

SOUTH AFRICA / JUDGMENT

Pedra v Wisium SA (Pty) Ltd (JS550/17)

[2024] ZALCJHB 45 (26 January 2024)

[2024] ZALCJHB 45**COURT**

Labour Court Johannesburg

BEFORE

Phehane

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:

19 & 20 October 2023, 27 November 2023 and 1 December 2023.

Delivered:

26 January 2024 (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 is deemed to be 10h00 on 26 January 2024.)

JUDGMENT

PHEHANE, J

Introduction

- [1] The applicant (Mr. Pedra) brings this referral in terms of the provisions of section 187(1)(f) read with section 191(5)(b)(i) of the Labour Relations Act[1] (LRA). He claims that he was dismissed from the employ of the respondent for the sole reason that he had attained the age of 60 years and therefore, his dismissal is automatically unfair. He alleges that there was no retirement age agreed between him and the respondent. He denies that a retirement policy existed, alternatively, if it existed, no one brought it to his attention as he did not sign it and therefore, it did not apply to him.
- [2] It is common cause that the respondent (Wisium) acquired an entity named Pennville (Pty) Ltd t/a Pennville Consulting (Pennville Consulting) in 2016. Pennville Consulting was solely owned by
- [3] Mr. John Alan Pennel (Mr. Pennel), who is the brother-in-law of the applicant.
- [4] Mr. Pedra was employed by Mr. Pennel representing Pennville Consulting, on 1 April 2006 as a General Manager.
- [5] Although Mr. Pedra states in his statement of claim[2] that there was no written contract of employment in place between him and the respondent when he was employed, during his evidence before this Court, he distanced himself from this allegation and conceded that the unsigned document entitled “Statement of Main Terms and Conditions of Employment” that appears from pages 1 to 8 of the evidence bundle is his contract of employment. I refer to this document as the contract of employment.
- [6] The evidence by Ms. Oosthuizen, Mr. Pedra’s financial adviser and the former payroll manager of Pennville Consulting, is that although she was not employed by the respondent when Mr. Pedra commenced employment, and was only employed by the respondent in 2013, there existed an employment contract between Mr. Pedra and Pennville Consulting and the aforesaid document forms part of that employment contract as stipulated in clause 1.2 thereof.[3] Her evidence is that she drafted the aforesaid document in 2014 when the company logo had changed. Her further evidence is that the company policies were previously contained in its standard operating procedures and were subsequently redone on the company’s new logo and were all contained in an employee handbook that was available to all employees in the office of Mr. Pennel. One of such policies is the retirement policy of the respondent.[4] The employee handbook was kept in a green file and also contained the rules of the provident fund that the respondent participated in.

- [7] It is common cause that the provident fund that the respondent participated in is the Old Mutual Superfund Provident Fund (Old Mutual Provident Fund), extracts of which appear on pages 53 to 71 of the evidence bundle. As stipulated in clause 6.7 of the contract of employment,[5] permanent employees of the respondent automatically join the Old Mutual Provident Fund. Both parties make a contribution towards this Fund. Its rules and regulations are binding on the parties. It is also common cause that the respondent participated in the Old Mutual Provident Fund from 2013.
- [8] It is not disputed that according to the rules of the Old Mutual Provident Fund, the normal retirement age for employees in member group 1 (management), in which group Mr. Pedra admits that he fell under, is 60 years of age.
- [9] With effect from 30 April 2017, Mr. Pedra's employment with the respondent was terminated in accordance with the respondent's retirement policy that provided that the normal retirement age for all staff is 60 years of age and shall take effect in the month in which they turn 60 years old; further, in line with such policy, the age of retirement of the respondent's Provident Fund is also 60 years of age.[6]
- [10] As stated above, Mr. Pedra denies the existence of the retirement policy.
- [11] Mr. Pedra does not dispute the content of clause 28.1 of the employment contract which provides:

'All the current statutory legislation, company policies, procedures, rules, regulations and employee handbook as determined and amended from time to time will apply to you that you are expected to comply with the aforementioned at all times. Failure to do so can result in disciplinary action being taken.'[7]

Issues

for this Court to determine

- [12] The parties identify the following issues to be determined by this Court in the pre-trial minute:[8]
11. Whether the applicant's termination of service constitutes a dismissal, and if so, whether such dismissal was substantively and procedurally fair;
 11. If the Court finds that the applicant was dismissed, whether such dismissal was automatically unfair;
 11. In determining the issue, the Court is to decide whether or not the respondent was entitled to terminate the applicant's employment on the grounds of retirement and whether or not the provisions of section 187(2)(b) of the LRA find application.

Evidence

[13] The evidence of Mr. Pennell is that Mr. Pedra approached him as he wanted to be employed by his company before the company was acquired by Wisium. At the time, Mr. Pedra was employed as a teacher but was looking for a job that was more inspirational. Pennville Consulting

was a small company at the time and Mr. Pennell could not afford his salary. He ultimately employed him in his company, in the position of general manager. A written contract of employment was concluded between them. The contract was drawn up by an entity named Protrax. Neither party presented a copy of this contract. This is of no moment as it is common cause that the unsigned statement of terms and conditions of employment[9] is part of, and is understood by the parties to be their contract of employment.

[14] Mr. Pedra approached him several times informally and in social settings, indicating that he was concerned that he had not made sufficient financial provision for his retirement, was not ready to, and did not want to retire at the age of 60 years. Mr. Pennell said he would consider the issue closer to the time, but made no promises. Mr. Pennel recalls that one such discussion occurred during 2011 and another in 2015.

[15] His evidence is that Mr. Pedra approached him in 2011 and wanted to buy shares in Pennville Consulting to bolster his retirement nest. Mr. Pennell was not keen on this as firstly, he had come out of a bad business relationship and secondly, he was aware of Mr. Pedra's dire financial situation which included an act of insolvency and therefore he was of the view that Mr. Pedra was not in a position to afford to buy shares in Pennville Consulting.

[16] Mr. Pedra's intention to bolster his retirement nest prompted Mr. Pennell to consider creating two additional financial instruments (over and above the respondent's provident fund) that would assist him to retire comfortably. He approached Mrs. Oosthuizen to assist in this regard as an intermediary to take out the two financial instruments for Mr. Pedra. One such instrument was a Momentum Investment Endowment Policy which commenced in March 2011 for a period of six years, with a maturity date that occurred in the same month in which Mr. Pedra would attain the age of 60 years (i.e. April 2017). Pennville Consulting paid the monthly premiums for this endowment policy, in the amount of R10 258.95 with an automatic contribution increase rate of 10%.[10]

[17] The second financial instrument consisted of a retirement annuity that would mature when Mr. Pedra attained the age of 65 years. The respondent contributed to this retirement annuity. The intention was that Mr. Pedra would continue paying the premiums of the retirement annuity after he retired from the respondent.

[18] Mr. Pennel stated that the respondent contributed 100% towards Mr. Pedra's retirement annuity and endowment policies to boost his retirement nest to allow him to retire comfortably. This was not done for any other employee.

- [19] The consistent and corroborative evidence of Mr. Pennell, Mrs. Oosthuizen and Mr. Le Roux (the human resources manager of Wisium) is that the respondent has a retirement policy that is contained in a handbook with all other policies of the respondent and is easily accessible. As recorded in the contract of employment, all policies of the respondent as amended from time to time are binding on employees.
- [20] Mr. Pennel and Mrs. Oosthuizen stated that Mr. Pennell approved the policies that were updated by Mrs. Oosthuizen, which she said were previously contained in the respondent's standard operating procedures. The revised policies were contained in the handbook in his office. Mr. Pedra as a senior manager responsible for staff, was aware of the handbook and employment contracts of staff. Mr. Pedra confirmed the existence of all policies except the retirement policy, as he stated that his job description entailed drafting policies. Mr. Pennell and Mrs. Oosthuizen denied this. Mr. Pedra could not explain why his job description did not include the drafting of policies and maintained that this was an oversight.
- [21] Mr. Pedra concedes that all policies of the respondent were contained in a file in Mr. Pennel's office, to which he had access. In my view, it is too convenient that of all the various policies that the respondent had, the only policy to which Mr. Pedra feigns ignorance is the retirement policy. His attempt to back paddle is no more convincing – he states that if the retirement policy existed, it was not applicable to him as it was not brought to his attention and it was not signed by him. He concedes that there existed an employment contract. Clause 28 thereof states that all policies of the respondent as amended from time to time are binding on employees. He also concedes that Mr. Pennell extracted the retirement policy from the file that he is aware of in his office on 24 January 2017 to read the content thereof to him. In light of the afore-going, his version that there existed no retirement policy or that it was not applicable to him is unconvincing.
- [22] The evidence of Mr. Pennel and Mrs. Oosthuizen is that in order to augment Mr. Pedra's retirement nest, the respondent went out on a limb for Mr. Pedra and took out an endowment policy from Momentum and a retirement annuity for Mr. Pedra's benefit. Further, that in 2015, Mrs. Oosthuizen prepared a financial needs analysis for Mr. Pedra independent of the respondent.
- [23] Mrs. Oosthuizen explained that Mr. Pedra approached her to do a financial needs analysis as he wanted to have an understanding of his shortfall in cover in respect of his financial needs for retirement so that it could be addressed before the need arose. He provided her with his financial information, and his needs in respect of his lifestyle and indicated that he wanted to retire at the age of 65 years. Together, they agreed on assumptions and he provided her with the age of 65 years to work on his needs analysis. The outcome of the financial needs analysis was a retirement shortfall of R1.2 million.[11] Mr. Pedra did not inform her about what he did on receipt of the financial needs analysis. No additional policies were taken out by Mr. Pedra pursuant to the financial needs analysis.

- [24] It was put to Mrs. Oosthuizen on behalf of Mr. Pedra that the financial needs analysis had nothing to do with his retirement – Mr. Pedra was in emotional distress in 2015, his daughter had suffered a tragic event and he approached Mrs. Oosthuizen to draft his will and she did the financial needs analysis. She consistently stated that the reason for the financial needs analysis was because Mr. Pedra wanted to know his financial status in order to retire comfortably, as he indicated that he could not afford to retire at age 60 and wanted to retire at age 70. She told him to discuss this with the respondent and informed him that the Old Mutual Provident Fund would not accept him working until age 70.
- [25] During cross-examination, Mr. Pennell and Mrs. Oosthuizen were taken to task for not specifically informing Mr. Pedra that the respondent's normal age of retirement is 60 years. They both stated that he knew this because the respondent had a retirement policy which he was well aware of and he knew the age of retirement is 60 years, hence his repeated statements that he was not ready to retire.
- [26] Mr. Pedra's own version is that he and Mr. Pennel oft spoke about working forever and this was his desire. He went as far as to say no employee retired from the respondent. He was fit and could continue working forever.
- [27] The consistent and corroborative evidence of Mr. Pennel and Mrs. Oosthuizen is that the rules and regulations of the respondent's provident fund are binding on permanent employees. The respondent (more specifically, Mr. Pennel) determined the normal retirement age of its employees. This was communicated to the Old Mutual Provident Fund that the respondent chose to participate in. The provident fund accordingly obtains the normal retirement age from the employer. Mr. Pedra's payslips indicate the contributions to the provident fund and information about the fund is available and easily accessible. Further, Mr. Pedra received annual statements from the provident fund indicating that the age of the retirement is 60 years. In addition, in 2016, a year prior to his retirement, Mr. Pedra received a statement from Momentum setting out his endowment policy investment figures including the maturity date which coincided with the month in which he was to retire from the respondent.
- [28] Mr. Pedra does not dispute receiving the annual statements from the provident fund or the statement from Momentum a year prior to his retirement. He states however, that when he received the annual statements from the pension fund, he concentrated only on the figures, which were according to him, were insignificant.
- [29] Mr. Pedra states that he did not receive any correspondence from the provident fund alerting him that his retirement age was approaching. His evidence is not that he was oblivious to the normal retirement age of 60 as stated in the Old Mutual Pension Fund Rules[12]
- he stated that he read this to mean that "it was possible to retire at age 60 when funds are made available to them" and he did not think this was a compulsory retirement age.

[30] The consistent and corroborative evidence of Mr. Pennel and Mr. Le Roux is that the respondent implemented its retirement policy by consulting with Mr. Pedra three months prior to his date of retirement. Mr. Pedra states that on 23 January 2017, he had a meeting with Mr. Pedra to discuss his retirement and informed him that the retirement policy must be implemented. Mr. Pedra was

aggrieved and wanted to have a meeting with Mr. Le Roux. On the following day (24 January 2017), a meeting was held between Messrs.

Pennel, Pedra and Le Roux, at which meeting, Mr. Pedra raised his discontentment at having to retire as he was not ready to retire. It was discussed that he was at all times, aware of the retirement age of 60 and the additional financial instruments that were taken out for him by the respondent to prepare and assist him for retirement at age 60, including the annual statements from Old Mutual that reflected the age of 60 as the normal retirement age. He was informed that his retirement would be implemented according to the respondent's retirement policy and conditions. The minute of this meeting[13] was drafted by Mr. Le Roux and was provided to Mr. Pedra.

[31] Mr. Pedra states that the respondent employed a certain Mr. Mpati in 2015 when he was 66 years old. In response, Mr. Pennell explained that the retirement policy provides that staff members beyond the normal retirement age shall not occupy leadership roles and unlike Mr. Pedra, Mr. Mpati did not occupy a leadership role. This is not disputed.

Evaluation

[32] The crux of Mr. Pedra's case is that there was no agreement between him and the respondent that the retirement age is 60. He disputes the existence of a retirement policy of the respondent

indicating that the normal retirement age is 60 years. He concedes that the Old Mutual Provident Fund Rules state that the normal

retirement age is 60 and he received annual statements from the fund which indicated this, although he did not pay attention to it. In my view, this was to his own peril.

[33] There are mutually destructive versions before the Court, mainly in relation to the existence of the retirement policy indicating that the normal age of retirement is 60 years, whether the engagements between Messrs. Pennel and Pedra prior to 23 January 2017 concerning Mr. Pedra's wish to acquire shares and the creation of the two financial instruments fully paid for by the respondent had anything to do with Mr. Pedra's approaching retirement.

[34] The Supreme Court of Appeal in the well-known case of Stellenbosch Farmers' Winery Group Limited and another v Martell et Cie and others,[14] has set how a Court is to resolve mutually destructive versions before it. The Court is to make a finding on the credibility of the witnesses, on their reliability and is to assess on a balance of probabilities, which version is more probable.

- [35] As stated above, the evidence of the respondent's witnesses is consistent and corroborative. Mr. Pedra is not a credible or reliable witness. On more than one occasion, he failed to put his version to Mr. Pennel and Ms. Oosthuizen.[15] By way of example: he did not put the version to Mr. Pennel that it was he who drafted the respondent's policies as it was part of his job description, notwithstanding that he could not explain why his job description was silent about this; he did not put to Mr. Pennel that the only time he indicated he was not ready to retire was during their formal meeting on 23 January 2017 when Mr. Pennel informed him he is to retire in three months' time; he did not put to Mrs. Oosthuizen that there were no employment contracts in place when she commenced work at Pennville and she proceeded to draw up the contracts for all staff including his.
- [36] Mr. Pennel fabricated his version as his evidence progressed. He wants this Court to believe that at no stage was he aware that there was a normal retirement age specified by the respondent, despite his concessions that his employment contract refers to the provident fund and its rules which are binding, as well as all policies of the respondent. He also conceded having received annual statements from the provident fund but claims he did not concern himself with the retirement age of 60 years recorded on the statement as he concentrated on the figures which were "insignificant". His version that he only learned of the age of retirement on 23 January 2017 during his formal meeting with Mr. Pennel is improbable.
- [37] Mr. Pedra's version that the reason he wanted to acquire shares in Pennville is because he wanted a salary raise and therefore the endowment policy and retirement annuity constituted an increase in his salary is fanciful. His version is disputed by Mr. Pennel who stated that had the intention been to increase his salary, it would have been done, but it was not – it was to assist him as he had a history of financial difficulties and indicated he was not ready to retire. When confronted with Mr. Pennel's version, Mr. Pedra developed his version and said he approached Mr. Pennel in 2016 to enquire what would become of the respondent's R10 000.00 contribution to the endowment policy once it matures, to which Mr. Pennel said he should not worry, they would discuss it when the time comes. The concern was if it went into the cash component of his salary, it would affect the bonus incentive, which they agreed they would keep out of his "salary increment". Mr. Pedra continued to develop his fabricated version by stating that he was considering if he could reinvest the funds after they matured.
- [38] The belated and unfortunate version of Mr. Pedra that he sought a financial needs analysis not for retirement purposes but because his daughter suffered a tragedy and he approached Mrs. Oosthuizen to draft a will and she went on a frolic of her own to draw up a financial needs analysis that had nothing to do with retirement, is highly improbable. To suggest that Mrs. Oosthuizen acted in conflict of interest is unacceptable and unnecessary in circumstances where he would have given her the authority to conduct a financial needs analysis based on his needs which included his retirement beyond the age of 60 years, given his utterances that he was not ready to retire.

- [39] The Old Mutual Provident Fund Rules read with the retirement policy state that retirement beyond the normal retirement age is possible, however, applications are to be made three months before the normal age of retirement and will not be granted purely on compassionate grounds. Mr. Pedra did not make such application.
- [40] In view of the afore-going, Mr. Pennel is not a reliable, credible or honest witness. Therefore, I find the version of the respondent is more probable. Mr. Pedra approached Mr. Pennel on several occasions, knowing that 60 was the respondent's normal age of retirement and indicated that he was not ready to retire as he did not make sufficient provision to retire comfortably. The respondent bent over backwards to assist Mr. Pennel to retire comfortably. He benefitted from these financial instruments.

Applicable law in respect of the age of retirement

- [41] The age of retirement for employees is not specified in our law. Employers are however, entitled to rely on a normal age of retirement which is often specified in the employer's internal policies. The normal age of retirement may also be established with reference to the pension scheme that employers participate in.
- [42] In *Cash Paymaster Services (Pty) Ltd v Browne*,^[16] the Labour Appeal Court (LAC) stated as follows:
- ‘The retirements are dispensations provided for in section 187(2)(b) of the Act is one that works based on the basis that, if there is an agreed retirement age between an employer and an employee, that is the retirement age that governs the employee's employment. This is the case even when there is a different normal retirement age for employees employed in the capacity in which the employee concerned is employed. The provision relating to the normal retirement age only applies the case where there is no agreed retirement age between the employer and the employee.’(Own emphasis)
- [43] In *Bos v Eon Consulting (Pty) Ltd*,^[17] this Court stated as follows with reference to the concepts of an agreed age of retirement and a normal age of retirement:
- ‘[37] As to these bases referred to, it has to be one or the other. It cannot be both. A normal retirement age can only apply where there is no agreed retirement age...
- [38] Turning firstly to an agreed retirement age, there can be no question of what an agreed retirement age means. In order for an agreed retirement age to exist, it has to be shown that the employer and the employee achieved consensus on the actual age of retirement of the employee and that this retirement age gives rise to the compulsory retirement of the employee from the employ of the employer at that age. This agreement need not be in writing, although this would be preferable. A retirement age stipulated in the employment contract of the employee would constitute such an agreed retirement age.’
- [39] As to what constitutes a normal retirement age, the Court in *Rubin Sportswear* said:

‘... What is the normal retirement age depends upon the meaning to be accorded the word “normal” in section 187(2)(b). The word is not defined in the Act. It, accordingly, must be given its ordinary meaning. Chambers-Mcmillan’s SA Students Dictionary describes the word “norm” thus: “You say that something is the norm if it is what people normally or traditionally do”. It further says: “Norms are usual or accepted ways of behaving”. It describes the adjective “normal” as meaning “usual, typical or expected”. The word “normality” is described as “the state or condition in which things are as they usually are”. The New Shorter Oxford English Dictionary describes the word “norm” as meaning, among others “a standard, a type; what is expected or regarded as normal; customary behaviour, appearance”. As to the adjective “normal”, one meaning that the latter dictionary gives is “constituting or conforming to a standard; regular, usual, typical, ordinary, conventional”.

After analysing a number of judgements the court concluded:

“It seems to me that the word “normal” as used in section 187(2)(b) really means what it says. It means that which accords with the norm.”

[40] A retirement age that accords with the norm, as contemplated by section 187(2)(b), can be established both internally in an employer, or externally in a particular industry if there is no norm in the employer itself.

[42] When it comes to the norm in an employer, this must equally be established by evidence. This evidence would include evidence about a practice in the employer, when other employees may have retired, policy provisions of regulation, or pension/provident funds rules or annuity provisions... The easiest way of establishing a retirement age norm in an employer would of course be by way of a retirement policy.

[43] It is not required that employees have to be consulted on, or that they have to agree to, the retirement age stipulated by the employer

in the retirement policy. In principle, an employee is entitled to unilaterally fix, and then implement, a normal retirement age...’

[44] With the afore-going in mind, in the present case, the contract between Mr. Pedra and the respondent does not specify his agreed retirement age. What does exist, is a retirement policy and provident fund rules that specify the normal retirement age as 60 years for employees in the category that Mr. Pedra was employed. Therefore, the basis of the age of retirement that is involved is the normal age of retirement. It is not both. Our Courts have said it cannot be both.

[45] The contract of employment refers to both the retirement policy as well as the pension fund and its rules, all applicable and binding on Mr. Pedra.

[46] I find that the dismissal of Mr. Pedra occurred as he had reached the respondent's normal age of retirement for persons employed in the capacity which he occupied. I find that the respondent followed its retirement policy and procedure to the letter in terms of terminating the employment contract of Mr. Pedra.

[47] I find that unfair discrimination does not arise for the reasons that follow below.

[48] Section 9 of the Constitution makes provision for the right to equality and the prohibition of unfair discrimination on the listed grounds in subsection (3) and reads as follows:

‘(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.’ (Own emphasis)

[49] The Employment Equity Act[18] (EEA), is one of the pieces of national legislation that prevents and prohibits unfair discrimination in the workplace.

[50] Sections 5 and 6 (1) and (2) of the EEA provide as follows:

‘5. Elimination of unfair discrimination. – Every employer must take steps to promote equal opportunity in the work-place by eliminating unfair discrimination in any employment policy or practice.

6. Prohibition of unfair discrimination.

(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.

(2) It is not unfair discrimination to –

(a) take affirmative action measures consistent with the purposes of this Act; or

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of the job.’

[51] In *Lewis v Media24 Ltd*, [19] the Court held as follows at paragraph 36:

‘The concept of discrimination is made up of three issues: differential treatment; the listed or analogous grounds; and the basis of, or the reason for, the treatment. Once a difference in treatment is based on a listed ground, the difference in treatment becomes discrimination for the purposes of s 9 of the Constitution and s 6 of the EEA.’

[52] In my view, Mr. Pedra has not established any differential treatment. Mr. Mpati is no comparator of Mr. Pedra. He is not employed in the same category or capacity as Mr. Pedra. Discrimination therefore does not arise and section 187(2)(b) of the LRA accordingly finds no application.

Costs

[53] This is a referral that ought not to have seen the light of day, particularly considering that the main parties to this dispute are related. It is clear that Mr. Pennel did his utmost to assist Mr. Pedra to retire comfortably and this was met with indifference considering the remarks by Mr. Pedra that the figures were insignificant, this, in circumstances where the respondent

contributed 100% to at least two financial instruments for his benefit over and above the compulsory provident fund of the respondent.

[54] In view of my remarks above concerning the conduct of Mr. Pedra in the manner in which he conducted himself in proceeding with this matter and his conduct during the proceeding of fabricating evidence and being dishonest, I exercise my discretion in terms of section 162(2)(b) of the LRA in ordering the applicant to pay the costs of this referral.

[55] In light of the afore-going, the following order is made:

Order

1. The referral is dismissed.
2. The applicant is to pay the costs.

M. T. M. Phehane

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. Y van der Laarse (Ms.)

Instructed by: Len Dekker Attorneys

For the Respondent: Rudolf Kuhn of Rudolf Kuhn Attorneys

[1] Act 66 of 1995, as amended. Section 187(1)(f) of the LRA reads thus: ‘187. Automatically unfair dismissals. (1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 50r, if the reason for the dismissal is – (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour,

sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family

responsibility.’ In the context of this present case, section 191(5)(b)(i) of the LRA states that an employee who has a dispute about an unfair dismissal, may refer the dispute to the Commission for Conciliation, Mediation and Arbitration or a council with jurisdiction, for conciliation and should the dispute remain unresolved, following conciliation, then the employee may refer the dispute to this Court for adjudication if the employee has alleged that the reason for dismissal is automatically unfair.

[1] Act 66 of 1995, as amended. Section 187(1)(f) of the LRA reads thus:

‘187. Automatically unfair dismissals.

- (1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 50r, if the reason for the dismissal is –
- (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour,

sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family

responsibility.’

In the context of this present case, section 191(5)(b)(i) of the LRA states that an employee who has a dispute about an unfair dismissal, may refer the dispute to the Commission for Conciliation, Mediation and Arbitration or a council with jurisdiction, for conciliation and should the dispute remain unresolved, following conciliation, then the employee may refer the dispute to this Court for adjudication if the employee has alleged that the reason for dismissal is automatically unfair.

[2] Pleadings bundle, at para 4.3.8 on p 3.

[3] Evidence bundle, p 1.

[4] Evidence bundle, p 37.

[5] Evidence bundle, pp 2 to 3.

[6] Fn 4 supra.

[7] Evidence bundle, at p 7.

[8] Pre-trial minute, pleadings bundle, at p 7.

[9] Evidence bundle, pp 1 to 8.

[10] The Momentum Endowment Policy appears at pages 72 to 74 of the evidence bundle.

[11] Evidence bundle, p 14.

[12] Evidence bundle, p 54.

[13] Evidence bundle, pp 19 to 21.

[14]

(2003) 1 (SA) 11 (SCA).

[15] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (10) BCLR 1059 (CC), the Constitutional Court held as follows regarding the failure to challenge the version of a witness during cross-examination: '[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.'

[15] In *President of the Republic of South Africa and Others v South African Rugby Football Union*

and *Others* 1999 (10) BCLR 1059 (CC), the Constitutional Court held as follows regarding the failure to challenge the version of a witness during cross-examination:

'[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.'

[16]

[2006] 2 BLLR 131 (LAC); [2006] 2 BLLR 131 (LAC) at paras 25 and 26. See also: Rubin Sportsware v SA Clothing and Textile workers Union and Others

[2004] ZALAC 8.

[17]

[2016] ZALCJHB 305.

[18] Act 55 of 1998.

[19]

(2010) 31 ILJ 2416 (LC) at para 36.

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