: Information Technology Division and the third respondent as Director Research Development and Administration.

3. In June 2000 the appellant conducted an investigation and surveys with regard to a possible voluntary staff retrenchment programme as part of its restructuring brought about by a drastic reduction in government subsidy. In a memorandum on the subject to the university council dated 7 June 2000 the first respondent proposed that a call be issued for volunteers to accept retrenchment as the beginning of a process to cut staff numbers drastically. It was pointed out that the main disadvantage of the scheme is the damage of losing key staff, but that nothing could be done to avoid this.

4. On 5 August 2000 the council mandated its executive committee "to handle the matter of voluntary retrenchments" as part of its restructuring process. In a memorandum on voluntary retrenchment by acting vice-chancellor and principal Prof M C P Golele presented to the executive committee (Exco) meeting of 11 August 2000 she sketched the financial crisis which made it imperative that staff costs be drastically reduced by a reduction of staff. She stated that two key elements for restructuring to be successful were swift action and a holistic process. To this end Management recommended that the restructuring process be started off by offering staff voluntary retrenchment and to encourage staff over 55 to leave, to offer them retirement as well. The attraction would be retrenchment benefits as well as retirement benefits.

5. She set out as the main disadvantage the fact that staff the university did not want to loose may take voluntary retrenchment, but that the advantages of the scheme outweighed the disadvantages. She stated that the second phase which should begin during the above process was the actual restructuring. This would require a complete review of the staff requirements. A survey had indicated the estimated number of possible applicants. Their retrenchment would cost approximately R25 million, the

equivalent of their salaries for 9 months. Should the matter be delayed for that period and they then be retrenched, the cost would have more than doubled.On that basis the report recommended that " the process of voluntary retrenchment is approved for immediate implementation and that the overall restructuring begins as soon as possible."

6. At its meeting of 11 August 2000 Exco dealt with "the matter of Restructuring of the University". Under the sub-heading "The matter of Voluntary Retrenchment" the relevant portions of the minute read:

"5.4.1.1 The report was tabled at the meeting. (Refer CEXCO 2000/303 - 304)
CEXCO2000/288

"5.4.1.2 Exco was mandated by Council on 5 August 2000 to handle the matter due to its urgency.

"5.4.1.3 Exco approved the recommendation that the process of voluntary retrenchment and early retirement be implemented and that the overall restructuring begins as soon as possible.

"5.4.1.4 Exco further resolved:

(i) that Management should work out mechanisms for implementation i.e. outlining clear steps to be followed re 5.4.1.3 above – how will the process be managed, in order to ensure that essential services and departments are not disadvantaged."

Sub-paragraph (ii) instructed the acting deputy vice chancellor Prof Machethe to draw up new terms of reference for "Productivity Assignments".

Sub-paragraph (iii) instructed him to contact Dr SS Mncube for assistance by the Development Bank of South Africa regarding the restructuring process as a whole.

Sub-paragraph (iv) stated that the Qwaqwa campus and Giyani Teaching Centre should be included in the restructuring exercise.
In paragraph 5.4.1.5 the minutes read:"Exco cautioned Management to the effect that no organization was able to restructure itself effectively. It was essential to have an outside agent to assist in this process."

7 On 15 August 2000 Professor N C P Golele issued a memorandum to the

university staff headed "voluntary retrenchment". It inter alia stated "the council of the university has approved that voluntary 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 as set out in policy G 5 and T 4 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. .....

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."

The attached acceptance form inter alia contains the following statement to be signed by the acceptor. " 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."

8 On 22 August a further memorandum on the same subject was issued by Prof Golele to all university staff. The relevant portions read as follows:

"This is a follow-up to my memo of the 15th August on voluntary retrenchment.

This offer is the first phase in the process of restructuring the university and entails offering retrenchment on a voluntary basis to permanent members of staff. As an incentive to staff over the age of 55, they are allowed to retire (and hence get university retirement benefits such as medical aid etc.) as well as acceptor retrenchment packages. It must be clearly understood that this (severance package and university retirement benefits) is a once off offer to the over fifty fives and may not be available in the subsequent phases of this restructuring process.
The second phase of the restructuring will involve a critical review of the university's activities which will result in the viable departments and activities being retained and non-viable departments being reorganised and if this is not possible, phased out.

This process of restructuring should not be perceived as an indication of the demise of the institution but rather as an honest attempt at a regeneration of a new and viable university. With this in mind you are urged to carefully consider your future and the future of the university before accepting the offer.
This should be viewed as a new beginning for the university and is a positive move"

9 An extraordinary volteface occurred on 4 September 2000. Mr G M Negota, acting chairperson of the council of the university signed a communiqué addressed to "The University Community" which was issued the next day. It read:

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

At its extraordinary meeting of 31 August 2000 Exco resolved to revisit the whole 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 now 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".

10 By this time the first and third respondents and some 139 others had accepted the offer. The second respondent contends that the offer – stated to be open till 15 September – could not be revoked on 5 September and that his acceptance thereof on 7 September is valid, entitling him to claim the benefits contained in the offer.

11 Of the communique the respondents say in the founding affidavit that they do not accept the so-called reasons as valid. They as employees are not privy to council meetings and do not receive copies of minutes. Voluntary retrenchment was

approved by both the council and Exco. The Vice-Chancellor has delegated authority to terminate employment and to deviate from the personnel policy and procedure. Employees can validly act on representations made by her and actions taken by her as she is the institution's chief executive officer.

The fact that "inputs" were made after the offer cannot be relied on by the council in an attempt to escape its liabilities in terms of contracts that came into existence as a result of acceptance of the offer. There is no legal or even "in-house" regulation requiring consultation with "structures" before the council makes an offer to its employees nor to their knowledge has the university's personnel policies and procedure manual been "violated". There is no specific policy on voluntary retrenchment and it is only mentioned as an alternative to "forced" retrenchment. These allegations by the respondents stand undisputed.

12 The respondents on 11 September 2000 launched this matter as an urgent application in the Labour Court and set it down for 29 September 2000. On 21 September 2000 the council of the appellant discussed the matter and after having heard Prof C L Machethe "the person who has been in charge of the process of restructuring" and Prof N C P Golele the acting Vice Chancellor and Principal at the relevant time, resolved as follows:

"Council ratifies the termination of Prof N C P Golele's services in her acting position as Vice Chancellor and Principal, and that she returns to her former position, as a result of the fact that she has deliberately acted contrary to the decisions of council and its executive committee on the retrenchment issues.
Council ratifies the appointment of Prof C L Machethe as Acting Vice Chancellor and Principal, with the proviso that it approaches the minister to second a person to beef up the Acting Vice Chancellor's office as an interim measure, until the reports of the assessor and the council bosberaad are out".
"Council endorses that the voluntary retrenchment circulars dated 15 August 2000 and 22 August 2000 be withdrawn and further ratifies other decisions of Exco on voluntary retrenchments."

13 The answer of the appellant to this case is set out in the affidavit of Professor C L Machethe who succeeded Prof Golele as Acting Vice Chancellor and Principal. The answer boils down to this:

(1) Exco Resolution 5.4.1.4 means and was understood to mean that the process must take into account appellant's needs to retain certain skills that it would require for its survival.

(2) That Machethe as Deputy Vice Chancellor was to drive the restructuring process.

(3) Machethe instructed the first respondent verbally to draft a circular inviting members of staff to apply for voluntary retrenchment packages, but to make certain that he reserved the right of the appellant to accept or reject any particular application.

(4) Contrary to these instructions the first respondent drafted an open ended circular and caused the Acting Vice Chancellor Prof Golele to sign it and have it distributed to employees.

(5) At the Executive Management Meeting of 15 August 2000 some members had raised their concerns about the open-endedness of the draft invitation but the first respondent had answered that should the appellant approach the matter on the basis that it could refuse to ratify some acceptances of voluntary retrenchment, it would experience numerous legal problems of discrimination and that such approach would not be valid. This advice was incorrect.

(6) This indicates that the first respondent did not serve the interests of the appellant but his own. This is confirmed by the fact that he was the second person to lodge his acceptance of the offer of a voluntary retrenchment package.

(7) The memorandum of 15 August was not in keeping with the spirit of the mandate of Exco to management contained in the resolution of 11 August quoted above and that the first respondent and Prof Golele acted outside their powers.

(8) This is "contrary to the regulations" of the appellant as only the Vice Chancellor has the authority to bind the university in any contract and even then only in terms of the council's mandate. The Acting Vice Chancellor (Golele) did not have any mandate

whatsoever to bind the university. The Acting Deputy Vice Chancellor (Machethe) in particular and the entire management were mandated by council to deal with the issue of voluntary retrenchments.

(9) The appellant was entitled to withdraw the alleged offer as it was unauthorised and was ab initio void, alternatively voidable.

(10) The Acting Vice Chancellor had no authority to make any offer relating to voluntary retrenchments. Machethe was the only person mandated by council to "carry forward the issues relating to voluntary retrenchments".

(11) The order for a declarator is inappropriate.

14 In his replying affidavit the first respondent admits that he was instructed by Machethe to draft the circular but denies that he was instructed to reserve the right of the appellant to accept or reject any particular application. He distributed his draft to Prof Machethe, Prof Golele and all deans of the various faculties of the appellant at the management committee meeting of 15 August. At this meeting Machethe was not present but Golele was. The draft circular was discussed, certain minor amendments were effected, Golele signed it and it was circulated on her instructions to the staff. He sent copies to Machethe and Golele. He received no indication that the circular was not in accordance with the approval granted by the management committee and the deans. He attaches to his replying affidavit the official delegations of authority from the council to various functionaries of the appellant, approved at a council meeting of 28 June 1996 and still in force. These show that the vice chancellor was authorised to terminate the services of staff and to scrap posts..

15 The first respondent denies that there is any policy or regulation prescribing

the manner in which voluntary retrenchments should be done. He reiterates that it was the intention of the appellant to issue the open ended invitation to all members of staff. A large number of employees accepted the offer of voluntary retrenchment and await the outcome of this case. Prof Golele in a supporting affidavit confirms the facts set out by the first respondent and that she was properly authorised as Acting Vice Chancellor and Principal of the appellant to make the offer.

16 The matter was heard on 19 December 2000 by the Labour Court after full heads of argument on all issues were filed. In limine a jurisdictional point raised on behalf of the appellant was argued. It was that the Labour Court did not have jurisdiction to hear the application in terms of section 157 of the Labour Relations Act, 66 of 1995 (the LRA) and neither did it have jurisdiction in terms of section 77 of the Basic Conditions of Employment Act, 75 of 1997 (the BCEA), as the dispute was not about a contract of employment. The court reserved judgment on the jurisdictional issue and on 6 February 2001 held that it had jurisdiction in terms of section 77 of the BCEA and granted the order sought by the respondents without hearing oral argument on the real issues. Leave to appeal to this Court was granted.

17 On appeal the appellant applied for condonation of its non-compliance with rule 5 and reinstatement of the appeal which had lapsed. The respondents applied for condonation of the late filing of their answering affidavits in this application. The appellant further applied for leave to lead "the further evidence set out in the affidavit of Patrick Fitzgerald " attached to the notice of motion, alternatively for an order setting aside the order of the Labour Court and remitting the matter to that Court to "hear oral evidence in relation to any dispute of fact that may have arisen from the

affidavits ... in this application". We heard argument on both these applications and the appeal and reserved our judgment.

18 This appeal itself raises the following issues:

(1) Did the Labour Court have jurisdiction to hear the matter?

(2) Is it a valid ground of appeal that an opportunity for oral argument on the merits was not afforded the parties?
(3) Are there such disputes of fact on the papers that the matter can be resolved without oral evidence?
(4) Was the offer of 15 August 2000 a valid offer?
(5) Alternatively, is the appellant by estoppel precluded from alleging that it is not?
(6) Could the offer be accepted after its purported withdrawal by notice issued on 5 September 2000?

Re-instatement:

19 The record was filed some 15 days late. The appellant's attorneys were negligent. Their services were terminated and new attorneys appointed. Neither this Court nor the respondents were inconvenienced. The period is relatively short. It is an important case to the university, its staff and the respondents. Justice demands that it be decided on its merits. The delay is condoned and the appeal is re-instated.

Re-opening:
20 Section 174 (a) of the Labour Relations Act 66 of 1995, in terms whereof it is sought to introduce further evidence on appeal, is modelled on and similar to section 22 (a) of the Supreme Court Act 59 of 1959 which deals with the powers of the Supreme Court of Appeal and the High Courts exercising their appellate jurisdiction to admit such evidence.. It is highly advisable that this Court applies the same test in such situations as those Courts.

21 It is imperative that there should be finality in litigation. This power will therefore only be exercised in exceptional circumstances. The failure to adduce this new evidence must not be due to the applicant's negligence. He must show that it could not have been obtained by him if he had used reasonable diligence. The tendered evidence must be weighty and material and presumably credible and if allowed be practically conclusive. If real prejudice to the respondent will be caused by the admission of the fresh evidence, it will be disallowed. See the cases referred to in Lawsa Reissue Vol 3 (1) para 369 footnotes 1 to 5.

22 The test set out above is stringent. The appellant's application fails it miserably. Mr Patrick Fitzgerald has no personal knowledge of the alleged facts to which he deposes. He is the new administrator of the appellant who came on the scene after the matter had been decided by the Labour Court. The previous deponent for the appellant, Prof Machethe, now merely files a cursory supporting affidavit. But he does not explain why this evidence which was available throughout was not presented. He had 16 days in which to draft his previous answering affidavit and did not request more time. The contention that the appellant had insufficient time is rejected. The fact that the appellant has a new administrative head who takes a different view of the facts and thinks that there are additional facts which will bolster his case, is irrelevant. So is the fact that it is an important matter. Most appeals are. These are the only grounds advanced for the application. The point made that oral argument was omitted in the Labour Court is no reason to reopen the appeal for further evidence. It will be dealt with below. Fitzgerald attempts to influence this Court by a statement that the offer was "a nefarious plot and self-serving exercise by the first respondent to financially benefit from public monies". He has no personal knowledge of the facts. He bases this statement on his view that the " process initiated by Golele bordered on the irrational" which would have an enormous negative impact on the university in view of the acceptance of the offer by a large percentage of executive and middle management. Whatever the position may be, it is not a sufficient reason for reopening the appeal.

Fitzgerald sets out the history of events leading up to 11 August 2000, coloured by his own interpretation of the relevant resolutions. He states that according to Mr Negota (acting chairperson of the council) and Ms Nhlane (acting registrar) the council on 5 August 2000 expressly rejected the recommendation by Golele and first respondent that the voluntary retrenchments be effected immediately. This is not borne out by the minute annexed. Negota told Fitzgerald that Golele had informed him on 31 August 2000 that she had intended to leave as her department had no students. .Negota inferred that she had contrived the offer in order to take advantage of it. Though Negota confirms this in a cursory formal affidavit, he omits to mention why he (an attorney) had failed to mention these facts previously. Golele

denies the conversation and the statement about council's rejection of her recommendation. ___

It will be evident from the above extracts from Mr Fitzgerald's affidavit that the evidence which it is sought to adduce will be hotly contested. and unlikely to be conclusive. In fact, in the light of my approach to the merits it will not even be material.

The application to reopen the matter has to be dismissed.

Jurisdiction:

23 In terms of section 158 (1) (a) (iv) of the L R A the Labour Court is empowered to make declaratory orders, provided of course they fall within its jurisdiction which is set out in section 157. The relevant portions thereof read:

"157(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction 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.
(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa 1996, and arising from –
(a) employment and from labour relations

(b) in respect of any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer;

(c) the application of any law for the administration of which the Minister is responsible."

24 It was not held by the Labour Court nor contended for by any of the parties that the Labour Court's jurisdiction in this case was founded on the section quoted above. Instead, the Labour Court held that it was empowered to grant the declaratory order sought by the provisions of section 77(3) of the Basic Conditions of Employment Act 75 of 1997 which reads:
"The Labour 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".

25 The Labour Court held that the appellant's challenge to its jurisdiction was without substance. The respondents were in a contractual employment relationship with the appellant and the withdrawal of the circulars of 15 and 22 August 2000 did not alter their status as employees. If, as they contend, the appellant is bound on a contractual basis by reason of the acceptance of the offer, their contracts of employment would in due course ipso facto terminate. The dispute therefore concerns a contract of employment any breach of which would vest the civil courts with jurisdiction to adjudicate it and, as the statute provides, so does the Labour Court concurrently have jurisdiction.

26 In this Court it was argued that the question to be answered is whether a dispute as to the existence or validity of a contract of retrenchment (the effect of which would be to terminate the contract of employment), is a dispute concerning a contract of employment. After observing that section 77(3) of the BCEA is couched in very wide language as it refers to "any" matter "concerning" a contract of employment two allegedly crucial and inter related observations are made. Firstly that the dispute must not be about a matter concerning an employment relationship; it must be a matter concerning a "contract of employment". Secondly the dispute must be concerned with an actual contract of employment (whether it be written or not). Relying upon the dictionary definition of "concerning" in Collins English Dictionary (Millennium edition): "about; regarding; on the subject of" it is submitted on behalf of the appellant that the present dispute is about the validity of a contract of retrenchment and that it is not the contract of employment which is in issue. Whilst it is so that the outcome of the dispute will impact upon the contract of employment in as much as it will determine the continued operation or termination thereof, the dispute is not about "a matter concerning a contract of employment". In support of this proposition we were referred to Langeveldt vs Vryburg Transitional Local

Council and Others (2001) 22 ILJ 1116 (LAC) 1135 A-B. It was pointed out that the Court there held that whilst the High Court had no jurisdiction to determine a dispute concerning the fairness of a dismissal, it would have jurisdiction where the dispute related not to the fairness of the dismissal, but its lawfulness. The relief of the complainant would be in contract.

There must be a direct relationship between the matter to be adjudicated and the employment contract. Section 4 of the BCEA incorporates the statutory basic conditions into all contracts of employment (with exceptions) and therefore section 77(3) was enacted to avoid litigation in two courts about the same contract eg in respect of basic conditions in the Labour Court and in respect of other terms in the civil courts. All section 77(3) does is deal with the dual claims problem. Had it been intended to do more, it would have been situated elsewhere e.g. in the LRA.

Thus far the argument for the appellant.

27 The nettle of overlapping jurisdiction of the Labour Court and the High Court was discussed in Langeveldt's case *supra* by this Court and by the Supreme Court of Appeal in Fedlife Assurance Ltd v Wolfaardt 2002 1 SA 49 (SCA). Neither of these judgments gives an answer to the present problem.

28 I deal with the appellant's last argument first. Parliament is not known for its logic and lucidity in draftmanship. One should not read too much into the situation of a provision within a statute if it is in itself clear. Section 77 of the BCEA is the section in the act which deals with jurisdictional aspects. Sub-section (3) is certainly not out of place.

29 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.

30 In this appeal it is not necessary to decide exactly how wide the jurisdictional net is cast. 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.

Absence of Oral Argument:

31 The Labour Court decided the merits of the case without hearing oral argument thereon. On behalf of appellant it is submitted that in such a case an appeal should succeed on that basis alone. Particularly as it was still open to either party to seek leave to supplement any evidence already presented. Reference is made to Kauesa v Minister of Home Affairs and Others, 1996 4 SA 965(NMSC) 973I-974A.

That case however differs from the present in an important respect. There the judge decided the issue without any argument (written or oral) at all. In the present case the parties both filed full heads of argument. I don't think the principles set out in Kauesa's case are necessarily applicable in the present one.

32 As far as the argument is concerned that it was open to either party to seek leave to supplement any evidence already presented, that has to be rejected on the facts. There was no such application and the matter was ripe for hearing and set down for hearing on the merits. In any event, the appellant has an insuperable difficulty in respect of its complaint that oral argument was omitted. It was never raised as a ground in the application for leave to appeal and we do not have the benefit of the view of the Court a quo thereon. Furthermore it is not a ground of appeal in the notice of appeal.

33 Lastly, as this appeal is a full rehearing on the record I fail to see what prejudice the appellant suffers by the fact that in addition to full written argument in both Courts its oral argument is only heard by this Court.

Disputes of Fact:

34 In my view there are no substantive disputes of fact which preclude us from resolving the matter. Such disputes as are raised by Prof Machethe are based on his interpretation of resolutions, evidence of what was discussed in meetings of the council and Exco and alleged general consensus thereon and hearsay evidence by Prof Machethe himself unsubstantiated by any confirmatory affidavits or documentation. In my view there is no real dispute of fact and no oral evidence is required.

35 I say this for the following reasons. His interpretation of resolutions of the council and Exco is irrelevant and inadmissible. The resolutions are minuted and before Court and he does not attack the correctness of the minutes. The university is a body corporate, a juristic person. It is governed by its council and its principal is its chief executive officer. The council may appoint committees and assign any of its powers to them. See sections 3, 4, 7 and 8 of the University of the North Act 47 of 1969. A body corporate does not act through mere discussions by its members. It acts through resolutions properly passed. Its decisions are to be sought in its resolutions. If these are clear, cadit quaestio. If there is no resolution, there is no decision. The words of Centlivres CJ in Commissioner for Inland Revenue v Richmond Estates (Pty) Ltd 1956 1 SA 602 (A) 606 in respect of a company are equally applicable here: "a company is an artificial person with no body to kick and no soul to damn and the only way of ascertaining its intention is to find out what its directors acting as such intended. Their formal acts in the form of resolutions constitute evidence as to the intentions of the company of which they are directors ..." See also Van Tonder v Pienaar and Others 1982 2 SA 336 (SE) 341; James North (Zimbabwe) (Pvt) Ltd and Others v Mattinson 1990 2 SA 228 (ZHC) 237C; Cilliers et al: Korporatiewe Reg # 15.48; Lawsa reissue Vol 4 (3) #93. It is not necessary to consider whether the doctrine of unanimous assent could be invoked here as the facts alleged do not go so far.

36 The statements of Machete that he was to drive the restructuring process and "to carry forward the issues relating to voluntary retrenchments" are not borne out by the relevant minutes. He is only referred to in paragraphs 5.4.1.4 (ii) and (iii) of the Exco minutes of the meeting of 11 August 2000 where specific tasks are allocated to him. In my view the description of Machete "as the person who has been in charge of the process of restructuring" in the minutes of the council meeting of 21 September 2000 held after this matter commenced bears little weight. In any event, when the process is seen as having two components, namely voluntary retrenchment and restructuring as set out in Professor Golele's report, this minute does not support his claims.

37 Machete's statement that Golele acted "contrary to the regulations"is devoid of any particularity. It was denied that any regulations were applicable. Counsel for the appellant did not argue that this vague statement could create a genuine dispute of fact. Upon re-reading this part of Machete's evidence I gained the impression that his view is that as Golele was acting principal and not the principal she did not have the powers a principal would have. If this is his view, it is clearly wrong as far as this matter is concerned..

There is no genuine material dispute of fact on the affidavits and the matter must be adjudicated on the papers as they stand.

The Validity of the Offer:

38 The offer contained in the circular of 15 August 2000 and repeated in the

circular of 22 August 2000 was made by the Acting Vice Chancelor and Principal of the university. Prima facie she would be authorised to make such offers, being the principal executive functionary of the university. In terms of the University of the North Act, 47 of 1969 the control, government and executive power of the university is vested in the council of the university of which inter alia the principal and vice principal are members. The university council may appoint a vice chancellor (who is the principal) and he is a member of each committee of the council and of the senate as well as a member of every joint committee of the council and senate. Prof Golele was at all relevlant times the acting vice chancellor and principal of the university. At all relevant times Prof Mashethe was an acting deputy vice chancellor.

39 Prof Golele by virtue of her appointment as acting vice chancellor and principal occupied the highest administrative authority of the university and was thus fully entitled and authorised to give instructions to the first respondent in respect of any matter falling within the ambit of her duties as vice chancellor and principal. The first respondent by virtue of his appointment as Executive Director Human Resources was duty bound to carry out instructions emanating from Prof Golele. Prof Golele was the appropriate functionary to have made the offer contained in the circulars of 15 and 22 August 2000. There is no evidence at all that somebody else was deputised by the council, Exco or Management Committee to make an offer. The respondents and the other members of the staff were well within their rights to accept that the offer made by Prof Golele had been duly authorised. She says so herself in the papers before court.

40 But even should one lift the corporate veil and study the resolutions of the

council and Exco there is no clear indication that the offer was unauthorised. On the contrary, the council authorised restructuring and voluntary retrenchment and mandated Exco to take the matter further. In a memorandum to the council the first respondent and in a memorandum to Exco Prof Golele set out the disadvantage of voluntary retrenchment in that the university might lose staff it could not miss. Both advised that there was no other way. In the light of this background the minutes of the Exco meeting of 11 August 2000 which inter alia contain the phrase "management should work out mechanisms for implementation i.e. outlining clear steps to be followed re 5.4.1.3 above – how will the process be managed, in order to ensure that essential services and the departments are not disadvantaged" cannot be read as an unequivocal instruction that the equality principle in respect of the acceptance of voluntary retrenchments must be jettisoned. Both these memoranda which were before the council and Exco emphasised as a disadvantage "the damage of loosing key staff" and "staff we do not want to loose may take it". Had both the council and Exco intended to drastically differ from these two memoranda one would have expected a clear indication thereof in the resolutions, especially by the use of the phrase key staff. Nothing approximating such phrase is to be found in the resolutions quoted.

41 In summary, council mandated Exco to restructure and implement voluntary retrenchment. Exco left the voluntary retrenchment in the discretion of management. Management decided upon the terms of the offer set out in the memorandum of 15 August 2000. One must therefore conclude that the offer was properly authorised and was a valid offer.

42 But even if this construction of the resolutions is incorrect and one were to hold that Exco resolved that the process of voluntary retrenchment be implemented

and that management should work out certain guidelines for the management of the process and that management without formulating these guidelines made the "blanket" offer, the appellant would still be bound. In company law a managing director, acting in that capacity, acts as the company itself, just as the board of directors would. Lawsa reissue Vol 4 (2) #10.2 Anyone dealing with the managing director may assume that the directors have conferred on him all the powers normally conferred if the articles do not restrict the powers of the directors to delegate. The company is bound by contracts with third parties within this ostensible authority even if it turns out that the managing director had no actual authority.. Lawsa reissue Vol 4 (2) # 104. In terms of the Turquand rule (Royal British Bank v Turquand (1856) 6 E&B327) where there is a general authorisation, but subject to some act of internal organisation, a third party is entitled to assume that everything necessary has been done. See Lawsa reissue Vol 4 (2) # 184 The Turquand rule is not confined to companies. It is applicable to all corporations. Mine Workers Union v Prinsloo 1948 3 SA 831 (A)

The rule is not based on estoppel but on policy considerations of efficacy. Lawsa op cit #185; Cilliers et al op cit # 6.28. There is no reason why the principles set out above should not apply to corporations like universities. On this basis also the appellant is to be held bound by its offer.

The First Respondent's acceptance

43 The first respondent's letter of acceptance is dated 14 August 2000 whereas the offer was dated 15 August. On this basis counsel for the appellant argued that it was ineffective.

In principle this approach is correct. An offer cannot be accepted before it is made.

Bloom v The American Swiss Watch Company 1915 AD 100; Kotze v Newmont South Africa Ltd 1977 3 SA 374 (NCD) 374.

First respondent, however, states in the founding affidavit that he accepted the offer on 16 August but erroneously inserted the incorrect date. This cannot be gainsaid. The argument has no merit.

Could the Offer be Withdrawn before 15 September?

44 The offer states that it is made with effect from 15 August 2000 "and shall expire on 15 September." It is therefore clear that the offer was to stand for a period of one month, which was regarded as a reasonable period. And for good reason. There were many aspects to consider. Any member of staff seriously contemplating the offer would therefore be entitled to take the university at its word and accept that it would be open for one month. In these circumstances one would raise an eyebrow if it was open to the university to slam the door in the face of those who were seriously considering acceptance of the voluntary retrenchment and early retirement set out therein.

45 The law is not as clear as one would wish. Had this been a classic option, namely an offer accompanied by an agreement that it would stand for a specified period, there would be no debate. cf Boyd v Nel 1922 AD 414. But here there is no agreement between offeror and offeree that the offer will be kept open. At least no express agreement. There is merely a statement by the offeror as to the duration of the offer. There is no evidence on record from which one can deduce a tacit acceptance by the offeree of the "offer" to keep the offer open, if such it was, which acceptance was conveyed to the offeror.

46 Before grasping the legal nettle one has to decide whether the statement that the offer "shall expire on 15 September 2000" amounts to an offer to keep the offer open for the given period or merely determines the reasonable time within which the offer is to be accepted, without any implied undertaking not to exercise the offeror's normal right of withdrawal before acceptance. In my view it was the former, for the following reasons: This was not a simple statement in a one-on-one contractual situation. It was made by the (acting) principal of a university to a big staff. The offer,

if accepted, would have vast personal repercussions for each of them. It would entail deep thought, investigation of alternative positions and family discussions. Probably serious soul-searching. Seen in this light it is inconceivable that either the principal or any of the staff would have contemplated that this offer could be withdrawn before the date set. I hold that the statement implied an undertaking to keep the offer open till 15 September 2000.

47 This brings me to the law. A number of questions arise for consideration:
(1) Must such implied (or for that matter an express) undertaking to keep the offer open for a specified time be accepted by the offeree or can in certain circumstances the undertaking in its context contain a waiver of the normal requirement of acceptance by the offeree?
(2) If acceptance is a prerequisite, must it be communicated to the offeror?
(3) Can the offer be unilaterally revoked at any time before acceptance?

48 Coetzee J in Anglo Carpets (Pty) Ltd v Snyman 1978 3 SA 582 (T) 585G had no doubts about the law. He held: " It is trite that an offer can at any time before acceptance be revoked and that the mere statement that it is irrevocable or not revokable for a certain period is ineffective. The only way in which this result can be achieved is if there is indeed a binding agreement on this aspect. Such an agreement is usually referred to as an option or a *pactum de contrahendo* " The learned judge was in good company. De Wet and Yeats *Kontraktereg en Handelsreg* 3rd ed 30 held the same view and so did Van den Heever J in Kotze v Newmont South Africa Ltd 1977 3 SA 368 (NC) 374E who also referred to the same authors. In neither of these cases nor the handbook was the question of waiver of acceptance or of communication thereof considered. In an article *The Irrevocable Offer* in 100 (1983) SALJ 441 K M Kritzinger supports this view in the case of non-gratuitous offers but submits that in the case of gratuitous offers a mere mental acceptance of the offer would be sufficient to conclude a contract (of option).

49 There is, however, Appellate Division authority which qualifies the decisions referred to. In Phillips v Aida Real Estate (Pty) Ltd 1975 3 SA 198 (A) clause 16 in a standard Offer to Purchase form read: "This offer is open to acceptance until and including ..... before which date I/we shall not be entitled to withdraw or cancel same and for which period it shall be irrevocable and shall be binding on acceptance." The date had been omitted and the offer was withdrawn before it was accepted.. The claim was by the estate agent for damages for breach of contract by withdrawal of the offer "before acceptance". It was based inter alia on clause 14 in which the offeror agreed to pay to the agent liquidated damages should he "cancel or withdraw this offer before acceptance". The Court held that in order to determine when the breach in terms of clause 14 is committed the parties required a date in clause 16. "When the seller receives the offer he accepts the right granted to him, viz. to exercise the "option" at any time within the period stated in para. 16. No authority is needed for the statement that an open offer can be withdrawn at any time before acceptance. Hence if no time is fixed in para. 16 and the offeror withdraws his offer before acceptance he has not committed any breach of his undertaking. ..... If a date is fixed in para. 16 the undertaking which he breaches by withdrawing the offer before that date is the withdrawal of the offer before he is entitled to do so. If no date is fixed in para.16 he is free to withdraw at any time before acceptance."
It does not appear that either acceptance or communication of the acceptance of the rights granted by a properly completed clause 16 were at all relevant to the reasoning of the Court.

50 In Musa v Fischat NO and Others 1980 2 SA 167 (SECLD) the Court held that there was no difference between an "irrevocable offer to sell" and an option for the purpose of preference in the case of double sales. The part of the judgment dealing with the facts has been omitted from the report but can be found in an article by Professor Kerr *Offers, Offers Said to be Irrevocable , Options, Rights of Pre-emption and Double Sales* 98 (1981) SALJ 6. It is clear that the question whether the undertaking not to revoke the offer to sell had been accepted, was not considered relevant.

51 Building Material Manufacturers Ltd v Marais NO 1990 1 SA 243 (OPD) concerned an application form issued together with a prospectus offering shares to the public. The form contained the words: "Ek ... doen hiermee onherroeplik aansoek om ondergemelde aantal gewone aandele..." The prospectus had declared that

"applications are irrevocable". The application was revoked before acceptance. The Court rejected an argument based on De Wet en Yeats *Kontraktereg en Handelsreg* that despite the wording that the offer was irrevocable it still could be revoked as the company had not informed the offeror that it accepted his undertaking that the offer was irrevocable. The Court held at 249B: "Dit was nooit beoog deur die partye dat eiser eers moes antwoord om te sê dat hy die onherroeplikheid van die aanbod aanvaar nie. 'n Onherroeplike aanbod het tot stand gekom toe die aansoekvorm deur die eiser ontvang is." The Court referred to Christie *The Law of Contract in South Africa* 43. In the circumstances therefore neither acceptance nor communication thereof was held necessary to constitute irrevocability. The relevant fact was here undoubtedly the prior demand that offers be irrevocable. In such circumstances it would be highly artificial to set further prerequisites for irrevocability. One may conclude that a prospective shareholder who sends in an offer under these conditions has waived any right he may have to withdraw the offer.

In Reich v Stone 1949 SR 178 (HC) 182 the Rhodesian High Court obiter remarked that an offer to buy at a given date was irrevocable before that date. The question of acceptance of the undertaking of irrevocability was not considered.
Dhanalutchmee v Naidoo 1975 1 PH A30 (D) did not concern an option or an offer to keep an offer open, although the words "irrevocably agree" were used in the document. The Court held that the document recorded a concluded contract of sale (which was invalid for want of compliance with statutory provisions). See Prof L Tager thereon in 1975 Annual Survey of SA Law 66/7

52 There is no paucity of learned thought on this issue. Apart from the articles by Kritzinger and Kerr abovementioned, there are amongst others Prof Ellison Kahn *Some Mysteries of Offer and Acceptance* (1955) 72 SALJ 246 at 272 and Prof B Beinart *Offers Stipulating a Period for Acceptance* 1964 Acta Juridica 200 at 202 who hold the view that a unilateral declaration that an offer is irrevocable is not sufficient

in our law to make it irrevocable. However Beinart op cit 206 and Prof D Zeffertt *Some Thoughts on Options* (1972) 89 SALJ 152 at 156 hold the view that silence coupled with non- rejection of the irrevocability creates an option .in the case of a gratuitous offer.[It is not clear why this should be limited to gratuitous offers. Perhaps because the discussion centred around offers without consideration as those for consideration create options, where the problem does not arise.] Beinart favours the view that where an offeror has undertaken to keep the offer open, he is bound, as the offeree can be assumed to accept the offer by implication " and it is important that he should be saved from the risks attendant on relying on the undertaking and possibly incurring trouble and expense or arranging his business in reliance on the undertaking. Any other rule would be undesirable and contrary to business practice.... It is submitted that there is adequate authority in Roman and Roman-Dutch Law, and in Romanistic jurisprudence generally to support a rule that were a person makes an offer, undertaking to keep it open or not revoke it for a period or until the happening of a certain event a valid option is constituted unless the offeree in fact rejects the option. Equity favours this rule as far as the offeree is concerned, and the offeror really suffers no prejudice. The concept of bilaterality of contract should not be driven too far in cases where acceptance would merely be an empty form and a foregone conclusion." He points out that the Codes of Germany, Switzerland and Austria go further and hold the offeror bound to keep open any serious offer as a legally binding unilateral declaration of will for a certain period, express or implied. See also

Wessels' Law of Contract in South Africa 2nd ed para. 231, 232 .

Prof Kerr op cit 9 and in his *Principles of the Law of Contract* 3rd ed 56/7, 66/7 holds the view that no hard and fast rule should be laid down but that the facts of each case should determine whether the requirement of acceptance and /or notification thereof is dispensed with. The intention of the offeror should be established. Kritzinger op cit

443, 450, 452 would rather let the facts determine whether there was tacit acceptance and communication or whether the latter is dispensed with and mere mental acceptance is adequate.
Professors Oosthuizen and Reinecke in an article *Die Herroepbaarheid van 'n Inskrywingsaanbod op Aandele* 1990 TSAR 332 commenting on the Building Material case point out that the Court on the sole authority of Christie departed from the traditional view that an offer cannot unilaterally be made irrevocable by the offeror but that a contract to that effect is required. They add that for practical reasons such approach is desirable in these circumstances but advise circumspection. The case of Rose and Rose v Alpha Secretaries Ltd 1948 1 SA 454 (A) to which Christie refers does not support his view. I agree. The learned authors seek to give the Building Material judgment a theoretical foundation on which the Court did not build. It is that the company offered in its prospectus and application form to accept from the public irrevocable offers for shares. By completion of the form the member of the public accepts this offer and upon receipt of the form by the company a contract of option comes into being. Pure theory leads one on devious ways to fit its straight jacket.

53 The view of Prof R H Christie in *The Law of Contract in South* Africa 2nd ed 56 is that a distinction must be drawn between an option and an irrevocable offer. The learned author relies on the Rose and Rose case *supra,* which, as stated, does not support his view, and on Beinart op cit who holds the view that an obligation exists on either of two bases: the offeror cannot as a matter of law be permitted to withdraw the irrevocable offer or there is a tacit acceptance by the offeree of the offer to keep the offer open. The first basis is German law and not our own and the second basis will in practice be difficult to demonstrate. Christie concludes that this is perhaps "one of those situations where the view of the courts may be accepted and welcomed without too close an inquiry into its theoretical foundation."
Prof Carole Lewis, discussing the Building Material case in 1990 Annual Survey of South African Law 33, is critical of the Court's rejection of the defendant's argument that an offer cannot be made irrevocable otherwise than by the agreement of the parties. She rejects Oosthuizen and Reinecke's theoretical basis for the judgment as that was not intended in the situation.

Prof J G Lotz in *Is Kontrakbreuk Moontlik by 'n Opsiekontrak?* 1988 THRHR 237, 238 can see no objection in principle to an offeror unilaterally creating irrevocability of an offer.

Quot professores tot sententiae.

54 The law must be clear. It must also be effective and practical. It must 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 between efficacy and pure theory the latter will have to be jettisoned. This is in my view such a case.

55 In my view the approach of professors Beinart, Christie, Lotz and Zeffert which is (mostly tacitly) reflected in the judgments in the cases of *Reich, Phillips, Musa* and *Building Material* discussed above, is to be preferred to that of the De Wet and Yeats (van Wyk) set out in the judgments in the cases of *Kotze* and *Anglo Carpets.*
Where an offer is (either expressly or tacitly) stated to be irrevocable for a given period and communicated to the offeree it becomes irrevocable upon receipt unless the offeree rejects the irrevocability. To require a mental acceptance would be meaningless in practice as that cannot be evidenced. Such requirement would merely pander to theory. To require notification of acceptance of the irrevocability would set a standard which in normal business practice will not be followed and will be regarded as rather foolish. To use the present case as an example: Who of all the parties involved would have thought that the addressees of the principal's offer were to notify her that they accept her undertaking to keep the offer open till 15 September?

56 It must therefore be held that the offer could not be revoked before its expiration date. The acceptance of the offer by the second respondent after the 5th of September

2000 and before 15 September 2000 was therefore valid.

Estoppel

57 The Labour Court decided the matter on the basis of estoppel. In respect of acceptances of the offer prior to 5 September 2000 estoppel does not come into play. In respect of acceptances after 5 September 2000 and before 15 September 2000 estoppel might be invoked in the alternative by those employees who because the offer had been stated to be open till 15 September 2000 were considering it at their leisure and failed to accept prior to 5 September 2000.

In view of the conclusion reached above it is not necessary to deal with this aspect. Suffice it to say that had we come to a different result on the law and should facts be presented to found such plea it may in the circumstances be invoked. Cf Christie op cit

Conclusion:

58 It follows from the above that the decision of the Labour Court was correct.The appeal is dismissed with costs.

Van Dijkhorst AJA

I concur

Zondo JP
I concur

Nicholson JA

For Appellant Adv P J Pretorius SC and adv G I Hulley

instructed by Hlatshwayo Du Plessis Van Der Merwe

For Respondents Adv M E D Moyses

instructed by Frese Moll and Partners

Date of hearing 20 March 2002

Date of judgment 29 May 2002