

SOUTH AFRICA / JUDGMENT

Coetzee v Enviro Bio Chem (Pty) Ltd (C535/2020) [2023] ZALCCT 62 (27 July 2023)

[2023] ZALCCT 62

COURT

Labour Court Cape Town

BEFORE

Lagrange

CASE / FILE NUMBER

C535/2020

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THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case : C535/2020

Of interest to other judges

In the matter between:

MATHYS JOHANNES COETZEE

Applicant

and

ENVIRO BIO CHEM (PTY) LTD

Respondent

Dates of Hearing: 7-8 June 2021, 13-15 September 2021, 11 February 2022

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 12h00 on 27 July 2023

Summary: (s 187(1)(f) of the LRA – Automatically unfair dismissal on account of age – Defence under s 187(2)(b) – Agreed retirement age not established by Respondent)

JUDGMENT [i]

LAGRANGE J

- [1] This is a claim of automatically unfair dismissal in terms of section 187(1)(f) of the Labour Relations Act, No 66 of 1995 (as amended) (“the LRA”) and of unfair discrimination under s 6(1) of the Employment Equity Act, 55 of 1998 (‘the EEA’). The applicant, Mr M J Coetzee (‘Coetzee’), claims that he was unfairly dismissed on account of his age. He sought reinstatement as a remedy together with an award of damages under damages under s 50(1) (d) and, or alternatively (e) of the EEA. In addition, he also claimed that he was due 2% of the gross profit of the respondent (‘Enviro’) from 1 May 2016 until 31 October 2019, amounting in the aggregate to some R 2,06 million and reimbursement of certain expenses amounting to just over R 6,200. Ultimately, the court was only required to determine the merits of the automatically unfair dismissal claim.
- [2] The parties concluded a pre-trial minute in September 2020 and the matter was enrolled for trial on 7 to 11 June
2021. The pre-trial minute was later amended following Enviro’s amendment of its statement of case following the court’s ruling on a special plea.
- [3] Two weeks prior to the commencement of trial, on or about 21 May 2021, Enviro lodged an application against Coetzee, his son and his wife, amongst others, in the High Court (“High Court civil application”) for allegedly engaging in unlawful competition and breaching confidentiality. It had previously threatened to bring such an application on 18 December 2020.
- [4] On 31 May 2021, a week before the trial, the Respondent applied to amend its response to the applicant’s statement of case, raising a special plea with regards to the Court’s jurisdiction. Coetzee did not oppose the amendment was not opposed, but did oppose the special plea.
- [5] The special plea made it necessary to determine whether a purported agreement of April 2015 between Africom commodities (Pty) Ltd and Coetzee (‘the 2015 agreement’ or ‘the Africom agreement’) was a valid contract of employment governing his employment relationship with Enviro at the time of his dismissal. The determination of that issue would also affect the court’s jurisdiction to hear his automatically unfair dismissal claim. This contention was based on the fact that the 2015 agreement contained an arbitration provision in terms of which Enviro claimed the matters before court should have been referred to private arbitration.
- [6] An additional obstacle to the trial commencing on the first day it was enrolled was that Enviro’s main witness, Mr C Grobler (‘Christo’), tested positive for Covid-19. As a result, the trial could not proceed during that week since the Enviro was to begin. Accordingly, the parties agreed that the special plea could be argued on 8 June 2021, at least insofar as the arbitration provision in the agreement might have affected the court’s jurisdiction, without the court having to determine if the 2015 agreement was valid or not. The court dismissed the special plea[1], reserving the issue of costs. Various

directions for the further conduct of the trial were also issued, including a requirement that both parties file witness statements before the trial resumed.

- [7] As ordered by the Court, the parties filed an amended, signed pre-trial minute and the witness statements of Christo, Mr M Grobler ('Migael') and Coetzee on 30 August

2021. The trial was enrolled to proceed on 13 to 17 September 2021.

- [8] Following the ruling on the special plea, both parties adjusted their positions somewhat. Coetzee withdrew his contractual claim in respect of outstanding commission, ostensibly for purposes of finalizing the unfair dismissal dispute expeditiously, but reserved his right to reinstitute the claim in a different forum. Likewise, Enviro expressly abandoned any reliance on the 2015 agreement. In a letter from Enviro's attorneys on 6 August 2021, it explained that because of the court had decided that the arbitration provision in that contract did not deprive it of jurisdiction, Enviro could no longer have the civil claim and the unfair dismissal claim determined in the same forum. Further, it was of the view that unnecessary time would be consumed in establishing the validity of the 2015 contract, given Coetzee's denial that it was concluded. While maintaining that its amended statement of defence, which asserted that the 2015 contract was the applicable one, it was willing to conduct its defence on the contract dated 28 February 2014, which it claimed Coetzee relied on. In Enviro's amended statement of defence, it conceded that it had dismissed Coetzee on account of his age, but denied that this amounted to unfair discrimination based on age because he was retired in terms of an agreed retirement age. Having made the concession that it dismissed Coetzee on account of age, Enviro agreed to commence giving evidence.
- [9] During the course of Christo's evidence-in-chief, the parties agreed that the merits of the claim could be separated from the issue of quantum, without Coetzee admitting any of the evidence canvassed in the High Court application. In the event of it being necessary to determine the quantum of any relief, it was also agreed that a hearing on that could be set down by either party on reasonable notice to the other.

Developments in the postponed proceedings

- [10] On 10 September 2021, the last court day before the trial was to resume, Enviro served a summons on Coetzee, claiming return of the payment in the amount of R3.1m made to the Applicant in respect of his sale of shares in Enviro. As a result of the above summons, the pending High Court civil application against him and his family members and his health, having been diagnosed with cancer, the Applicant communicated at the onset of the postponed trial on 13 September 2021 that he no longer sought reinstatement.
- [11] The parties agreed that Coetzee had been continuously employed since 2004, with what is now Enviro, albeit it that the business had exchanged hands a few times with various section 197 transfers and, or alternatively, changes of ownership having taken place.

- [12] Further, after discussions between the parties concerning the admissibility of the facts and contents of the High Court civil application, following upon the Court indicating that same may be of relevance in respect of the Applicant's damages claim in respect of his claim for damages under the Employment Equity Act, 55 of 1998 ('the EEA'), Coetzee abandoned this claim, in an effort to finalise the unfair dismissal claim expeditiously.
- [13] About half-way through the employer's first witness, Christo, he made reference to facts pertaining to Enviro's High Court application. Coetzee objected to the introduction of this evidence and the parties agreed to split the merits and the quantum of the Applicant's automatically unfair dismissal claim. They further agreed that no reference to the High Court civil litigation would be allowed during the first leg of the case relating to the merits of the automatically unfair dismissal dispute. In agreeing to this, Coetzee made no admission that the evidence canvassed in the High Court application would be relevant or admissible in this court, in the event the quantum of his claim had to be determined. The parties also agreed that if this Court found that Coetzee's dismissal did amount to an automatically unfair dismissal, determination of the quantum of any compensation due could be set down hearing at any time by either party, on reasonable notice to the other.
- [14] Christo, Migael and, somewhat unconventionally, Coetzee were called to give evidence for Enviro. As mentioned, all three witnesses had provided witness statements before the trial resumed.

The dispute over the applicable employment contract

- [15] Enviro's case was that Coetzee was retired in terms of an agreed retirement age of 65 and consequently the dismissal was fair in terms of s 187(2)(b) of the LRA[2]. Accordingly, it is central to the case which contract applied at the time of Coetzee's dismissal.
- [16] Coetzee's contractual contentions were two-fold. Firstly, in terms of the last contract of employment, which he signed on or before 28 February 2014 when he was appointed as Regional Business Manager of Enviro Crop in Cape Town, clause 8.1 of that contract stated:

"8. Retirement Age

8.12 Current retirement age in the company is at 65 years. A new fixed term contract may be negotiated provided that the employee is healthy and able to perform duties as expected."

- [17] Secondly, he claimed that when he was appointed CEO of Enviro Crop during 2015 it was orally agreed with Mr P Venter (the chief financial officer) and Mr C Grobler that he would remain in that position as long as he was able to perform that function. The relationship between the written and oral agreements was not entirely clear. He also did not clearly identify the contract in terms of which he claimed commission payments.
- [18] Enviro's contentions on the applicable contract were multifaceted and varied.

- [19] Until Coetzee's amended written version of the 2015 contract came to light when Enviro was preparing for the High Court application in November or December 2020, Enviro claimed it was not aware of the Africom agreement amended and signed by Coetzee, but assumed that the last valid contract was the 2014 agreement. It initially asserted the validity of the 2015 Africom agreement in order to argue that the automatically unfair dismissal claim should be subjected to arbitration, but then abandoned reliance on this agreement after the courts' ruling that it had jurisdiction to entertain the automatically dismissal claim, if the 2015 contract was valid. Enviro then sought to rely instead on the 2014 agreement. Confusingly, notwithstanding formally abandoning reliance on the 2015 agreement, in the course of Christo's and Migael's testimony they still asserted that it was the 'correct' agreement. A further complicating factor is that there were two versions of the 2015 agreement: The unaltered version of Enviro and the amended version signed by Coetzee, but not dated or countersigned by Enviro.
- [20] In respect of Coetzee's claim that he had an oral agreement with Christo, Enviro's statement of defence simply denied that any undertaking whatsoever was given regarding Coetzee's retirement and further pleaded that, even if the unconditional undertaking alleged by Coetzee had been made, it was never reduced to writing. Therefore Enviro argued, if such an undertaking had been made, it could never have been binding in terms of clause 9.2 of the 2014 agreement, which stated that:

"9.2 The terms and conditions referred to in this letter may only be varied by a written agreement signed by both you and the employer."

Since it contended Coetzee relied on the 2014 agreement and not on the 2015 agreement, there could be no agreement that he was entitled to work after his retirement age of 65, and could be retired at any stage after that. In this regard it should be noted that the only document referring to a retirement age of 65 was the 2014 agreement. Clause 3.1 of the unamended Africom contract provided only for a retirement age of sixty years "or such other date as the parties may specifically agree to in writing or his earlier death;...".

- [21] Despite disputing the existence of an oral agreement, Christo partially conceded that such an oral agreement had been reached between them in Venter's presence, namely that, when the applicant became a shareholder and Enviro's was endeavouring to make the business a family business, it was said to Coetzee that, as long as he was CEO and the business thrived, he could remain in the position of CEO. However, Christo claimed this was subject to a stated condition that once Africom Commodities transferred the business to Enviro, the new board of directors would review not only Coetzee's position, but also the entire management. Enviro's acknowledgement that there had even been such a discussion was only conceded for the first time in Christo's

written statement.

- [22] In another iteration of Enviro's case it pleaded that, in 2018, Coetzee had been told he would have to train and supervise the next generation of managers and directors. Once he had satisfactorily done this, "the retirement provision in his contract would be given effect to." It added that when this decision was made, it was not aware of the Africom agreement. The only sensible interpretation of this allusion to the Africom agreement is that when it decided on the training arrangement and linked it to his retirement, it was assuming the 2014 agreement was the relevant contract.
- [23] What emerges from the above, is that neither party was willing to commit to a single version of the contractual arrangement underpinning the determination of the timing of Coetzee's retirement. The true contractual position was difficult to discern in the swamp of alternative versions laid before the court. Nonetheless, Enviro bore the onus of proving the existence of an agreed retirement age, so it had to establish a contractual agreement to that effect.

Factual chronology

- [24] Coetzee commenced employment with Erintrade CC t/a RT Chemicals during April 2004 and was appointed as technical sales manager and herbicide division manager (the '2004 contract' or 'the Erintrade contract').
- [25] During September 2011 he was presented with a contract of employment with Yield Chemical Group which he never signed (the '2011 contract' or the 'Yield agreement').
- [26] During 2014 his employment was transferred to Enviro Crop Protection (Pty) Ltd ('Enviro Crop'). Coetzee's contract of employment, which he signed on 28 February 2014 ('the 2014 contract' or the 'Enviro Crop agreement'),

appointed him as regional business manager and stated that the current retirement age of the company was 65 years and that a new

contract of employment may be negotiated provided that the applicant is healthy and able to perform his duties as expected[3]. Clause 3.7 of the same agreement set out an incentive bonus scheme Based on a profit share of 15% of net revenues over and above a benchmark level sit out in the clause. For the purposes of calculating cost of sales the clause stated that "(t)his will

typically include all costs related to the Cape region including depot costs, salaries and marketing costs." Prior to an email from Coetzee to Migael on 24 October 2019, Enviro's directors claimed to be unaware of the existence of the 2014 document.

- [27] The 2014 agreement was concluded before Enviro Crop was bought under business rescue process. On or about 17 March 2015 Africom Commodities (Pty) Ltd ('Africom') purchased three of Yield Chemicals' subsidiary companies, being Enviro Industries, RT Chemicals and Enviro Crop Protection. Christo testified that he was present in the meeting where terms of Coetzee's appointment as CEO of Enviro Crop was discussed when the business was bought out of business rescue. At that time the only document under consideration was the Africom agreement and there was no need to consider Coetzee's previous contracts. Coetzee was a

technical manager when his appointment as CEO was considered.

- [28] Coetzee was then given a contract of employment by Africom in terms of which he would be appointed as a CEO of Enviro Crop with effect from 1 April 2015. However, Coetzee did not simply sign the contract and return it, but made some substantial changes to it and returned it undated. He did not date because he was waiting for Enviro to sign it first. The alteration most relevant to these proceedings is that he deleted clause 3.1 of the document which stated:

“3. APPOINTMENT

Subject to the rights of the employee existing as at entering into this agreement, the employee is appointed and shall serve the employer as from the date of appointment until

3.1 the end of the financial year in which he attains the age of 60 (sixty) years or such other date as the parties may specifically agree to in writing or his earlier death; or

...”

- [29] It is common cause that Africom never signed or accepted Coetzee’s amendments, and it is a matter of dispute whether it was concluded. However, it is not in dispute that Coetzee was appointed as CEO of Enviro Crop and that he received his 10% shares in Enviro Crop Protection pursuant to clause 13 of the 2015 agreement and that the shares were later repurchased from him for R3,15 million, at his request. Irrespective of the applicability of the Africom agreement in either its unamended or amended form, Coetzee testified that he reached an oral agreement with Christo that there was no required retirement age and that he could continue working so long as he was willing and able to.
- [30] More specifically, Coetzee pleaded and testified that, during a meeting on or about 26 January 2017 at which Mr. Venter (who was then the financial director the company), Mr. Grobler, Mr C du Toit, Ms C du Toit and Ms R Rheeder were present, the issue of the retirement age came up. Christo had clarified that it was a family business and there was no such thing as a retirement age in their business. Coetzee also claimed that other employees could work for as long as they wanted and were willing and able to do so. Venter had been subpoenaed by Coetzee to testify but ultimately was not called to give evidence.
- [31] Coetzee also claimed in his statement that during a meeting on 23 February 2017 with a number of other managers, the question of the firm’s retirement age policy came up and he reiterated what he had been told, namely that one retired when one could no longer do the work or felt too old to do so. Christo could not comment on Coetzee’s claim that in February 2017 he advised his subordinates there was no retirement age or whether he also conveyed this staff in the offices in Paarl in November or December 2018. Coetzee did not call any other witness to corroborate his version of these meetings.

[32] Coetzee further stated that Venter had confirmed Christo's statement and had mentioned there another lady employed in the same group of companies who was already 72 years old. Christo testified that he did not remember the meeting and that he could not recall stating that there was no such thing as a retirement age. He did say (both in his testimony and his statement under oath) that he was aware of a lady working at an entity known as BPI and that he could only assume that the applicant wrongfully

presumed that BPI was a part of the Enviro Group of Companies, whereas in fact it belonged to another entity known as "Michigan",

at that time of which Mr. Venter was the owner. When asked to comment on what Christo said, Coetzee insisted that the meeting took place in the presence of the others mentioned.

[33] In 2017, Enviro Crop Protection changed its name to Enviro Bio-Chem (Pty) Ltd. Coetzee turned 65 years old on 5 September 2018.

[34] In Coetzee's written statement he stated that at a meeting in Paarl in late November or early December 2018, Christo had confirmed that there was no retirement age for Coetzee and Coetzee had requested written confirmation of that, but Christo had assured him that he had a good heart and would never go back on his word. Christo could not recall such a meeting.

[35] In January 2019 a document was circulated setting out the company's vision and structure, as envisaged by Christo and Ms T Grobblers, Christo's spouse and director of Enviro ("Tania"). The document reflected that Coetzee still held the position of CEO. Incidentally, Christo and Tania donated a boat cruise to Coetzee and his spouse, which they enjoyed during Coetzee's annual leave in May 2019. At that stage relations between all involved seemed to be good, but matters deteriorated after his return from leave. Christo attributed to having discovered during March or April 2019, that Mr. Nico Coetzee (Coetzee's son) who was then Enviro's sales manager, had allegedly been doing an extensive amount of business

with his own company without having sought or obtained the permission of the Enviro. This led to Nico's resignation from Enviro, which put strain on the working relationship between the applicant and the respondent. From June 2019 Coetzee's position and functions were substantially altered.

[36] Christo stated that on 21 June 2019, he informed Coetzee that Migael would forthwith take over management of the Respondent and that he (Christo) would become the CEO. Christo further confirmed that he told Coetzee that he could serve a supporting role for as long as he felt up to doing so and he (Christo) undertook to put this in writing. This was confirmed in the pre-trial minutes as well. On 22 June Coetzee received an email from Tania setting out the new structure and his duties. The new arrangement suited him as he no longer wanted responsibility for the business and wanted to phase down his involvement owing mainly to his deteriorating health.

- [37] Christo testified that when his son, Migael, started working for Enviro he reported to Coetzee. When Coetzee did not want to take the responsibility for the business any longer he became a trainer, and Migael became Coetzee's boss in the capacity of the general manager. Thus, Migael took responsibility for the company after that. However, Migael testified that his authority was limited in certain respects. In particular, it did not extend to decisions about Coetzee's retirement.
- [38] On 12 September 2019, Coetzee sent an email to Christo in which he referred to the Enviro structure and a meeting held with Christo on 24 June and various other meetings between himself and Migael regarding his own position at Enviro. He recorded that, on all the occasions mentioned, it was stated to him that his contract with Enviro had no expiry date, but he never receive written confirmation of this from Migael, contrary to what had been agreed at the meetings. He asked for confirmation that his understanding was correct ('bevestig dat ek dit reg verstaan') Migael's response the next day was "Oom Thuys understood it 100 % correct. Nex week we also make a date to discuss Oom's 'program' and responsibilities."
- [39] In the pre-trial minute the parties agreed that in the discussion on 23 October 2019 about the fact that there were no contracts in place confirming Coetzee's new position, Migael had stated that they still had the 2014 contract in place. However, in his evidence he was reluctant to accept this was correct saying that he was not aware of that contract at that time and argued that Coetzee's request for commission payment was obviously a reference to the 2004 contract.
- [40] On 24 October 2019, Coetzee confirmed relevant details of a discussion between himself and Migael in an email. In summary, the contents of the email were that:
- 40.1 Coetzee's employment contract with Enviro was the same contract coming from RT chemicals since 2004 and his contract had not changed;
 - 40.2 an annual 2% bonus owing to him had not been paid for the last three years and he wanted to place that on record in case it was considered to have expired or if the business changed hands;
 - 40.3 no retirement age was specified and Migael had confirmed that there was presently none;
 - 40.4 his salary had remained the same since 2014 despite other staff getting increases;
 - 40.5 with effect from 24 June his responsibilities as CEO had been removed and he would receive an agreement on the way going forward;
 - 40.6 from 25 June he no longer had access to management information;
 - 40.7 his function was currently a supportive one, and
 - 40.8 Migael had undertaken to give him a written agreement in respect of the future, and he requested this should be finalised before the end of October.

- [41] Migael only responded a week later on 31 October. Instead of confirming any of the discussions as Coetzee had requested, he said that the company had prepared “the necessary information” and wanted to discuss it with him during a meeting scheduled for 4 October 2019. The following day, Coetzee asked who would be attending the meeting, but received no reply, nor did he receive any indication of an agenda for the meeting.
- [42] As it turned out, a labour consultant, Mr W Smit (‘Smit’) from the Association for Retailers, Manufacturers and Service Providers (‘ARMS’) was present. Christo and Migael claimed that Smit had been asked to attend the meeting because Christo could not. It is not necessary to review in detail what transpired at the meeting. What is apparent from the transcript is that Smit approached the meeting on the basis that Coetzee was past the ‘statutory’ retirement age and therefore his retirement was due. His manner could only be described as abrasive. Coetzee was clearly caught off guard by being confronted out the blue with this proposition and responded defensively. He repeatedly complained he had not had not had an opportunity to prepare for the meeting.
- [43] Christo testified that the object of the meeting was to determine which employment contract was valid and to straighten out the retirement issue once and for all. Christo and Migael said that the labour consultant had advised the firm that the 2014 contract was the valid current contract. Accordingly, it should be given effect to and negotiations on new terms should then take place. At that stage, Enviro wanted him to continue as a consultant, and Coetzee also wanted to phase down and have less responsibilities. Christo testified Coetzee was more than happy to assume a consulting position. Migael was of the view that the purpose of the meeting was to discuss the retirement provision in clause 8 of the 2014 agreement and agree on a way forward. One possibility was that Coetzee might work on a retainer and invoice the firm for his services. He agreed that at the time, it was the plan was to terminate Coetzee’s employment as he had reached retirement age, but also to see how he could continue with the company under a new agreement.
- [44] Migael claimed that, during the meeting, Coetzee responded aggressively to the consultant Mr W Smit (‘WS’) when the latter said the meeting was to discuss Coetzee’s retirement or plan going forward. The meeting was convened for the purposes of having a discussion and did not require preparation, in Migael’s view. There were two adjournments during the meeting,

one for lunch and another when Coetzee threatened to walk out, and was given an opportunity to obtain advice. Migael admitted that the meeting had been tense but said that at the end of the meeting Coetzee and Smit apologised to each other, of which there was some evidence in the transcript. At the end of the meeting Coetzee proposed that he received 12 month salary and that they should conclude a consultancy agreement. Smit asked Coetzee to put his proposal in writing, but he never did. Migael agreed that Coetzee was expecting the company to make a proposal rather than receiving one from him.

[45] It was pointed out to Migael that the transcripts of the 4 November 2019 meeting showed there was confusion with regards to which contracts were being referred to during the meeting and that Coetzee had made it clear he no longer wished to argue about the contracts as he had not had an opportunity to prepare for the meeting. In the transcript of the meeting, Coetzee was recorded as stating “daai ding was nooit afgehandel gewees nie” and “daar was veranderinge op hom wat nooit reggemaak is nie”,

which was an apparent reference to the 2015 Africom agreement which was never signed by the Enviro. At the meeting, Migael and Smit only had the unsigned version of the 2015 agreement and were unaware of the amended document which Coetzee had signed. The Applicant then indicated that he felt he was being bamboozled and “julle storm my nou”.

[46] Migael was insistent that Coetzee was encouraged to consult with his legal representative, whilst the recording of the meeting clearly indicated that it was Coetzee who insisted on obtaining legal advice and that he was about to walk out of the meeting, at which point Smit said he would be given an opportunity to seek advice.

[47] Enviro’s case was that, prior to the lunch interval during that meeting, Coetzee was referring to the 2004 contract (‘the RT Chemicals contract’), but in the afternoon relied on the 2014 contract, which Enviro and the consultant also then believed was the current one. Smit referred to the retirement provisions in the 2011 and 2014 agreements. The former provided for retirement at age 65 and the automatic cancellation of the contract within three months after that date. The 2014 agreement reiterated that the current retirement age at the company was 65, but stipulated that: a new fixed term may be negotiated subject to Coetzee being able to perform. When Smil read out this latter provision in the meeting, Coetzee’s immediate response was that something had been negotiated. This was apparently a reference to his claim that he had an agreement with Christo that he was to mentor Migael and that he could stay as long as he saw fit.

[48] Migael said in his statement that both parties at the meeting were relying on the 2014 agreement, as far as the retirement clause in that agreement was concerned. However, he conceded that Coetzee did refer to his subsequent oral agreement with Christo to the effect that he could stay as long as he liked. Migael said he was unaware of such an agreement. He agreed that changes that took place in Coetzee’s remuneration and functions after stepping down as CEO, had not been reduced to writing.

[49] Migael could not explain how the company claimed it had not waived its reliance on the 2014 agreement but at the same time maintained that the 2015 agreement was valid.

[50] During Migael’s cross-examination, he was requested to give evidence on why a certain depot manager Mr. J Smit was able to remain employed despite his retirement age being reached and that he was not subject to the retirement clause. Mr. Migael Grobler testified that the facts of that case were different in that Mr. Smit was a depot manager and it had been Coetzee who had informed Smit there was no retirement age. Migael claimed that, unlike Coetzee, Mr. Smit had no Africom Commodities Agreement in place. Under those

circumstances, if the company were to retrench him even though Coetzee had created the impression that he could work further, the company would in all probability act unlawfully. Migael also claimed that as CEO, Coetzee ought to have known that he would have needed a director's approval for any extension on his 2014 agreement. At the time the director was Tania Grobler. Mr. Christo Grobler testified that this meant she would have had to take any "big decision's" such as

extending the applicant's contract. By contrast Smit had only reported to Coetzee. This evidence was not addressed in Coetzee's

own testimony.

[51] In relation to the firm's contention that Coetzee had been dishonest about not revealing the Africom agreement, Migael said that it only came to light after Coetzee had spoken to his advisor during the meeting. Coetzee then told them that the 2004 contract was not valid, yet he must have been aware of the Africom agreement because of the share purchase provision in clause 13 of that contract. He had been issued with shares in terms of clause 13 of the Africom agreement and had been paid out for them. Despite the firm no longer relying on the Africom agreement, Migael maintained that it was the correct contract. He conceded that it did

not contain a retirement age and that in terms of that agreement Coetzee's dismissal would have been 'unlawful'.

[52] After the meeting, Migael advised Gs that Coetzee wanted a 'golden handshake' and wanted to leave, but Migael still wanted Coetzee to provide Technical Support.

[53] Following the meeting there was a flurry of correspondence between the parties's consultants and legal representatives, but no agreement on a way forward could be reached. When Coetzee did not come up with a proposal before the company closed at the 2019 year end, Enviro decided to dismiss him on the basis he had reached retirement age, believing he had sufficient time to come up with a proposal and it was not necessary to extend the time for a response into the next year.

[54] Christo said the firm was guided by their consultant in deciding to retire Coetzee at the end of December 2018. In his view, Coetzee did not need until January to consider his position as he already had six weeks to consider it by the time he requested additional time. He claimed Tania was dealing with the consultant at the time and he was not involved and could not say why no additional time was afforded to Coetzee to consider his position.

Argument

[55] Coetzee argued that Christo had not disputed the existence of an oral agreement, which was reflected also in the 2015 agreement, as amended by Coetzee, which did not stipulate a retirement age. Enviro disputed that Christo had agreed the discussions he had were encapsulated in the Africom agreement amended by Coetzee. Rather it was the written unamended contract it had relied on.

[56] In his statement of claim, Coetzee had said the following about the 2014 agreement:

“4.9 in terms of the applicant's last contract of employment which he had signed on or about 28 February 2014 and being the contract which appointed him as Regional Business Manager with effect from February/ March 2014, it was stated that the retirement age in the company is at 65 years and that a new contract of employment may be negotiated provided that the applicant is healthy and able to perform his duties as expected.”

[57] As mentioned, Enviro abandoned any reliance on the Africom agreement. Accordingly, it asserted that the 2014 Enviro Crop contract applied. Migael confirmed Enviro's reliance on this agreement to establish that the agreed retirement age was 65. Enviro argued that, even though the possibility of negotiating a new contract existed, any new contract would have varied Coetzee's terms of employment and it would have been necessary to effect any changes in terms of clause 9.1 of that agreement which provided that the terms of the 2014 agreement could only be varied by a written agreement signed by both parties. Accordingly, no extrinsic evidence of oral agreements could not be considered. In *KPMG Chartered Accountants (SA) v Securefin Ltd and Another 2009 (4) SA 399 (SCA)*, the Supreme Court of Appeal reaffirmed that:

“[39] First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (Johnson v Leal 1980 (3) SA 927 (A) at 943B).”

[58] Coetzee argues simply that the 2015 agreement was a completely new contract, which was distinct from the 2014 contract that had already ended. Accordingly, there was no requirement to comply with clause 9.1 of the 2014 agreement to conclude the new contract. Further, because Migael argued that the 2015 agreement was the valid agreement, there was no agreed retirement age, he had conceded this. This contention was premised on Coetzee's version that the applicable 2015 document was the one he amended and signed, but it cannot be assumed Migael was referring to Coetzee's version of the 2015 agreement.

[59] In relation to the claim that Coetzee's dismissal on account of age was unfairly discriminatory, Enviro argued that clause 8 of the 2014 agreement clearly identified an agreed retirement age of 65. In common with the situation in *Karan t/a Karan Beef Feedlot v Randall [2012] 11 BLLR 1093 (LAC)*, either under clause 3.1 of the 2014 agreement or clause 3.1 of the unamended 2015 agreement, which stipulated a retirement age of 65 and 60 years, respectively, Coetzee had passed the retirement age in the contract. Coetzee contended the *Karan* case was irrelevant, because in that instance there had been an agreed retirement age

but the employer had permitted the employee to work beyond that on the condition that his service could be terminated on notice at any time.

- [60] Enviro also pointed out that once established that there was a normal or agreed retirement age and the employee's service was terminated on that account, even if the termination took place after the employee reached the retirement age, the issue of procedural fairness does not arise (See *Schweitzer v WACO Distributors* (J463/97) [1998] ZALC 48 (28 July 1998) at para [27]). Accordingly, whether Coetzee got an adequate opportunity to prepare for the meeting on 4 November

2019 and whether the consultant adopted an abrasive style were irrelevant to the fairness of the dismissal. S s 187(2)(b) of the LRA deems a dismissal in such circumstances to be fair without requiring compliance with any procedural obligations. Coetzee argues that this case is also distinguishable from the circumstances of his retirement. In that case there was an agreed retirement age, whereas in the case either in terms of the verbal agreement or the 2015 agreement as amended, there was no retirement age.

- [61] The respondent asked for costs given: Coetzee's abandonment of his claim for reinstatement (a claim equivalent to approximately R 2 million or more); for allegedly altering his stance on the applicability of the 2015 agreement having contested it was not applicable to begin with, and abandoning his employment equity claim for damages and his claim for commission (a further R 2 million). Enviro contends that his abandonment of these issues indicates his claim was an exaggerated one which entitles it to costs.
- [62] Coetzee claims Enviro had three versions. Firstly, he could only retire once training had been completed, and had admitted it had not been completed, even if they sought to suggest it was because he had not applied himself to the task. Enviro stated that this was its expressed intention at the end of 2018, but at that stage it was not aware of the 2015 Africom agreement.
- [63] Secondly, Enviro had pleaded Coetzee would play a supporting role as long as he wanted to. This was common cause in terms of the pre-trial minute at paragraph 3.23, viz:

"On or about 21 June 2019, Christo informed the Applicant that Migael would forthwith take over management of the Respondent and that he (Christo) would be the CEO. He further stated that the Applicant would serve a supporting role for as long he feels up to doing so. Christo undertook to put this in writing the following day so as to put the Applicant at ease. The Respondent records that it is however in dispute whether this was by way of agreement between the Applicant and the Respondent or whether this was unilaterally imposed by Christo"

(emphasis added)

Christo confirmed this under cross examination. On this version too, Christo argued Enviro had no right to terminate his service unilaterally.

[64] Lastly, Enviro relied on the 2015 agreement as amended and admitted the same in its reply and in evidence. It claims Christo was aware of the 2015 agreement and the changes Coetzee had given effect to. Enviro stressed it abandoned reliance of the Africom agreement, and only relies on the 2014 agreement. However, it had conceded the existence of the oral agreement, and Migael acknowledged this too when he responded to Coetzee's email on 13 September 2019.

Discussion

- [65] As mentioned already, Enviro's defence to the claim of unfairly discriminating against Coetzee by dismissing him on account of age, is that he was entitled to retire him because he had passed the agreed retirement age of 65 or 60 stipulated in the 2014 or 2015 agreements, respectively. However, Enviro expressly disavowed reliance on the Africom agreement without any qualification, so its case must rest on the applicability of the 2014 agreement.
- [66] Much of Enviro's argument was directed at challenging the basis on which Coetzee asserted that there was no agreed retirement age, rather than supporting its own contention that the parties had agreed on a retirement age of 65. The onus rests on Enviro to establish this to defend itself that its retirement of Coetzee was automatically unfair on account of his age.
- [67] The 2014 agreement was drafted in the form of an offer by Enviro Crop to Coetzee, which he accepted in writing on 28 February 2014. Thus, at that stage there was an agreed retirement age of 65, subject to the possibility of him negotiating a fixed term contract if he was also healthy and able to perform his duties. The only question then is whether that contract was still in place when he was dismissed at the end of 2019.
- [68] Coetzee had claimed that when he was appointed CEO in 2015, it was on the basis that he could carry on as long as he was able and willing to. Christo, had conceded this had been said but said it was subject to a rider that this applied only so long as Coetzee remained CEO and until a reassessment of all management positions was undertaken. It seems the alleged rider was an afterthought on his part as it is highly improbable it would not have been pleaded by Enviro. In any event, any oral undertaking made at this stage was superseded by later ones.
- [69] It was recorded as common cause by the parties in the amended pre-trial minute that, on 21 June 2019, Christo conveyed to Coetzee that he (Christo) was assuming the role of CEO in Enviro and Coetzee would perform a supportive role as long as he was up to doing so. Christo was supposed to confirm this in writing but never did. Subsequently, on 12 September 2019, Coetzee sought written confirmation that his contract had no expiry date. Migael responded apparently confirming this, but in his testimony claimed he was merely confirming that nothing had been reduced to writing. His explanation of his response, is highly implausible. It is quite clear that Coetzee was well aware the undertaking had not been reduced to writing. He did not need confirmation of that. It is patently obvious that what he sought was confirmation of his understanding that his contract with Enviro had no expiry date, and this is what Migael confirmed in his replying email. Had Migael's version

been correct, the most obvious step would have been for him to say he would follow up about getting written confirmation.

- [70] When Coetzee sent a further email on 24 October 2019 stating that Migael had confirmed in a discussion that there was presently no retirement age, Migael did not dispute this, and did not reply directly to any of the content of Coetzee's email. Instead, he referred obscurely to having obtained "the necessary information" which would be discussed at a meeting he scheduled for 4 November.
- [71] Migael's attempt to disavow his authority to make any decisions regarding the status of Coetzee's employment conditions was also unconvincing. Other documents from the company showed that as the General Manager he was in charge of all operations and day-to-day management. In an email attachment in September 2019 setting out Coetzee's new responsibilities it was emphasized that Migael had complete responsibility for staff, without any stipulated limitations.
- [72] It is common cause that at the meeting on 4 November 2019, and until Enviro discovered Coetzee's amended Africom agreement when it was preparing to launch the High Court application at the end of 2020, both parties were dealing with each other on the basis that the 2014 agreement was the last agreed contract. Coetzee's version, in part, was that the type of negotiation envisaged in clause 8.1 to extend his employment had taken place and had resulted in an oral agreement concluded between himself and Christo, to the effect that his employment would at least extend until he had concluded the training of the next generation of managers. Consequently, the date of his termination was agreed to depend on that event occurring, which in effect would have amounted to a resolute condition, and not on his age.
- [73] It was common cause that such a training role was envisaged and indeed that he was supposed to be performing that role, as instructed by Christo on 21 June 2019. It is also common cause that Christo undertook to record this change in writing but never did so. However, as already mentioned, the pre-trial minute, cited at paragraph 63 above, went further in stating that he was told he could play a supportive role as long as he felt up to it.
- [74] The critical question is the contractual status of the changes which occurred and the undertakings made. What is clear is that effect was given in some respects to the 2015 Africom agreement, whether one relies on the one amended by Coetzee or the unamended version. Thus, Coetzee was made CEO of the firm. He also received shares in terms of the agreement. However, the fact that these changes were in line with the relevant provisions of the 2015 agreement does not help to determine whether other other provisions were agreed to. In particular, the parties were not in agreement about the retirement provision, hence Coetzee's proposed amendment. We also know that the whole agreement was never concluded in writing between the parties, which was clearly the intention of clause 42 of the agreement, requiring any changes to be made in writing and recording the written contract as the exclusive record of the agreement. Coetzee had deliberately withheld dating the

document until his changes were accepted by Enviro. No reliance can therefore be placed on either version of the 2015 agreement as embodying a new written employment contract, even if he was nevertheless appointed by consent to the position of CEO and received shares in accordance with the provisions of the 2015 agreement.

- [75] In any event, his appointment as CEO came to an end and he was employed in a completely different support role from mid-2019.
- [76] Coetzee argued that when it was stated on 21 June 2019 that he would change roles, this amounted to a new contract of employment and not an amendment of his previous 2014 contract, in terms of which he had accepted appointment as a regional business manager on certain terms. This raises the question whether or not the 2014 contract was still applicable. The year after concluding that contract, Coetzee was appointed to a completely different position as CEO and was awarded shares bought with commission, something the 2014 agreement did not provide for. In mid-2019 he was removed as CEO and placed in a completely different support role on the understanding that he was phasing himself out of the company by training successors. The possibility of such fundamental changes in his appointments and responsibilities and remuneration packages were plainly not encompassed in the 2014 agreement, and at the times he assumed the new positions no change was brought about to align his contract with the new appointments. The 2015 agreement (though never concluded) was not a variation of his terms of employment as a regional branch manager, but premised on different substantive conditions of employment and, from Enviro's perspective, would have entailed a lower retirement age. The fact this contract was never concluded in writing does not detract from the existence of clear intention to end his appointment as a regional branch manager under the 2014 contract and enter into a new one, without reliance on any terms of the previous appointment.
- [77] Moreover, the 2014 agreement was in the form of a written offer to take up the specific appointment as a regional business manager "on the terms and conditions set out" in the letter containing the offer. Yet he subsequently was appointed to the completely new position of CEO with the attendant benefit of a share purchase scheme without any written variation of the 2014 agreement being effected. The 'terms and conditions' referred to in the 2014 letter were the terms and conditions of that appointment. The variation provision referred to variation of those terms, namely the terms and conditions on which that appointment was made. It does not follow that when that appointment came to an end, all the other terms of that appointment persisted. It is one thing to say that in terms of clause 9.1 of the 2014 agreement, the terms of his appointment as regional branch manager could not be varied except by written agreement. It is quite another to say that even when his appointment in that post ended and he was appointed to a completely different post, that his new appointment was simply a change in the terms and conditions on which he had been appointed as a regional branch manager in 2014. His appointment to a new position required a new contract, albeit that it could have replicated many features of the old, because an appointment to a completely different position could not be construed as a

variation of the terms or conditions on which he was engaged as a regional branch manager.

- [78] It is clear that, after he ceased to be the CEO, there was a mutual intention to engage Coetzee in a different capacity, with the length of employment being either indefinite, or subject to the conclusion of a training programme, but not determined by his age. That agreement was never finalised, but when his employment was terminated there was no contractually agreed retirement age still governing his employment.
- [79] Consequently, I am not satisfied that Enviro has proved that when it retired Coetzee it did so in accordance with an agreed retirement age. The last agreed retirement age was 65 in terms of the 2014 agreement, but that agreement was no longer applicable when Coetzee was dismissed. It follows that his dismissal was automatically unfair on account of age as Enviro did not prove Coetzee had reached an agreed retirement age for someone in the capacity he was employed in at the time of his dismissal in terms of s 187(2)(b) of the LRA.

Costs

- [80] Any cost award on the merits, if one is to be made, can only be fairly determined once a determination of the quantum is made. The costs of the special plea can be determined though. It is true the trial had to be postponed owing to Christo's illness, but the parties still had to remain at court to argue the special plea, which was done on 8 June 2021. The special plea had been necessitated by a late amendment of the Enviro's claim in which it sought to rely on the 2015 agreement. It readily shrugged off its reliance on that agreement once the jurisdictional point was determined in Coetzee's favour, and the trial proceeded on that basis. Had Enviro genuinely believed a version of the 2015 agreement was in fact the correct one, it is improbable it would have so readily abandoned reliance on it. The distinct impression created, is that the special plea was simply a tactical strategy and its contention that the agreement was binding was made solely for that purpose. In my view, as a matter of fairness and law, this kind of conduct should be discouraged and Coetzee should be entitled to the costs of the special plea.

Order

- [1] The dismissal of the Applicant by the Respondent was an automatically unfair dismissal based on his age, in terms of s 187(1)(f) of the Labour Relations Act, 66 of 1995.
- [2] Either party may enrol the matter for determination of quantum of compensation due to the Applicant, if any, on account of his automatically unfair dismissal.
- [3] Cost of the trial on the merits are reserved pending the determination of the quantum of compensation due to the Applicant, if any.
- [4] The Respondent must pay the Applicant's costs of opposing the special plea.

Lagrange J

Judge of the Labour Court of South Africa

Representatives For the Applicant L Erasmus instructed by Mr J Du Randt of Du Randt Du Toit Pelser attorneys For the First Respondent RA Arcangeli instructed by Mr G Van Wyk of Gerrit Coetzee Attorneys

[1] The court's reason for the ruling was set out in these paragraphs of the ruling: '[1] Having heard argument from both parties I am satisfied that it is not an implied term of the April 2015 agreement that the applicant had a contractual right not to be automatically unfairly dismissed or otherwise unfairly dismissed. (See SA Maritime Safety Authority v McKenzie 2010 (3) SA 601 (SCA); (2010) 31 ILJ 529 (SCA) at para [56].) Although it was argued by the respondent that the latter case is distinguishable from the present one, the existence of an arbitration provision in this matter does not alter the fundamental premise on which the special plea in the law is based, namely an implied right not to be unfairly dismissed. An additional ground raised, though not pleaded, was that the right to refer a dispute over an automatically unfair dismissal would have to be referred to arbitration because the April 2015 agreement incorporated the Labour Relations Act, 66 of 1995 and the Employment Equity Act 55 of 1998 by reference thereto. However, this alternative argument is not supported by the text of the document.

[4] Consequently, I am satisfied that if the April 2015 agreement is valid and applicable it is not a bar to this court determining the applicant's claim of automatically unfair dismissal."

[1] The court's reason for the ruling was set out in these paragraphs of the ruling:

'[1] Having heard argument from both parties I am satisfied that it is not an implied term of the April 2015 agreement that the applicant had a contractual right not to be automatically unfairly dismissed or otherwise unfairly dismissed. (See SA Maritime Safety Authority v McKenzie 2010 (3) SA 601 (SCA); (2010) 31 ILJ 529 (SCA) at para [56].) Although it was argued by the respondent that the latter case is distinguishable from the present one, the existence of an arbitration provision in this matter does not alter the fundamental premise on which the special plea in the law is based, namely an implied right not to be unfairly dismissed. An additional ground raised, though not pleaded, was that the right to refer a dispute over an automatically unfair dismissal would have to be referred to arbitration because the April 2015 agreement incorporated the Labour Relations Act, 66 of 1995 and the Employment Equity Act 55 of 1998 by reference thereto. However, this alternative argument is not supported by the text of the document.

[4] Consequently, I am satisfied that if the April 2015 agreement is valid and applicable it is not a bar to this court determining the applicant's claim of automatically unfair dismissal."

[2] The section reads: "187

(2) Despite subsection (1) (f)- ...; (b) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity."

[2] The section reads:

"187

(2) Despite subsection (1) (f)-

...;

(b) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.”

[3] Cited in paragraph [16] above.

[i] As varied on 13/11/2023 in terms of S 165(b) of the Labour Relations Act, 66 of 1995, to correct patent grammatical and typographical errors in the original judgment.

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