

SOUTH AFRICA / JUDGMENT

**Solidarity obo Strydom & 5 Others v State Information
Technology Agency SOC Ltd (C 148/18; JS 49/18; JS
67/18
JS 68/18; JS 338/18; JS 195/18) [2022] ZALCJHB 95; (2022)
43 ILJ 1881 (LC); [2022] 9 BLLR 843 (LC) (9 May 2022)
[2022] ZALCJHB 95**

COURT

Labour Court Johannesburg

BEFORE

Nkutha-Nkontwana

CASE / FILE NUMBER

C 148/18; JS 49/18; JS 67/18; JS 68/18; JS 338/18;
JS 195/18

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case

no:

C
148/18; JS 49/18; JS 67/18
JS 68/18; JS 338/18; JS
195/18
In

the matter between:

SOLIDARITY obo
GERHARDUS VILJOEN STRYDOM
& 5
OTHERS
Applicants
And
STATE
INFORMATION TECHNOLOGY AGENCY SOC LTD
Respondent

Heard:

07 – 09 December 2020, and 13 – 15 September 2021

Delivered:	09 May 2022 (This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 09 May 2022.)
Summary:	Automatically unfair dismissal based on age in terms of section 187(1)(f) of the LRA – employee cannot successfully rely on both the normal and agreed retirement age as these scenarios are mutually exclusive – the applicants' contention that there was no agreed retirement age, having conceded a normal retirement age, is a fallacy to which most litigants seem prone – once it is shown that the employee had reached the normal or agreed retirement age and that the dismissal was based on age, section 187(2)(b) states that such dismissal is fair.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

- [1] In this action, Solidarity, acting on behalf of its members (applicant employees), claims that their dismissal by the respondent (SITA) was automatically unfair in terms of section 187(1)(f) of the Labour Relations Act[1] (LRA). Solidarity also pleaded two alternative claims: firstly, that the applicant employees were unfairly dismissed as contemplated in section 188 of the LRA; and secondly, a contractual claim for damages in terms of section 77(3) of the Basic Conditions of Employment[2] (BCEA). Each applicant employee filed a separate statement of claim wherein their respective cases are pleaded, which are, to a large extent, similar. The parties agreed to the consolidation of all the matters.
- [2] SITA denies that the applicant employees were automatically or otherwise unfairly dismissed. In light of SITA's renunciation that the applicant employees were automatically or otherwise unfairly

dismissed, it contends that this Court lacks jurisdiction to entertain the matter.

- [3] The trial sat on the following days 07 - 09 December 2020, and 13 -16 September 2021, By agreement between the parties, they were directed to file heads of argument. The applicants duly filed their heads of argument on 19 October 2021. SITA, on the other hand, filed its heads of argument on 14 January 2022, almost three months after it had received the applicants' heads of argument. The applicants filed their replying heads of argument on 22 February 2022.
- [4] Undoubtedly, SITA's ineptitude is unacceptable, especially since there was no attempt to seek indulgence for extension from the applicants as well as this Court. Obviously, the applicants as well

as this Court were heavily prejudiced by the SITA's failure to timeously file its heads of argument. There is no excuse for the remiss conduct on the part of SITA's legal representatives. I was urged to mark my displeasure at this conduct, which I will revert to when I deal with costs.

- [5] I also note that SITA has attached to its heads of argument a plethora of documents, most of which are extrapolated from the trial bundles. To the extent that SITA's heads of argument contain new evidence, it is vetoed and accordingly struck out.

Background

- [6] The facts in this matter are mostly common cause. The applicant employees were employed by SITA. The terms and conditions of employment for all the applicant employees were regulated by their respective employment contracts, the SITA Employment Conditions and relevant policies. Clause 9.18 of the SITA Employment Conditions provides that the employees' retirement age shall be regulated by the rules relevant and applicable to the applicant employees' own retirement or pension fund.
- [7] The applicant employees were members of the Alexander Forbes Pension Fund (Pension Fund). The Pension Fund Rules provide that the member's retirement age shall be the last day of the month on which he/she reaches the age of 60 years. Notwithstanding the Pension Fund Rules, the applicant employees were allowed to work beyond the normal retirement age of 60 years.
- [8] In September 2017, SITA resolved to enforce the retirement age per the Pension Fund Rules. The applicant employees were accordingly served with individual notices of retirement.
- [9] I consider it appropriate that I should tersely outline the applicant employees' respective contexts.

9.1. Mr Christoffel Gerhardus Viljoen Strydom[3] (Mr Strydom)

9.1.1. Mr Strydom was appointed on 2 August

2006. On 23 August 2017, SITA served him with a letter informing him that he had reached his retirement age on 19 May 2016 and, as a result, his employment would terminate on 30 November 2017.

9.1.2. On 14 September 2017, the Public Service Association of SA (PSA), Mr Strydom's trade union at that time, wrote a complaint letter to SITA wherein it, inter alia, stated that:

'In terms of SITA's Conditions of Service a member who transfers from another company-approved pension fund or approved provident fund shall retain his previous retirement age of 65 in terms of the rules of such approved pension fund or approved provident fund.

Furthermore, subject to the consent of the SITA, a member who has reached his normal retirement age and normal retirement age of 60 or 65, whichever is applicable may remain in service and retire at age 67.

Mr Strydom doesn't wish to retire on 30 November 2017, at which time he will be 62 years of age, but wishes to retire when he turns 65.'

9.1.3. The essence of Mr Strydom's complaint was that, since SITA failed to enforce the retirement age, it consented to him working beyond his retirement age.

9.1.4. Mr Strydom's employment terminated on 31 December

2017. His monthly salary at that time was R66 612.32.

9.2. Mr Alwyn Enslin^[5] (Mr Enslin)

9.2.1. Mr Enslin was appointed on 21 May 2007. In May 2017, he was served with a notice that he had reached his retirement age of 60 years on 9 November 2016 and, as a result, his employment would be terminated on 31 August 2017.

9.2.2. Mr Enslin last working day as a permanent employee was 31 August

2017. His monthly salary was R61 141.69.

9.2.3. It is common cause that in August 2017 a business case was prepared in support of Mr Enslin's continued employment beyond his retirement age. It particularly stated that "[a]pproval is required for the Contract of Employment of Mr Alwyn Enslin to be extended for a period of 18 months effective from 01 September 2017 to 28 February 2019, subject to CEO's approval"^[6]. SITA's Chief Executive Officer (CEO) approved the extension of Mr Enslin's employment contract but only for a period of six months.

9.2.4. Mr Enslin conceded during his cross-examination that he was aware of the business case but his understanding was that the extension of his employment was only sought for the purpose of knowledge transfer. He did accept the six-months fixed term contract of employment. However, by that time his permanent employment contract had terminated and all the benefits ceased. Hence, he continued to challenge his forced retirement.

9.3. Mr Andreas Olivier[7] (Mr Olivier)

9.3.1. Mr Olivier was appointed on 2 August

2005. On 22 June 2017, the respondent reminded Olivier was served with a notice that he had reached the age of 60 on 25 November 2016 and, as a result, his employment would terminate on 30 September 2017.

9.3.2. Mr Olivier likewise lodged a grievance, challenging SITA's decision to enforce the retirement age after it had allowed him to work beyond the retirement age.

9.3.3. Mr Olivier's last working day was 30 September 2017 but he remained in employment during October 2017 pending the finalisation of his grievance. His monthly salary at that time was R 154 841.75.

9.4. Ms Wilma Ena Smith[8] (Ms Smith)

9.4.1. Ms Smith was employed on 1 July 1999. On 11 July 2017, she was served with a notice that she had reached the retirement age of 60 years at the end of June 2014 and, as a result, her employment would terminate on 30 September 2017.

9.4.2. Ms Smith lodged a grievance against the fact that she had to retire on 31 September 2017. Her request to retire at 67 years was not acceded to.

9.4.3. Ms Smith's permanent employment contract terminated on 30 September 2017. At the time of termination of her employment, she was earning R39 083.82 per month.

9.5. Ms Petra Van den Berg[9] (Ms Van den Berg)

9.5.1. Ms Van den Berg was appointed by SITA on 1 August 1999. On 11 October 2017, she was served with a notice that she has reached retirement age at the end of August 2015 and, as a result, her employment would terminate on 31 December 2017.

9.5.2. Ms Van den Berg lodged a grievance alleging that, by allowing her to remain in service beyond retirement age, SITA created an expectation that her contract would be indefinite.

9.5.3. In these proceedings, like all other applicant employees, her case is that SITA tacitly consented to her remaining in service up until she would reach the age of 67 years.

9.5.4. Her employment came to an end on 31 January 2018 and she was earning R 480 076.85 per annum.

9.6. Ms Sonia du Plessis[10] (Ms du Plessis)

9.6.1. Du Plessis was employed by SITA in March 1999. She was appointed as a permanent employee in August 2007.

9.6.2. On 2 October 2017, she was served with a notice that she had reached the retirement age of 60 in July 2016 and, as a result, her employment would terminate on 31 December 2017.

9.6.3. She lodged a grievance, challenging the decision to terminate her employment on 31 December 2017 with no success. She was earning a monthly salary of R 79 424.14 when her employment came to an end.

9.6.4. Ms Du Plessis, unfortunately, passed away on 7 January 2021. Ms Theresilda Sieglinde Lotter (Ms Lotter) from Erasmus, Lotter & Co was duly appointed as the executrix of her estate. The applicants' application for substitution was not opposed. Accordingly, Ms Lotter is substituted for the late Ms Du Plessis.

Legal principles and application

[10] Section 187 is pertinent in the present matter and it provides that:

'(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, 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.

(2) Despite subsection (1)(f):

(a) ...

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

[11] The test applicable when dealing with section 187(2)(b) protection for employers is straightforward and was aptly articulated by Zondo J, as he then was, in *Schweitzer v Waco Distributors* (A division of Voltex (Pty) Ltd)[11] (Waco) as follows:

'...the enquiry in relation to the fairness of the dismissal can only relate to whether the conditions necessary for s 187(2)(b) to apply exist. Once it is established that they do exist, and it has been established that the dismissal is one based on age, the statute itself pronounces on the fairness of the dismissal; it states that such dismissal 'is fair'. Once those conditions are found to exist, there is nothing left for the court to pronounce on. The conditions which must exist in order for a dismissal to be fair in terms of s 187(2)(b) are the following:

(a) the dismissal must be based on age;

(b) the employer must have a normal or agreed retirement age for persons employed in the capacity of the employee concerned;

(c) the employee must have reached the age referred to in (b) above.' (Emphasis added)

[12] In *Karan t/a Karan Beef Feedlot v Randall (Karan Beef)*,^[12] the Labour Appeal Court (LAC), per Tlaletsi JA, as he then was, stated that:

[19] There are two plausible arguments concerning the application of section 187(1)(f) and 187(2)(b) in this matter. The first is that where there is a normal or agreed retirement age and the employee has reached that age, the employer shall enjoy protection prescribed in section 187(2)(b) from that date and at any time thereafter. He or she would be entitled to terminate the employment of the employee on the grounds of age.

[20] The second scenario is that, when there is an agreement reached between the employer and the employee before the latter has reached

the normal or agreed retirement age, to determine a new retirement age, the employer would enjoy the protection of section 187(2)(b),

should he/she terminate the employment of the employee, once the new agreed date is reached.’ (Emphasis added)

[13] Turning to the present matter, it is common cause that the normal retirement age in terms of the Pension Rules was 60 years and that the applicant employees had worked beyond same. The essence of the applicants’ case, as I understand their evidence, it is that SITA cannot avail itself to the protection afforded by section 187(2)(b) because, by allowing them to work beyond retirement age, it had tacitly agreed to the new retirement age, being 67 years; alternatively, they had a reasonable expectation to work up until they reach 67 years of age. They accordingly contend in their heads or argument that, to the extent that the normal retirement age is conceded, the issue to be decided is whether there was an agreed retirement age subsequent to the applicant employees being allowed to work beyond the retirement age.

[14] To the extent that the applicant employees’ retirement age is regulated by the SITA Conditions of Employment and the Pension Fund Rules, the question to be determined turns on the interpretation of those regulations, a task that must be undertaken in line with the principles explicated by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*,^[13] where it was stated that:

‘...Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be

alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the

purpose of the provision and the background to the preparation and production of the document.’ (Emphasis added)

[15] Clauses 9.18 and 9.19 of the SITA Employment Conditions provide that:[14]

‘9.18 Retirement age

Retirement age specifications shall be set according to the rules of the relevant pension or retirement funds.

9.19 Retirement funds

The SITA is a participating employer in the following funds.

1.19.1 Defined contribution funds

(a) ...

(b) Alexander Forbes Retirement Fund

i) The normal retirement age of the fund is the last day of the month in which a member reaches the age of 60. A member who transfers from another company-approved pension fund or approved provident fund shall retain his previous retirement age of 65 in terms of the rules of such approved pension fund or approved provident fund.

ii) Subject to the consent of the SITA, a member who has reached his normal retirement date and normal retirement age of 60 or 65, whichever is applicable, may remain in service and retire at a date not later than the last day of the month in which the member attains the age of 67.

Contributions by and on behalf of the member shall cease after the normal retirement date and the employee forfeits the death, disability and funeral benefits should the employee pass away or become disabled while in the service of SITA.’ (Emphasis

added)

[16] There is obviously no controversy on the construction to be accorded to the above provisions. It is contended on behalf of the applicants that, on a casual read, these provisions patently provide that the normal retirement age applicable to the applicant employees is 60 years. Notwithstanding the normal retirement age and subject to SITA’s consent, members of the Pension Fund may remain in service beyond the normal retirement age, but no later than reaching the age of 67 years.

[17] The parties, however, can't find each other on the meaning of "consent" that is referred to in clause 9.19.1(b)(ii). The applicants contend that, absent a clear expression on how consent ought to be sought (the manner, whether in writing or verbal; and the timing it must be given, whether before or after age 60), the solution should be found in the Consolidated General and Special Rules of the Pension Fund (Special Rules), in particular, clause 5.2.2 and 5.2.4 which provide that:

'5.2.2 A member who has not retired in terms of Rule 5.2.1 must retire from Service on reaching his Normal Retirement Date unless his Employer agrees in writing to his remaining in Service after that date.

5.2.4 A Member who is allowed to remain in Service after his Normal Retirement Date shall retire from Service on such later date as he agrees with the Employer.'

[18] It is the applicants' case that SITA consented in writing that the applicant employees should remain in service beyond the normal retirement age. To support this averment, the applicants placed reliance on the letters the applicant employees were served with, communicating the decision by the Board of Directors of SITA to approve the annual salary increases. Even though the applicant employees received respective copies, it is common cause that the content of these letters is the same. Also, these letters were issued after the applicant employees had reached the normal retirement age. By way of example, I refer to Ms Plessis's letter dated 1 September 2016, which, inter alia, states the following:

'SALARY INCREASES

In terms of the Board resolution pertaining to the annual salary review process, it is our pleasure to announce that your salary in the financial year 2016/2017 has been adjusted with 7% increase as approved. The increase will be effective from 1st April 2016 and is based on your Total Guaranteed Package (TGP) as at 31st March 2016.

...[16]

Please note:

* The salary increase will be effective from the or of April 2016 [sic].

** Please note that this letter will serve as an addendum to your current employment contract.

On behalf of the Board and the Executive Committee, we would like to thank you for your continued support and contribution that SITA achieves its current Service Delivery commitments.

We wish you a fulfilling career with the State Information Technology Agency (SITA).'

[19] The applicants contend that, to the extent that the annual salary adjustment letters amended their contracts of employment, they constitute a written consent by SITA and agreement between the parties which allowed them to remain in service beyond the normal retirement age as contemplated in clause 5.2.2 of the Special Rules.

[20] SITA, on the other hand, contends that the applicant employees' contracts of employment automatically came to an end when they reached the normal retirement age of 60 years and no new contracts of employment were concluded after that. This argument is hinged on clauses 2.1.18 and 4.1 of the applicant employees' contracts of employment.

[21] Clause 2.1.18 defines the termination date of the contract of employment as follows:

'Termination Date means the retirement age specifications set according to the rules of the relevant pension or retirement funds or any other earlier date as envisaged in terms of this Agreement.'

[22] Clause 4 reads as follows:

'4.1 This Agreement shall commence on the Commencement Date... and shall be valid and operational until the Employee reaches retirement age set according to the rules of the relevant pension or retirement funds or until termination by either party as provided for in clause 17 or for any reason recognized by law.'

[23] It is further contended on behalf of SITA that the applicant employees could not have had the duration of their contracts of employment lawfully extended beyond their termination dates since there was no written amendment, per clause 24 of their contracts of employment, to provide a termination date beyond the normal retirement age of 60 years. Clause 24 provides that:

'24.1 This Agreement constitutes the whole Agreement between the Parties relating to the subject matter hereof.

24.2 No amendment or consensual cancellation of this Agreement or of any provision or term hereof or of any Agreement, bill of exchange or other document issued or executed pursuant to or according to this Agreement, and no extension of time, waiver, relaxation or suspension of any of the provisions or terms of this Agreement or of any Agreement, bill of exchange or other document issued pursuant to or according to this Agreement shall be binding unless recorded in a written document signed by duly authorized representatives of the Parties. Any such extension, waiver, relaxation or suspension that is so given or made shall be strictly construed as relating strictly to the matter in respect whereof it was made or given.

24.3 No extension of time, waiver or relaxation of any of the provisions or terms of this Agreement or any Agreement, bill of exchange or other document issued or executed pursuant to or according to this Agreement, shall operate as an estoppel against any Party regarding its rights under this Agreement, nor shall it operate so as to preclude such Party thereafter from exercising its rights strictly according to this Agreement.'

- [24] In my view, there is no merit in SITA's contention that the applicant employees' contracts of employment automatically terminated when they reached the normal retirement age of 60 years. Clearly, they continued to render services in terms of their contracts of employment and continued to contribute to the Pension Fund before they were forced to retire. Yet, the applicants' argument that the salary adjustment letters constitute written consent as contemplated in clause 5.2.2 of the Special Rules is a bit of a stretch as its contents are unambiguous.
- [25] SITA is correct in its contention that any amendment terms and conditions of employment of the applicant employees had to be in writing as required by clause 24.2 of their contracts of employment. The salary adjustment letters are a typical example of how to comply with this requirement. Yet, it is clear ex facie the letters that the scope of their application was limited to the amendment of the applicant's salaries and nothing more.
- [26] Moreover, SITA's evidence that the applicant employees' conditions of employment were also regulated by the Termination of Employment Policy was not controverted. Clause 6.3.1 provides that:

'6.3.1 Termination on reaching retirement age

The retirement fund provides retirement benefits for employees who complete their careers in SITA's service. The retirement age for employees is as defined in the SITA conditions of employment and/or the respective Pension or Retirement Fund rules.

An employee may apply to continue working beyond normal retirement age. Any decision to allow an employee to continue working beyond normal retirement age shall be taken by the head of department in consultation with the Human Resource Department. Any decision in this regard should be based on operational requirements, fitness of the employee (should be confirmed in writing) and applicable fund rules.' (Emphasis added)

- [27] It is not the applicants' case that the applicant employees did apply to continue working beyond the normal retirement age before they reached the age of 60 years; alternatively, that there was a decision that had been taken and confirmed in writing as contemplated in clause 6.3.1 of the Termination of Employment Policy read with the Pension Fund Rules.
- [28] Even so, the applicants seem to suggest that, since they had worked beyond the retirement age, the normal retirement was no longer applicable. They maintain that SITA was enjoined by clause 2.2.4 of the Special Rules to consult with them with a view to reach a new retirement age. Absent an agreement on the new retirement age, SITA was stripped of the shield provided by section 187(2)(b), so they further contend. To support these arguments, the applicants referred to the various dicta in their heads of argument and, pertinently, the judgments in *Karen Beef*[18] and *Datt v Gunnebo Industries (Pty) Ltd*[19] (*Datt*).
- [29] In my view, the applicants clearly misconstrued the *Karen Beef*[20] dictum, which is, in any event, distinguishable. Briefly, in *Karen Beef*, the respondent employee in that matter was served with a letter allowing him to continue work beyond his retirement date. The LAC

found that the respondent employee tacitly agreed to work beyond the normal retirement age and left it to the appellant employer to determine the retirement age or date on notice to the respondent. As such, the appellant employer was found to be protected against automatically unfair dismissal in terms of section 187(2)(b).

- [30] As mentioned above, in the present matter, the normal retirement age is common cause. Yet the applicants seem to rely on the fact that there was no agreed retirement age or date to support their claim for automatically unfair dismissal. Unfortunately, this submission is flawed. It is well accepted that there are two prerequisites to be met in order for the employer to justify dismissal on the basis of retirement in terms of section 187(2)(b).
- [31] In *Rubin Sportswear v SA Clothing and Textile Workers Union and Others*, [21] the LAC stated that “Section 187(1)(b) creates two bases upon which an employer can justify the dismissal of an employee on grounds of retirement age. The one is an agreed retirement age, the other is normal retirement age”. In addition, the prerequisites in Section 187(2)(b) are mutually exclusive. As stated in *Cash Paymaster Services (Pty) Ltd v Browne*[22] (*Cash Paymaster*) “...normal retirement age only applies to the case where there is no agreed retirement age between the employer and the employee...” It follows that the applicants’ contention that there was no agreed retirement age, having conceded a normal retirement age, is a fallacy to which most litigants seem prone.
- [32] Equally, the decision in *Datt*, [23] lends no assistance to the applicants’ argument that there was no agreed retirement age. In *Datt*, unlike in the present matter, the respondent employer specifically requested the applicant employee to remain in its employ beyond the normal retirement age and up until such time as they would mutually agree that the applicant employee should take retirement. *Steenkamp AJ*, as he then was, found that the retirement age that was relevant for determining the application of section 187(2)(b) accordingly became the one that the parties would have mutually agreed to, as opposed to the normal retirement age.[24] Therefore, the facts in *Datt* are distinguished from the present matter.
- [33] In passing, I am unable to agree with *Steenkamp AJ* to the extent that he seemed to find fault with the interpretation of section 187(2)(b) as adopted in *Waco*[25]. In light of the observation expressed in *Cash Paymaster*[26], which I agree with, it is inconceivable that an employee could successfully rely on both the normal and the agreed retirement age as these scenarios are mutually exclusive.
- [34] The consequence of allowing the employee to work beyond an agreed or normal retirement age was well articulated by *Snyman AJ* in *Bank v Finkelstein t/a Finkelstein and Associates*: [27]

‘...where an employee works beyond an agreed or normal retirement age. The harsh reality is that such an employee is in effect working on ‘borrowed time’. The employer, unless it can be proven

that the employer specifically waived its rights to apply the retirement age, would remain entitled to at any point after the employee had attained the normal or agreed retirement age place the employee on retirement. In *Rubenstein v Price's Daelite (Pty) Ltd*[28] the Court held, with specific reference to Section 187(2)(b), that: 'It says a dismissal is fair if the employee has reached retirement age, not when he reaches it.' In *Rockliffe v Mincom (Pty) Ltd*,[29] the Court approved of the above ratio in *Rubenstein* and further said:[30]

'Accordingly in an automatically unfair dismissal claim the enquiry ends at the point where, if a defence of having reached an agreed age is raised, such age has been reached. What happened afterwards is immaterial unless a defence of waiver is successfully raised.' (Emphasis added)

[35] In *Kutuma and Others v Limpopo Legislature*,[31] confronted with similar circumstances, Lagrange J pertinently observed that:

'[35] It may be questionable if this would apply in the case of employees who have only reached the age when they are eligible for early retirement, as an early retirement date could hardly be considered a

'normal retirement date' for the purposes of s 187(2)(b). However, it is difficult to see why the respondent would not be entitled to rely on clause 4.8.1 in the case of employees who had reached the normal retirement age but had not yet reached the compulsory retirement age. There is nothing inconsistent in having a normal retirement age, which after it is reached, permits either party to terminate the employment relationship coupled with a mandatory retirement age, at which stage retirement must take place...

[36] If clause 4.8.1 could only have been intended to refer to the age of compulsory retirement one would have expected it to refer to the compulsory retirement age rather than using the broader term

'retirement age'. Even if the status of the 28 May resolution in so far as it might amend the conditions governing the applicants' retirement entitlements is debatable, and if I assume in their favour that they are entitled to rely on the

Conditions of Service Policy issued in 2001, those conditions do not seem to give them alone the choice of deciding when to retire after age 60. By virtue of clause 4.8.1 the employer may also decide, once an employee has reached the age of 60 but not yet 65, to rely on the employee having reached the normal retirement age to terminate their employment.

[37] I appreciate that the applicants might have hoped they would continue to work until the compulsory retirement age, but under their

conditions of service they were always vulnerable to being retired after reaching the age of 60. I also wish to emphasise that because I have assumed in the applicants' favour that they were entitled to rely on the conditions of service which they claimed to be entitled to enforce, namely those which prevailed prior to the 28 May resolution, it is not necessary to make a finding on whether that resolution validly amended those conditions.' (Emphasis added)

[36] In *Marais v Aveng Grinaker Lta*,^[32] based on the on the straightforward test endorsing the test in *Waco, Moshona J* observed, correctly in my view, that:

'Clearly, once the day of reckoning arrives – reaching the normal or agreed retirement age – the clock cannot be reversed. The only way to reverse it is to novate. In the nature of novation, the obligation must still be extant at the time of replacement. In my view, once the horse bolts – the retirement age is reached – the retirement age is not capable of being novated. I understand this to be the point made by the LAC in *Karan Beef supra*.' (Emphasis added)

[37] In light of the above authorities, there is no merit in the applicants' contention that SITA's failure to engage the applicant employees with a view to reach an agreement on a new retirement age post age 60 years amounted to a unilateral determination of a new retirement date in breach of the Pension Fund Rules; alternatively, given the circumstances of this present matter, SITA tacitly agreed to allow the applicant employees to remain in employment until the age of 67 years.

[38] In *Bothma-Batho Transport (Edms) Bpk v S Bothma and Seun Transport (Edms) Bpk*,^[33] elaborating on the principles articulated in *Natal Joint Municipal Pension Fund*, Wallis JA stated:

'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. Accordingly, it is no longer helpful to refer to the earlier approach.'

[39] The interpretation of clauses 5.2.2 and 5.2.4 contended for by the applicants is untenable when regard is had to the context of the Pension Fund Rules. It is implausible that the consent referred to in clause 5.2.2 would be limited to permission to work beyond the normal retirement age without an agreement on the exact retirement date thereafter. If there is no agreement on the retirement date once the employee reaches the normal retirement age, then the employer is entitled to enforce the normal retirement age any time thereafter.

- [40] It follows that the normal retirement age of 60 years remained uninterrupted and binding. Nothing much turns on the fact that the applicant employees continued to work after they had reached the normal retirement age. It is common cause that they had reached the normal retirement age and that their dismissal was based on age. That being the case, as stated in Waco[34], it is section 187(2)(b) that pronounced their dismissal fair. SITA could accordingly avail itself to the protection prescribed in section 187(2)(b) from the date the applicant employees reached the normal retirement age and at any time thereafter.
- [41] Given the conclusion I have reached; the applicants' contractual claim is patently stillborn and must fail. Lastly, there is no discernible basis from the evidence before me for the applicants' section 188 unfair dismissal claim. In any event, this claim was pursued in futility as this Court lacks jurisdiction to deal with matters that must be referred to arbitration in terms of section 191(5)(a) of the LRA. Since there are no written submissions made on this issue, I prefer to say nothing further.

Conclusion

- [42] In all the circumstances, I am satisfied that the applicant employees' dismissal was fair because they had reached the normal retirement age. As such, their automatically unfair claim as well as their contractual claim stand to be dismissed. The Court lacks jurisdiction to deal with the section 188 dismissal claim.

Costs

- [43] Tritely, costs do not follow the result in this Court in accordance with the requirements of law and fairness. Moreover, as mentioned above, SITA's unexplained delay and flagrant disregard of the directive to file heads of argument is another consideration for not granting costs.
- [44] In the circumstances, I make the following order:

Order

1. The applicants' claims are dismissed.
2. There is no order as to costs.

P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Advocate C Goosen

Instructed by:

Serfontein, Viljoen & Swart

For the Respondent: Advocate K Tsatsawane SC and Advocate Nandi Makhaye

Instructed by:

Rambevha Morobane Attorneys

[1] Act 66 of 1995, as amended.

[2] Act 75 of 1997, as amended.

[3] C148/18 Solidarity obo Christoffel Gerhardus Viljoen Strydom v SITA see pages 1-71 of the joint pleadings bundle.

[4] See page 7 of the trial bundle.

[5] JS49/18 Solidarity obo Alwyn Enslin v SITA – see pages 72-136 in the joint pleadings bundle.

[6] See page 125 in additional bundle.

[7] JS67/18 Solidarity obo Andreas Olivier v SITA

- see pages 137-203 in the joint pleadings bundle.

[8] JS68/18 Solidarity obo Wilma Ena Smith v SITA

- see pages 204-233 in the joint pleadings bundle.

[9] JS195/18 Petra Van Den Berg v SITA – see pages 276-308 in the joint pleadings bundle.

[10] JS338/18 Solidarity obo Sonia du Plessis – see pages 309-387 in the joint pleadings bundle.

[11]

(1998) 19 ILJ 1573 (LC) at paras 30 – 31.

[12]

(2012) 33 ILJ 2579 (LAC) at paras 19–20.

[13] 2012 (4) SA 593 SCA at para 18.

[14] See page 170 of the trial bundle.

[15] See pages 173-174 of the trial bundle.

[16] See additional bundle, page 1.

[17] By way of example, see Mr Strydom contract of employment, clause 24, page 118 of the trial bundle.

[18] Supra fn 12.

[19]

(2009) 30 ILJ 2429 (LC).

[20] Supra fn 12.

[21]

(2004) 25 ILJ 1671 (LAC) at para 24; see also: Bank v Finkelstein t/a Finkelstein and Associates (JS219/15)

[2016] ZALCJHB 428 (unreported judgment delivered on 26 October 2016) at para 25.

[22]

(2006) 27 ILJ 281 (LC) at para 25.

[23] Supra fn 19.

[24] Ibid at para 28.

[25] Supra fn 11.

[26] Supra fn 22.

[27] Supra fn 21, at para 35.

[28]

(2002) 23 ILJ 528 (LC) at para 23.

[29]

(2008) 29 ILJ 399 (LC) at para 26.

[30] Ibid at para 36.

[31] (JS886/09) [2014] ZALCJHB 357 (unreported judgment delivered on 15 September 2014) at paras 35-37.

[32] (JS602/14) [2019] ZALCJHB 259 (unreported judgment delivered on 10 September 2019), at para 15.

[33] 2014 (2) SA 494 (SCA) at para 12.

[34] Supra fn 11 at para 30.

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