



**IN THE LABOUR COURT OF SOUTH AFRICA  
(HELD AT DURBAN)**

**Reportable**

**Case Number: D1117/16**

**In the matter between:**

**HIRALAL, ROSHINI**

**Applicant**

**And**

**SHELL AND BP SOUTH AFRICAN**

**Respondent**

**PETROLEUM REFINERIES (PTY) LTD**

**Heard: 16 July 2018**

**Delivered: 9 October 2018**

**Summary: Section 77 (3) of the BCEA claim – after resignation of employee attempt was made to resuscitate relations- which severance package is discussed – bonus conditions to be met – counter claim – main claim unsuccessful – counter-claim upheld.**

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**JUDGMENT**

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**CELE J**

## Introduction

[1] *In casu*, the applicant relies on section 77(3) of the Basic Conditions of Employment Act<sup>1</sup> as she seeks payment from the respondent on the basis of a contractual claim for damages which includes payment in relation to:

- 1.1. remuneration and leave accrual for the months of March and April 2016;
- 1.2. payment of a Voluntary Severance Package (“VSP”), in terms of the relevant policy;
- 1.3. payment of a Variable Pay Package (“VPP”) in terms of the relevant policy.

[2] The respondent opposed the claim and filed a counter claim seeking payment of the outstanding balance from a student loan extended by the respondent to the applicant during the currency of her employment with the respondent. The applicant admitted her indebtedness for the student loan and sought to set this amount off the main claim she filed.

## Factual Background

[3] On or about 1 December 1989 the applicant and respondent concluded a written contract of employment with *inter alia* the material express, alternatively implied further alternatively *tacit* terms that the applicant would be subject to the rules, regulations and other practices of the respondent.

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<sup>1</sup> Act Number 75 of 1997, herein after referred to as the BCEA.

- [4] As on 29 February 2016, the applicant held the post of Business Improvement Coordinator (Acting Business Improvement Manager) and her gross cost to company was R79 158.00 per month. In addition to such remuneration, the applicant stood to earn an annual bonus termed '*variable pay*' upon the fulfilment of certain criteria.
- [5] On 11 July 2000 the respondent, through the introduction of a written '*Team Brief*', provided for the payment of voluntary severance payments to certain classes of employees with *inter alia*, the following material express terms:
- 5.1 the opportunity for employees to apply, by close of business on 30 September 2000, for enhanced packages in order that the respondent might address its staffing requirements, both operationally and in terms of its Employment Equity commitment.
- 5.2 eligible employees could expect to receive the following package:
- 5.2.1 up to twenty (20) years' of service would be recognised on the basis of awarding a month's pensionable salary per year of service.
- 5.2.2 in addition, years of service over the age of forty (40) would accrue a severance payment of seventy-five percent (75%) of a month's pensionable salary up to a maximum of six (6) months' pensionable salary with a cap of twenty-four (24) months' pensionable salary applying to the combined amounts.
- [6] Subsequent to 30 September 2000 this basis for the calculation of certain voluntary separation packages was applied.

- [7] On 22 February 2016, the applicant handed in a letter of resignation dated 17 February 2016 to take effect on 29 February 2016. At approximately 14h30 on 22 February 2016, the applicant's direct manager, Mr Rodney Youldon came to see her about her resignation and to enquire as to whether there were any alternatives that could be explored in order to get her to stay, such as a change to her line manager, alternatively the pursuance of a grievance. The applicant declined and Mr Youldon indicated that he would revert as to whether Human Resources would accept her short notice. Her short notice was accepted.
- [8] On 24 February 2016 the applicant met with the Managing Director, Mr Ton Wielers, in his office where he sought clarity on the applicant's reasons for her resignation and whether there was anything the respondent could do to change her mind. On the same day the applicant received feedback from both Mr Youldon and her former direct manager, who was retired but on contract with the company on another job, Mr Eddie Chettiar that Mr Wielers was prepared to appoint the applicant permanently to her post, after the completion of the recertification audit which she was heading up and which was due for completion by 22 April 2016.
- [9] The audit pertains to the ISO 9001: 2008 (Quality) and ISO 14001:2004 (Environment) certifications that the respondent was then holding but which were required to be revaluated in their entirety every three years to ensure compliance with the relevant codes. Such standards were designed to address a company's commitment to achieving quality products and by-products with minimum possible harm to the environment. The exercise was conducted by the international certification body, Det Norske Veritas ("*DNV*"), and took place over a five-day period where a team of three to four auditors audited all the respondent's processes. Preparation before the audit involved an intensive process over a six-month period, where a team, led by the applicant, had to prepare the site. The planning of the audit schedule and logistics associated thereto was one of the applicant's deliverables. Should

the company fail such an audit then the certificates would be withdrawn and this would result in significant reputational harm to the respondent.

- [10] On 25 February 2016, the applicant met with Mr Wielers where her possible ongoing employment with the respondent was discussed. Should the applicant be incapable of being persuaded to remain in the respondent's employ then the question of her remaining for purposes of delivering a timeous and successful audit in return for an extra payment was discussed. On the following day the applicant advised Mr Youldon that she had agreed to remain for purposes of completion of the audit. Mr Youldon supported her decision and offered the applicant the opportunity to sit with Mr Andrew McKay, Human Resources (HR) Operations Manager, over queries by the applicant about her post-retirement medical aid. The applicant was happy for Messrs Youldon and McKay to discuss this and to calculate an offer to be emailed to her for consideration over the weekend.
- [11] At approximately 20H00 on 26 February 2016 the applicant received a call from Mr Youldon who advised her that due to the unavailability of Ms Lindiwe Khuzwayo, the Head of HR and Mr Wielers being out of the country, he sought a meeting with the applicant on 29 February 2016, which she agreed to. On 29 February 2016, Mr Youldon offered to the applicant an arrangement in terms of which she would continue in the respondent's employ until the end of April 2016 and a bonus payment equal to three months' pay, over and above her usual remuneration, would be paid to her at the end of that period on condition that she deliver a successful audit.
- [12] The applicant rejected Mr Youldon's offer. She requested that she be released from her employ with the respondent in terms of her original resignation, which request Mr Youldon agreed to. The applicant further addressed an email to Mr Wielers but received no response thereto.

- [13] The applicant owed the respondent the amount of R 120 434.30 (one hundred and twenty thousand four hundred and thirty-four Rand and thirty cents) in respect of the outstanding balance on interest-free tertiary education loans granted and paid to her by the respondent.
- [14] The calculation should the applicant be entitled to '*variable pay*' is accepted as R 56 993.00 (fifty-six thousand nine hundred and ninety-three Rand) and similarly and should the applicant be entitled to payment as provided for in terms of the '*separation formula*', the applicant will be entitled to payment in the sum of R 1 429 584.00 (one million four hundred and twenty-nine thousand five hundred and eighty-four Rand). The increase which the applicant would have been afforded were she to be in the employ of the respondent as at 1 March 2016 amounts to 6.7% (six-point seven percent).

#### Evidence led

- [15] I am indebted to Mr Nel, counsel for the Applicant, for an excellent outline of the summary of evidence led by both parties during trial. The summary, which I shall adopt, includes quotations from the transcribed record. Mr Haslop, counsel for the Respondent, similarly agreed with that summary.

#### Applicant's version

- [16] In support of her version, the applicant ,Ms Roshini Hiralal, was the only witness called for the applicant's case. She testified that in March 2015 she was asked to take over the total responsibilities and accountabilities for the business employment manager in an acting position, being previously appointed in the position of business employment co-ordinator, i.e. the position reporting directly to the business employment manager. She was earmarked to take over the position upon the retirement of Mr Chettiar through a process of succession planning. Mr Chettiar and the applicant

during the preceding year, around October to December 2014 already discussed the merger of the positions held by him and her.

- [17] The respondent was to have met with the applicant on 21 April 2015 in order to assess her efficiency within the position but due to an explosion at the respondent's plant on 17 April 2015 the meeting never occurred and matters remained in limbo. Mr Youldon thereafter met with the applicant during June where he indicated that the position was no longer being considered but no indication could be given to the applicant as to what her future would entail and the applicant continued doing the work she was doing in her acting role.
- [18] The applicant had a further meeting with Mr Youldon in October 2015 which meeting was preceded by the permanent appointment of a fellow employee who was also in an acting position. The appointment followed without it being advertised and the applicant raised issue with the appointment and unhappiness with the uncertainty pertaining to her position. The applicant however stressed to Mr Youldon that despite being a preferred candidate she did not expect any favours and Mr Youldon confirmed that he would follow a correct procedure and stressed that the applicant was in an unenviable position having been left in limbo for an extended period of time.
- [19] During November 2015 Mr Sandile Nxumalo the third person who was also in an acting position was also permanently employed and the applicant again approached Mr Youldon and expressed her need for clarity going into the New Year. When the applicant could not obtain a definitive answer the applicant inquired into the possibility of a "stretch" or increase on her remuneration. As the applicant was at the highest remuneration scale applicable to her level within the respondent, the applicant enquired whether she could be placed at a slightly higher level, that is, 4A level. Mr Youldon indicated that the respondent is no longer utilising the 4A level and the applicant took issue with the said statement as she contended that Mr

Donovan Govender was just appointed to the said level. Mr Youldon indicated that he would revert to the applicant;

[20] Mr Youldon and the applicant again met in January 2016 in order to discuss the applicant's deliverables associated with the combined position and when the applicant again sought certainty as to her position Mr Youldon could still not provide any clarity and stated that '*... it's a sad, sad situation and nobody would like to be you. I fully understand where you come from and I'm hoping to resolve it but at this stage I don't have an answer for you...*'. Mr Youldon and the applicant had a similar discussion on 15 February 2016 but again without any certainty provided and the applicant directly subsequent to the meeting sent an email to Mr Youldon seeking a definitive answer; alluding that if she was not good enough for the said position, she was willing to revert to her previous position. On the following day Mr Youldon contacted the applicant and provided her with three (3) pre-conditions prior to the respondent being able to consider the appointment of the applicant to a 4A level.

[21] The applicant considered the three (3) pre-conditions to be unreasonable and she handed in her resignation letter. She elected to resign as she could not deal with the stress any longer and did not want to go through a grievance process which she saw merely as a repetition of the process she has been going through. At the time of her resignation the applicant just took out the student loan through the respondent for her daughter and had not been looking for alternative employment. Mr Youldon contacted the applicant approximately six hours after receipt of the applicant's letter of resignation that is, on 22 February 2016, and stated to the applicant that he spoke to Mr Wielers and that Mr Wielers suggested that a "promotion" be offered to the applicant. Mr Youldon in turn advised Wielers that he was of the view that it was no longer about the "promotion" anymore. Something which the applicant in evidence confirmed; stating that she felt that the trust relationship had been destroyed and that she just wanted to leave. On 23 February 2016,



the respondent advised the applicant that it was willing to afford the applicant a two weeks resignation notice period as requested by her.

- [22] On 24 February 2016 Mr Wielers' secretary asked the applicant to meet with Mr Wielers and they met later on the day where Mr Wielers indicated that he wanted to understand how a member of the respondent's family could, after twenty-seven years, just want to leave. The applicant repeated the history which gave rise to her resignation and Mr Wielers asked if she would prefer a different line manager to which the applicant responded that the issue was not with her line manager but with the failure to make a decision. The meeting was ended off with Mr Wielers asking the applicant to reconsider and denoting concern with the upcoming audit, which fell partly under the scope of the applicant's duties.
- [23] Shortly thereafter Mr Chettiar met with the applicant and indicated to the applicant that Mr Wielers was willing to appoint the applicant to a level 3, to which the applicant stated that it was too late for that. Mr Chettiar however asked the applicant to meet again with Mr Wielers. The applicant again met with Mr Wielers on 25 February 2016 and commenced by stating that she has heard that Mr Wielers was willing to place her on a level 3 but that she was not willing to accept the appointment as it would appear to have been the result of her resignation and not in consequence of her performance. Mr Wielers then enquired from the applicant if she was so aggrieved that she was willing to walk away and the applicant confirmed the same. The discussion then turned towards the audit and Mr Wielers expressed concern regarding the audit as the applicant was responsible for it. Mr Wielers asked if she was willing to stay on to complete the audit and the applicant stated that she had twenty-seven years' service with the respondent and was 53 years old and would be open to a possible package. The applicant stated to Mr Wielers that he could think about her proposal. Mr Wielers then stated that '*... , I'm the only site manager and I am happy to do that.*' He put his hand out and said: '*let's shake on this agreement.*' So, and he repeated, '*you will stay to help us with the audit, to see it through and at the end of*

*April I will pay out a severance package.” And he said “there’s just one thing” and I asked “what is that.” He said “there’s just one thing I want from you and I’m pretty confident I will get it” and I said “what is it”. He says “I want you for the two months that you are here, I want you to find it in your heart to, to have, have a change of um, mind and I would like you to consider, reconsider...”.*

- [24] Directly after the meeting the applicant informed her sub-ordinate to stop stressing as she would be at the respondent for the audit. The following morning the applicant met with Mr Youldon who confirmed that he spoke to Mr Wielers and that Mr Wielers had agreed to provide the applicant with a severance package.<sup>2</sup> The applicant requested Mr Youldon to confirm the severance package in writing and to take her post-retirement medical aid into account. Mr Youldon offered that the applicant was to meet with Mr Andrew McKay to go through the calculations and the applicant stated that it would not be necessary. The applicant surmised the purpose of the request to be.

*‘All he needed to do was to send me the calculation. Basically, it was formulating the arrangement Ton and I had. That is what the offer was. Not the offer about tabulating, basically confirming this is the agreement, this is what it’s going to work out to come end of April.’*

- [25] The applicant bore knowledge of four (4) individuals within the respondent who has been afforded VSPs as per the policy.<sup>3</sup> On 26 February 2016, the applicant sent an email reminder to Mr Youldon and still later Mr Youldon reverted to the applicant informing her that he wanted to send her an email but Mr Wielers was out of the country and the human resources manager was not available. Mr Youldon requested to meet with the applicant on 29 February 2016. The meeting between Mr Youldon, Ms Khuzwayo and the applicant took place on 29 February 2016 around 12h30 and the contents of

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<sup>2</sup> The applicant understood this to refer to a VSP.

<sup>3</sup> Reflected on pages 18 and 19 of the combined bundle.

the meeting are surmised in the following terms in the testimony of the applicant:

‘[RODNEY stated that] ...we’re here to convince you to stay and uh, the uh, our first prize is to get you to stay and uh, should you stay uh, we would uh, and if you close off this three items that we spoke about the other day we will give you a job with 4A and for your help on delivering a successful audit uh, we will give you a two to three months uh, bonus. So, and I turned to him and I said but that’s not, that’s not what we spoke about. Sorry, that’s not what uh, what Ton and I agreed to. Ms KHUZWAYO said no, what Ton um, what Ton meant was uh, Ton was saying he would give you a bonus pay out on successful completion of the audit. He did not mean a severance package. So, I looked at Rodney and I said but Rodney, when I came to you on Friday morning your words to me was that Ton told you that he was going to give me a VSP as per policy. And now you are telling me something completely different. And he uh, Rodney did not look at me, he sat looking at the documents that was put in front of him and he said no, that’s what Ton meant...’

[26] The meeting was ended with the applicant requesting the respondent to process her resignation paperwork. The applicant shortly thereafter at 13h57 settled and sent an email to Mr Wielers, which read:

‘... I agreed to stay on to see the site through the audit till the end of April, and thereafter I would get a severance package as per policy. To this we had an agreement and we shook hands on it. Today Rodney and Khuzwayo met with me to table the following:

1. You (Ton) agreed to give me a bonus payout for 2/3 months should I stay till end April.

2. Or should I choose to stay on permanently a jg4A would take place if I delivered the SITEms actions and see the audit through.

This was not the agreement that you and I had, so unfortunately I will need to terminate my services based on my letter dated 17th February 2016.'

- [27] The applicant remained at her office till approximately 16h30 in the hope of receiving a response from Mr Wielers as Mr Wielers read her email at 14h09, but received no response and then left the employ of the respondent.

#### The Respondent's version

- [28] The respondent called and led the evidence of 3 witnesses. These are Messrs Rodney Youldon, Ton Wielers and Andrew McKay. Their evidence follows.

##### 1. Mr Rodney Youldon

- [29] Mr Youldon was the commercial manager at the respondent and the immediate line manager of the applicant at times material to this matter and when she tendered her resignation on 22 February 2016. Mr Youldon was not happy with the resignation of the applicant but it was not totally unexpected as he was aware of the applicant's 'unhappiness'. After receipt of her resignation he discussed it with Mr Wielers who in turn asked Mr Youldon to attempt to persuade the applicant to withdraw her resignation. Mr Youldon met with the applicant on 23 February 2016 but was unable to persuade the applicant to withdraw her resignation as she indicated that she would not even look at a promotion to job grade 3 at that point in time anymore.

[30] Mr Youldon reverted to Mr Wielers to this effect when Mr Wielers in turn, indicated that he wanted to speak to the applicant and that took place on 24 February 2016. After the said meeting Mr Wielers informed Mr Youldon that during the meeting he enquired from the applicant as to what it would take for the applicant to withdraw her resignation. Another meeting ensued between the applicant and Mr Wielers on 25 February 2016 where after Mr Wielers telephoned Mr Youldon informing him that:

‘... he had, he had met again with Roshini and they had, they had come to some agreement um, for, for encouraging her to stay on at SAPREF. That she had agreed she would stay on till the end of April um, for, for a package. Some form of package which um, I was to explore...’.

[31] The telephone call was approximately 15 minutes and centred on the applicant, though different options for packages were not discussed during the call. Mr Youldon understood the feedback from Mr Wielers to be that ‘... *they had some agreement in principle. Um, I was concerned that uh, that this agreement wasn’t signed and sealed*’ and he ‘... *recall Ton did say what he was offering needed to be within policy*’. Mr Youldon understood policy to mean the VSP policy and could not recall any other policy which could be relevant. Mr Youldon’s

‘... personal feeling was one of surprise. I was surprised that they had come some agreement. Um, that, that he had managed to persuade Roshini to take [Unclear], that she had agreed to stay on to the end of April, which is what I understood. Um, I was pleased, I was, I was somewhat relieved that I would have that support through the period of the audit because that was a personal concern of mine. How would, how would I manage this company through the audit, so I was relieved and I was happy at that stage for that same reasons’.

[32] Mr Youldon had a short meeting with the applicant on 26 February 2017 where he stated that he understood that Mr Wielers and the applicant had a

meeting and that the applicant agreed to stay on till the end of April 2016 and that there was a package to be determined. The applicant further had some queries regarding post-retirement medical aid and Mr Youldon thereafter asked Mr McKay to do some calculations around the VSP. Mr Youldon was not one hundred percent sure as to why he was looking at VSP and recorded that:

‘It may have been some words that Ton had used, it may have been my own presumption that when you talk about a package this is a, the package which may be considered. The context for that uh, is that I had previously used a similar package for another member of my staff that we had made an offer to. Um, so maybe that was in my mind’.

- [33] Mr Youldon received the calculations back from Mr McKay on the same day and noted with concern that the amounts were very large and as such contacted Mr Wielers and asked him if he had the said ‘numbers’ in mind and Mr Wielers in turn indicated that he did not. During the course of the day Mr Youldon and Ms Khuzwayo looked at alternative packages which could be offered and Mr Youldon contacted the applicant and indicated to her that he would not be able to meet with her on the day and that he would meet with her on Monday 29 February 2016. Mr Youldon and Ms Khuzwayo met with the applicant on 29 February 2016 and conveyed to her an offer which was aimed at retaining the applicant and which would provide her with a three (3) months’ bonus upon completion of the audit as well as an immediate ‘promotion’ to a job level 4A.
- [34] Mr Youldon held the personal view that it was unlikely that the applicant would have accepted the offer. The applicant was upset and informed Mr Youldon that the offer was not the agreement reached with Mr Wielers and that as such she was no longer willing to stay on with the respondent.

## 2. Mr Ton Wielers

[35] Mr Wielers is the managing director of the respondent employed since February 2014. He was told of the applicant's resignation by Mr Youldon during the week of 22 February 2016 and was surprised and shocked to learn of the applicant's resignation. The initial discussion between Mr Wielers and the applicant centred on an attempt to ascertain why the applicant resigned. Mr Wielers wanted to know what it would take for the applicant to stay on with the respondent but the meeting ended without a resolution. During the second meeting on 25 February 2016, Mr Wielers and the applicant discussed the possible promotion of the applicant and the possibility of creating space around the audit, being options considered for further discussion during that meeting. Mr Wielers indicated that it was possible that the applicant might have mentioned the possible severance during the meeting. He contended that a financial incentive to finalise the audit was discussed but did not discuss severance from his side and the agreement was for the parties to explore what it would take for the applicant to remain with the respondent. He was not aware of the written VSP policy at the time of the meeting but, was aware of the existence of a VSP policy within the respondent and has previously offered VSP to other employees of the respondent.

[36] Mr Wielers had a telephone discussion with Mr Youldon later on that day, after his meeting with the applicant, and indicated to Mr Youldon that the applicant has indicated that she would be open to options regarding staying on. Mr Youldon sought some specifics regarding a possible offer and asked if the respondent should look into severance and Mr Wielers agreed that Mr Youldon was to look at severance as an option. The offer eventually made to the applicant was of two to three months' salary on successful completion of the audit and a promotion. Mr Wielers conceded that he did not respond to the email send to him by the applicant on 29 February 2016.

### 3. Mr Andrew McKay

[37] Mr McKay was employed as the respondent's human resources operations manager and has been with the respondent for 31 years. He was not aware of any instance where a person has resigned and received a severance payment in terms of the VSP as the VSP is applied to situations where employees are still in the employ of the respondent at the time of the VSP offer. The VSP policy has not been used in relation to all retrenchments. The VSP was implemented by Mr McKay as a staff retention method, providing that staff be employed at the respondent as at 1 March of any specific year. The document denoting the VPP was part of an approved board presentation but was never introduced as a physical policy. The qualification and value of the VPP was determined on the performance of the respondent and the employee for the preceding years.

#### Submissions of the parties.

[38] Mr Nel appearing for the applicant contended that probabilities favoured the acceptance of the version of the applicant. In terms of that version, the outcome of the two meetings held by the applicant and Mr Wielers was that an agreement was reached in terms of which she would continue working for the respondent until 30 April 2016 and would consequently receive two months' salary, leave pay for that two months, severance pay in terms of the VSP and payment in terms of the VPP. The respondent would remain entitled to the repayment of the study loan. The respondent breached the terms of that agreement and had to pay the damages consequent thereupon.

[39] Mr Haslop appearing for the respondent argued that, looking at the probabilities more closely, the obvious improbability in the applicant's version was that, according to her, Mr Wielers offered her almost R1.5 million if she left in circumstances where it was common cause that the respondent reiterating the fact that it hoped she would change her mind and stay. It was much more probable that the respondent intended to pay her a bonus, which was the offer she was waiting to consider over the weekend, in return for



staying until the end of the audit and was hoping that, by buying this extra time, it would be able to change her mind completely and persuade her to withdraw her resignation altogether.

- [40] He contended that the agreement reached by the parties was of the payment of the severance pay in terms of the BCEA. He said that the VPS was a specific provision applicable only for a limited period as stated in the VSP document, that the terms of the VSP were unknown to Mr Wielers at the time and so he could not agree to something he was ignorant of. According to this submission, the calculation of the applicant of her damages in the letter of demand conformed to the BCEA calculation. He said that for the applicant to qualify for the variable pay, she had to be, but was not an employee of the respondent as on 1 March 2016. Accordingly the main claim had to be dismissed and the counter-claim sustained.

#### Evaluation

- [41] Both parties are agreed that the evidence led during the trial of this matter is constituted by irreconcilable versions and that the well-known technique to be employed in resolving such factual dispute is one outlined in *Stellenbosch Farmers Winery v Martell et cie*.<sup>4</sup> When it comes to the closer look at the decisive evidence led, I am not convinced that the evidence led is mutually destructive.
- [42] When the applicant and Mr Wielers shook hands on the way forward, both agree in their evidence that the respondent was to pay the applicant **severance package**<sup>5</sup> (my emphasis) when she departed at the end of April 2016. Nowhere in her evidence does the applicant allege that Mr Wielers made any specific reference to the VSP. To this extent the parties' evidence is accordingly not contradictory.

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<sup>4</sup> 2003 (1) SA 11 (SCA).

<sup>5</sup> Page 20 lines 16 – 21 and page 41 lines 9 – 10 of the transcript.

- [43] The real dispute between the parties is about what each understood by the **severance package**. This is a matter of interpretation more than it is about a dispute of facts. The applicant understood the term to refer to a **severance package** as envisaged in the VSP document of 2000. Mr Wielers was not yet specific of the meaning but aligned himself along a **severance package** as in terms of the BCEA by rejecting a calculation made in line with the VSP. Mr Youldon, having spoken to the applicant and to Mr Wielers realised this problem between the two.
- [44] The applicant bears the onus to prove her version on a balance of probabilities. She has admitted her indebtedness to the respondent for a study loan which constitutes the cause of action on the counter-claim.
- [45] When the applicant testified in chief she did not say anything about a SAPREF voluntary package, which is significantly different from BCEA package. Nor did she say it was to be a week per year or "VSP as per policy" either. Under cross-examination she said "a severance package". She alleged that, "There is only one severance package at SAPREF". That is not true. The uncontradicted evidence of Mr McKay was that, when SAPREF retrenched employees, it paid their severance packages according to the BCEA. The applicant conceded that the BCEA package requirement is also "a severance package", which it clearly is. The applicant's evidence was that she told Mr Wielers that she would be "open to a possible package". A severance package without details surely simply means the payment of money when one leaves employment. In the absence of clear terms of the agreement of the parties, it cannot be said that they reached an agreement or were of the same mind on what was to be paid to the applicant upon her working until the end of April 2016.
- [46] This was a material term of the agreement. It must be remembered that this was an employee who had taken a decision to walk away from her employment with nothing, had she not been approached to work for an

extended period. The request for her to stay longer, if successful, would have been a new intervening act to her resignation, as the clock for her departure was already ticking. It was not successful and she left in terms of her resignation notice.

#### The VSP document

- [47] On 11 July 2000 the then Managing Director (MD) of the respondent, Mr Craig Glashan released, for the information of all the respondent's staff, a letter headed: "General letter of invitation for voluntary separation." The letter served as an open invitation to staff to apply for a voluntary separation in that year, that is, 2000. The aim was to maintain certain work standards by reducing staff compliment in specific departments. A formal invitation letter with a reply slip was issued to identify staff, who if interested in taking up voluntary separation, would indicate such in the reply slip on or before 30 September 2000. Should it be operationally feasible to release the applicant employee, the company would discuss the matter with that employee and then address a formal letter directly to that employee, setting out the date of separation and details of separation terms. Receipt of the letter signed by the Departmental Head was the only indication of acceptance to the voluntary separation. Still, the applicant employee had to formally accept the terms of separation.
- [48] It remained common cause between the parties that none of the prescribed consecutive steps were followed in this matter by the applicant and the company, except a discussion and some purported verbal agreement. Clearly the VSP was designed for a specific period and purpose. It was conceded by the respondent that certain employees were accorded the VSP sometime after 30 September 2000 but that their cases were different from that of the applicant. None had resigned. It was never suggested by the applicant that she fell into a category similarly to that of the four or any employee in respect of whom the VSP was applied. A reliance on the

severance package as meaning the VSP of 2000 had clearly therefore to be based on a specific agreement by the parties, which is not the case here. Mr Wielers said that he had never seen the September 2000 document, nor did he have an idea how much a severance package might be if based on the September 2000 document.

#### The variable pay package (VPP)

- [49] The applicant has also claimed payment in terms of the variable pay package in the sum of R56 993.00. Here, the annual performance results are used together with individual performance information for the purpose of calculating and paying individual performance bonuses at senior levels. This additional payment is made in March of each year. It has a specific formula used to calculate payment. Bonuses are to be paid prorated for individual employees who have part of a year's service and who are in service as on 1 March of the year.
- [50] The applicant was initially not clear on whether she was aware of the 1 March requirement in relation to the payment of variable pay. She ultimately admitted under cross-examination that Mr Youldon told her that leaving before 1 March would disqualify her on this claim. Therefore, she was aware of the requirement but was not prepared to say so when asked by her own representative during the trial. It was only when it was put to her that Mr Youldon had specifically reminded her of the requirement that she conceded it. In addition, the parties agreed, in the pre-trial minute, that, "*should the applicant be incapable of being persuaded to remain in the respondent's employ then the question of her remaining for purposes of delivering a timeous and successful audit in return for an extra payment was discussed*" at the second meeting between the applicant and Mr Wielers. In her evidence, the applicant denied that a successful audit was discussed.

[51] Mr McKay gave evidence that, in order to qualify for the variable pay bonus, an employee who was not being retrenched was obliged to be in service on 1 March of a year. He indicated that one of the purposes of variable pay was to encourage the retention of employees, in other words to encourage employees to continue their employment with the respondent. There is nothing unusual about this concept. A number of employers require employees to be in service when bonuses are paid out. It was the evidence of the applicant that payment was normally made later in March. The respondent merely requires the employee to be employed by it on 1 March of a year. The condition about having to be in employment on 1 March so as to qualify has been well communicated and consistently applied.

[52] Here, the issue is about whether there is a contractual obligation on the respondent to pay the variable pay bonus. The applicant's representative has argued about the reasonableness of the policy, but that is not what this is about. This is not a debate on reasonableness. Nor is it an unfair labour practice dispute concerning benefits. It's about whether or not the applicant qualifies for the bonus.

[53] The applicant left the employment of the respondent on 29 February 2016 and was therefore no longer its employee on 1 March 2016. She therefore did not meet the set requirements for the variable pay.

[54] These are civil court proceedings therefore costs in this matter shall follow the results.

Order:

1. The claim of the applicant is dismissed.

2. The counter claim of the respondent to the amount of R120 434, 30 is upheld. (No evidence was led on how this payment was to be made.)
3. The applicant is ordered to pay the costs hereof.

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**Cele J.**

**Judge of the Labour Court of South Africa.**

**APPEARANCES:**

1. For the Applicant: Mr A J Nel  
Instructed by Dean Caro and Associates
2. For the Respondent: Mr Haslop  
Instructed by Woodhead Bigby Incorporate.