IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN **REPORTABLE**

CASE NO. J1814/03

IN THE MATTER BETWEEN:-

J M WILTSHIRE	**1ST APPLICANT**
ERENS LODEWYK HERHOLDT	**2ND APPLICANT**
ALETTA MARIA HERHOLDT	**3RD APPLICANT**

AND

THE UNIVERSITY OF THE NORTH	**RESPONDENT**

JUDGMENT

GUSH, A J

1. The Applicants were all employees of the Respondent, a University established by virtue of Act 47 of 1969. The 1st and 3rd Applicants took early retirement in 2001 and 2002 respectively and the 2nd Applicant retired on reaching normal retirement age in 2001.

2. Despite having retired from the employ of the Respondent the Applicants seek:-

   2.1 an Order determining that they had concluded an agreement with the Respondent in August 2000 that they would be entitled to voluntary retrenchment and a severance package including the benefit of early retirement; and

   2.2 an Order of specific performance directing the Respondent to pay to the Applicants the voluntary severance package which formed

part of the offer of voluntary retrenchment.

3. On the 15th August 2000 and pursuant to a restructuring exercise, which the Respondent was conducting, the Respondent's Acting Vice Chancellor and Principal Professor Golele, on the 15th August 2000, addressed a Memorandum to all permanent members of the Respondent's staff headed *"VOLUNTARY RETRENCHMENT"*.

4. The Memorandum advised the University Staff that the Council of the respondent had approved that voluntary retrenchment be offered to all permanent members of staff. The offer was made with effect from the 15th August 2000 and would expire on the 15th September 2000. It identified the severance/retrenchment package offered as that which was set out in the Respondents Personnel Policy and Procedure Manual.

5. *"In addition"* the Memorandum stated *"Council has approved that staff over the age of 55 may elect to retire as well as accept the retrenchment package"*. All three Applicants fell within this latter category, all being over the age of 55.

6. The University staff were urged to carefully consider the implications of accepting the offer and were advised that if they wished to accept the offer they were to complete the form attached to the memorandum which form they were to submit personally to the Human Resources Department.

7. Those administrative / senior staff members of the University Staff who elected to accept the offer were advised that *"you will terminate services on the 30th September 2000"*.

8. All three Applicants who were administrative members of staff accepted the

offer, completed the acceptance of voluntary retrenchment form on the 17th August 2000, and as required submitted the forms to the Human Resources Department.

9. On the 22nd August 2000 Professor Golele who was still the Acting Vice Chancellor and Principal at that time addressed a further Memorandum to all University Staff. This Memorandum, too, was headed *"VOLUNTARY RETRENCHMENT".* The Memorandum indicated that the offer of voluntary retrenchment was the first phase of the restructuring process, and was being extended to all permanent members of staff. It specifically stated:-

> *"As an incentive to staff who are over the age of 55, they are allowed to retire (and hence get University Retirement Benefits such as Medical Aid, etc) as well as accept the retrenchment package. It must be clearly understood that this (Severance Package and University Retirement Benefits) is a once off offer to the over 55's and may not be available in the subsequent phases of this restructuring process."*

10. On the 31st August at an Extraordinary Meeting of the Respondents Executive Committee the offer of voluntary retrenchment was discussed. Concerns were expressed by the Deans Committee that the voluntary retrenchment package was attracting acceptance from valuable staff among the academics. There appears to have been no mention of administrative staff. These concerns were raised in a memorandum addressed to Professor Golele and a Mr G M Negota the Acting Chairperson of the Respondent's Council which memorandum is attached to the minutes of the meeting.

11. On the 4th September 2000 following the extraordinary meeting of the Executive Committee, the Acting Chairperson of Respondents Council Mr G M Negota issued a *"Communiqué"* addressed to *"The University Community"*. This Communiqué referred to Professor Golele's previous two circulars and purported to withdraw and rescind the offer of voluntary retrenchment as set

out in the said Circulars. Mr Negota purported to list five reasons for this decision.

12. The reasons were that the offer did not comply with the council resolution, that it offended the Respondents policy and procedures and did not 'consider inputs from structures" which had now been taken into account. Whilst it is true that the first three items on the list constituted reasons, the last two points did not, but indicated first that the process was to be *"properly embark*[ed] *on"* and that a *"further Circular will follow in due course to inform the University Community accordingly"*; and that *"the University, as the final arbiter, will consider and decide on the applications already submitted"*.

13. It became clear during the course of the evidence that none of the *"applications"* (sic) already submitted were ever considered or decided on by the Respondent and that the only circular which followed was the circular issued by a Professor Machethe on the 2nd October 2000.

14. This purported withdrawal and rescission of the offer lead to an application being brought in the Labour Court by three employees of the Respondent (other than the Applicants in this matter) for a declarator declaring the offer of voluntary retrenchment set out in the Memorandum to its staff dated the 15th August 2000 to be valid and for an order that the Applicants in that matter were entitled to accept the offer. The Applicants were one *Franks and two others*. (The matter is reported as **Franks v The University of the North** (2001) 22 ILJ 1158 (LC))

15. On the 2nd October the then Acting Vice Chancellor and Principal, Professor C L Machethe issued a further communication this time addressed to the University Community under the heading *"VOLUNTARY RETRENCHMENT"*. This Memorandum referred to the purported withdrawal of the offer of voluntary retrenchment as contained in Mr Negota's Communiqué of the 4th

September 2000 and advised the University Community that some staff members had taken the University to the Labour Court, clearly referring to the application brought by Franks.

16. Machethe states specifically in this communication that:-

> *"Some staff members took the University to the Labour Court. The Court ruled that the matter was not urgent and the application was, therefore, not successful."*

Machete says in addition that it had been brought to his attention that some staff who had submitted their acceptance of the voluntary retrenchment had left the Respondent's employ without a valid resignation. He advised that these staff members would be regarded as having absconded unless an acceptable explanation was provided.

17. Not only was Machete wrong in stating that the application had been unsuccessful, it was never explained what would have constituted an acceptable explanation given the fact that the Respondent not only opposed the application in the Labour Court but appealed against the decision of that court that the offer and acceptance thereof by the applicants was valid.

18. This was the last time the Respondent addressed the issue with the Applicants in this matter and it appears with those other employees of the Respondent who had also accepted the offer.

19. The matter in the Labour Court which Machethe referred to was heard on the 19th December 2000 and Judgement was handed down on the 6th February 2001. The Judgment is the reported judgment as **Franks v the University of the North (Supra)**. Franks and his two colleagues, employees of the Respondent, had timeously accepted the offer of voluntary retrenchment as communicated by Golele on the 15th August 2000. It appears from the judgment that they together with 136 other employees of the Respondent had

accepted with due acknowledgement the offer of voluntary retrenchment. In their application they disputed the Respondent's right to unilaterally rescind and withdraw the offer. They sought a declarator to the effect that they had accepted a valid offer and an order that it was therefore legally binding on the Respondent.

20. In the Franks application the court rejected the Respondents' contention that the offer had been withdrawn and rejected the Respondents purported reasons for withdrawing the offer. The court found that the Respondent was estopped from denying that the offer was validly made and that the agreement was validly concluded.

21. The court held:-

"I am satisfied as to the validity of the contract in question in this matter and that the right and entitlement of the Applicants to the benefits properly accruing to them thereunder have been established. It is common cause that the Respondent has repudiated that liability and those rights have therefore been infringed".

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22. An Order was granted in the following terms:-

"1.1 The offer of voluntary retrenchment contained in the Respondent's Memorandum to its staff of the 15th August 2000 is valid and the Applicants were entitled to accept that offer in the manner prescribed therein.

1.2 *The 1st, 2nd and 3rd Applicants are accordingly entitled to the retrenchment benefits provided for therein."*

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23. This however was not the end of the matter. The Respondent appealed against the decision of the Court. The Labour Appeal Court, on the 29th May 2002, found that the *court a quo* had been correct and dismissed the appeal with costs. This matter too is reported.

UNIVERSITY OF THE NORTH v FRANKS AND OTHERS *(2002) 23 ILJ 1252 (LAC)*.

24. When the applicants in this application became aware of the fact that the matter had finally been decided they instructed their Attorney to address a letter of demand to the Respondent claiming payment of the severance benefit that they had accepted on the 17th August 2000. Their attorney Mr Freese who gave evidence indicated that the applicants were amongst a number of employees of the Respondent who under similar circumstances had accepted the offer and who now demanded compensation from the Respondent based on the Labour Appeal Courts ruling.

25. Mr Freese said that a number of these matters had been resolved. There was no evidence as to how they had been resolved. He said that the three Applicants in this matter had been unable to resolve their dispute with the Respondent and this application was then launched.

26. This Court is by agreement of the parties asked to decide:-

"Whether there was an Agreement entered into;

If there was an Agreement entered into, whether the Applicants are entitled to relief sought, that is specific performance."

27. The parties also reached agreement that if it was found that an Agreement had been entered into and the Applicants were entitled to specific performance the amounts recorded in a document headed “Agreement on Quantum” should be paid by the Respondent to the Applicants.

28. The Respondent raised two *points in limine* which the parties agreed should be dealt with in closing argument as the facts surrounding the matter were relevant. Both points dealt with the courts jurisdiction to hear the matter.

29. The 1st Applicant gave evidence that he had been permanently employed by the Respondent on the 1st February 1994 and had held various administrative posts including that of Executive Director of Public Affairs and Executive Assistant to the Vice Chancellor. Suffice to say that the Applicant was a Senior Administrative member of management of the Respondent at the time that the offer was made and accepted.

30. The 2nd Applicant was permanently employed by the Respondent on the 1st October 1988 and had held the position of Principal Control Officer in the Transport Section of the Respondent at the time of the offer. This was an administrative post.

31. The 3rd Applicant had been employed as a Secretary to the Dean of Theology and had commenced her employment with the Respondent on the 1st March 1981. Likewise the 3rd Applicant was a permanent member of the Respondent's administrative staff.

32. All three Applicants gave evidence that at the time that the offer was made they were older than 55.

33. All three Applicants received the offer of voluntary retrenchment from the Acting Vice Chancellor and Principal, Professor N C P Golele dated the 15th August 2000 and all accepted the offer of voluntary retrenchment on the 17th August 2000. They duly completed the designated acceptance of Voluntary Retrenchment Offer form which reads:-

"… hereby accepts the Councils offer of voluntary retrenchment as set out in the Personnel Policy and Procedure Manual (and of retirement if over 55). I have given serious consideration to the implications of this acceptance and will seek financial advice with regard to the utilisation of funds I receive. I further acknowledge that by accepting this offer I have taken an irreversible step and once this acceptance is acknowledged by the University it cannot be reversed unless by mutual agreement.".

34. All three Applicants gave evidence that their forms were delivered to the Respondent's Human Resource Department. The 1st and 2nd Applicants forms were signed by the Human Resource Department under the heading *"Acknowledged Receipt"*. The 3rd Applicant's form does not bear such a signature. The 3rd Applicant gave evidence to the effect that she had given her form to her husband, the 2nd Applicant, who had personally delivered the form to the Human Resource Department. It was never seriously challenged by the Respondent that the 3rd Applicant had communicated her acceptance of the offer of voluntary retrenchment and that it had been received by the Human Resources Department. The Respondent made nothing of the fact that this form had not been signed.

35. The Applicants all stated that they were aware of the communiqué issued by Mr G M Negota which communiqué purported to withdraw and rescind the Respondents offer of voluntary retrenchment. The three Applicants evidence regarding their response to this communiqué was similar. The 1st Applicant stated that he did not accept the repudiation of the offer and had conveyed this to the Vice Chancellor and anyone else who had been in the vicinity. He said that he had made it clear that he did not accept the repudiation and regarded the offer as being binding.

36. The 2nd Applicant gave evidence that on learning of the Negota communiqué he reported to his immediate Superior and indicated that he was dismayed by the purported withdrawal and rescission of the offer but that he regarded the offer as having been concluded and he expected the Respondent to comply and that he was not going to back down. The 2nd Applicant said that his manager told him that if he left he would be fired for being absent without leave.

37. The 3rd Applicant said that when she heard of the withdrawal of the matter she had reported to the Dean of Theology for whom she worked and likewise indicated that she was dismayed by this attempt to withdraw the offer but that she regarded the agreement as binding, that she had an agreement with the Respondent. She said that she did not accept the withdrawal.

38. It was common cause that none of the Applicants formally recorded in writing their attitude towards the purported repudiation and rescission of the offer of voluntary retrenchment and that they intended holding the Respondent to the agreement. The 1st Applicant however did state that he had made it clear that he associated himself with the application brought by Franks and that he was awaiting the outcome.

39. All three Applicants had continued to work for the Respondent after the 30th September 2000. The 1st Applicant said he had done so out of loyalty and due to uncertainty surrounding the Franks case. The 2nd and 3rd Applicants had continued working so as not to jeopardize their rights as they were close to retirement age and were concerned that if they simply left they would lose their pensions.

40. The three Applicants said that they were aware of the contents of the Circular of the 2nd October and were concerned at the threat issued by the

Respondent. All the Applicants stated that they knew about the "court case" which was pending viz the application by Franks.

41. The Applicants said that they had remained in the employ of the Respondent, had tendered their services and were paid for the services that they rendered up until the dates of their respective retirements.

42. The Applicants gave evidence that once they learnt of the outcome of the Labour Appeal Court decision they instructed their attorney to address letters of demand to the Respondent claiming the payment of the severance benefit which had been offered and accepted by them in August 2000 which ultimately led to this application being brought as their dispute with the Respondent could not be resolved.

43. The Applicant's attorney, Mr Freese, in his evidence confirmed having issued the letters of demand dated 19th June 2002. He said that he had been unable to resolve the dispute between the Applicants and the Respondent despite attempts and that in addition private mediation and arbitration had been considered. Owing to uncertainty as to whether or not the CCMA had jurisdiction he had referred the dispute to this Court. This evidence became relevant in the light of the *point in limine* which the Respondents raised regarding this Courts jurisdiction to consider the matter.

44. The Respondents called three witnesses. A Professor Fitzgerald who was appointed in January 2001 as the Respondent's Administrator. A Ms Hlako who was the HR Manager: Benefits, and Mr Negota the author of the communiqué purporting to withdraw and rescind the offer of voluntary retrenchment.

45. Fitzgerald gave evidence largely surrounding the negotiations and discussions surrounding the 1st Applicant's early retirement. 1st Applicant had given evidence that he had made it clear during discussions with

Fitzgerald regarding his early retirement that any agreement would not affect the severance package payable in terms of the Golele offer which he had accepted since the Franks case had been resolved.

46. Fitzgerald however maintained that there was no discussion at all surrounding the Golele offer. He indicated that as far as he was concerned that had the 1st Applicant raised the Golele offer, the early retirement option would not have been offered and the 1st Applicant would have then been required to work until normal retirement age despite his ill health.

47. Ms Hlako's evidence confirmed that the three Applicants had been paid what was due to them in terms of their retirement and early retirement as well as confirming that they had been paid for their services from the 1st October 2000 up until the date upon which they retired.

48. Mr Negota then gave evidence. He is a practicing attorney and in 2000 he had been appointed the Acting Chairperson of the Council at the time that the Golele offer was made and was the author of the communiqué purporting to withdraw it. Mr Negota's evidence was that the Council was concerned about the loss of all qualified staff including administrative staff and the need to retain skills. He said that the concern over the loss of staff extended to all areas of the Respondent's activities.

49. Mr Negota, however, did not deal specifically with the memo annexed to the minutes of the extraordinary meeting on the 31st August 2000 where concerns had been expressed only in regard to academic staff. Mr Negota referred to the extraordinary meeting of the Respondents Executive Committee which was the meeting he said it had been decided to withdraw and rescind the Golele offer.

50. Mr Negotas' evidence that the reason for withdrawing the offer was that it

would lead to mass exodus of all staff including administrative, is not supported by the evidence. In fact the only document which refers to losing staff is the document which forms part of the minutes of the extraordinary meeting.

51. Mr Negota gave evidence that Golele had been replaced by the time this meeting took place and that Machethe had been appointed as Acting Vice Chancellor.

52. Following the meeting Negota said he had issued the Communiqué to withdraw and rescind the Golele offer. He said that the Golele offer was no more than an invitation to apply for the voluntary retrenchment and that the council would have had to consider the applications. Negota did not however explain why if this was so it was necessary to rescind and withdraw the Golele offer.

53. Mr Negota purported to suggest in his evidence:-

53.1 that the Golele offer of the 15th August 2000 implicitly required an application for voluntary retrenchment to be submitted. He said that it was an invitation to submit an application for voluntary retrenchment and that the Council was required to consider each application. It was not an offer by the Respondent for acceptance by staff members.

53.2 that the sentence *"if you are an administrative/service staff member, you will terminate services on the 30th September 2000"* meant that this required the Applicants to actively resign on that date;

53.3 that the offer made in the Golele letter was for either early retirement or a severance package but not both.

None of these contentions are borne out by the contents of the Golele offer.

54. Mr Negota also stated that it was his view that anyone who had accepted the offer and who had left at the end of September would have been paid the benefits as set out in the Golele offer. Mr Negota did not explain how this view could be reconciled with the fact that the Franks matter remained unresolved until the appeal was dismissed on the 29th May 2002 particularly as it was the Respondent who had appealed against the order of the Labour Court declaring the offer to be valid and the acceptance binding.

55. Mr Negota further stated that despite the undertaking (in his letter withdrawing and rescinding the offer) that all applications submitted would be considered, none of the applications that had been submitted had ever been considered by the Respondent.

The first point in limine

56. The Respondent submitted that Section 157(4)(a) of the Labour Relations Act No 66 of 1995, gave the Court a discretion to refuse to determine any dispute if the Court was not satisfied that an attempt had been made to resolve the dispute through conciliation.

57. Relying on the decision in **NUMSA v Drive Line Technologies Proprietary Limited And Another 2000 21 ILJ 142 (LAC)**, the Respondent averred that by virtue of the requirement of Section 191 it was a jurisdictional prerequisite for the dispute to have been conciliated in order for this Court to have jurisdiction. The Respondent argued that the matter had not been conciliated and therefore the court should exercise its discretion by refusing to hear the matter.

58. Section 191 of the Labour Relations Act refers specifically to unfair

dismissals. The dispute between the parties was not an unfair dismissal.

59. The Applicants relied on the provisions of Section 77 as establishing jurisdiction. Section 77 of the Basic Conditions of Employment Act establishes that the Court has jurisdiction to determine any matter concerning the Contract of Employment.

60. The Respondent argued that whilst this might be so, the court did not have jurisdiction to order specific performance.

61. The Respondent averred that as Section 77(A) of the Basic Conditions of Employment Act had not been promulgated at the time that the dispute arose the Labour Relations Act was the only Act conferring jurisdiction on the Court and that in the absence of formal conciliation the Court did not have jurisdiction.

62. Section 77(A)(e) confers on the Court the power to make an order of specific performance in making a determination in respect of any matter concerning a Contract of Employment.

63. Prior to the insertion of Section 77(A) in 2002 the Basic Conditions of Employment Act 75 of 77 provided that the Labour Court had concurrent jurisdiction with the Civil Courts to hear and determine any matter concerning a Contract of Employment.

64. Section 151(2) of the Labour Relations Act establishes the Labour Court as Superior Court with the authority, inherent powers and standing in relation to matters under its jurisdiction, equal to that which a Court of a Provincial Division the Supreme Court has in relation to the matters under its jurisdiction. This read with Section 158(1) of the Labour Relations Act establishes that this court has jurisdiction to make an order of specific performance.

65. The question of jurisdiction has also been raised in the matter of **Franks v**

the University of the North (supra) where the Court found it did have jurisdiction. (at pages 1161 and 2)

66. I am satisfied that not only does the court have jurisdiction to make an order of specific performance but that the parties did attempt to resolve the dispute. Although these attempts were not formal conciliation I exercise my discretion in favour of determining the dispute despite the fact that it was not referred to formal conciliation.

Second point in limine

67. The Respondent suggested that as the 1st and 3rd Applicants had applied for early retirement they had in fact resigned from the employ of the Respondent and accordingly were not employees of the Respondent as a result of the resignation and therefore could not claim specific performance as the claim for specific performance amounted to a claim for benefits contemplated in Section 2(1)(b) of Schedule 7 of the Labour Relations Act at the time.

68. This point ignores the fact that the court enjoys jurisdiction by virtue of the provisions of Section 77 of the Basic Conditions of Employment Act and accordingly is without substance. The Applicants did not rely on an alleged unfair labour practice.

Both *points in limine* are dismissed.

The Merits

69. I accept the evidence of the applicants that they had accepted the offer made by the Respondent, that they had communicated their acceptance in accordance with the Respondents requirements and that therefore a valid agreement was entered into.

70. I do not accept Fitzgeralds evidence that had Wiltshire mentioned the Golele offer he would not have agreed to the early retirement. The seriousness of

Wiltshire's' illness and the fact that there had been no decision in the Franks matter suggest that the Golele offer was not an issue which Fitzgerald took into account or even considered.

71. As far as the 2nd and 3rd Respondents are concerned it was never suggested that their retirement was regarded by the Respondent as settling the dispute over the validity of the Golele offer and their acceptance thereof.

72. Mr Negotas' evidence is not supported by the facts. His interpretation of the nature of the offer is without substance and his suggestions that had the applicants simply left on the 30th September 2000 they would have been paid, is not borne out by the evidence nor the actions of the Respondent. His evidence did not take the matter any further.

73. The Respondent argued that there was no agreement between the parties. It avers that the offer and the acceptance of voluntary retrenchment must be interpreted to mean that it was merely an invitation to all University Staff to apply for voluntary retrenchment and early retirement and that the acceptance of the offer was an application to the Respondent's Council which would consider all applications with particular regard to the retention of necessary skills. The Respondent's Counsel argued that this interpretation based on the evidence of Mr Negota, clearly established that there had not been an acknowledgement of the application, and that as the applications had not been considered and approved, accordingly no agreement was concluded.

74. Unfortunately for the Respondent this is not borne out by the contents of the Communiqué issued by Mr Negota himself. If, as Mr Negota would have had the Court believe the Golele offer was merely an invitation to apply his Communiqué of the 4th September 2000 would have been unnecessary.

75. It is noted that the argument that the offer was nothing more than an invitation

was not raised by the respondent either in the **Franks v University of the North** (supra) or **University of the North v Franks and Other** (supra) cases.

76. The Respondent sought to distinguish these cases on the grounds that the question of whether or not there was an agreement reached between the parties, and whether the Applicants were entitled to a specific performance were not the subject of the Franks matter and therefore not relevant. Save for the fact that the Applicants in this matter did not leave on the 30th September 2000, the issue before the court regarding the validity of the agreement is the same.

77. The second argument offered by the Respondent is that in seeking an Order for specific performance the Applicants are not entitled to such specific performance as they had not complied with their reciprocal obligations under the agreement.

78. The Respondent argued that by virtue of their acceptance of the offer the Applicants were obliged to tender to perform their side of the bargain viz: to resign. Their failure to tender such performance or in fact to their failure to perform, particularly in the absence of any proof to the contrary meant that the Applicants are not entitled to specific performance. The reciprocal obligation on which the Respondent sought to rely, that the Applicants had to resign, was based on that part of the Golele offer of the 15th August 2000 which reads:-

> *"If you are an administrative/service staff member, you will terminate services on the 30th September 2000"*.

79. It was argued that this placed an obligation on the Applicant to perform by resigning. I disagree. The statement in question is a statement of fact. It informs the Applicant that on a specified date, having accepted the offer, the

employment contract with the Respondent would come to an end on the 30th September 2000; but for the Respondents purported withdrawal of the offer.

80. Having come to the conclusion that statement in question is a statement of fact and not an invitation to perform, I am satisfied that the Golele offer did not require the Applicants to do anything subsequent to accepting the offer of voluntary retrenchment.

81. The effect of an acceptance of an offer of voluntary retrenchment was considered in the matter of **SATAWU v Old Mutual Life Assurance Company South Africa Limited** (2005) 4 BLLR 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 this matter the Respondent simply offered voluntary retrenchment coupled with early retirement. In these circumstances the Applicants acceptance of the offer concluded the agreement and no separate or additional act of resignation was required. Their contracts of employment would, had it not been for the actions of the Respondent, have come to an end on the 30th September 2000.

82. In the absence of any obligation on the Applicants to perform or tender performance it is necessary to decide what the consequences of the Applicants remaining at work after the 30th September were and whether or not their actions in not leaving after the 30th September had any effect on the agreement reached and concluded between the Applicants and the Respondent.

83. It is true that the Applicants remained in the employ of the Respondent and were paid their normal remuneration until they took subsequent early retirement or retired and left the employ of the Respondent.

84. In the face of the Respondents purported rescission and withdrawal of the

agreement reached and its stated intention not to be bound by it as evidenced by its defence of the Franks application coupled with the threat issued by the Respondent's Acting Vice Chancellor and Principal Machette, I am of the view that the Applicants were entitled to and justified in deciding to continue to tender their services.

85. This is despite the fact that the Applicants only became aware of the threat made by the Respondent after the 30th September. The threat is evidence of the Respondent's attitude towards those employees, including the Applicants, who had accepted the offer and is in line with the Negota withdrawal.

86. The Applicants were whilst the matter remained undecided entitled to have acted as they did particularly as the Respondent was the author of the uncertainty.

87. The Respondent was aware of the fact that the validity of the offer was being challenged, was aware that the Applicants had accepted the offer and yet did nothing to address the issue with any of the Applicants after the 30th September, save to threaten them with action should they abide their acceptance and leave their employment.

88. The Respondent did not argue that by remaining in the employ of the Respondent the Applicants abandoned the agreement nor that their subsequent retirement novated the original agreement or that it constituted a waiver of their rights.

89. The Respondent by its own actions actively sought to prevent the Applicants from leaving in accordance with the agreement reached by threatening them with disciplinary action.

90. It is true that a severance benefit is payable in circumstances when as a result of a no fault termination the employee is compensated for the loss of

job security and that generally speaking severance benefits do not accrue to employees who retire. The position here is different however. The Applicants concluded a valid and binding agreement with the Respondent. The Respondent sought unsuccessfully to escape the agreement. In so doing it continued to employ the Applicants. It did so at its own risk and not at the risk of the Applicants. Accordingly, when it was finally decided that the agreement was binding the Respondent was obliged to perform.

91. For the reasons given above I find that the Applicants and the Respondent:-

91.1 entered into an agreement.

91.2 are entitled to specific performance.

92. The Applicants application for specific performance is granted.

92.1 the Respondent is directed to pay to the Applicants the amounts set out in the agreement regarding quantum.

93. The Respondent is ordered to pay the Applicants costs.

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Gush AJ

28 September 2005

For the Applicant: A N Kruger

Instructed By: J Fred Attorneys

For the Respondent: HBR Woudstra SC
Instructed By: R Du Plessis Attorneys

Date of Judgment: 20 October 2005