

**IN THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION, PRETORIA**

**CASE NO: 61596/16**

17/5/2017

(1) REPORTABLE: YES / NO  
(2) OF INTEREST TO OTHER JUDGES: YES/NO  
(3) REVISED. 1

15.05.2017

In the matter between:

**SIKHAKHANE WISEMAN SITHEMBILE**

**APPLICANT**

and

**TELKOM SA SOC LTD**

**RESPONDENT**

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**JUDGMENT**

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**RAULINGA J,**

1. The applicant seeks a declaratory order in the following terms:

- 1.1 That it be ordered and declared that the agreement between the parties under the name and style of Early Retirement/Voluntary Severance Package ("VSP") dated 1 April 2016 is a valid and enforceable agreement;

- 1.2 That the respondent be ordered to adhere to and comply with the terms of the said VSP within 5 days of the order;
  - 1.3 That in terms of the said VSP applicant's employment be terminated as of 30 June 2016;
  - 1.4 That the respondent be ordered to make payment to applicant in accordance with the said VSP agreed upon and offered to the applicant;
  - 1.5 That the respondent be ordered to pay the punitive costs of this application on attorney and client scale; and
  - 1.6 That the respondent be ordered to pay interest at 10.25% from 25 July 2016 until final payment.
2. The relief sought by the applicant is based on him having applied for a VSP which the respondent had accepted on 30 March 2016. Under normal circumstances, the applicant would have received his VSP on 30 June 2016, the date on which his employment contract would have terminated.
3. The applicant has been in the employment of the respondent since April 2006 as a sales consultant stationed at Telkom branch Centurion Mall. The respondent and the applicant's union reached an agreement early 2016 on the principle that would apply in reducing the workforce and to the terms that would be offered to the employees of the respondent.
4. In March 2016 the respondent notified the applicant per email that he may take an offer for termination of his employment contract by the acceptance of the VSP. It was indicated to the applicant by the respondent that once he makes a decision to accept

the VSP offer his decision cannot be reversed. He then exercised his option by accepting the VSP in the format as required by respondent on the intranet.

5. On 1 April 2016 he received a letter from the respondent confirming approval of his VSP, which was approved with 30 June 2016 as his last day of duty. The letter further indicated that he would receive his severance package on 25 July 2016.
6. On 13 April 2016, the applicant was approached by two human resource employees and his supervisor Ms Gegan and was informed that they were aware of the termination package that he accepted, but that there have been a decision to revoke it and suspend him on the basis that there was a pending disciplinary hearing due to misconduct on his part. He refused to accept and sign the document regarding the revocation of termination of his VSP because he didn't commit any misconduct.
7. On 28 June 2016 the applicant's attorneys of record received a letter stating that his application for VSP which was accepted has been put on hold pending the finalization of the investigation process. On 1 July 2016 his attorneys of record addressed a letter to the respondent informing them that the applicant's employment with the respondent was terminated and that the respondent does not have any further legal capacity to continue with disciplinary proceedings against him.
8. On 22 July 2016 the applicant received a call from Ms Gegan inviting him to come and collect documentation from her. On arrival he was served with a charge sheet and notification to attend disciplinary hearing on 28 July 2016. The allegations regarding the misconduct relate to actions dated 19 November 2015 and 12 January 2016. It is common cause that the applicant brought an urgent application in the Labour Court to

interdict his disciplinary hearing and on 29 July 2016 the said application was struck off the roll.

9. The disciplinary hearing reconvened on 2 August 2016, but the applicant did not attend and it was proceeded with in his absence. The applicant was found guilty of having defrauded the respondent of R 11 554.80 and summarily dismissed.
10. The applicant contends that since his VSP was approved by the respondent on 1 April 2016 with his last day of duty being 30 June 2016, the applicant was therefore entitled to receive his severance package on 25 July 2016. Further that the respondent had no right to unilaterally dismiss him. Whereas the respondent avers that the disciplinary investigation entitles it to revoke the VSP agreement with the applicant in that he failed to disclose that when the VSP agreement was signed he had already committed a material breach of his contract.
11. I must immediately state that I disagree with the submission of the respondent that when the VSP agreement was concluded it was a material term of the agreement that the applicant has to disclose that he had committed fraud. While it is possible that the applicant owed the respondent a duty of honesty and loyalty in terms of the employment contract concluded between them in 2006, such a duty is not applicable to the VSP agreement.
12. It is common cause that the investigation into the misconduct of the applicant commenced in November 2015 and continued into the year 2016. The applicant's VSP was approved on 1 April 2016. On 13 April 2016 the applicant was suspended pending the finalization of the disciplinary proceedings. Notwithstanding applicant's suspension, the respondent failed to terminate the payment of the severance package and waited

until 2 August 2016 when he was found guilty of having defrauded the respondent. The respondent was not entitled to terminate the applicant's VSP on 13 April 2016 when he was informed of the investigation against him and when no payment was made. The applicant was not finally dismissed on 2 August 2016, as his last day of duty was 30 June 2016.

13. It is a trite requirement in our law that parties to an agreement comply with their obligation in terms thereof and that they are not allowed to unilaterally deprive the other party of its rights.
14. The effect of an acceptance of an offer of voluntary retrenchment was considered in the matter of *Satawu v Old Mutual Life Assurance Company SA Ltd* (2005) 4 BLR 378 (LC), where the court found that when an employee elects early retirement it is akin to a resignation and does not constitute a dismissal. In the instant case the applicant's acceptance of the offer concluded the agreement and no separate or additional act of resignation was requested. The applicant's contract of employment came to an end on 30 June 2016. The submission by the respondent that Jordaan, the Managing Executive, was not aware of the applicant's perceived misconduct when he approved the VSP on behalf of the respondent, does not hold water and cannot be sustained.
15. The broad principle governing the issue of the power of an employer to discipline an employee who had resigned from his or her employ, is set out in the minority judgment in *Toyota SA v The Commission for Conciliation Mediation and Arbitration and Others* (2016) 37 ILJ 313 (CC). The majority in that case dismissed the application for leave to appeal which means that they never considered the merits of the application. It is the minority judgment of Zondo J that dealt with the merits of the application and in this regard held that:

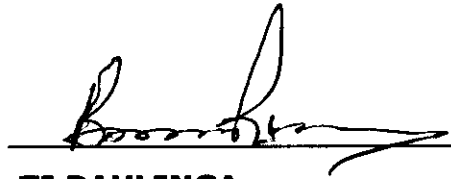
*"[42] Another context of resignation is the normal resignation. Where an employee resigns from the employ of his employer and does so voluntarily, the employer may not discipline that employee after the resignation has taken effect. That is because, once the resignation has taken effect, the employee is no longer the employee of that employer and that employer does not have jurisdiction over the employee anymore. Indeed, even the CCMA or the relevant bargaining council would have no jurisdiction to entertain a referral of a "dismissal" dispute in such a case because there would be no dismissal as envisaged in section 186 of LRA. Therefore, if an employee who has validly resigned later refers an alleged unfair dismissal to arbitration under the LRA and it is found that the employee had validly resigned and had not been dismissed, reinstatement would be incompetent."*

See also *Kalipa Mtati v KPMG Services (PTY) Ltd & Another* Case no: J22/2016 (Delivered on 18 October 2016).

16. In my view, this dicta is the last nail on the coffin of the respondent's case. I have already indicated above that the VSP agreement which was approved by the respondent on 1 April 2016 remains valid against the wishes of the respondent who unilaterally attempted to revoke it. In its own words, the respondent submits that it did not immediately and finally terminate the agreement on 13 April 2016 when it became aware that the applicant may have committed fraud. The respondent only took a final decision to do so after the applicant was found guilty of having committed fraud.
17. In terms of the VSP agreement the applicant's last day of duty was 30 June 2016. At the time the disciplinary hearing was conducted on 2 August 2016, the applicant was

no longer an employee of the respondent and therefore respondent had no jurisdiction over the applicant. The disciplinary proceedings are therefore rendered null and void.

18. The issue of dishonesty and disclosure does not arise in this case in that at the time the VSP was approved by the respondent, the investigations into the conduct of the applicant was already underway. The respondent cannot hide behind the excuse that its Managing Executive Jordaan was not aware of the investigations. Moreover, it was not only Jordaan who was involved in this matter, the human resource section ought to have informed whosoever was involved in the matter.
19. In the premises I have come to the conclusion that at the time the disciplinary proceedings were conducted the applicant was no longer in the employ of the respondent and as a consequence the respondent had no jurisdiction over him.
20. I make the following order:
  - 20.1 The VSP approved by the respondent on 1 April 2016 and accepted by the applicant, is a valid and enforceable agreement;
  - 20.2 The respondent is ordered to comply with its obligations in terms of the said agreement;
  - 20.3 The applicant's employment with the respondent was terminated on 30 June 2016 in terms of the VSP agreement;
  - 20.4 The Respondent is ordered to pay the applicant the money due to him in terms of the VSP agreement; and
  - 20.5 The respondent is ordered to pay interest at 10.25% from 25 July 2016 until final payment.
  - 20.6 The Respondent is ordered to pay the costs of the application on the attorney and client scale.

A handwritten signature in black ink, appearing to read 'TJ Raulinga', is written over a horizontal line.

**TJ RAULINGA**

**JUDGE OF THE GAUTENG DIVISION, PRETORIA**