



IN THE LABOUR COURT OF SOUTH AFRICA

Case no: **D306/19**

Not Reportable

In the matter between:

SIPHO WILSON DLONGOLO

Applicant

And

THE UNIVERSITY OF ZULULAND

Respondent

Heard: 21 January 2022

Delivered: 01 June 2023

JUDGMENT

GOVENDER AJ

INTRODUCTION

[1] The applicant launched a claim in terms of section 77(3) of the Basic Conditions of Employment Act, 1977 as amended ("BCEA"), wherein he claims that a valid and binding agreement was reached between him and the respondent regarding the "*pension contribution benefit compensation*" that he would receive as a result of his early retirement.

[2] The background to this agreement is as follows: the applicant held the post of Director: Physical Planning in the employment of the Respondent. In and around 2017 he began receiving death threats relating to his implementation of the insourcing process at the University of Zululand ("the University"). From August 2017 the applicant was placed on sick leave due to psychological harm suffered as a result of these death threats.

[3] The applicant testified that he was contacted by the Vice Chancellor of the respondent seeking to discuss ways in which this issue could be resolved. The respondent could no longer afford the Applicant's leaves of absence which were impacting on the functioning of that particular department. The applicant held a meeting with the Vice Chancellor and respondent's Executive Director: Human Resources, Thabo Ngcobo (Ngcobo). The Applicant proposed a formal request that the Respondent assist him in retiring early since he was 57 years old at the time and he was fearful of the death threats which severely impacted on his life. One of the options proposed by the Applicant was that he be compensated for 03 years of service up to age of 60.

[4] Following all the discussions between the applicant and respondent's representatives' other options were counter-proposed to the Applicant.

[5] Ngcobo advised the applicant that the University could not afford to buy out the applicant's remaining years of service up to the age of 60, which according to the University's calculation, amounted to R1 614 644.66 due to the University's budgetary constraints.

[6] The applicant contended that Ngcobo instead offered that the respondent would compensate the Applicant the amount of R824 000.00 being the number of

penalties that the applicant would suffer as a result of him taking early retirement. The Applicant had the option of a full withdrawal from the Pension Fund, alternatively a monthly pension amount, alternatively the Applicant could be paid a third of his pension benefit and a reduced monthly pension.

[7] At paragraph 12 of response to the statement of claim, the Respondent records that:

3.1 On 08 December meeting, the respondent's Executive Director: Human Resources, Thabo Ngcobo (Ngcobo) confirmed that should the Applicant retire as 31 December 2017 with penaltiesamounting to R 824 700-00 (eight hundred and twenty four thousand rand), which respondent will consider funding as a contribution towards the Applicant's retirement¹.

3.2 On 14 December 2017, Ngcobo recorded in an email following a meeting that if the Applicant elected early retirement, the Respondent would compensate the Applicant for the penalties suffered as a result thereof.²

[8] The applicant contends, at paragraph 13 of the statement of claim, that on or about December 2017 the applicant duly accepted the respondent's first offer in writing, the terms of which were as follows:

8.1 the applicant would take early retirement from employment with effect from 31st December 2017.

8.2 that the respondent was to pay to the applicant a full withdrawal of his pension benefit in the amount of R578 225.34 comprising of the applicant's compensation benefit and leave days; and

¹ Page 12 Index to Pleadings para 7.1.2

² Page 13 Index to the Pleadings para 7.3.1

8.3 the agreed amount is to be paid on or before the 31st of December 2017³.

[9] The respondent contends that whilst it was agreed that the applicant would be compensated the pension penalty, this meant that the penalties to be paid would only be paid to the pension fund (because of the early retirement) and not paid to the Applicant directly. Further it would only be paid, in the event that the Applicant did not take an early retirement with full withdrawal of his pension benefits. Further they contend that since the Applicant elected to withdraw from the pension fund instead of taking early retirement, no penalties were payable as he was no longer a member of the fund. Further the agreement to “compensate” the Applicant by contributing the penalties was in order for the Applicant to receive his full pensionable retirement amount.

CHRONOLOGICAL SEQUENCE OF EVENTS

[10] I will briefly set down the pertinent events and the time limits:

10.1 26 November 2017 the respondent's Vice Chancellor contacted the applicant to address his continued absence from work.

10.2 29 November 2017, a meeting took place between the applicant, respondent's Vice Chancellor, and its Executor Director: Human Resources (Ngcobo) who was a witness to discuss the applicant's continued absence from work.

10.3 8 December 2017 a further meeting took place between the applicant and Ngcobo where the applicant was presented with two options, namely that of a withdrawal from the pension fund and the option of early retirement.

³ Page 5 Index to Pleadings para 13

10.4 11 December 2017 the applicant requested a financial breakdown of the respondent's proposal for the retirement benefit as well as the respondent's policy regarding employment benefits.

10.5 14 December 2017 Ngcobo confirmed the options available to the applicant via email.

10.6 15 December 2017 the applicant, his Financial Advisor, Ibgal Khan (Khan) & Ngcobo met in Ngcobo's office to discuss his email dated 14 December 2017.

10.7 18 December 2017 the applicant elected to withdraw his funds per email from the respondent's pension fund and completed Allan Gray forms to transfer his pension fund withdrawal value to the preservation fund.

10.8 20 December 2017 the respondent advised the applicant by way of email that the terms proposed by the respondent for the applicant's early retirement with compensation of penalties were no longer valid.

10.9 4 January 2018 the respondent resent the email to the applicant that had been sent prior on 20 December 2017.

10.10 7 January 2018 the applicant indicated that the early retirement option was his preference with the understanding that the penalties are still going to be statutorily affected.

10.11 8 January 2018 the applicant confirmed via email to the respondent that his option preference remained withdrawal.

10.12 22 January 2018, after discussion with the respondent's Remuneration and Benefits Manager, Constant Ngxito, also witness for the respondent, the applicant again confirmed that his option remains renewal.

10.13 24 January 2018 the applicant completed his withdrawal forms confirming that he was submitting a withdrawal claim from the respondent's pension fund and not a retirement claim.

10.14 31 January 2018 the applicant completed the clearance from as requested by the respondent in the email dated 8 January 2018 and subject to the respondent's explanation to the applicant that he had opted to withdraw from the pension fund with no compensation penalties.

10.15 1 February 2018 the respondent paid the applicant the leave pays due to him calculated on 90 days accumulated leave.

10.16 19 November 2018 the applicant's attorneys submitted to the respondent a letter of demand for the payment of R1 614 644.63 (one million six hundred and fourteen thousand, six hundred and forty-four rand and sixty-three cents).

10.17 29 November 2018 the respondent denied liability.

10.18 4 February 2019 the applicant's attorneys submitted to the respondent a letter of demand for payment of the R578 225.34 (five hundred and seventy-eight thousand two hundred and twenty-five rand and thirty-four cents). The applicant subsequently instituted proceedings in this Honourable Court claiming that amount.

[11] Clearly there was an agreement between the parties. The issues here seem to be what was in fact agreed to by the parties. The main dispute in a nutshell, appears therefore to be whether or not there was agreement between the parties that the Respondent would compensate the Applicant for taking an early retirement irrespective of the type of exit chosen from the pension fund, or whether the offer of paying the "pension fund penalties" was only applicable to the scenario where the

Applicant did not withdraw in full his pension fund benefits and that in scenario the amount would be paid to the pension fund and not the Applicant.

[12] **ISSUES FOR DETERMINATION**

12.1 What was the precise agreement between the parties in respect of the Applicant's early retirement, in other words what was the terms the agreement.

12.2 Is this agreement between the parties a valid and binding contract.

12.3 Whether the respondent breached the agreement in failing or refusing to pay the Applicant the amount of R 578 225 -34.

12.4 Whether the Applicant is entitled to the relief claimed.

THE LAW

[13] It is trite that the onus is on the applicant to prove that a valid and binding agreement was concluded between the parties and that there was a breach of that an agreement.

[14] The basis of a contract is the meeting of minds or the mutual understanding between two or more persons with the subjective intention to create an obligation, or obligations, between them. The essentialia is that there must be an offer and acceptance of that offer. The agreement need not be reduced to writing for its validity unless there is sufficient proof that the parties intended that a written document should embody the agreement for obligations to arise or the agreement is required by law to be in writing. Hence, the formation and conclusion of a contract is the conscious agreement between parties, through one making an offer and the other accepting the offer. Our jurisprudence recognises three theories for the formation of a contract, viz *the will*, *the declaration* and *the doctrine of quasi-mutual assent*.

[15] Quasi-mutual assent is also known as the reliance theory with its origins from English law and was best formulated in **Freeman v Cooke**.⁴ This doctrine was popularised after the following pronouncement by Blackburne J in the case of **Smith v Hughes**⁵:

"I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not ad idem, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in Freeman v Cooke. If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."⁹ my emphasis)

[16] The test for the application of the quasi-mutual assent has been clearly expressed by Majiedt JA, as he then was, in **Van Huyssteen** as formulated in **Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis**⁶

"[22] In Sonap this court, in dealing with the law relating to unilateral mistake, confirmed that as a general rule, the law concerns itself with the external manifestations and not the workings of the minds of the parties to a contract. In the case of alleged dissensus, the law has regard to other considerations. In such cases, resort must be had to the reliance theory. in order to determine whether a contract has come into being. This court stated as follows:

... (T)he decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? ..., To answer this question, a three-fold enquiry is. usually necessary, namely, firstly, was there a misrepresentation.

⁴ (1848)2 Ex 654

⁵ (1871) LR 6 QB 597 at 607

⁶ 1992 (3) SA 234 (A)

as to one party's intention, secondly who made that.

representation: and thirdly, was the other party misled thereby? ...

The last question postulates two possibilities: Was he actually.

misled and would a reasonably man have been misled? "

[17] Intention is a subjective element. It often happens that a party may have a different intention from the other contracting party but fails to clearly communicate this intention. The essence of the doctrine of quasi mutual assent is to protect a party who would not be able to dispute the other contracting party's denial of their intention, where there is dissensus and the latter party acted contrary to his/her intention.

ANALYSIS

[18] I am not going to repeat verbatim the evidence of the witnesses as the same is well summarised in the Heads of Argument.

[19] Briefly, the Applicant testified on his behalf and led the further evidence of a witness Khan, who was his financial advisor and who attended a meeting with the Applicant and Ngcobo on 15 December 2017.

[20] The Applicant evidence was that due the circumstances (death threats and his sickness) he had decided to retire at age 60 and age 65 as earlier planned and therefore requested the University to pay him for the three years between age 57 and age 60 and buy the time left and compensate him for 60 years retirement benefit. This was reduced also in email dated the 11 December 2017. He confirmed he received an email from Ngcobo dated 14 December 2017, wherein it was recorded that if he retires with penalties, the penalties will amount to the R824 700-00, and the university would consider this as contribution toward his retirement.⁷ The contents of the email were confirmed by Ngcobo.

[21] It was further recorded in the above email that:

⁷ Page 6 Bundle of Documents

“...summary, at the end of the meeting, this was the understanding:

That you will retire as at 31 December 2017 with penalties amounting to R824 700-00

That the university will compensate you (my emphasis) for the penalties suffered because of early retirement

.....

It is your option how you receive the retirement benefits as reflected on the quotationto you i.e

Full withdrawal

Or

Monthly pension without commuting a third

Or

Commuting a third”

[22] It was further recorded in the email that “My I also point out to you that the undertaking by the university to compensate you for the penalties suffered is not standard practice but is done to reach an amicable solution to your predicament (your circumstances) that presents.”

[23] The applicant’s evidence was that after consulting with Khan and Ngcobo he duly accepted the respondent’s first offer in writing, which he confirmed via email on 18 December 2017. The terms of which were as follows:

- a) the applicant would take early retirement from employment with effect from 31st December 2017;
- b) that the respondent was to pay to the applicant a full withdrawal of his pension benefit in the amount of R578 225.34 comprising of the applicant’s compensation benefit and leave days; and

c) the agreed amount is to be paid on or before the 31st of December 2017.”

[24] The applicant testified that he duly served his last day of employment on the 31st of December as per the agreement and this appears common cause between the parties.

[25] He confirmed he received the email dated 20 December 2017 only in Jan 2018 and by the he already taken his retirement effective 31 December 2017. He testified that he maintained to Ngcobo in January 2018 that his decision remains as per his email 18 December 2017. He disputed the Respondent's version that the penalties amount was to be paid by to the pension fund and not him. He also denied that he would only be entitled to the benefit as proposed by the university only if he elected not to withdraw his pension fund benefit in full.

[26] Khan confirmed in his evidence that the meeting took place with Ngcobo. He testified that at the end of the meeting it was decided that the R 5 100 000-00 (five million and one hundred thousand rand) will be transferred out of the fund and the university would pay the Applicant approximately R 552 000-00. Further he told Ngcobo he will prepare the forms and send it to Ngcobo on Monday (18 December 2017). On the Monday he sent the Allen Gray forms to Ngcobo.

[26] Ngcobo testified for the respondent and a further witness Ngxito, the director: remuneration and benefits also testified. Her evidence pertained to documents she handed to the Applicant in respect of actuarial calculations and his discussions with the Applicant regarding his withdrawal of his pension fund benefit from the fund. Her evidence was she explained to him that by withdrawing from the fund he was not accepting retirement but was resigning. Further that he was not entitled to UIF benefits if he withdraws as it was technically a resignation.

[27] Ngcobo confirmed the contents of his emails. Further that there were discussions to resolve the issue of the Applicant. However, the compensation to be paid to the applicant as agreed to by himself and the applicant was only to be paid if

the applicant had exercised the option of a full withdrawal. He confirmed that after his meeting with Khan and the Applicant there was the understanding that the Applicant could respond by 18 December 2017. Further he testified that the Applicant did not suffer because he withdrew his pension, so penalties incurred. He further confirmed that he tried to explain to the Applicant that compensation will not work if he withdrew his pension in full only after the Applicant confirmed that he is withdrawing his pension in full. Further he confirms that his email did not inform the Applicant that he can reconsider and change his mind only that the “compensation” was no longer applicable. He also conceded that the arrangement between the Applicant and the university was separate from the relationship with Applicant and the pension fund.

[28] The respondent submitted in its heads of argument, that the rules regarding offer and acceptance in terms of the Law of Contract, must be understood in the light of their underlying premise, namely that a contract entails the formation of a common intention by the parties through an exchange of declarations which express their respective intentions. One of these requirements in respect of consensus and offer and acceptance, are facts from which consensus may be inferred. The common law requirements for a valid acceptance of an offer are:

- a. the offer must be clear, unequivocal and unambiguous;
- b. the acceptance must correspond with the offer;
- c. the acceptance must be made in the mode prescribed with the offer;
- d. the offeree must communicate acceptance of the offer to the offeror.

[29] The respondent also contends that the Applicant cannot rely on the principles of *quasi mutual assent* as there was no meeting of minds according to the evidence as his and Khan’s conduct was not reasonable. This contention is based on the assertions by the respondent that Khan failed to properly explore the understanding of the respondent’s proposal.

[30] It is trite that in order to decide whether a contract exists, or an agreement is binding on the parties, one looks first for the true agreement of two or more parties and because such agreement can only be revealed by external manifestations one's approach of necessity must generally be objective⁸. The doctrine of quasi mutual assent imports an objective approach to the conclusion of a contract. The critical question to ask is whether the party whose actual intention did not conform to the declared intention lead the other party to, as a reasonable man, to believe that his declared intention represented his actual intention.⁹

[31] In *Pillay V Shaik*, (above) the SCA said that the answer to the above question necessitates a threefold enquiry, namely: firstly, was there a misrepresentation as to the intention of the one of the parties; secondly who made that representation; and thirdly was the other party misled thereby? The last question, the court said should be divided into two separate questions, namely: firstly, was the other party misled; and secondly, would a reasonable man (in his position) have been misled.

[32] I disagree with the respondent that the principle of quasi-mutual assent finds no application herein. In fact, I am of the view that the facts of this case call for an application of this doctrine.

[33] It is common cause that the university wanted a solution to the Applicant's prolonged leave of absence, the root cause of which was the death threats received by him, resulting in him being unwell. On a careful scrutiny of the wordings of the various emails, it quite clear that the applicant's termination of employment was based on and influenced by special circumstances. There was a special request by the applicant, in his letter dated 29 November 2017, that initiated the discussions between himself and the Vice Chancellor of the university and Ngcobo. He specifically requested that the university compensate him for the time left between his age then and the benefits he would receive if he retired at age 60 in the normal course of events.

⁸ RH Christie The Law Of Contract in South Africa , Butterworths , 2001 4th edition page 26

⁹ *Pillay v Shaik* 2009 (4) SA 74 SCA

This led to a meeting where further discussions took place.

Email of 14 December 2017 sent by Ngcobo to the applicant.

[34] Further and more pertinent is the contents of the email of 14 December 2017 (14 December email). In this email, the applicant was informed that the university could not afford to “buy out the outstanding service” in the amount of R 1 614 644.63 if he were to retire without penalties. However, it proposed that if he retired with penalties the university would consider the penalties amount of R 824 700-00 as a contribution towards his retirement. The email goes on to talk about the leave credit and capping of the leave days as well. However, most significant is the recording at the end of the email which is a summary of the understanding between the parties and states that:

“...summary, at the end of the meeting, this was the understanding:

That you will retire as of 31 December 2017 with penalties amounting to R824 700-00.

That the university will compensate you for the penalties suffered because of early retirement (My emphasis)

.....

It is your option how you receive the retirement benefits as reflected on the quotationto you i.e

- Full withdrawal***
- Or***
- Monthly pension without commuting a third***
- Or***
- Commuting a third”***

Was there a misrepresentation and if so by whom?

[35] This email from Ngcobo (Executive Director HR), served to summarise the negotiations between the parties up to that point, it records very importantly, that the

understanding is that university will compensate the Applicant for penalties suffered because of early retirement.

[36] It is significant to point out, that the email does not in any way record or infer that if the applicant elected a full withdrawal, the option of compensation will no longer be paid to him. Further, it does not record that the compensation will be paid to the pension fund.

[37] Instead the email, clearly and unambiguously records that in the event that the applicant elected early retirement:

- a) the respondent would **compensate the applicant** (my emphasis) for the penalties suffered as a result thereof.
- b) the applicant would contribute his leave days pay-out amounting to R271 780.72 towards the penalties.
- c) the applicant's accrued annual leave difference of 12 days amounting to R25 306.06 would be paid to the applicant.
- d) the applicant would have the option of how to receive his retirement his benefits.
- e) the amounts recorded in the email were subject to statutory deductions.
- f) the undertaking by the respondent to compensate the applicant for penalties **suffered was not standard practice but was done to reach an amicable solution to the predicament (applicant's circumstances) at the time.**
- g) respondent's undertaking was only valid if exercised in the 2017 financial year.

h) applicant needed to confirm his decision to the respondent's management before 12h00 on Friday 15 December in order for the amount to be accrued.¹⁰

[38] The email further records that it is the Applicants options how he receives his retirement benefits as reflected on the quotation issued by Absa directly to him and includes the option of a full withdrawal.

[39] From the above, it conclusive that the Applicant was misled by Ngcobo. The Applicant was misled to believe, as he testified on his version as well, that he understood the agreement between the parties to be that the university would separately compensate him for the loss of pension benefits because he was taking an early retirement. Even if this was not the intention of Ngcobo, Ngcobo clearly misrepresented through his conduct, via emails and in the meetings held, especially that on 15 December 2017, that the university would compensate the Applicant directly and not the pension fund. If the intention was different, Ngcobo had to simply state so in his rather detailed and long email of 14 December. He simply had to record that offer to compensate was dependant on the Applicant not electing to exercise a full withdrawal and further that the compensation would not be paid to the Applicant but rather to the pension fund on the Applicant's behalf and for his benefit. This was not done at all. One would reasonably expect Ngcobo, being a Director of HR to record such conditions and terms if indeed they were so.

[40] I, therefore, reject in its entirety the contention by the respondent that what was intended was in fact a contribution towards the pension fund benefits which would ultimately benefit the Applicant to receive full benefits as if retiring at age 60. The Applicant, as pointed by the respondent was employed on a director level and is not a layman and I am not persuaded at all, that he would not understand the negotiations and terms agreed to by the parties.

Did the Applicant mislead by the representation?

¹⁰ Para 7 of the response to the statement of claim at p14 of the indexed pleadings.

[41] I find that is most conclusive from the evidence that the Applicant was misled. He testified and it is common cause that Applicant on 18 December informed the Ngcobo of his decision to the terms as set out in writing in the 14 December email and as further discussed on 15 December 2017. This email was a clear acceptance of the respondents offer. It was also conceded by Ngcobo under cross examination that he and the Applicant had agreed to confirm a final decision by 18 December 2017. This was done by the Applicant. I reject, with the contempt the contentions and assertions that the Applicant failed to reply by 15 December 2017 and the agreement fell away.

[42] On the 18th of December 2017, the applicant advised the respondent by email that ***“After careful consideration I have made the decision to accept the University’s proposal for my voluntary early retirement for my safety, including that of my family and University community. I shall be withdrawing from the University pension fund managed by ABSA. I have attached a completed application form from Allan Gray where my pension will be deposited until I make the final decision on the funds. I shall await the deposit into my account. The agreed amount is laid down in your email dated 14 December 2017.”***

[43] The last two sentences infers that the Applicant understood that the monies referred to in the email, other than the pension fund (to be paid to Allen Gray), will be “deposited into my (his) account”. There can be doubt from the evidence lead, that the Applicant was persuaded by the offer of compensation to him, in a rather large sum at that, to take the early retirement.

Would a reasonable person in the Applicant’s position have been misled?

[44] I find in the affirmative. When has reference to the wording and phrases of the email communications and the numerous meetings held with the most senior staff of the respondent (the Vice Chancellor and Executive Director HR), I conclude that there can be no doubt that any reasonable person in the Applicant’s position would also be misled by the actions of the respondent through Ngcobo. There is no issue

with the authority of Ngcobo to represent the university and the evidence in any event was even that the Vice Chancellor met the Applicant to find a solution. The respondent does not plead that Ngcobo lacked the requisite authority to conclude the agreement on the terms as pleaded by the applicant and to bind the respondent thereto. The evidence clearly illustrates that there was actual, ostensible or apparent authority of Ngcobo and the Vice Chancellor to conclude the agreement on behalf of the respondent.

[45] I reject the evidence and contentions of the respondent that the withdrawal of the applicant's pension fund did not constitute early retirement and that because of the pension fund rules, the university could never have intended to directly compensate the applicant. Further since there was no agreement on the terms there was no *animus contranendi* on the part of the parties. This agreement between the Applicant and the university was a private agreement between the parties to compensate the applicant for taking an early retirement. This agreement had no bearing on the pension fund at all, neither was the pension fund a party to this agreement. It is significant that the respondent's offer to the applicant to compensate him for penalties was not standard practice at the University. In fact, Ngcobo records this in his email. Therefore, I agree with the applicant's contention that the pension fund rules are not relevant to the validity of the agreement and do not in any way impact on the agreement. The benefits in terms of the pension fund are a separate arrangement from the University to compensate the applicant for terminating his services earlier than at age 60. The fact that Ngcobo's inclusion of the option of withdrawal in the options to the applicant to receive his retirement benefit clearly demonstrated to any lay person that it formed part of the special arrangements and negotiations between the applicant and the respondent relating to his early retirement due to these particular special circumstances of his case. In my view, the university was being disingenuous to suggest the same and it appears the university was attempting to renege on the agreement with the absurd contentions that it intended to pay the benefits to the fund and not the Applicant etc. when these contradict the very wording Ngcobo's emails. Again, I re-iterate who is a very senior HR employee.

[46] Despite the respondent being aware that the applicant, by his email of the 18th of December, had accepted the proposal of the 14th of December email, and hence service would terminate on the 31st of December, the respondent nevertheless sent the email of the 20th of December 2017 and once again on the 4th of January 2018 to the applicant. What was significant about this email, is that it did not come to the attention of the applicant prior to 31 December 2017, being the date, the retirement was effective. In any event, the agreement between the parties was concluded when the Applicant accepted the offer by 18 December 2017. The email of the 14th of December provided that the applicant's termination, if any of the options were accepted, would be affected 31st December. The applicant, in his acceptance email, stated that he was accepting that his service would terminate on 31st of December. It is common cause that he had not received this email on the 20th of December and therefore, he was not aware of it. Hence, the agreement between him and the respondent concluded effective the 31st of December. It was therefore not open to the respondents after that to seek a variation of the agreement without the applicant's consent. Clearly the applicant did not consent to vary the first agreement and maintained that he was proceeding with it. The applicant responded to this email on the 7th of January 2018 where he confirmed that he still thinks that the early retirement withdrawal option is his preference with the understanding that penalties are still going to be statutorily affected as the applicant had no other means to sustain him except to make a withdrawal of one third from the pension and then get a monthly salary. On the 8th of January 2018 the applicant submitted a further email to the respondent confirming that he had discussed his option with the Vice Chancellor and that his option preference remained a withdrawal. The respondent acknowledged the applicant's confirmation of his option for a final withdrawal and requested that the applicant submit a completed exit form to the respondent's Human Resources Department so that all monies due to the applicant could be processed and paid out to him with the termination date being the 31st of December 2019.

Conclusion

[47] From all the evidence, it is patently clear that the Applicant was misled by the representations of the university. Upon a scrutiny of the emails and from the evidence of the Applicant, I find that the applicant was misled to believe that he would be compensated by the university, irrespective of which option he exercised on his retirement. The undertaking by the university to financially compensate the Applicant for the **penalties suffered by early retirement**¹¹, in the large sum of R 824 700-00, in my view would most certainly induce and influence any reasonable person in the circumstances of the Applicant to take the early retirement. I find that that misrepresentation indeed induced the Applicant to take the early retirement.

[48] I am of the view therefore, after having considered the conspectus of all the evidence, that the respondent through the actions and conduct of Ngcobo, misrepresented to the Applicant that it would compensate him personally if he took early retirement. As a result, Ngcobo created the impression that the parties were *ad idem* on the material terms of the agreement. I find that the applicant has discharged the onus and has established the necessary animus contradendi on the part of both parties.

[49] For the reasons above, I find that there was valid and binding agreement between the Applicant and the respondent.

[50] The respondent has breached the agreement by failing to pay the Applicant the amount as claimed. The penalties compensation was R 824 700-00 and if you subtract the leave days capped at 90 days in the amount of R 271 780-72, the amount due is R552 919.66. However, the Applicant claimed R578 225-34 and then amended the relief to R 552 919-28.

Costs

[51] The Applicant was compelled to institute this application, to seek payment of monies that the respondent had agreed to be paid to him by way of compensation.

¹¹ Email page 7 Bundle of Documents

This is not simply an ordinary dispute pertaining to terms of an employment contract. The Applicant was employed for many years and on the eve of his retirement, he had had to be saddled by unnecessary litigation. I find that the Applicant was treated unfairly and therefore in light of all the circumstances of this case, I find that it will be only appropriate to make an order that costs must follow the result.

[52] Order

In the circumstances I make the following order: Judgment is granted against the respondent as follows:

1. Payment of the sum of R552 919.28 to the Applicant, Sipho Wilson Dlongolo.
2. Interest thereon at the rate of 9% per annum from 4 February 2019 to date of final payment; and
3. Costs of suit.

Nalini Govender

Acting Judge of the Labour Court of South Africa

APPEARANCES:

APPLICANT: Adv NSV Mfeka instructed by TB Mbili Attorneys

RESPONDENT: Mr Casells instructed by Maserumule Attorneys