THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 925/17

In the matter between:

SIMON RAPULE MOKOBANE **Applicant**

and

WESTCOL TVET **First Respondent**

WESTCOL COLLEGE COUNCIL **Second Respondent**

Heard: **21 November 2024**
Heads of argument submitted on 29 November 2024

Delivered: **5 December 2024**

This judgment was handed down electronically by consent of the parties by circulation to them via email. The date for hand-down is deemed to be 5 December 2024.

JUDGMENT

PRINSLOO, J

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Introduction

[1] The Applicant applied for an advertised position at the First Respondent (Respondent) and after his application was successful, the parties signed an employment contract in terms of which the Applicant was employed as a lecturer with effect from 18 February 2008 'for an indefinite period'. Clause 36 of his employment contract provided for retirement at the age of 65.

[2] On 23 November 2015, the Respondent provided the Applicant with a notice to amend his employment contract. In terms of the said notice, the parties agreed to amend the Applicant's open-ended contract of employment to a fixed-term contract and for the employment relationship to terminate on 31 July 2017. The Respondent made specific reference to clause 36 of the Applicant's contract of employment, which provided for retirement at the age of 65. The Applicant refused to sign the amendment, and he did not agree to it.

[3] The amendment followed a meeting of the 'college council' in June 2015 where it was decided and agreed that the retention of pensioners should only be considered based on scarce skills and that an extension of 24 months for pensioners had been approved.

[4] The Applicant's pleaded case is that following the aforesaid council decision, all lecturers who were classified as 'pensioners' left the Respondent's employ, but he refused to leave because he had a valid contract and there was no agreement as to the reasons why he had to go.

[5] The Applicant pleaded that he was finally dismissed on 31 July 2017.

[6] The Applicant subsequently approached this Court for relief and his claim is that the reason for his dismissal was that the Respondent unfairly discriminated against him on the grounds of his age, and he pursued an unfair discrimination claim in terms of section 6 of the Employment Equity Act[1] (EEA) on the ground of his age.

[1] Act 55 of 1998, as amended.

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[7] The Applicant's pleaded case is that the termination of his employment amounted to unfair discrimination because he was employed on the basis of his experience and scarce skills, there was no reason to terminate his employment as he is *"still healthy, not an invalid, have all my faculties in place and age has never been a problem with me".* There was no reason to terminate his employment and his right not to be discriminated against was violated.

[8] The Applicant seeks reinstatement, alternatively 24 months' compensation.

[9] The main issue for this Court to decide is whether the Respondent's conduct in terminating the Applicant's employment constituted discrimination and if so, whether it was fair.

The evidence adduced

The Applicant's case

[10] The Applicant testified that he had entered into an employment contract with the Respondent and he referred to the contract that was signed in February 2008 which employed him as a lecturer with effect from 18 January 2008. The Applicant's understanding was that the contract was for an indefinite period and to him it meant that the contract 'was forever'.

[11] He testified that when he had entered into the said contract with the Respondent, he was already over the retirement age, a fact the Respondent was well aware of and notwithstanding that, he was still employed because of his experience and scarce skills. The Respondent could not have terminated his employment contract and in doing so, he was discriminated against.

[12] In cross-examination, the Applicant confirmed that he commenced employment with the Respondent in February 2008 and at that point, he was 63 years old.

[13] The Applicant was referred to clause 36 of his employment contract which provided as follows:

'36. Date of retirement

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36.1. The employee will automatically retire and the employment relationship terminated accordingly at the age of 65 (sixty five) or as otherwise agreed in writing and without any additional notice given by any of the parties to the other.

36.2. This will automatically terminate the employment relationship and will not constitute dismissal of the employee by the employer of any nature whatsoever.'

[14] Mr Mokobane testified that he understood the aforesaid clause to mean that unless there was another agreement, the employer could use the clause to 'say step down'.

[15] It was put to the Applicant that when he had entered into the employment agreement, he was 63 years old and he had not yet reached retirement age, as provided for in his contract of employment. The employment contract contained a retirement age. The Applicant agreed that it was indeed what clause 36 of the contract provided for, but he insisted that it was irrelevant because he only commenced his employment with the Respondent after he had already reached retirement age and furthermore, he was permanently employed. Mr Mokobane explained that permanent employment means that *"I was employed as long as I was alive".*

[16] It is evident from the facts placed before this Court that the Applicant was employed by the Respondent when he was 63 years old and prior to him reaching retirement age and that the employment contract specifically provided for retirement at the age of 65. The Applicant was not over the retirement age when he took up employment with the Respondent.

[17] The Applicant did not call any witnesses and closed his case. The Respondent adduced no evidence and closed its case.

<u>The issues to be decided</u>

[18] The issue to be decided is whether the Respondent's conduct in terminating the Applicant's employment constituted discrimination and if so, whether it was fair.

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[19] Before I deal with the merits of this case, I wish to state that this Court has empathy for the Applicant, who is 80 years old and still believes that he has a contribution to make in the workplace and could remain employed for as long as he is alive, but in deciding the issues relating to discrimination, the law must be applied dispassionately, with the focus on the relevant legal questions and the applicable principles. The Applicant is a senior citizen who must be treated with respect and the findings in this judgment mean no disrespect but are informed by an application of the law.

Discrimination

[20] Section 6(1) of the EEA prohibits unfair discrimination and provides that:

> '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.'

[21] The Applicant's pleaded case is that the Respondent dismissed him in contravention and breach of section 6(1) of the EEA and that he was unfairly discriminated against because of his age. Section 10(1) of the EEA specifically excludes a dispute about an unfair dismissal. An unfair discrimination dispute, pursued in terms of the EEA, does not include an unfair dismissal dispute and the Applicant's discrimination case is the only issue for this Court to decide.

[22] Section 187(1)(f) of the Labour Relations Act[2] (LRA) is almost a mirror image of section 6(1) of the EEA and provides that a dismissal is automatically unfair if the reason for dismissal is:

> '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,

[2] Act 66 of 1995, as amended.

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conscience, belief, political opinion, culture, language, marital status or family responsibility.'

[23] In section 187(2) the LRA provides that:

> (2) Despite subsection (1)(f)—
>
> (a) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job;
>
> (b) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.'

[24] Section 187(2)*(b)* of the LRA pronounces a termination of a contract of employment at a normal or agreed retirement age to be fair. Section 6 of the EEA should be read and interpreted consistently with section 187(2)*(b)* of the LRA.

[25] In *Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society & others*[3], it was held that:

> 'It is a well-established canon of statutory construction that "every part of a statute should be construed so as to be consistent, so far as possible, with every other part of that statute, and with every other unrepealed statute enacted by the Legislature." Statutes dealing with the same subject-matter, or which are *in pari materia*, should be construed together and harmoniously. This imperative has the effect of harmonising conflicts and differences between statutes. The canon derives its force from the presumption that the legislature is consistent with itself. In other words, that the legislature knows and has in mind the existing law when it passes new legislation, and frames new legislation with reference to the existing law. Statutes relating to the same subject-matter should be read together because they should be seen as part of a single harmonious legal system.'

[26] In *HOSPERSA on behalf of Venter v SA Nursing Council,*[4] it was held:

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[3] [2019] ZACC 47; 2020 (2) SA 325 (CC) at para 38.
[4] [2006] ZALC 29; (2006) 27 ILJ 1143 (LC) at para 22.

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'As stated above, the applicant in this matter elected to refer a dispute in terms of the Employment Equity Act and not the Labour Relations Act. It appears that one of the reasons therefor was that she referred a dispute before she had been dismissed. Nevertheless, I consider the principles encapsulated in s 187 of the Labour Relations Act to provide guidance in handling allegations of discrimination based on age, in the employment context, in terms of the Employment Equity Act. "Employment policy or practice", as defined in s 1 of the EEA, includes dismissal. The proviso in s 187(2)*(b)* of the LRA that a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity, appears to me to be no more than a justification for what would otherwise amount to unfair discrimination based on age.'

[27] In *Khan v MMI Holdings Ltd*[5]*,* the Court confirmed that:

'[77] In applying the principle to interpret statutes consistently in accordance with the *Independent Institute of Education* case, it is clear that an employee whose employment is terminated through the application of a retirement policy has two potential courses of action. He may institute an automatically unfair dismissal claim under the LRA, or an unfair discrimination claim under the EEA, or both. Both causes of action would arise from the same set of facts. This is a clear indication that the two statutes must be interpreted consistently.

[78] Further, the legislature could not have intended that the same conduct, termination of employment on an agreed or normal retirement age, could be fair under the LRA and unfair under the EEA. Such an outcome would undermine the principle of legality and employees would simply 'forum shop' by bringing claims under the EEA instead of the LRA.

[79] A further consideration is that the LRA was enacted first and followed by the promulgation of the EEA. The legislature must be deemed to have been fully aware that the employer could fairly apply a retirement policy based on a normal retirement age when the EEA was enacted.

[80] In summary it is certainly possible to interpret the LRA and EEA in a consistent manner. As Steenkamp AJ (as he then was) held

[5] [2021] ZALCCT 38; (2021) 42 ILJ 1737 (LC).

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> in *HOSPERSA*, s 187(2)*(b)* is no more than a justification ground available to an employer under the EEA which affords the employer a defence under s 11(1)*(b)* where the alleged discrimination is shown to be rational, not unfair, or justifiable.'

Closing arguments

[28] The parties were afforded an opportunity to submit closing arguments. I have considered the closing arguments submitted by the Applicant and the Respondent and it is not necessary to repeat the arguments and submissions for purposes of this judgment.

Analysis

[29] In my view, there is no merit in the Applicant's claim for reasons fully dealt with *infra*.

[30] First, the parties entered into an employment contract which contains a clause dealing with retirement and which provided that the Applicant would automatically retire and the employment relationship terminated accordingly at the age of 65 or as otherwise agreed.

[31] Ordinarily, a dismissal based on age would be automatically unfair or could constitute discrimination based on age, unless it is established that section 187(2)(b) of the LRA applies.

[32] Section 187(2) of the LRA, to be read with section 6(1) of the EEA specifically provides that it is not unfair to terminate an employee's services where he or she reached the agreed retirement age. Termination of an employment contract on account of reaching the agreed upon retirement age is permissible in law and does not constitute unfair discrimination. A retirement age stipulated in the employment contract of the employee would constitute such an agreed retirement age.

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[33] The Court has also confirmed that the termination of the employment relationship when an employee reaches the normal age of retirement does not amount to a dismissal and cannot be automatically unfair.[6]

[34] A dismissal on the basis of an agreed retirement age or a normal retirement age is deemed to be fair by virtue of the application of section 187(2)(b) and there is no separate requirement of procedural fairness in effecting it. Therefore, there is no need to first consult the employee or afford the employee some kind of hearing before implementing retirement.

[35] Second, Mr Mokobane made much of the fact that he was employed by the Respondent for a period of nine years and seven months and that he was dismissed 'out of nowhere'. He was still employed by the Respondent long after he had reached retirement age. This is of no moment.

[36] The Labour Appeal Court (LAC) observed that there are possibly two scenarios in which section 187(2)*(b)* confers protection to an employer to dismiss an employee fairly. The first scenario is where an employee has reached the normal or agreed retirement age but continues to work for the employer, and the second is when an agreement is reached between the employer and employee to determine a new retirement age before the latter has reached the normal or agreed retirement age. Consequently, in the latter instance, the employer would continue to enjoy the protection of section 187(2)*(b)* of the LRA should it terminate the employment of the employee once the new agreed employment date is reached.

[37] A termination of employment based on age is fair, as contemplated in section 187(2)*(b)* of the LRA if *(a)* the dismissal is based on age; *(b)* the employer must have an agreed or normal retirement age for employees employed in the capacity of the employee concerned; and *(c)* the employee must have reached the normal or agreed retirement age.

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[6] See: *Schmahmann v Concept Communications Natal (Pty) Ltd* [1997] 8 BLLR 1092 (LC) at 1097 with reference to *Badenhorst v GC Baars (Pty) Ltd* [1995] 10 BLLR 19 (IC) at 26. See also *Coetzee v Moreesburgse Koringboere Koöperatief Bpk* [1997] 9 BLLR 1167 (LC); *Thomas (Rockliffe) v Mincom (Pty) Ltd* [2007] 10 BLLR 993 (LC).

[38] *In casu,* there was an agreed retirement age of 65 and the Respondent retained the right to dismiss the Applicant based on age at any time after he had reached his agreed to retirement age.

[39] This position was confirmed by the LAC in *Motor Industry Staff Association & another v Great South Autobody CC t/a Great South Panelbeaters*[7] where it was held that:

> '[14] Section 187(2)*(b)* of the LRA is clear and unambiguous. On its ordinary meaning, once the employer proves that the dismissed employee has reached the agreed or normal retirement age, the dismissal is deemed fair. The use of the phrase 'if the employee has reached his agreed or normal retirement age' is decisive in denoting that for the dismissal in terms of s 187(2)*(b)* to be fair, the employee must have passed his or her normal or agreed retirement age.
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> [15] Section 187(2)*(b)* does not prescribe a time frame within which the dismissal should take place, provided it is after the employer has reached his or her agreed or normal retirement date. Properly construed, s 187(2)*(b)* affords an employer the right to fairly dismiss an employee based on age at any time after the employee has reached his or her agreed or normal retirement age. This right accrues to both the employee and the employer immediately after the employee's retirement date and can be exercised at any time after this date. The focus is not so much on when the employee reached his or her retirement date, but rather that the employee has already reached or passed the normal or agreed retirement age.
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> [16] For a dismissal in terms of s 187(2)*(b)* of the LRA to be insulated against a claim of unfair discrimination on the grounds of age, the reason for, or proximate cause of the dismissal must be that the employee has already reached retirement age. The appellants contend that if an employer is permitted, on the employee having reached his or her retirement age, to rely indefinitely on an agreed or normal retirement age, this will leave the employee in a vulnerable position by enabling the employer to abuse its position to dismiss the employee based on

[7] [2022] ZALAC 103; (2022) 43 ILJ 2326 (LAC).

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his age. I disagree. On a proper construction of s 187(2)*(b)* read in the context of the LRA, it is impermissible for an employer to invoke the defence in s 187(2)*(b)* where the real reason for the dismissal is based on operational requirements or misconduct or incapacity. For example, if the most proximate cause of the dismissal is proven to be one based on operational requirements and not age, as contemplated in s 187(2)*(b)*, then it will be open to the Labour Court to, inter alia, order the employer to pay the employee severance pay.

[17] Section 187(2)*(b)* of the LRA contemplates that where an employee continues to work for the employer uninterrupted after reaching retirement age, the employment relationship and employment contract continue. In other words, for purposes of a dismissal in terms of s 187(2)*(b)*, the employment contract does not terminate by the effluxion of time when the employee reaches his or her retirement age but is deemed to continue. This effectively means that the agreed or normal retirement age of the employee remains unchanged.

[18] On this interpretation, a dismissal contemplated in s 187(2)*(b)* would have the same meaning as the definition of dismissal in s 186 of the LRA, which does not include the termination of a contract by effluxion of time as the latter is not a dismissal. Properly construed, s 187(2)*(b)* does not contemplate a new tacit contract coming into existence between an employer and employee (by virtue of their conduct) which governs their employment relationship when the employee continues to work for his or her employer after reaching the normal or agreed retirement age. In the same vein, s 187(2)*(b)* does not envisage a tacit amendment of the contract to the effect that the employee would continue to work indefinitely or that a new retirement age applies, as is contended for by the appellant in this appeal.'

[40] This interpretation gives effect to the right that accrues to an employer in terms of section 187(2)*(b)* to fairly dismiss an employee who has passed the agreed or normal retirement age. Significantly, it is consistent with the purpose of section 187(2)*(b)* which is to allow the employer to dismiss employees who have passed their retirement age to create work opportunities for younger members of society. This interpretation was endorsed by the LAC.

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[41] In *Solidarity on behalf of Strydom and others v State Information Technology Agency SOC Ltd*[8], the Court held that even where an employee is allowed to work beyond retirement age, the employer may at any time after such age is reached terminate the employment relationship and nothing turned on the fact that they worked beyond their retirement age.

[42] This was also the position in *Bank v Finkelstein t/a Finkelstein and Associates*[9] where the Court held that:

> 'A final consideration is the situation 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* 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".'

[43] The Applicant relies on an employment contract that contains a mandatory retirement age and as such, he failed to make out a case for unfair discrimination based on his age and it follows that his case must be dismissed.

[44] This Court has a broad discretion in awarding costs and in my view, the interests of justice and fairness will be best served by making no order as to costs.

[45] In the premises, I make the following order:

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[8] [2022] ZALCJHB 95; (2022) 43 ILJ 1881 (LC).
[9] (JS219/15) [2016] ZALCJHB 428 (LC) at para 35.

Order

1. The Applicant's claim is dismissed.
2. There is no order as to costs.

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Connie Prinsloo

Judge of the Labour Court of South Africa

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Appearances:

For the Applicant:	Mr Mokobane in person
For the Respondents:	Advocate S Swiegers
Instructed by:	Lee and McAdam Attorneys

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