

SOUTH AFRICA / JUDGMENT

Pedra v Wisium SA (Pty) Ltd (JS550/17) [2022] ZALCJHB 53 (15 March 2022)

[2022] ZALCJHB 53**COURT**

Labour Court Johannesburg

BEFORE

T Deane

CASE / FILE NUMBER

JS550/17

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Source record**IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG****Not****Reportable****Case no: JS550/17****In the matter between:**FELIPE CARLOS
PEDRA
Applicant
and
WISIUM
SA (PTY)
LTD
Respondent**Heard:**11 February
2022**Delivered:**

15 March 2022

JUDGMENT

DEANE, AJ

Introduction

[1] The matter has been set down on the interlocutory roll for hearing of a preliminary issue.

[2] The Respondent (the Applicant in the point in limine) raises two preliminary issues. The first preliminary issue is that the statement of claim is defective and that the Applicant has referred an unfair dismissal dispute to this Court, coupled with an automatically unfair dismissal dispute.[1] Simultaneously, the Respondent contends that the only dispute before the Court should be an automatically unfair dismissal dispute, but that if the Court should hold a different view, the statement of claim should be amended so that any unfair dismissal dispute should be included as an alternative.[2]

[3] The second preliminary issue raised by the Respondent as a preliminary point is that notwithstanding the agreement by the parties in the pre-trial minute[3] that the Respondent will begin, the Applicant must begin. It is argued that “this argument is predicated on the Respondent’s view that because the onus is on the applicant to prove his dismissal, he necessarily has to begin.”[4] The Applicant differs from the stance adopted by the Respondent.

[4] I will therefore have to firstly clarify the nature of the dispute and then secondly the duty to begin.

Parties

[5] The Respondent in the original application is the Applicant in this interlocutory application and the Applicant in the original application is the Respondent in this application.

[6] For the sake of convenience and unless specifically indicated, the parties will be referred to as they appear on the original application.

Brief Background

[7] Before turning to the issues posed in paragraph 4 above, it is necessary to briefly refer to the facts that gave rise to the present dispute and more in particular, the present application before the Court.

[8] The Applicant was employed by the Respondent on or about 1 April 2006 as a general manager.

[9] The Applicant was informed on or about 23 January 2017, by the Respondent, that in terms of the Respondent’s retirement policy, he will be required to go on pension at the age of 60 years.

[10] The Applicant, in summary submits, amongst others[5], the following regarding the Respondent’s retirement policy:

10.1 The Applicant disputes that the Respondent had a retirement policy which was applicable to him.

10.2 There was no written contract of employment in place.

[11] The Applicant filed a statement of claim in terms of rule 6 of the Rules for the Conduct of Proceedings

in the Labour Court[6] on 21 August 2017.

[12] In the statement of claim, the Applicant avers, inter alia, that:

12.1 He was unfairly dismissed by the respondent;[7]

12.2

The respondent failed to follow a fair procedure in dismissing him;[8]

12.3

His dismissal is substantively unfair in that his dismissal was not based on a fair reason;[9]

12.4 His dismissal is also automatically unfair due to the fact that the respondent dismissed the applicant and discriminated against him on the basis of his age, alternatively on arbitrary grounds which are unknown to the applicant.[10]

[13] The Respondent denies that the termination of the applicant's service was unfair in any way and also denies that the applicant was unfairly discriminated against.

Nature of the Dispute

The Respondent's Case (Applicants in the point in limine)

[14] The Respondent contends that if one has regard to paragraphs 5.1 to 5.3 of the Statement of Claim, it appears that the main complaint of the Applicant relates to an unfair dismissal (substantive and procedural fairness).

[15] In paragraph 5.3 of the statement of claim, the Applicant avers that his dismissal was also automatically unfair.

[16] The Respondent argues that the Applicant cannot proceed on this basis because the dispute that was conciliated before the Commission for Conciliation Mediation and Arbitration (CCMA) was an automatically unfair dismissal dispute

based on discrimination due to age. The referral form states "automatically unfair dismissal: Related to age"[11] and that "the respondent dismissed the applicant on the grounds that he will turn 60 [in] April 2017. This constitutes arbitrary discrimination in terms of the provisions of section 187(1)(f) of the LRA".[12]

[17] The CCMA's certificate of outcome also refers to the dispute that remained unresolved as follows:

'S187(2)(f) – Automatically unfair dismissal to discrimination based on age.'[13]

[18] The Respondent contends that “it is clear that the dispute referred to the CCMA was a dispute relating to an alleged automatically unfair dismissal in terms of the section 187 of the.....(...LRA)”, [14] however, the statement of claim indicates that the Applicant has referred an unfair dismissal dispute to the above Court, with the averment that the dismissal was

not only unfair but also automatically unfair. [15]

[19] The Respondent holds the view that the Applicant cannot refer an unfair dismissal dispute coupled with an automatically unfair dismissal dispute under circumstances where only an automatically unfair dismissal dispute was referred to and conciliated at the CCMA.

The Applicant’s case (Respondent’s in the point in limine)

[20] The Applicant contends that the Applicant referred an automatically unfair dismissal dispute to the CCMA.

[21] In paragraph 3 of the referral form, [16] the dispute is described as an automatically unfair dismissal dispute related to age.

[22] In paragraph 4 thereof, the Applicant states that the Respondent informed the Applicant that he would retire on 30 April 2017 because he was reaching the retirement age of 60. [17]

[23] In paragraph 7(a) of the referral form, the Applicant states that the dismissal is procedurally unfair because no procedure was followed and in paragraph 7(b), the Applicant states that the dismissal is substantively unfair because the Respondent dismissed him because he was turning 60 and therefore discriminated against him, as provided by section 187(1)(f) of the Labour Relations Act [18] (LRA). [19]

[24] The Applicant submits that the dispute that was conciliated at the CCMA, is the same dispute that was referred to this Court, viz an automatically unfair dismissal dispute.

[25] If one has regard to the Applicant’s statement of claim [20] it reads:

‘Jurisdiction and Nature of Claim

The Applicant’s claim concerns an automatically unfair dismissal in terms of Section 185, 187(1)(f) and 191(5)(b)(i) of the Labour Relations Act, 66 of 1995 (as amended). The Respondent dismissed the Applicant for the sole reasons that he had reached the age of 60 years, thereby discrimination against him by virtue of his age. The Honourable Court therefore has jurisdiction to adjudicate this claim.’

[26] Furthermore in response to the “Legal Issues That Arise From The Above Facts” as reflected in the Statement of Claim, the Respondent’s response in paragraph 37 thereto is reflected as follows: [21]

37.1 The allegations as contained in this paragraph is denied and the Applicant is put to the proof thereof. The Applicant has not been unfairly discriminated against by the Respondent in any way. The Applicant's termination of services was based on the agreed retirement policy of the Respondent which the Applicant was duly aware of. The Respondent followed its own retirement policy in consultations with the Applicant and complying with a fair procedure. The termination of Applicant's services based on reaching the normal retirement age of 60 years is in line with the company's policies and procedures and is based on a fair reason.

37.2 The Respondent accordingly submits that the Applicant's termination of service was both procedurally and substantively fair and accordingly not automatically unfair in any way nor unfair as contemplated in section 188 of the Labour Relations Act in any manner as he reached normal and retirement age of 60 years in April 2017. The Respondent considered the Applicant's submissions and as indicated in the minutes and letter dated 30 January 2017 to the Applicant clearly stipulated the reasons why his employment cannot be extended beyond normal retirement age of 60 years.'

[27] What is clear from the CCMA referral form[22], the statement of claim[23], the Respondent's statement of defence[24] and the signed pre-trial minute[25], it is that the same dispute, namely an unfair dismissal dispute, that has been brought before this Court. Indeed the unfair dismissal

dispute concerns the allegation by the Applicant that the Respondent had unfairly dismissed him by terminating his employment on the grounds that the Applicant had reached the age of 60, and that the said age was the retirement age as set out in the Respondent's retirement policy, the existence of which, is disputed by the Applicant.

[28] When one has regard to the statement of claim as a whole and the Respondent's statement of defence together with the CCMA referral form and irrespective of the wording in the statement of claim which states inter alia that ".....[T]he applicant's dismissal is also automatically unfair...." (my emphasis), firstly; it should be read as that the Applicant is alleging that the Respondent did not follow any procedure before terminating his employment for the reasons that the Respondent's version is that there was no need to follow any procedure because there was no dismissal, since a retirement age had been implemented by way of a policy and the Applicant was bound to that policy. Whether or not there was indeed a policy to this effect and whether or not the Applicant was aware of said policy falls

outside the scope of this judgment, it suffices to mention this within the context of the dispute before this Court.

- [29] Secondly; regarding the allegation that his dismissal was substantively unfair due to the fact that the Respondent did not have a fair reason to dismiss the Applicant, the Respondent's reasons for disputing this is related to the allegation that the Applicant's employment was terminated in line with the Respondent's policy which provides that employees retire at age 60.
- [30] What is clear herein is that the Applicant, in referring his dispute for conciliation and to this Court for adjudication, shows that the Applicant has not relied on any facts save for the allegation that the dismissal is automatically unfair because the Respondent terminated his employment on the basis of a disputed policy which provides for retirement at the age of 60 years.
- [31] It is also clear that the dispute the Applicant had always intended to refer to the CCMA and to this Court relates to that of an automatically unfair dismissal. In addition, from the factual matrix before this Court, there is no indication of an intention on the part of the Applicant to include a dispute in the alternative.
- [32] I, therefore, do not agree with the Respondent in this matter that the "the referral to the Labour Court is problematic" as the Applicant has not referred an unfair dismissal dispute coupled with an automatically unfair dismissal dispute to this Court, for the reason that it was always an automatically unfair dismissal dispute that has been referred to and conciliated before the CCMA and now referred to this Court. The true nature of the dispute is and always has been an automatically unfair dismissal. Having had regard to the various sources cited by the Respondent[26] regarding the true nature of the dispute and including a dispute in the alternative, I am not convinced that a dispute in the alternative

should be included in the referral to this Court, for all of the reasons mentioned above, but specifically because there is no need to consider the true nature of the dispute which is and always has been an automatically unfair dismissal.

- [33] This then brings me to the next issue of the duty to begin.

The Duty To Begin

Who bears the onus?

- [34] It is trite that the incidence of onus is a matter of substantive law and based upon broad principles

of experience and fairness.[27] In *Pillay v Krishna*[28] sets out the legal principles in relation to pleadings and the onus as follows:

"The first principle in regard to the burden of proof is thus stated in the *Corpus Juris*: *Semper necessitas probandi incumbit illi qui agit* " (D. 22.3.21). If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it. But there is a second principle which must always be read with it: "*Agere etiam is videtur, qui exceptions utitur: nam reus in exceptione actor est*" (D. 44.1.1). (*Exceptio* does not mean, of course, an exception in

the sense in which the term is now used in our practice.) Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded quoad that defence, as being the claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it.'

The legal principles applicable to automatically unfair dismissals

[35] In *SA Chemical Workers Union and Others v Afrox Ltd*[29] the Labour Appeal Court (LAC) in dealing with an automatically unfair dismissal in terms of section 187(1)(a) of the LRA (protected strike action), said the following:

'The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual twofold approach to causation, applied in other fields of law, should not also be utilized here ... The first step is to determine factual causation: was participation or support, or intended participation or support, of the protected strike a sine qua non (or prerequisite) for the dismissal? Put another way, would the dismissal have occurred if there was no participation or support of the strike? If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether such participation or conduct was the 'main' or 'dominate', or 'proximate', or 'most likely' cause of the dismissal. There are no hard and fast rules to determine the question of legal causation... I would respectfully venture to suggest that the most practical way of approaching the issue would be to determine what the most probable inference is that may be drawn from the established facts as a cause of the dismissal, in much the same way as the most probable of plausible inference is drawn from circumstantial evidence in civil cases ...'

[36] The LAC in *Kroukam v SA Airlink (Pty) Ltd*[30] held as follows:

'In my view, s 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstances envisaged in s 187 for constituting an automatically unfair dismissal.'

[37] In *State Information Technology Agency (Pty) Ltd v Sekgobela*[31] the LAC held:

'In cases where it is alleged that the dismissal is automatically unfair, the situation is not much different save that the 'the evidentiary burden to produce evidence that is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place rests on the applicant (employee). If the applicant succeeds in discharging his evidentiary burden then the burden to show that the reason for the dismissal did not fall within the circumstances envisaged by s 187(1) of the LRA rests with (employer). It is evident therefore that a mere allegation that there is a dismissal is not sufficient, but the employee must produce evidence that is sufficient to raise a credible possibility that there was an automatically unfair dismissal.'

[38] The applicable legal principles herein make it clear that the duty to begin therefore rests with the Applicant. However, in casu, the parties agreed in the pre-trial minute that the Respondent will begin.[32]

Pre-Trial Minute

[39] It is well established in our law that a pre-trial minute is no different to any other agreement concluded consequent to deliberations between the parties or those that they may have expressly or impliedly authorised to represent

them. It follows therefore that a pre-trial minute constitutes a binding agreement between the parties. It is for that reason that the Courts ordinarily hold the parties to the contents of their pre-trial minute.[33] A party can only resile from a pre-trial minute on condition special circumstances exist to do so.[34]

[40] The representative for the Respondent emphasised that the pre-trial minute was a binding agreement.

[41] In the present instance, the Applicant is seeking to resile from their agreement on the basis that the common cause facts and the issues in dispute, indicate that the duty to begin rests with the Applicant. It is further argued that it would be impractical if one had regard to the onus on the respective parties as referred to above, for the Respondent to begin.[35]

[42] When the parties entered into a pre-trial conference, they were at all relevant times legally represented. This was not disputed. In addition, the nature of the dispute was not in or an issue since it was the agreement that it was an automatically unfair dismissal based on age. It was on this basis that the pre-trial minutes were entered into and signed. It was

only when the matter was set down for trial, and I was given to understand ripe for trial, despite being disputed that it was indeed so, that the issue of the nature of the dispute arose.

[43] Seeing that I have just confirmed that the nature of the dispute was and remains unchanged during relevant times, in that it remains an automatically unfair dismissal, and that all parties willingly entered into and signed the pre-trial minute, I see no special circumstances that has since arisen and that has been placed before me to decide that the parties may deviate from that which was agreed to at the pre-trial conference. Indeed, this Court has held on numerous occasions that where a litigant is a party to a pre-trial minute reflecting agreement on certain issues, our Courts will generally hold the parties to that agreement or to those issues.[36] I therefore do not see why this Court in the circumstances of this case, should deviate from the legal principles mentioned herein.

[44] Indeed, in *Filta-Matix (Pty) Ltd v Freudenberg*[37], during argument after a trial appellant's counsel sought to rely on claims "A" and "B" when, at a pre-trial conference, he had specifically said he would rely upon claim "BB", counsel sought to "resile" from the agreement by stating in an affidavit that the limitation of the claim to claim "BB" had been the result of confusion caused by the nature of the questions asked. The Supreme Court of

Appeal held that that excuse could not, "in the light of the facts recited, be accepted"[38]. The Court continued and said that "to allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of Rule 37 which is to limit issues and to curtail the scope of the litigation"[39] (my emphasis). Whilst the facts of the above-mentioned case differs from the present matter, there is no reason that exists why the principle should not apply in this case.

[45] In the premise the following order is made:

Order

1. The statement of claim is not defective.
2. The dispute is clear and relates to an automatically unfair dismissal.
3. The Respondent is held to its duty to begin as agreed to by the parties in the signed pre-trial minutes.
4. There is no order as to costs.

T. Deane

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

R Kuhn

For the Respondent:

Adv F Storm

Instructed By:

Len Dekker Attorneys

- [1] Respondent's heads of argument at para. 17.
- [2] Respondent's heads of argument at para. 44.
- [3] Signed pre-trial minute, index, p. 37 at para. 12.
- [4] Applicant's heads of argument, p. 2 at para. 2.
- [5] See: Statement of claim for further allegations.
- [6] GN 1665 in GG 17495 of 14 October 1996, as amended.

- [7] Statement of claim, index p. 5 at para. 5.1.
- [8] Statement of claim, index p. 5, para. 5.2.
- [9] Statement of claim, index p. 5, para. 5.3.
- [10] Statement of claim, index p. 5 at para. 5.4.
- [11] Referral form at p. 39.
- [12] Referral form at p. 40.
- [13] Certificate of outcome at p. 44.
- [14] Respondent's heads of arguments on preliminary Issue, p. 3 at para. 9.
- [15] Statement of claim at p. 5 and Respondent's heads of arguments on preliminary issue at pp. 3-5.
- [16] Referral form at p. 39.
- [17] Referral form at p. 40.
- [18] Act No. 66 of 1995.
- [19] Referral form at p. 40.
- [20] Statement of claim at p. 2.
- [21] Respondent's statement of defence, p. 19 at paras. 37.1 and 37.2.
- [22] See: Index combined bundle at pp. 38-41.
- [23] Index Combined Bundle, pgs. 1-8.
- [24] Index, pgs. 11-22.
- [25] Index, pgs. 29-38.
- [26] Respondent's heads of argument on preliminary issue, pp. 4-10.
- [27] See: The Law of South Africa (LAWSA) vol 3(1) at para. 310.
- [28] 1946 AD 946 at 951 – 952.
- [29]
- (1999) 20 ILJ 1718 (LAC) at para. 32.
- [30]
- (2005) 26 ILJ 2153 (LAC) at paras. 28.
- [31]

(2012) 33 ILJ 2374 (LAC) at para. 15.

[32] See: Pre-trial minute at para. 12.

[33] See: National Union of Metalworkers of SA v Driveline Technologies (Pty) Ltd and Another (2000) 21 ILJ 142 LAC at para. 93.

[34] See: Zondo N and Others v St Martins School (Unreported case) case no: J3020/12 LC.

[35] See: Respondent's heads of argument at para. 43.

[36] See: Price NO v Allied - JBS Building Society 1980

(3) SA 874 (A) at 882D - E; and Filta-Matix (Pty) Ltd v Freudenberg & Others [1997] ZASCA 110; 1998

(1) SA 606 (SCA) at 613E - 614D.

[37] 1998(1) SA 606 (SCA).

[38] Ibid at 614C.

[39] Ibid at 614B. See also: Price NO v Allied - JBS Building Society 1980(3) SA 874 (A) at 822D – H.

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