



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JS 1040/20

In the matter between:

ROSY KIDIDIMETSE SEOKWANE

Applicant

and

BIDVEST PRESTIGE CLEANING SERVICES (PTY) LTD

Respondent

Heard: 08 September 2023

Delivered: This judgment was handed down electronically by circulation to the Applicant's and Respondent's Legal Representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing - down is deemed to be 16h00 on 08 November 2023.

JUDGMENT

LALLIE, J

- [1] To many employees retirement signals the end of gainful employment. Section 6(1) of the Employment Equity Act¹ prohibits direct and indirect unfair discrimination of employees based on age. Section 187 (2) (b) of the Labour Relations Act 66 of 1995 as amended (the LRA), however, provides 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'. The applicant instituted these proceedings seeking relief based on the allegation that her dismissal by the respondent constituted an automatic unfair dismissal on the grounds of age as envisaged in section 187 (1) (f) of the Labour Relations Act. The respondent denied the allegation and raised the defence that the contract of employment between the parties was terminated fairly after the applicant had attained the agreed retirement age of 60 years.
- [2] The applicant was a general worker. In 2002, she was employed by Sanmac and Tsebo (Pty) Ltd (Tsebo) and performed her duties at Volkswagen Group SA (VW) where Tsebo had a cleaning contract. In June 2019, Tsebo lost the contract to the respondent. At the request of VW the respondent employed the applicant and on 8 July 2019 the applicant and the respondent entered into a fixed term contract of employment with effect from 1 July 2019. The contract was a fixed term three-year eventuality contract.
- [3] The applicant testified that in May 2020 during the hard lockdown that was imposed by the government in an effort to prevent the spread of the covid 19 virus she received a telephone call from her supervisor, Ms Makhanya, (Makhanya) who informed her that she would be retrenched and offered her a retrenchment package. She declined it and asked for reasons. She was told that the reason for her retrenchment was that she had exceeded the retirement age. After the respondent's employees resumed their duties in June 2020, the applicant made further enquiries about the reasons for the planned termination of her services. She was informed that the respondent expected a reduction of employees on the VW contract. The applicant was 62 years old when she was employed by the respondent. Her contract of employment provided that the retirement age is 60 years. She, however,

¹ Act 55 of 1998.

expected to be employed until October 2022 when the respondent's contract with VW would have expired. Her plea to work for 6 months in order to pay off her debt did not receive a favourable response from the respondent. She was retired on 30 June 2020.

- [4] The respondent denied that it initially told the applicant that she would be retrenched before informing her that the reason for the termination of her services was retirement. It was submitted that it is the applicant who, upon being informed of her retirement requested to be retrenched instead so that she could benefit from an insurance policy. The disagreement on who initiated the idea of retrenchment is immaterial for purposes of this dispute because it is common cause that the reason for the termination of the applicant's contract of employment was retirement.
- [5] The respondent's version was that when it took over the VW contract from Tsebo it employed a number of employees who had been employed by Tsebo. Initially the applicant was not selected for employment because of her age but VW prevailed upon the respondent. Volkswagen decided to reduce the respondent's staff who worked at its premises with effect from 1 July 2020. In a virtual meeting held on 12 June 2020 in respect of the reduction VW asked the respondent to retain the applicant until December 2020. The respondent sought VW to delay the staff reduction by the same period but VW refused. As a result of the refusal the respondent proceeded with the applicant's retirement.
- [6] The respondent's case was that it exercised its discretion to employ the applicant at age 61 on a fixed term eventuality 3-year contract with VW which had a renewal option. In defence of the termination of the applicant's contract the respondent relied on the terms of the contract and on *Motor Industry Staff Association v Willem Frederick Landmand and Another*² in support of its defence that the applicant's retirement did not constitute unfair discrimination on grounds of age. The applicant submitted that properly construed the terms of the contract did not support the respondent's case and that the facts of her case were distinguishable from those of the authority the respondent sought

² (2022) 43 ILJ 2326 (LAC).

to rely on. The respondent relied on clause 13 of the contract of employment which provides that 'The employee will retire at the end of the month in which he or she reached the age of 60'. It also made reference to clause 19 of the contract in which the applicant agreed to abide by the respondent's procedures, rules and regulations. A further document the respondent used in support of its version was its retirement policy. The specific clauses it relied on read as follows:

'1. The normal retirement age is as follows:

Both males and females – 60 years of age, unless otherwise agreed in terms of an employment contract entered into prior to 1 April 2005.

2. When employees reach the age of retirement, as stipulated above, their contracts of employment will terminate automatically on the basis of effluxion of time.

The Company and Employee would not construe any continuation of services past normal retirement age as a variation of the agreed and normal retirement date for Employees.'

[7] I accept the applicant's argument that all the documents the respondent sought to rely on do not support its contention that the termination of the applicant's contract of employment is fair as envisaged in section 187(2)(b) of the LRA. The contract of employment and the retirement policy provide that when an employee reached the retirement age of 60 years his or her contract of employment would terminate automatically. It is common cause that when the applicant was employed she had already passed the retirement age. The contract and the clause of the retirement policy that provides for continuation of services past the normal retirement age cannot assist the respondent because it presupposes that the employment relationship commenced before the employee reached the retirement age.

[8] In *Motor Industry Staff Association (supra)* section 187 (2)(b) of the LRA was elucidated as follows:

“[15] Section 187(2)(b) does not prescribe a time frame within which the dismissal should take place, provided it is after the employee has reached his or her agreed or normal retirement date. Properly construed, section 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.”

[9] The court prevented the abuse of the employer’s power to retire employees in active service post retirement age in the following words:

“[16] For a dismissal in terms of section 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 his age. I disagree. On a proper construction of section 187(2)(b) read in the context of the LRA, it is impermissible for an employer to invoke the defence in section 187(2)(b) where the real reason for the dismissal is based on operational requirements or misconduct or incapacity.”

[10] it is clear from the above *dictum* that the determination of the fairness of retirement requires more than proving that the employee being retired has exceeded the agreed or accepted retirement age. It must be established whether the employer is not using retirement as a means of dismissing an employee for other reasons. The respondent disregarded its retirement policy by employing the applicant in order to please its client. In so doing it created an obligation for itself to inform the applicant about the peculiarity of her

conditions of employment including her retirement date. It did not address the issue. Even the letter of the applicant's retirement the respondent sought to rely on is silent on the date on which she reached the retirement age according to its records. The space for that information is left blank.

[11] A Mr Nyamathe (Nyamathe), a senior executive of the respondent testified that when the respondent obtained the VW contract it decided not to employ the applicant because she had passed the retirement age. He, however, allowed VW to prevail when it persuaded the respondent to employ the applicant. A year later VW decided to reduce the respondent's staff at its premises. He explained that reduction of the respondent's staff at the behest of a client is referred to as the 'sell down'. He added that when the 'sell down' arrived at VW the respondent decided to retire the applicant to avoid a retrenchment. Owing to the change in the VW contract, the respondent had to remove an employee from VW. Its operations therefore required one less employee. The real and proximate reason for the applicant's dismissal was based on the respondent's operational requirements. The respondent's conduct therefore falls outside the realm of section 187 (2)(b) of the LRA and the applicant's dismissal constituted unfair discrimination based on age because when the respondent had to remove a staff member from the VW contract it selected her based on age. The respondent's conduct rendered the applicant's dismissal automatically unfair.

[12] The applicant was employed on a 3-year eventuality contract from July 2019. She earned R4 860.40 monthly. She was dismissed unfairly based on her age on 31 June 2020 and received an amount equivalent to her remuneration for July and half of August 2020. She sought compensation. The respondent submitted that the applicant was employed because it allowed itself to be persuaded by VW to employ her. The respondent overlooked its policy and employed the applicant in order to please VW, its client. It had no regard of the impact of its conduct on the applicant, a vulnerable employee. When employing the applicant, the respondent was aware that her circumstances were different. It did nothing to warn her. It instead gave her the standard contract in terms of which she would be employed for a period of 3 years. The

direct result of the respondent's conduct was that the applicant was given a month's notice of her retirement. The conduct is in conflict with fair retirement of employees which gives employees fair notice of retirement. The retirement age is either contained in the contract of employment or is known by employers and employees in the capacity the employee is employed in. The knowledge gives employees enough time to prepare for their retirement. The manner in which the respondent retired the applicant denied her opportunity. The applicant's dismissal is not justified by section 187 (2) (b) of the LRA. It is just and equitable in all the circumstances of this case to award the applicant compensation equivalent to remuneration she would have earned over a period of 12 months at her rate of remuneration on dismissal.

[13] Considerations of the law and fairness justify a costs order against the respondent because the applicant should not be out of pocket for asserting her right not be discriminated against.

[14] In the premises, the following order is made:

1. The applicant's dismissal by the respondent was automatically unfair;
2. The respondent is ordered to pay the applicant compensation in the amount of R58 324, 80.
3. The respondent to pay the applicant's costs.

Z. Lallie

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr. S. Khanya of Ismail & Dahya Attorneys
For the Respondent: Mr. C. Beckenstrater of Moodie & Robertson

LABOUR COURT