THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case numbers: JS 487/20

In the matter between:

CHRISTIAAN SAMUEL BESTER **Applicant**

and

STATE INFORMATION TECHNOLOGY AGENCY (SOC) LIMITED **Respondent**

Heard: **1 – 2 September 2022**

Delivered: **15 September 2022**

Summary: Referral – dispute alleging automatically unfair dismissal. Once dismissal is established, an employer is obliged to justify the said dismissal. Where dismissal is based on age, it is *only* the employer that is entitled to raise any of the available defences outlined in section 187 (2) (b) of the LRA. Where the employer relies on a defence of an employee having reached a normal retirement age – this Court is required to assess only that defence and not concern itself with whether an agreed retirement age has been reached or not.

An employee alleging that contractually, he or she is entitled to retire at a particular age which surpasses the normal retirement age may institute a contractual claim in terms of section 77 (3) of the BCEA in order to seek

contractual remedies contemplated in section 77A (e) of the BCEA. In such a claim the issue of the validity and invalidity of a contract of employment may arise for determination. Section 187 (2) (b) interpreted. Normal includes what is normal industry wide. SITA as a state organ is entitled to adopt the normal retirement age in the government industry, which age is 60 years.

Once SITA proves on the balance of probabilities that age 60 is a normal retirement age and the applicant reached that age, then his dismissal is fair. The claim for automatically unfair dismissal falls away.

The Labour Court lacks jurisdiction to entertain an ordinary unfair dismissal based on reasons unknown to an employee. Section 158 (2) of the LRA does not confer jurisdiction over the Labour Court to adjudicate such a dispute. An agreement between the parties is incapable of clothing the Labour Court with jurisdiction it does not have.

Held: (1) The claim for automatically unfair dismissal is dismissed. Held: (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] At first blush, any termination of an employment contract may constitute a dismissal challengeable in law. Here I have in mind instances where a pure breach of the employment contract ends an employment relationship. In order to establish a dismissal as defined in section 186 of the Labour Relations Act[1] (LRA), an employee must first establish the existence of a contract and its

[1] Act 66 of 1995, as amended.

terms. However, where an employee alleges that the reason for the dismissal is one that is proscribed by law, as opposed to being non-performance and/or malperformance (breach), the remedies lie in the law that proscribes the reason used to terminate employment. The matter before me is a referral made in terms of section 191 (5) (b) (i) of the LRA, in terms of which the applicant, Mr Christiaan Samuel Bester (Bester) claims that his retirement (dismissal) is automatically unfair within the contemplation of section 187 (1) (f) of the LRA. The referral is duly opposed by the State Information Technology Agency (SOC) Ltd (SITA). The issues brought for determination were spelled out in a consensual document (pre-trial minute) concluded by the parties on 12 February 2021, and those are:

1.1 Whether the applicant's dismissal constitutes an automatically unfair dismissal as contemplated in section 187 (1) (f) of the LRA, alternatively;

1.2 Whether the applicant's dismissal is substantively and/or procedurally unfair;

1.3 Whether the applicant is entitled to relief and, if so, the relief which the applicant is entitled to;

1.4 The parties agree that, in the event of the Court finding that the applicant's dismissal (if any) does not constitute an automatically unfair dismissal as contemplated in section 187 (1) (f) of the LRA, the Court should decide whether his dismissal was substantively and/or procedurally unfair in accordance with the provisions of section 158 (2) (b) of the LRA.

[2] As it shall later be demonstrated, this Court lacks jurisdiction over the alternative claim and this judgment shall confine itself to the main claim. It also suffices at this stage to state that parties cannot confer jurisdiction on a Court

by agreement[2]. If a Court lacks jurisdiction an agreement conferring jurisdiction, if upheld leads to a *brutum fulmen*.

[3] In this trial, the parties led testimony of one witness a piece in support of each other's case. Bester testified in his own case and Ms Agnes Mamaregane (Mamaregane) testified on behalf of SITA.

Background facts and evidence

[4] SITA is a State Owned Company (SOC) established in terms of an Act of Parliament[3]. On 4 April 1999, SITA was established. It is constituted by three entities which in the past provided information technology (IT) services to the South African government. These three entities (Chief Directorate of the Department of State Expenditure (CCS); Infoplan (which provided IT services to the Department of Defence); and the South African Police Services (SAPS) IT) merged to form SITA. Obviously, these three entities had in their employ employees governed by different conditions of employment. For the purposes of this judgment, some employees who moved over to SITA belonged to the Denel Retirement Fund (Denel) others to Alexander Forbes Retirement Fund (Alexander) and Government Employee Pension Fund (GEPF) respectively. These retirement funds governed the retirement ages of the respective employees differently. Denel provided the retirement age as 65 years; and Alexander and GEPF provided age 60 as a retirement age.

[5] Owing to this anomalous situation, for a period, SITA left the regulation of the retirement age of its employees in the hands of the respective retirement funds. On 22 April 1999, Bester was appointed as a full time employee effective 1 July 1999, after having worked for SITA as an independent contractor. Bester did not belong to any of the retirement funds mentioned above. In his letter of appointment, it was stated that his appointment is subject to the conditions of

[2] See: *Patel Roadways Limited, Bombay v Prasad Trading Company* (1991) 4 SCC 270 and *Mittal v Shukla* unreported judgment of 25 February 2022 New Delhi High Court.
[3] State Information Technology Agency Act 88 of 1998, as amended.

service (COS) applicable to SITA, which may be amended from time to time after consultation. Such specified conditions of service were not availed to this Court during trial. It is unknown as to whether the said COS made provision for a retirement age. Howbeit, on 2 December 2011, SITA Board adopted employment conditions. A copy of such adopted conditions was availed to this Court.[4]

[6] Pertinent to this dispute, clause 9.18 of the said COS provided as follows:

> 'Retirement age specifications shall be set according to the rules of the relevant pension or retirement funds.' (Own emphasis)

[7] As indicated above, the clause recorded the retirement ages of each of the retirement funds as the applicable normal retirement ages. Bester did not belong to any of the identified funds. Nevertheless, the COS recorded that new employees appointed after 1 April 1999 shall be members of Alexander[5]. Despite this condition of employment, for reasons not properly canvassed before me, Bester failed to join Alexander. Instead, he chose to make annuity arrangements by taking out an annuity policy with Momentum. Certainly, Bester, having been appointed after 1 April 1999, he was to be governed by the Alexander normal retirement age of 60 years.

[8] On the version of Bester, which was not sufficiently challenged for the obvious reasons that the witness who could have quibbled with his testimony was untraceable and had relocated out of South Africa, around December 2011, he was provided with an employment contract for his signature. Of particular relevance to this dispute, the draft contract of employment's clause 4.1 read as follows:

> 'This agreement shall commence on the commencement date, notwithstanding the signature date 10 January 2012 and shall be valid and operational until the

[4] Page 41 and further of Bundle A.

[5] Clause 9.19.1 (b) (iv) of the 2011 COS.

employee reaches retirement age set according to the rules of the relevant pension or retirement funds…'(Own emphasis).

[9] I pause to mention that the underlined or highlighted portions of clause 4.1 are consistent with paragraph 3 of Bester's letter of appointment and clause 9.18 read with 9.19.1 (b) (iv) of the 2011 COS. Owing to what turned out to be the desires of Bester as expressed to Momentum brokers, Bester deemed it appropriate to delete the underlined or highlighted portion and replaced it with a hand written inscription to the following effect, "*the age of 65 years*". It must be stated at this stage that in an ambivalent and contradictory manner, Bester testified that the replacement was informed by an earlier agreement he had reached with SITA. Howbeit, he failed to plead and or produce such an agreement in Court. After having made the replacement, he appended his full signature next to the deletion and replacement. He then initialled each page of the draft and signed at the end of the document on 25 January 2012. On his version, there was a toing and froing of the draft between him and one Ms Van Wyk (Van Wyk) – the relocated person. Ultimately, on 23 February 2012, Van Wyk initialled each page of the document but failed to counters-sign all the places where Bester effected replacements or amendments. Of course Bester testified that with effect from 23 February 2012, his agreed retirement age became 65 years.

[10] I pause to mention that given the view this Court takes in due course, it matters not whether the amendments effected by Bester were valid or not.

[11] Around 30 January 2018, the SITA Board resolved to set the retirement age for every employee at 60 years, in order to avoid the lack of uniformity which obtained over the years since SITA's inception. On 23 May 2018, the Executive: Human Capital Management, notified all SITA employees of the 30 January 2018 resolution. Owing to that resolution, certain of the employees were informed that they had reached the normal retirement age (60 years). This action caused ruction within the workforce, particularly to those employees who belonged to Denel. This ruction culminated in a collective agreement being concluded between SITA and the Public Service Association (PSA). In the

collective agreement, it was agreed that the implementation of the resolution shall be put on hold pending some investigations. It was agreed that the matter shall be concluded by 31 December 2018.

[12] On or about 16 November 2018, a further communique was issued to all SITA employees, which recorded that the investigations were conducted and more importantly that all SITA employees who joined the company after 1 April 1999 will remain at the maximum age of 60 years. This position was confirmed with the PSA at a bargaining forum meeting of 26 October 2018. This Court was not favoured with the minutes of that meeting and Mamaregane was not part of that meeting.

[13] In February 2019, Bester became aware that he would be retired at age 60. He then approached Human Resources and asked for a copy of his employment contract where he had effected the change on his retirement age. Immediately thereafter, he commenced grievance proceedings. The grievance took long to resolve and one Mr Van Deventer launched an inquiry on Bester's behalf. Ultimately the grievance was not resolved in Bester's favour. Mamaregane testified that she was involved in the grievance process. She questioned the validity of the alleged employment contract and could not receive satisfactory explanations from Van Wyk. In the meanwhile, Bester on 15 January 2020 reached the age of 60. SITA gave him notice that his services would terminate on 31 January 2020.

[14] Mamaregane testified that since 2018 all employees of SITA retired at age 60 without fail and those that were to be retained after age 60 needed to provide motivation. She referred to two instances where the retirement ages were extended after motivations. Her testimony in this regard was not challenged by Bester and his legal representative.

[15] In due course, Bester referred a dispute to the CCMA and alleged an automatically unfair dismissal. It is not clear as to when was the referral made. It is also unclear whether the dispute was conciliated upon or not. The referral forms were signed by Bester on 30 April 2020. I pause to mention that Bester

alleged that he was dismissed on 31 January 2020. In terms of section 191 of the LRA he was obliged to refer the dispute within 30 days from 31 January 2020. The 30-day period would have expired on or about 2 March 2020. Therefore as at 30 April 2020, the referral was out of time. There is no indication that condonation was sought and granted for the late referral.

[16] Howbeit, on 8 September 2020, Bester withdrew the dispute and contended that it was erroneously referred for arbitration. I must mention that it is an essential requirement for a party in a statement of case to state that the dismissal dispute was referred to conciliation, since such a fact is a jurisdictional fact that must exist before this Court determines a matter. In the statement of case, Bester simply made a bare allegation that this Court possesses jurisdictional powers. Sadly, SITA did not raise any objection to lack of materiality or particularity of the statement of case. SITA should have because the allegation of referral to conciliation is a material one since it speaks to the jurisdiction of the Labour Court[6].

[17] At the commencement of the trial, Mr Sefudi, appearing for SITA raised a misguided jurisdictional objection. That objection was not directed to the fact that the dispute was not properly referred to conciliation but to the fact that because Bester referred and withdrew a dispute, the dispute was about an ordinary dismissal as opposed to an automatically unfair dismissal. Having debated the issue with the Court, he abandoned the objection. This Court became aware of these facts, which somewhat place its jurisdictional powers in doubt, when preparing this judgment. Given the view I take at the end, I must depart from an assumption that the dispute was properly referred and conciliated.

[18] Bester referred the automatically unfair dispute for adjudication on or about 17 August 2020.

Argument

[6] *September and others v CMI Business Enterprise CC* (2018) 39 ILJ 987 (CC).

[19] This being a trial action, the Court listened to oral submissions immediately after the delivery of *viva voce* testimony and extensively debated the applicable legal principles with the legal representatives of the parties.

[20] In brief, Mr Grundlingh, appearing for Bester submitted that Bester had a valid employment contract which entitled him to retire at age 65. Since he was made to retire at age 60, SITA effectively failed to perform in terms of the agreed term of 65 years, thus his dismissal is automatically unfair. Relying on various Labour Appeal Court (LAC) authorities, he submitted that the dispute is not governed by the normal retirement age regime but by the agreed retirement age regime. He was critical of some legal basis[7] raised by SITA because such legal basis were not its "pleaded" case. He strenuously argued that when Bester effected the amendments, he was making a counter-offer, which was accepted by Van Wyk by initialling at the foot of the page where the amendment occurred[8]. In conclusion, he submitted that since Bester wished to be reinstated there is no evidence to gainsay his wishes and the reinstatement must be retrospective.

[21] On the other hand, Mr Sefudi argued that Bester gave three contradictory versions with regard to the alleged agreed term of him retiring at age 65. He further submitted that on the conspectus of the evidence, SITA succeeded to demonstrate that Bester had reached the normal retirement age which was set at age 60. Accordingly, based on section 187 (2) (b) of the LRA, the dismissal is fair and the claim of Bester must be dismissed with an order as to costs.

Evaluation

[22] Before I deal with the relevant legal principles appertaining this matter, I deem it necessary to clarify certain salient general legal principles in relation to

[7] Grundlingh took a view that SITA is raising the legal defence of lack of authority. However, Sefudi clarified that it is not a defence SITA seeks to raise. All SITA contends is that the amendments effected by Bester were not co-signed by Van Wyk.

[8] It ought to be remembered that a party is not prevented from repeating its rejected offer. In such instances, the counter-offer is rejected and the original offer is resuscitated. See: *Stephen v Pepler* 1921 EDL 70.

disputes of this nature. Bester approached this Court in terms of section 191 (5) (b) (i) read with section 187 (1) (f) of the LRA. It must be stated upfront that where an employee alleges premature termination of an employment contract, such an employee may approach this Court in terms of section 77 (3) of the Basic Conditions of Employment Act[9] (BCEA) for a relief in terms of section 77A (e) of the BCEA. In order to illustrate a point to be made later, regard must be had to the provisions of section 187 (1) (f) of the LRA. It provides that:

> '187. **Automatically unfair dismissals**
>
> (1) A dismissal is automatically unfair if the employer, in dismissing the employee acts contrary to section 5or, 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 or social origin, colour, sexual orientation, age…' (Own emphasis)

[23] What is instantaneously discernible from the above provisions is that the unfairness is automatic if the reason for the dismissal is an employee's age – proscribed reason. The dictionary meaning of the word 'automatic' is something done or occurring as a matter of course and without debate. As a matter of course, if an employee is dismissed for reasons of age, there can be no debate regarding the unfairness of his or her dismissal. Therefore, if the law was left by the legislature at subsection (1) (f), all an employee would be required to show in order to enjoy the remedies in terms of the LRA, is that the dismissal was based on his age. That in itself is presumed to be an unfair discrimination. In practical terms, what it means is that an employee armed with a letter couched in the following terms, is automatically entitled to the remedies set out in section 193 of the LRA:

> 'Dear Sir/Madam

[9] Act 75 of 1997.

Since you have now reached 60 years your employment with the company is terminated.'

[24] However, the legislature did not leave it there. The legislature inserted the following provisions, which solely provides an employer faced with automatic unfairness allegation with a legal defence. Section 187 (2) of the LRA provides thus:

'(2) Despite subsection (1) (f) –

(a) …

(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.' (Own emphasis)

[25] In order to perspicuously bespeak the point to be made later, it is fundamental to dissect the provisions of subsection (2). The best place to inaugurate the dissection is to give the word 'despite' its grammatical meaning. It means without being affected by; in spite of. That simply means that the section seeks to wish away the unfair discrimination based on age as a reason for the dismissal. Having given the word 'despite' its grammatical meaning, regard must be had to the phrase 'dismissal based on age is fair'. It must be stated upfront that the legislature carefully employs the word 'fair' as opposed to valid or lawful. Thus, what the employer is required to demonstrate is fairness as opposed to validity. It may be appropriate to digress a bit at this stage. In contractual parlance, a contracting party who fails to perform in accordance with the terms of an agreement, is said to be in breach. That party is not said to be acting unfairly. Without seeking to enter the fray of the difference between fairness and lawfulness, the word 'fair' as an adjective means just or appropriate in the circumstances.

[26] Returning to the provisions of the subsection, a dismissal based on age would be justified and/or be appropriate if (a) the age reached by the employee is one that is normal for retirement or (b) the age reached by the employee is one that is agreed upon for retirement. It is immediately crucial to give meaning to the

word retirement. As a noun the word 'retirement' means an action or fact of leaving one's job and ceasing work. The phrase 'retirement age' when used as a noun, it means the age at which most people normally retire from work. In the manner of speaking, if it is said that Joe Soap has reached a retirement age, that simply means that Joe Soap has reached an age where people normally leave a job or cease work. I may *en passant* mention that if an employee reaches the retirement age, there can be no speak of a dismissal within the meaning of section 186 of the LRA. A dismissal may arise if there is no evidence that the retirement age is a normal or one agreed upon.

[27] What is required to be shown by the employer in order to justify a dismissal is the reaching of an age which most people normally cease to work or leave a job. In other words, it is not an age where a person may be considered to be physically unable to work. A person may reach a retirement age even if that person is still physically and mentally able to work. Before I deal with the last phrase of 'persons employed in that capacity', it is important to mention that the age to be reached is either one agreed upon or one that is normal. The legislature employed the word *or* instead of *and*. As a conjunction, the word is used to link alternatives. For an example; "*chicken or beef*". This Court in *Solidarity obo Strydom and 5 others v State Information Technology Agency SOC Ltd*[10] (*Solidarity*), per my sister Nkutha-Nkontwana J felicitously stated the following:

> "[31] In *Rubin Sportswear v SA Clothing and Textile Workers Union and Others,* the LAC stated that "*Section 187 (2) (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 Service (Pty) Ltd v Browne* (*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

[10] (2022) 43 ILJ 1881 (LC) at paras 31 and 33.

> that there was no agreed retirement age, having conceded a normal retirement age, is a fallacy to which most litigants seem prone.
>
> …
>
> [33] …In light of the observations in *Cash Paymaster*, which I agree with, it is inconceivable that an employee [employer] could successfully rely on both the normal and the agreed retirement age as these scenarios are mutually exclusive. (Own emphasis and footnotes omitted)

[28] I intimately see eye to eye with the sentiments expounded by my erudite sister in *Solidarity*.

What is an *'agreed* retirement age'?

[29] This phrase implies existence of an agreement between an employer and an employee. It is important to mention that the term 'agreed' or 'agreement' means discussed or negotiated and then accepted by all and harmony or accordance in opinion or feeling respectively. Of course legally, an agreement is consummated by an offer and acceptance – often times referred to as meeting of minds.[11] There are many ways in which an employer may demonstrate an agreement as in discussion or negotiation and acceptance evincing harmony or accordance of opinion and feelings. For the purposes of this judgment, as it shall later be demonstrated, it is unnecessary to investigate whether there was meeting of minds and or harmony of feelings and opinion between Bester and SITA with regard to the retirement age.

[30] In an instance where an employer challenged to justify a dismissal based on age raises as a justification that the retirement age has been agreed upon, such an employer would be required to (a) establish that agreement and (b) its terms. Under those circumstances, an employee may in rebuttal suggest different terms that have been agreed upon. For an example, an employer may say it dismissed an employee because it and the employee agreed that age 50 is the retirement age[12]. In rebuttal, an employee may allege and prove that the agreed

[11] See: *SAR&H v National Bank of SA Ltd* 1924 AD 704 – external manifestation of minds.
[12] See: the second scenario mentioned in para 20 of *Karan t/a Karan Beef Feedlot v Randall* (2012) 33 ILJ 2579 (LAC).

age was 55 as opposed to 50. Should an employer fail to show on the balance of probabilities that 50 was the agreed age, and an employee shows on the preponderance of probabilities that the agreed age was 55, dismissing an employee simply on the basis that he or she has reached 50 (not the agreed retirement age) would constitute an automatically unfair dismissal[13].

[31] In this matter, SITA does not raise agreed retirement age as a defence and/or justification. Instead, it is Bester who is seeking to allege an agreed retirement age. This was illuminated at the embryonic stages of this dispute. In the referral forms, Bester outlined the facts of the dispute in this manner:

> 'Dismissed based on age in contravention of contractually agreed retirement age.'(Own emphasis)

[32] In providing reasons why the dismissal is substantively unfair, he repeated what is quoted above. Put on a microscopic eye, the above has a breach of contract written all over it. To that, this Court must hasten to say, the defences in subsection (2) are made available to an employer. It is either an agreed retirement age or a normal retirement age is reached by a dismissed employee, it cannot be both[14]. It is SITA which seeks to fend off a claim of automatically unfair dismissal and not Bester. Section 192 provides that in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal and if the existence of the dismissal is established, the employer must prove that the dismissal is fair. I shall in due course return to this aspect. It suffices to mention at this stage that the proceedings before me concerns an automatically unfair dismissal. Dismissal is defined in section 186 (1) of the LRA. That dismissal as defined has been established. Therefore, for the purpose of these proceedings, SITA is obligated to prove that the established dismissal is fair. It is not required of Bester in these proceedings to establish the terms of an agreement and/or the existence of some agreement. Once he established dismissal, which he did, in these proceedings he must rest and

[13] See: *Numsa obo King and Others v BMW South Africa* [2020] ZALCJHB 115 (11 March 2020).

[14] See: *Cash Paymaster Services (Pty) Ltd v Browne* (2006) 27 ILJ 281 (LAC) and *BMW (SA) (Pty) Ltd v Numsa & another* (2020) 41 ILJ 1877 (LAC).

where necessary rebut whatever SITA presents as a justification for his dismissal.

What is '*normal* retirement age'?

[33] The defence of normal retirement age has been raised by SITA in these proceedings. Pertinent to Bester, as far back as 2011, SITA made it a condition of employment that all employees appointed after 1 April 1999, should belong to Alexander. It was also a condition of employment that the retirement age is regulated by the rules of the funds. It is undisputed that the fund that Bester was obligated to belong to, Alexander, had 60 years set as a normal retirement age. The above position obtained at the very least since 2011 until when SITA normalised what was clearly an abnormal situation in 2018. On 30 January 2018, the Board of SITA explosively and unequivocally resolved that the normal retirement age is set at 60 years. Having set the normal retirement age to be 60 years, all its employees who reach that age retire. That was the position consistently since 2018. Bester did not dispute this consistency. Nor was it Bester's case that the normal retirement age at SITA was anything other than 60 years.

[34] I hasten to point out that Bester did not suggest in his testimony that he was unaware of the 2011 COS. The COS was explicit that the retirement age is as per the rules of the funds, and most importantly that having been appointed after 1 April 1999, he was obligated to join Alexander, whose rules provides that 60 years is the normal retirement age. For reasons best known to him Bester did not join Alexander. Not that this failure really matters. The COS applied to him as such the legal implications are similar. Instead, he made his own arrangement with Momentum. The importance of joining Alexander was not necessarily to make arrangements for retirement plans but to associate an employee with a particular retirement age. Such that even if Bester joined Alexander, he would still augment his retirement plans by taking an annuity policy, as he did, with Momentum. At Momentum, Bester was making his own arrangements as far as his retirement plans are concerned in line with

paragraph 4.2 of his letter of appointment. Momentum did not operate as a pension or retirement fund and did not have rules that would regulate normal retirement age. An annuity is regulated by the South African Revenue Services (SARS) rules for tax purposes and does not constitute rules of a pension or retirement fund. Of course the arrangement between Bester and Momentum did not involve SITA. It was as it was spelled out in paragraph 4.2 of the letter of appointment "own arrangements". The desire to cash out the annuity at 65 was the desire of Bester, expressed to his broker outside the knowledge of SITA. As the life and risk consolidated client portfolio document states, what Bester contracted with Momentum Financial Planning on was a "Retirement Annuity Max Investment II", a type of an investment policy sold by Momentum to its clients. Therefore, it is incontrovertible that all employees who joined SITA after 1 April 1999, Bester included, had 60 years as a normal retirement age. It was only Denel members who had age 65 as a normal retirement age. Bester was not a Denel member.

[35] A feeble attempt was made during argument to suggest that the benchmark in the "industry" is 63 years. This attempt remains feeble since it was not enclaved by any solid and reliable evidence, other than the extract made only on 19 August 2022. During argument, both representatives advised the Court of a belated agreement they reached that the extract forms part of evidence. That agreement is not binding on this Court. In any event, Mamaregane referred to the extract during evidence. What is perspicuous for the Court is that the resolution was taken in January 2018, and in August 2022, four years later someone sought to provide an extract of the minutes. The best evidence to reflect the resolution is the letter addressed to all the employees, Bester included, on 23 May 2018, hardly four months after the resolution had been adopted. In terms of that letter the resolution is recorded as:

'The SITA normal retirement age (NRA) is 60 years for all employees.'

[36] The LAC in *Rubin Sportswear v SA Clothing & Textile Workers Union & others*[15] (*Rubin Sportswear*) after having had regard to the dictionary meaning of the word 'normal', charitably volunteered an example of determining a normal retirement age and said it is where employees without a formal agreement have over 20 years been retiring at a particular age. The Court went further to state that if the period is not sufficiently long but the number is large, it might still be that a norm has been established.

[37] In my view, the best approach, which would also take into account new companies, which may not have amassed the sufficient number of years and number of employees who have retired, in order to establish the norm suggested in *Rubin Sportswear*, it is to interpret and give meaning to the word 'normal'. Of late, the Constitutional Court in *University of Johannesburg v Auckland Park Theological Seminary and another*[16] (*University of Johannesburg*) suggested an interpretation approach, which seeks to take into account grammar, context and purpose holistically. It cannot be so that a fairly new employer would lose the benefit of the normal retirement age defence because it is unable to exhibit sufficient number and years of existence. Section 9 (1) of the Constitution[17] provides that everyone has the right to equal protection and benefit of the law. Similarly, section 34 provides that everyone has the right to have any dispute that can be resolved by the application of law decided fairly in Court. To my mind, these fundamental provisions mean that a small and young employer is entitled to the benefit of the defence of an employee it dismissed having reached the normal retirement age and for a dispute involving the invocation of that defence to be decided fairly.

[38] As it was confirmed in *Rubin Sportswear*, the word normal has not been given a special meaning in the LRA, accordingly, it must be given an ordinary meaning and be interpreted applying the approach suggested in *University of Johannesburg*. The word normal geminates from the word norm. As a noun, 'norm' means something that is usual, typical, or standard. Philosophers have

[15] (2004) 25 ILJ 1671 (LAC)

[16] 2021 (6) SA 1 (CC).
[17] Constitution of the Republic of South Africa, 1996.

taken a different approach to norms. Some of them state that norms are represented as equilibria of games of strategy, and as such, a cluster of self-fulfilling expectations supports them. Beliefs, expectations, group knowledge and common knowledge have thus become central concepts in the development of a philosophical view of social norms.[18] In my view, the key question to ask is what makes something a norm? Relevant to this matter, what makes a particular retirement age a norm or normal? Is it the usual, standard or typical conduct of a specific employer or employers in general?

[39] It is said that social norms are created through a process called socialization. People learn about these norms from families, schools, and the society they grow up in[19]. It must follow that employers may learn certain norms from one another and adopt them even if such employers have no history of having practised the norms. For an example, a newly established security company may adopt a retirement age of an old established security company. An employer is entitled to adopt or set a retirement age unilaterally as long as it does not thereby alter terms and conditions of employment[20]. I hasten to mention that it is not the case of Bester that when SITA set the normal retirement age to be 60 years, it unilaterally changed his terms and conditions of employment. By 2011, long before Bester secured the disputed term of retiring at age 65, there is objective evidence that SITA had adopted age 60 as a normal retirement age. By way of an example, on 21 August 2017, a few months before the 30 January 2018 resolution was adopted, a request for extension was made in favour of one Mr Alwyn Enslin who had reached the normal retirement age of 60 years in November 2016.

[40] In *Air Canada Pilots Association v Kelly*[21] (*Kelly*) the Federal Court of Appeal accepted that mandatory retirement will normally be imposed by the employer, or will be a term of a collective agreement negotiated between the employer

[18] See: *Stanford Encyclopaedia of Philosophy: Social Norms*, March 2011 and September 2018.
[19] See: Norms for professional learning, California Academy of Sciences.
[20] See: *Lyall v City of Johannesburg* (JS171/2014) [2017] ZALCJHB 461 (22 November 2017) at para 55
[21] 2012 FCA 209 (CanLII) at para 52.

and the employees' bargaining agent. One of the conclusions reached in *Kelly* was the following:

> 'For our purposes, the distinction between the two provisions is that in one case, the age at which mandatory retirement is permissible is set out in the statute whereas in the other, it is determined by the industry practice with respect to persons working in positions similar to that of the individual in question.'(Own emphasis)

[41] Ultimately, this Court takes a firm view that a norm is also determined by having regard to the industry practice. SITA is a statutory body established in terms of section 2 (1) of State Information Technology Agency Act (SITA Act)[22]. Effectively as a legal entity it existed from April 1999. As already outlined, it comprised of employees from other state institutions and as a result, it was faced with various fund rules that regulated the retirement age. Resultantly, it did not have a uniform normal retirement age for a period of time. However, the conditions of service adopted on 2 December 2011 reflected that since inception, the following was happening: (a) in respect of employees who belonged to Denel, the normal retirement age was 65 years; (b) in respect of the Alexander, the normal retirement age was 60 years; (c) in respect of the GEPF the normal retirement age was 60 years.

[42] An anomaly only arose in respect of the employees who belonged to the Denel. Thus, it must be so that since the establishment of SITA in 1999, the norm in relation to employees who belonged to Alexander and GEPF was that they ceased employment when they reached age 60. This remained the position until 30 January 2018 when SITA uniformly and formally adopted 60 years as a normal retirement age. Although SITA did not provide this Court with the statistics of how many employees since 1999 have normally retired at the age of 60, it must be so that those of the employees who belonged to Alexander and GEPF retired at the age of 60, if they had retired before 2018. Nevertheless,

[22] SITA Act *supra* at fn 3.

there is uncontested evidence that after October 2018, employees at SITA, including Bester retired at the age of 60 without fail.

[43] Based on the above, this Court is satisfied that at SITA, age 60 was the normal retirement age.

For persons employed in that capacity

[44] Returning to subsection 2, it seems to be so that the phrase "*persons employed in that capacity*" applies to both the normal and the agreed retirement age situation. In my view, the wording of the section in this regard seem unfortunate because an agreement would be guided by meeting of minds as opposed to what the industry dictates. Impliedly, the section introduces a comparator. In that capacity must mean category as *Rubin Sportswear* suggested. Definitionally, the word 'capacity' means a specific role or position. To my mind, the category and/or capacity extends to outside a specific employer. It is for that reason that the legislature employed the term 'persons' as opposed to 'employees'. Thus, a new employer employing pilots for instance, may adopt the norm of other old employers of pilots to set a normal retirement age or agree with an employee on a retirement age. As stated in *Kelly*, the industry practice is a source for what is normal and what to agree on.

[45] In the circumstances of this case the norm in the government industry, regard being had to the GEPF rules, is for employees to cease employment at the age of 60. SITA is an organ of state, thus, it is not incongruent to compare its situation with regard to retirement with the government industry. The Federal Court in *Nedelec v Rogers*[23] (*Nedelec*), dealing with a review application endorsed the following conclusions reached in *Vilven v Air Canada*[24]:

> '…the Tribunal's conclusion that 60 was the normal age of retirement for employees in positions similar to those occupied by Messrs. Vilven and Kelly

[23] 2021 FC 191.
[24] 2009 FC 367 at para 174.

> prior to their forced retirement from Air Canada was one that fell within the range of possible acceptable outcome...' (Own emphasis)

[46] The Court in *Nedelec*[25] went further and concluded thus:

> 'Accordingly, there is no basis to consider that the absence of comparator pilots in similar positions would render section 15 (1) (c) obsolete, or that the Tribunal was not required to apply the same methodology in similar circumstances to this matter…" (Own emphasis)

Conclusions

[47] Regard being had to the evidence before this Court, SITA has successfully raised the defence outlined in section 187 (2) (b). Since the overwhelming evidence demonstrates that within the industry which SITA operates the age of 60 is a normal retirement age, retiring Bester when he reached the age of 60 does not constitute an automatically unfair dismissal. The dismissal of Bester based on the age he attained was fair. Accordingly, he is not entitled to any of the remedies in the LRA. This conclusion leads to an irresistible conclusion that Bester's claim of automatically unfair dismissal must be dismissed.

The 2012 Contract of employment

[48] Throughout the entire trial, it remained the case of Bester that the agreed retirement age was 65. He did not contend that 65 years is a normal retirement age in SITA and/or the government industry. As indicated above, the defences outlined in section 187 (2) (b) are solely for the benefit of an employer as opposed to an employee. In other words, an employee may not compel an employer to use an agreement as opposed to a norm to justify the fairness of the dismissal. In short, the rules of these proceedings are exclusively dictated, as it were, by SITA defence wise. If SITA chooses the norm, the agreement falls by the wayside and *vice versa*.

[25] *Nedelec* supra at para 37.

[49] Therefore, in order to determine the fairness of the dismissal in the current proceedings, the employment contract of 2012 is of no moment. Once this Court upholds or rejects the defences available to an employer that spells the end of the proceedings concerning a dismissal dispute. It is indeed so that, as held in *Archer v The Public School – Pinelands High School and others,*[26] an employee is entitled to claim for a breach of contract as well even if he or she fails in an unfair dismissal claim. Properly considered, it appears to be the gripe of Bester that in dismissing him before reaching the agreed age of 65 years, SITA breached the agreement reached in 2012. Such cases resorts under the jurisdiction of this Court as a civil Court in terms of section 77 (3) of the BCEA. In his statement of case, Bester alleged amongst others that the parties accordingly agreed that his retirement age would be at the age of 65. The referral forms of Bester suggest that SITA contravened the contractually agreed retirement age.

[50] When an employee is dismissed for automatically unfair reasons like age, such an employee would state a case and lead evidence that credibly suggest that he was indeed dismissed for a proscribed reason. It is not required of that employee to attack, as it were, an unpleaded defence. By raising issues of the 2012 agreement and its validity, Bester had premonitions that SITA would rely on an agreed retirement age defence. It turned out that the premonition was wrong. Resultantly, the 2012 agreement only served to show nothing but a common law claim of breach. On his version, there is an agreement to perform in a particular manner – make him retire at 65 – but SITA failed to perform as undertaken. Such is a classic case of breach of contract.

[51] I must point out that if the premonition of Bester was correct, such would have compelled the Court to determine the agreed age, applying the applicable principles of evidence in order to reach a conclusion that the dismissal is fair or not. For all the above reasons, it is unnecessary for this Court, at this stage of the proceedings, to pass any judgment with regard to the validity or otherwise

[26] [2020] 3 BLLR 235 (LAC).

of the 2012 agreement. It suffices at this stage to express doubt on the validity of certain of the terms of that agreement.

The alternative claim

[52] In the pre-trial agreement, parties called upon this Court to, in the alternative, decide whether the dismissal of Bester was substantively and procedurally fair or not. Other than the reason of age no other recognisable reason was advanced nor alleged to justify the dismissal of Bester. Assuming that Bester would have contended that he does not know the other reason for his dismissal, this Court would lack jurisdiction over such a dispute[27]. The parties raised the provisions of section 158 (2) (b) of the LRA. This Court in *Mkokeli v Bloomberg L P (Pty) Ltd* [28] (*Mkokeli*) reached a conclusion that section 158 (2) of the LRA does not confer jurisdiction over the Labour Court.[29] On application of *stare decisis et movere*, this Court finds no reason to depart from *Mkokeli*.

[53] For all the above reasons, the following order is made:

Order

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

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GN Moshoana

Judge of the Labour Court of South Africa

[27] In terms of section 191 (5) (a) (iv) of the LRA, the Commission or council must arbitrate the dispute at the request of the employee if the employee does not know the reason for dismissal. Section 157 (5) states that the Labour Court does not have jurisdiction to adjudicate an unresolved dispute if the LRA requires the dispute to be resolved through arbitration.
[28] [2021] 6 BLLR 611 (LC).
[29] *Ibid* at para 33.

Appearances:

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For the Respondents:	Mr L Sefudi
Instructed by:	Kunene Ramapala Inc, Braamfontein.