IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 2644/18

In the matter between:

FAMIDA YACOOB VALLA **Applicant**

and

SOUTH AFRICAN BROADCASTING CORPORATION SOC LTD **First Respondent**

SOUTH AFRICAN BROADCASTING CORPORATION PENSION FUND **Second Respondent**

Delivered: This judgment was handed down electronically by circulation to the parties' representatives through email. The date for hand-down is deemed to be 19 July 2023.

JUDGMENT

MAHOSI, J

Introduction

[1] The applicant, Ms Famida Yacoob Valla (Ms Valla), referred the following four alternative claims against the first respondent, the South African Broadcasting Corporation SOC Ltd (the SABC), and the second respondent, South African Broadcasting Corporation Pension Fund (the Pension Fund), to this Court for adjudication:

'1.1 Claim A

1.1.1 Declaring the termination of her contract of employment as unlawful.

1.1.2 Reinstating her into the employ of the respondent on a permanent basis.

1.1.3 Costs.

1.1.4 Further and/or alternative relief.

1.2 Claim B

1.2.1 Declaring that the respondent's failure to renew her fixed-term contract constitutes automatically unfair dismissal.

1.2.2 Ordering the respondent to reinstate her alternatively to pay 24 months' compensation and three years' pension calculated by an independent actuary.

1.2.3 Costs.

1.2.4 Further and/or alternative relief.

1.3 Claim C

1.3.1 Declaring that the Personnel Handbook, the Policy and the Fund Rules directly discriminate against her on the basis of her age.

1.3.2 Ordering the respondent to amend the Personnel Handbook, the Policy and the Fund Rules to provide that senior managers' normal retirement age shall be 63.

1.3.3 Declaring that she was entitled to continue her duties until the age of 63.

1.3.4 Ordering the respondent to reinstate her and to comply with all its obligations until she reaches the age of 63.

1.3.5 Alternatively, ordering the respondent to pay her three years' compensation and three years' pension calculated by an independent actuary.

1.3.6 Costs.

1.3.7 Further and/or alternative relief.

1.4 Claim D

1.4.1 Declaring that the Labour Court has jurisdiction to deal with Claim D as it is expedient to continue with the procedures in terms of section 158(2)(b).

1.4.2 Declaring that the failure by Exco to exercise its discretion in terms of the Policy to extend her retirement age to 63 constitutes an unfair labour practice.

1.4.3 Substituting the decision of Exco with an order extending her retirement age to 63 and setting aside the respondent's decision of 2 March 2018 to terminate her contract as of 30 April 2018.

1.4.4 Ordering the respondent to reinstate her and to comply with its obligations until she reaches the age of 63.

1.4.5 Alternatively, ordering the respondent to pay her 36 months' compensation and three years' pension calculated by an independent actuary.

1.4.6 Costs.

1.4.7 Further and/or alternative relief.'

[2] Subsequently, Ms Valla withdrew her claim against the Pension Fund.

[3] The SABC opposed all the abovementioned claims.

Background

[4] The SABC employed Ms Valla as a Deputy Company Secretary on a fixed-term contract from 01 May 2013 until 30 April 2018, and she earned a total guaranteed remuneration package of R141 846.50 per month.

[5] The SABC's Personnel Handbook regulated the retirement age and provided that the normal retirement age for senior management employees was 60, whereas for all other employees was 63.

[6] Further, the SABC Pension Fund regulated the retirement and other benefits of the SABC's employees and former employees, and the Fund Rules defined the normal retirement age as follows:

'NORMAL RETIREMENT AGE shall mean:

(a) In case of a group executive member or a general management member who is appointed for a fixed period in terms of a service contract, the expiry date of such contract provided that it is not reviewed;

(b) the age of 60 years for group executive members or general management members;

(c) the age of 63 years for other members.

(d) notwithstanding the above provisions, age 63 determination of benefit upon the death or disablement of a member.'

[7] Furthermore, the SABC's Policy number HR 040/02/A (Policy) defined the 'normal retirement' as:

> ‘Normal retirement
>
> Members of top management and senior management retire at the age of 60. For all other staff, the normal retirement date is the first day of the month following the month in which the member turns 63 years of age.'

[8] The Policy also provided for an extended service, after the normal retirement age, with special permission from the Group Executive Committee. It reads:

> ‘1.1 Extended service with the Corporation after normal retirement age
>
> Application for extended service
>
> - Members may continue in the service of the Corporation after the normal retirement date, with special permission from the Group Executive Committee. An application for extended service should be submitted, not less than six (6) months before the normal retirement date, via line management, to the Divisional Head.
> - Should they want further extensions, they would have to submit their application to the Divisional Chief Executive not less than three months before the extended period expires.
> - No reason need be given for the rejection of such an application.
> - Group Executive Committee will take a final decision on these applications.
> - No further extension of the normal retirement date will be granted after the age of sixty-five (65).'

[9] In 2013, the SABC started aligning the retirement ages within the structure to 63 for all employees, regardless of whether they were senior managers. In addition, there was a movement to change all fixed-term employees whose job description was of permanent nature to permanent employees for skills retention.

[10] On 18 September 2013, the Executive Committee (EXCO) passed the following Resolution:

> 'Resolved that:
>
> (1) Permission to amend the Pension Fund rules so that the name "Executive General Manager" is removed from the definitions and the entire Pension Fund Document Rules (including changes) to clause 6.1(1) and 6.2(2) and definition pensionable service clause (iv) with the view to changing the General Management Member as per the true definition, be and it is hereby given.
>
> (2) The calculation of pension fund benefits of General Managers who retire at age 60 (3 years short of the normal retirement age compared to other employees) be aligned to that of Executive General Manager but with the new definition of General Management Member for the purpose of aligning the rules with the SABC Internal governance Definition, i.e. scales 120, 115 and 110.'

[11] In October 2014, the Group Executive: Human Resources made a written submission to the SABC's Group Executive Committee for the following purpose:

> 'To seek approval of the EXCO for funding based on the rule change approved that defines general managerial employees to include 120, 115 and 110 for the purposes of equitable calculation of termination benefits for this scheme codes.
>
> Alternatively, conversion of GM level fixed term contracts to permanent and extend the retirement age to 63, where positions are deemed permanent in nature.'

[12] Despite the above Resolution, the Pension Fund Rules were not amended. On 27 July 2015, the SABC's Human Resources and Remuneration Committee resolved to convert General Managers to permanent employment. This resolution was then ratified as a Round Robin Resolution (Resolution) by the Board of the SABC on 26 November 2015. The terms of the Resolution read as follows:

> 'Approval be and is hereby given to convert GM Levels to permanent; where the status of the job is permanent in nature and not project-based, as an incentive for buy in and for the retention and leadership continuity and to assist with pension benefit equity, medical dependency equity, group life equity, etc.'

[13] On 29 November 2017, Ms Valla lodged a grievance in which she, among other things, stated that:

> '…In view of the fact that the Resolution taken by the Board has not been implemented, I am of the view that I am being prejudiced. Given the Board Resolution, I do not see why I have to submit a motivation for the extension of my contract, as I am supposed to be a permanent employee. Had the Resolution been implemented, as it should have, I would not be placed in this position.
>
> SUGGESTED SOLUTION: The conversion to permanent status is implemented as resolved by the Board in November 2015.'

[14] On 20 December 2017, Ms Valla's attorneys formally applied to the SABC for the extension of Ms Valla's retirement to the age of 63. They further reiterated that the Resolution of 26 November 2015, which made Ms Valla's employment permanent, bound the SABC and gave the former a reasonable expectation. Furthermore, they indicated that the SABC's Policy was discriminatory.

[15] The SABC's Board met on 26 February 2018, and Ms Valla was in attendance as a Deputy Company Secretary. However, they requested Ms Valla to leave the meeting to allow the discussion of her grievance. Ms PNP Philiso, the Group Executive: Television, requested that the Resolution be rescinded. The reasons for her submission appear in the transcription of the meeting as follows:

> 'Ok Chair, thank you for allowing me to make a late submission. We'd like to request that the Board resolution, part of it, be rescinded so that we can… cannot have it, so we so then let me give the comfort. In reading the minutes of a particular meeting there was a conversation around the total conversion to total guaranteed remuneration and in that discussion, there was a notion that as part of getting buy in from GMs, that they all be converted to permanent. Given where we are Chair, that we can't have a resolution that speaks to automatically, make everybody permanent when we are busy reviewing the operating model. Secondly, reading this decision we felt being rescinded, it means that the people whose contracts ended can then come back and claim that actually, they should have been made permanent. When you read the minutes themselves, there was no specific rationale about the conversion because the discussion was about the changing to total package. So, we then asked, there was an informal discussion with Maserumule to say, what does it mean to the Board if the is a resolution that is now in conflict with subsequent resolutions? Because the remember that the interim Board also made a decision, we'll only extend for one year whilst we are still busy with all the other exercise. And the danger is that this thing is a valid resolution and legally it can stand [sic]…'

[16] Ms Philiso then stated that a staff member had already made a claim and another whose contract was extended for a year threatened the Board because of non-implementation of the Resolution. Mr Tsedu, a Board member, said:

> 'What I'm not sure of, I agree that we need to rescind, what I'm not sure of is, how that action will deal with the retrospective complaints that may come because whatever we do would not be retrospective in the sense. So, we may stop, forward this stuff, but we are not out of the woods in terms of the people who, we are out of the woods in terms of people who may stand up and say, you should have made me permanent [inaudible] [sic].'

[17] The Board discussed the confidentiality of minutes of its meetings and the consequences of its disclosure, with a suggestion that Ms Valla may have used confidential information for her benefit. Mr Makhathini, the Board chairperson, enquired:

‘Mr BE Makhathini: By the way, when does Fahmida retire?

Ms NP Philiso: April.

Mr BE Makhathini: In two months?

Ms NP Philiso: Two months.

Mr BE Makhathini: Two months to go. At what point do we start recruiting for a replacement if it's two months?

Ms NP Philiso: We are out there already.’

[18] Mr Makhathini asked what discipline the SABC would take against Ms Valla, and Mr J Phalane stated that there was an alleged transgression of the SABC's existing Policy which necessitated adherence to the process.

[19] On 27 February 2018, the SABC addressed a letter to invite Ms Valla to submit written representations in respect of an allegation of the following misconduct:

‘2.1 Contrary to clauses 4 and 5 of your confidentiality agreement dated 07 June 2013, you gained and/or obtained unauthorised access to the SABC’s confidential information attaining to SABC’s Board resolution taken about 26 November 2015, and you, on or about 29 November 2017, unfairly and unlawfully misused the said confidential information to advance your own interest and for your own benefit.

Further, you committed acts of misconduct in that you, *inter alia*: -

3. On or about 29 November 2017, in your grievance form, you misrepresented facts by stating that (on a date after 26 November 2015) you were told by Ms T Geldenhuys ("Ms Geldenhuys") that the Deputy Secretary had been made permanent and that your understanding thereafter was that the Human Resources Division would implement the alleged Resolution, in circumstances where you knew and were aware or ought to have reasonably known or to have reasonably been aware that between 26 November 2015 and 29 November 2017, none of the Deputy

> Company Secretaries was ever converted/appointed on a permanent basis as per the alleged discussion you had with Ms Geldenhuys and that the Human Resources Division did not implement the alleged Resolution to convert/appoint Deputy Secretaries on a permanent basis.'

[20] Ms Valla's legal representatives responded on 05 March 2018, disputing the allegations made against Ms Valla and stating, *inter alia*, that she acted within the course and scope of her duties.

[21] In writing on 02 March 2018, the SABC informed Ms Valla that it employed her on a fixed-term contract, which would expire on 30 April 2018. Ms Valla's attorneys responded on 05 March 2018 and, *inter alia*, confirmed that Ms Valla's grievances were *bona fide* and that she intended to enforce the Board Resolution.

[22] On 14 March 2018, the SABC indicated that the EXCO would consider Ms Valla's application for an extension of her retirement age. Accordingly, the EXCO met on 19 March 2018 to consider Ms Valla's application and dismissed it.

[23] Ms Valla's attorney addressed another letter to the EXCO on 26 March 2018 requesting the reconsideration of its decision to dismiss Ms Valla's application as her employment was permanent. They further alleged that the SABC's failure to do so would amount to an act of inconsistency and that its Policy was discriminatory based on age. Furthermore, they submitted that Ms Valla would suffer prejudice if SABC did not extend her retirement age to 63. Notwithstanding the abovementioned letters, the SABC terminated Ms Valla's employment contract on 30 April 2018 because her fixed-term contract had expired.

[24] Notwithstanding the above resolutions, even though the same was ratified and internal processes were being followed to resolve the issue, Ms Valla remained on a fixed-term contract until its expiry date.

[25] Aggrieved by the SABC's decision to terminate, Ms Valla referred an unfair dismissal dispute that was unsuccessfully conciliated on 07 April 2018 and

automatically an unfair dismissal dispute that was also unsuccessfully conciliated on 04 July 2018. As a result, she filed the current application.

Evidence

[26] Ms Valla testified in support of her case, and her legal representative referred her to documents in the trial bundle. She was cross-examined by SABC's legal representative and re-examined by her legal representative. After closing her case, the SABC closed its case without calling any witnesses.

Ms Valla's evidence

[27] Ms Valla contended that by failing to recognise her as a permanent employee, the SABC had unlawfully and unfairly terminated her contract of employment, the nature of which was converted by the Resolution of 06 August 2015 and which was ratified on 26 November 2015, from fixed-term to permanent, thereby extending her retirement age to 63 despite the rules of the Pension Fund.

[28] It was Ms Valla's further testimony that on 26 November 2015, shortly after the ratification of the abovementioned Resolution, Ms Geldenhuys informed her that she, and all general managers, were now permanently employed and could retire at the age of 63 years, which was accepted by the former. Ms Valla further testified that Mr Zac Yunus, the SABC's General Manager for Human Resources, informed her that her employment status had changed to permanent and that the SABC had varied her retirement age to 63 in terms of the Resolution.

[29] Ms Valla stated that she had no reason not to believe her senior managers, which led to her regarding herself to be permanently employed and looking forward to retiring at 63. She first became concerned in 2017 upon receiving her pension fund statement, which reflected her retirement age as 60. Ms Valla then communicated with Mr Yunus, who informed her that the SABC did not implement the Resolution. She also communicated with her line manager, Ms Lindiwe Bayi, who suggested she submit a motivation for extending her contract.

[30] Ms Valla did not find any joy in the SABC's actions and ultimately lodged a grievance, the outcome of which was not satisfactory to her. Ms Valla's case was that SABC was bound to the age of 63 as an agreed age, as the Resolution was a valid decision that it made.

The SABC's case

[31] Without conceding that the Resolution changed the nature of Ms Valla's contract of employment, the SABC contended that if the Court accepts that the Resolution converted Ms Valla's employment contract to be permanent, it did not automatically amend her retirement age from 60 to 63, given the provisions of the Policy and the Rules of the Retirement Fund that were not amended as at 30 April 2018, when her fixed-term employment contract expired by effluxion of time.

[32] The SABC further contended that Ms Valla's claim regarding the alleged unlawful termination of her contract had prescribed in that it was communicated to her on 0 6 August 2015.

[33] Furthermore, the SABC contended that Ms Valla could not retire at 63 because the pension fund rules were unchanged at the end of the applicant's fixed-term contract, and the retirement age was still 60.

Retirement age

[34] Before determining whether the non-renewal of the fixed-term contract was unlawful or an automatically unfair dismissal based on age, the Court must assess the retirement age.

[35] Ms Valla was required, in terms of her fixed-term contract, to retire on 30 April 2018 when her contract expired, approximately one month before she turned 60 years old. The SABC's Policy provides for the retirement of Top Management and Senior Management at age 60, whilst the normal retirement of age of all other staff members is age 63. However, the SABC resolved to convert general managers to permanent employees.

[36] On the one hand, Ms Valla maintained throughout the grievance process and later throughout the referral that she was a permanent employee of the SABC. On the other hand, the SABC denied that Ms Valla was its permanent employee. Instead, the SABC alleged that it terminated Ms Valla's fixed-term employee because it had expired.

[37] It is common cause that all general manager positions that were not project-based and permanent in nature were to be deemed permanent. The SABC has no argument that Ms Valla's position was not project-based and would have been deemed permanent had the board resolution been implemented.

[38] It is trite that when interpreting any document, the Court must consider the normal and logical interpretation.[1] The wording of the Resolution clearly stated that all general managers' levels were to be made permanent. Thus, the Court could give no other logical explanation for the Resolution.

[39] To the extent that the SABC intended to convert Ms Valla's employment into one of permanency and eventually took a lawful and binding resolution to do so, which was, from her conduct, amenable to her, the only conclusion to make is that the former converted her employment into one of permanency.

[40] Although the Resolution does not state that the SABC would change the retirement age of the affected General Managers to 63, this can be implied from its wording, the context, the background leading to its adoption and the assurances Ms Valla received from her senior managers. Thus, the Resolution converted Ms Valla's fixed-term contract into permanency and amended the agreed retirement age from 60 to 63.

[1] See: *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA); [2012] ZASCA 13.

Was there a dismissal?

[41] To the extent that Ms Valla was permanently employed, the SABC could not rely on the effluxion of time due to her fixed-term contract. Therefore the termination of her employment was a dismissal.

Was the dismissal automatically unfair?

[42] Section 187 (1)(f) of the Labour Relations Act[2] (LRA), defines an automatic unfair dismissal as:

> '187. Automatically unfair dismissals —
>
> (1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 54 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…'

[43] It is apparent from the above section that an employer may not discriminate against an employee due to age. Thus, a dismissal is automatically unfair if the reason for the dismissal is based mainly on, among other things, the employee's age. Thus, a dismissal that is based on the employee's age is presumed to be discriminatory and automatically unfair. However, that is not the end of the matter. The LRA goes further in section 187(2) and states:

[2] No. 66 of 1995, as amended.

'(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.'

[44] Once an employee shows that the reason for the termination of the employment relationship was due to their age, section 187(1)(f) kicks in a presumption that such termination amounts to discrimination and, therefore, the dismissal is automatically unfair. The onus then shifts, in terms of section 187(2), to the employer to show that such dismissal was fair in that either the age is an inherent requirement for the job in which the employee was employed or the employee has reached either an 'agreed' or 'normal' retirement age.

[45] Should the employer prove either of these situations to justify the dismissal, the presumption would be rebutted, and the dismissal would be for a fair reason and, therefore, not automatically unfair. In this case, the SABC terminated Ms Valla's employment contract because of her age. The onus then shifts to the SABC to prove that the dismissal was for a fair reason.

[46] The SABC argued that even if Ms Valla was permanently employed, which she was, the retirement age was a valid reason for terminating the employment relationship as it could not have kept her in its employment as she was one month shy of her retirement age. However, if that age was not agreed upon or considered the *'normal'* retirement age, then a dismissal based on age could be unfair.

[47] The LRA does not define the terms '*agreed*' and '*normal*' retirement age. In *Rubin Sportswear v SA Clothing and Textile Workers Union and others*[3] (*Rubin*), the Labour Appeal Court (LAC) found that the LRA created two distinct situations in

[3] [2004] 10 BLLR 986 (LAC); [2004] ZALAC 8 at para 24.

which an employer may justify the dismissal of an employee based on age. Therefore, an employee can only be dismissed if the retirement age is agreed upon or normal.

[48] As such, it has to be determined whether there was an agreed retirement age. If there were none, then the normal age of retirement within the company or the industry would be considered. Should the employer show that the employee was dismissed due to reaching the agreed age or reaching the normal retirement age, then the dismissal was a termination of the contract due to the term of the contract. However, should the employer fail to show that the termination was due to either reaching an agreed age or normal retirement age, then that constitutes a dismissal which is automatically unfair.

[49] In *Solidarity obo Strydom and others v State Information Technology Agency SOC Ltd*[4], the Court reiterated that these two situations are mutually exclusive. An employer needs to remember that the LRA has made both an agreed and normal retirement age distinct. Thus, the employer cannot postulate between the two. It is an either-or situation; therefore, the employer cannot hedge its bets on both.

[50] An agreed age, like any other agreement in an employment situation, is a term of the employment contract. Therefore, it is an age that both parties have agreed to as the retirement age, or it is an age set in a policy or collective agreement that forms part of the employee's employment contract.

[51] In *Arb Electrical Wholesalers (Pty) Ltd v Hibbert*[5] (*Arb Electrical*), the LAC found that if there is no agreed age, the termination of the employment contract could be automatically unfair. When determining what was meant by 'agreed retirement age', the Court in *Bester v State Information Technology Agency (SOC) Ltd*[6] (*Bester*) stated that, when you have an agreed retirement age, like any other contractual term, there must be a "*meeting of the minds*". The Court further

[4] [2022] 9 BLLR 843 (LC); [2022] ZALCJHB 95 at para 31.
[5] [2015] 11 BLLR 1081 (LAC); [2015] ZALAC 34 at paras 17 – 18.
[6] [2023] 4 BLLR 303 (LC); [2022] ZALCJHB 269 at para 29.

stated that it doesn't matter what the employee alleges was the retirement age, that is agreed or normal; the onus is not on them to prove the fairness or unfairness of their dismissal. The Court stated that:

> '…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… Once he [Bester] established dismissal, which he did, in these proceedings he must rest and where necessary rebut whatever SITA presents as a justification for his dismissal.'[7]

[52] In *Rubin,*[8] the LAC held that –

> '[19] It seems to me that the word "normal" as used in sec 187 (2) (b) really means what it says. It means that which accords with the norm. However, it is important to bear in mind that that word is used in relation to persons employed in the same capacity as the person whose dismissal on the basis of having reached normal retirement age is in issue. Sec 187 (2) (b) must, therefore, not be read as if it says "(d)espite subsection 1 (f), a dismissal based on age is fair if the employee has reached the normal or agreed retirement age." It includes the words at the end "for persons employed in that capacity." What the section does not make clear is whether the words "persons employed in that capacity" refer to such persons who are in the same employer's employ or whether it also refers to persons who are employed in the same capacity by other employers in the same industry or in general.
>
> [20] It seems to me conceivable that one employer could have different normal retirement ages for different categories of employees within its workforce. There may, for example, be different normal retirement ages for professionals and artisans. In such a case the employer cannot retire an employee on the basis of a normal retirement age applicable to

[7] Id fn 13 at para 32.
[8] *Rubin supra* at paras 19 – 20.

> employees employed in a capacity different from that of his own. In other words, where an employer seeks refuge in the provisions of sec 187 (1) (b) against a claim of unfair dismissal and his defence is that the employee had reached normal retirement age, he must show not only that the employee had reached normal retirement age but that the retirement age is normal to employees employed in the same capacity as the employee concerned.'

[53] In *Hibbert v Arb Electrical Wholesalers (Pty) Ltd*[9] (*Hibbert v Arb Electrical*), the Court found that first, there must be an agreed age, and if there is none, then the normal age within the industry must be determined. If there is no 'normal' age, then the employer can imply that the pension or provident fund retirement age is applicable, provided it was encapsulated in the contract, Policy or discussed.

[54] The SABC argues that the Resolution did not vary Ms Vally's retirement age, as the retirement age was not in the wording of the Resolution. However, the historical background of what led to the passing of the Resolution paints a different picture.

[55] The SABC was well aware that its conduct in respect of the retirement age was discriminatory. For that reason, the submission made to the Group Executive Committee in October 2014 specifically stated that, should the Board resolve to convert the general manager positions into permanent employment, same would include an extension of *"the retirement age to 63; where the positions are deemed permanent in nature*".

[56] It was common cause that all general manager positions that were not project-based and were permanent in nature were deemed permanent. In addition, SABC had no argument that Ms Valla's position was not project-based and would be deemed permanent once the board resolution came into effect. Therefore, looking at the nature of Ms Valla's position and the SABC's Resolution, the former's position was deemed permanent.

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[9] [2013] 2 BLLR 189 (LC); [2012] ZALCD 13.

[57] The SABC argued that even if the Court finds that Ms Valla was deemed to be employed permanently, the same would still not change her retirement age as the Resolution did not change the retirement age, and the pension fund rules bound it. It submitted that it was common cause that the pension fund rules only changed in 2022 to reflect a retirement age of 63.

[58] It is important to note that the wording of the Policy, as quoted above, does not explicitly include the Pension Fund as the basis for attaining a 'normal' retirement age. Instead, it is silent, as is the evidence that was led in this Court. There is nothing to show that, as was found in *Hibbert v Arb Electrical* that the Pension Fund rules were specifically included in the employment contract. Even if the Court is wrong on this front, there is, however, an agreed retirement age that certainly trumps that of the 'normal' retirement age.

[59] As the Court enunciated recently in *Bester*, only the normal retirement age must be considered if there is no agreed age. In the current matter, the Policy is a contractual term of the employment contract, making the retirement age an agreed age which was changed at the employer's behest through a resolution that Ms Valla accepted. Since the agreed age was 63, the only conclusion that can be arrived at is that Ms Valla was dismissed based solely on her age, which was not the agreed retirement age, thereby making her dismissal automatically unfair.

Was there unfair discrimination in terms of EEA?

[60] Ms Valla argued that, by dismissing her when she turned 60, the SABC discriminated against her on age, which is one of the grounds listed in section 6(1) of the Employment Equity Act[10] (EEA).

[61] Section 11(1)(a) and (b)[11] of the EEA requires the SABC to prove that the alleged discrimination did not occur or that such discrimination was rational, not unfair, or otherwise justifiable.

[10] Act 55 of 1998.

[62] The SABC argued that the Policy and the Rules of the Provident Fund do not discriminate on the basis of age, but they differentiate between senior and top management and the rest of the employees. It further argued that it was not the age that mattered but the scale code of the employee that did. Furthermore, the SABC submitted that, to the extent that Ms Valla premised her unfair discrimination claim on an alleged binding termination clause, there could not be any claim under the EEA.

[63] Alternatively, the SABC submitted that, as section 187(2)(b) of the LRA provides that termination of a contract of employment at a normal or agreed retirement age is fair, both the EEA and the LRA must be read consistently.

[64] The evidence showed that the general managers were required, in terms of the Policy and Pension Fund Rules, to retire at the age of 60. At the same time, the Executive General Managers received enhanced pension benefits calculated as per a defined formula, which credits them with three additional years as if they were in the SABC's employ, although they also retire at the age of 60. In addition, the other employees below the level of general managers retire at 63. Undoubtedly, the SABC discriminated against its General Managers.

[65] The SABC sought to justify the differentiation based on the responsibilities and accountabilities of the General Managers but failed to advance any discernable rationale for affording Executive General Managers favourable pension benefits than General Managers when they all retire at 60.

[66] To illustrate this, the SABC belatedly recognised the discriminatory nature of its policies by ensuring that the Pension Fund Rules were amended with effect from the first day of this trial, 01 August 2022, to eliminate the discrimination suffered by the General Managers.

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[11] Section 11(1) provides that:
'If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination –
(a) did not take place as alleged; or
(b) is rational and not unfair, or is otherwise justifiable.'

[67] The SABC failed to show, on the balance of probabilities, that discrimination did not take place, that such discrimination was rational and not unfair or was otherwise justifiable. Consequently, Ms Valla's dismissal constituted unfair discrimination on the ground of age in terms of section 6(1) of the EEA.

Was the contract of employment unlawfully terminated?

[68] In light of the above findings, the SABC varied the agreed retirement age by terminating Ms Valla's employment contract when her contract expired on 30 April 2018. Such conduct constituted a repudiation of the employment contract the SABC had with Ms Valla, which gave the latter an election to either accept or reject it and hold it to the terms and conditions of her employment contract. In this regard, Ms Valla elected the latter.

[69] Accordingly, the purported variation of Ms Valla's employment contract was unlawful, wrongful, and of no legal effect. In effect, the SABC could not rely on the effluxion of time due to her fixed-term contract. Therefore, the SABC unlawfully terminated her employment contract. The issue is whether Ms Valla's contractual claim prescribed as alleged by the SABC.

Prescription

[70] The SABC contended that Ms Valla’s contractual claim prescribed as three years passed between the date she became aware of the Resolution that converted her contract of employment from fixed-term to permanent status and the delivery of her statement of claim on 31 August 2018.

[71] In response, Ms Valla testified that although the SABC passed the Resolution on 06 August 2015, she was only informed about it by Ms Geldenhuys on 26 November after it was ratified.

[72] Section 10 of the Prescription Act[12] provides for the extinction of debts by prescription and reads:

> '10. Extinction of debts by prescription –
>
> (1) Subject to the provisions of this Chapter and of Chapter IV, a debt shall be extinguished by prescription after the lapse of the period which in terms of the relevant law applies in respect of the prescription of such debt.
>
> (2) By the prescription of a principal debt a subsidiary debt which arose from such principal debt shall also be extinguished by prescription.
>
> (3) Notwithstanding the provisions of subsections (1) and (2), payment by the debtor of a debt after it has been extinguished by prescription in terms of either of the said subsections, shall be regarded as payment of a debt.'

[73] Section 12, which provides for the date on which the prescription begins to run, and reads:

> '(1) Subject to the provisions of subsections (2), (3) and (4), prescription shall commence to run as soon as the debt is due.
>
> (2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
>
> (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'

[12] Act 68 of 1969.

[74] The first issue to determine is what constitutes a debt as envisaged by the Prescription Act. In *Electrical Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd*[13], the Court narrowly defined the word "*debt*" to mean –

> '…that which is owed or due; anything (as money, goods or services) which one person is under obligation to pay or render to another.'

[75] However, in *Desai NO v Desai and others*[14] (*Desai*), the Appellate Division (as it was known then) held that, in the context of section 10(1) of the Prescription Act, the definition of "*debt*" had a wide and general meaning which included "*an obligation to do something or refrain from doing something*".[15]. The Court went on to state that an *undertaking* to procure the registration of the transfer of immovable properties constituted a "debt" as envisaged in the Prescription Act.

[76] In *Makate v Vodacom (Pty) Ltd*[16], the Constitutional Court disputed the Appellate Division's broad interpretation of the word "*debt*" and held that –

> '[84] On this construction of *Desai*, every obligation irrespective of whether it is positive or negative, constitutes a debt as envisaged in section 10(1). This in turn meant that any claim that required a party to do something or refrain from doing something, irrespective of the nature of that something, amounted to a debt that prescribed in terms of section 10(1). Under this interpretation, a claim for an interdict would amount to a debt. However, the Appellate Division in Desai did not spell out anything in section 10(1) that demonstrated that "debt" was used in that sense. What needs to be determined is whether the pre-constitutional interpretation of the relevant provisions is still good law. In determining this question, we are guided by section 39(2) of the Constitution.
>
> [85] The absence of any explanation for so broad a construction of the word "debt" is significant because it is inconsistent with earlier decisions of the same Court that gave the word a more circumscribed meaning. In *Escom,*

[13] 1981 (3) SA 340 (A) at 344F-D.
[14] 1996 (1) SA 141 (A)
[15] Ibid at 146I.
[16] 2016 (6) BCLR 709 (CC); [2016] ZACC 13 at paras 84 – 85 and 93.

the Appellate Division said that the word “debt” in the Prescription Act should be given the meaning ascribed to it in the Shorter Oxford English Dictionary, namely:

> “1. Something owed or due: something (as money, goods or service) which one person is under an obligation to pay or render to another. 2. A liability or obligation to pay or render something; the condition of being so obligated.”

Escom was cited and followed in subsequent cases. It was also cited as authority for the proposition in *Desai NO*.

…

[93] To the extent that *Desai* went beyond what was said in *Escom* it was decided in error. Nothing in *Escom* remotely suggests that "debt" includes every obligation to do something or refrain from doing something apart from payment or delivery. It follows that the trial Court attached an incorrect meaning to the word "debt". A debt contemplated in section 10 of the Prescription Act does not cover the present claim. Therefore, the section does not apply to the present claim, which did not prescribe.'

[77] In light of the above authority, it cannot be said that an obligation to convert an employee's employment status from that of fixed term to permanent (or failure to do so) in accordance with a board resolution or the obligation to implement a board resolution constitutes a debt and thus gives rise to the application of the Prescription Act. Accordingly, the prescription does not apply to Ms Valla’s claim.

Unfair labour practice

[78] Ms Valla contended that this Court enjoys jurisdiction to adjudicate her unfair labour practice as the facts pertaining to it cannot be separated from her other claims.

[79] The SABC correctly raised a point *in limine,* contending that this Court has no jurisdiction to entertain this claim as section 191(1)(a) provides for employees to

refer disputes arising from an alleged unfair labour practice to the Commission for Conciliation, Mediation and Arbitration (CCMA) or bargaining council. Section 191(4) of the LRA requires the CCMA or the bargaining council to conciliate the dispute, and if not successful, section 191(5)(iv) requires that it be arbitrated.

[80] Ms Valla has not referred her unfair labour practice dispute to the CCMA for conciliation, has not provided a reasonable explanation for her failure to do so, and has not led any evidence on exceptional circumstances why this Court should entertain her claim. The contention that the facts relating to this claim cannot be separated from her other claims is no basis for this Court to exercise its discretion in favour of Ms Valla.

Remedy

[81] Regarding claim A, Ms Valla proved that the SABC repudiated her employment contract by amending her retirement age from 63 to 60 without her consent. In this regard, her damages are limited to the position she would have been in under the contract had the SABC not breached her employment contract.[17] As a result, Ms Valla is entitled to contractual damages amounting to one month's notice pay.

[82] Concerning the claim for automatically unfair dismissal as envisaged in section 187((1)(f) of the LRA and unfair discrimination as envisaged in section 6(1) of the EEA, Ms Valla sought reinstatement, alternatively 24 months' compensation and three years' pension calculated by an independent actuary.

[83] Having found that Ms Valla's dismissal was automatically unfair and that reinstatement at this stage would not be reasonably possible, the SABC is liable for compensation in terms of section 194(3) of the LRA. Additionally, to the extent that Ms Valla's dismissal was found to have constituted unfair discrimination, the SABC is liable for the payment of compensation and damages in terms of section 50(1) of the EEA.

[17] See *BMW (South Africa) (Pty) Ltd v National Union of Metalworkers of South Africa and another* (2020) 41 (ILJ) 1877 (LAC) at para 71.

[84] Regarding patrimonial loss resulting from unfair discrimination, Ms Valla asserted in the statement of the case that she sought reinstatement and the first respondent's compliance with its obligations until she reached 63 years of age, alternatively 36 months remuneration and three years' pension calculated by an independent actuary. In her heads of arguments, Ms Valla sought damages equivalent to her salary for the period between 01 May 2018 to 30 April 2021, the latter being the date on which she would have reached the retirement age of 63, "*computed according to the Total Guaranteed Remuneration Calculation based on the February 2018 payslip and accounting for salary increase of 4% for 2018/2019; 5% for 2019/2020 and 5% for 2020/21 respectively for 3 years*". In total, the damages amounted to R7 648 227.08.

[85] Although the patrimonial damages may be calculated based on Ms Valla's payslip, no evidence was led to prove the salary increase over the years. In addition, the parties were not afforded an opportunity to present evidence or advance arguments as to what would be just and equitable in the current circumstances. Resultantly, the determination of the quantum of compensation and damages is reserved for a subsequent determination by another Court in terms of section 194(3)[18] of the LRA and section 50(2)[19] of the EEA.

[18] Section 194(4) provides that – 'the compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.'

[19] Section 50(2) of the EEA provides that – 'If the Labour Court decides that an employee has been unfairly discriminated against, the Court may make any appropriate order that is just and equitable in the circumstances, including –

(a) payment of compensation by the employer to that employee;
(b) payment of damages by the employer to that employee;
(c) an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees;
(d) an order directing an employer, other than a designated employer, to comply with Chapter III as if it were a designated employer;
(e) an order directing the removal of the employer's name from the register referred to in section 41; and
(f) the publication of the Court's order.'

Costs

[86] Section 162 of the LRA provides this Court-wide discretion in awarding costs. The Constitutional Court has reiterated in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[20] that in labour matters, cost orders should be made according to the requirements of law and fairness.

[87] In *cas*u, costs against the SABC are warranted as its persistence in defending this application when the validity of its Resolution was not in dispute was unreasonable. Moreover, the manner in which the SABC treated Ms Valla after discovering that her retirement age had not been adjusted in accordance with the Resolution was unfair and demonstrates *mala fides*.

[88] The undisputed evidence was that Ms Valla informed her line manager, Ms Bayi, about her dissatisfaction with the SABC's failure to implement its Resolution. Ms Bayi could not assist Ms Valla. This prompted the latter to pursue the grievance procedure. Whilst the grievance procedure was still pending, the SABC's Board, in the meeting on 26 February 2018, discussed strategies to circumvent the implications of its Resolution, the plan to recruit a replacement for Ms Valla and decided to subject her to a disciplinary process. Accordingly, Ms Valla's post was advertised.

[89] Surprisingly, Ms Philiso addressed a letter dated 14 March 2018 to Ms Valla's legal representatives indicating that Ms Valla's application for the extension of her contract would, in the spirit of good faith, be referred to EXCO for consideration even though it was irregular. At the EXCO hearing of 19 March 2018 chaired by her, Ms Philiso advised Ms Valla to exercise her rights to pursue her grievance because she persisted with the argument that she was a permanent employee. In the letter dated 02 March 2018, the Human Resource Manager informed Ms Valla that her contract would not be renewed although her grievance hearing had not been exhausted.

[20] (2018) 39 ILJ 523 (CC) at para 24.

[90] In the premise, the requirements of law and equity prompted this Court to exercise its discretion in favour of Ms Valla and to order the SABC to pay her costs.

[91] Accordingly, the following order is made:

Order

1. The first respondent unlawfully terminated the applicant's employment contract.

2. The applicant's dismissal by the first respondent is automatically unfair in terms of section 187(1)(f) of the LRA.

3. The applicant's dismissal by the first respondent constitutes unfair discrimination in terms of section 6(1) of the LRA.

4. The first respondent is liable for the applicant's proven patrimonial damages for discriminating against her based on age.

5. The determination of the quantum of compensation and damages has been postponed *sine die*.

6. The first respondent must pay the applicant's legal costs.

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D. Mahosi

Judge of the Labour Court of South Africa

Appearances:

For the applicant:	Advocate R. Rawat and A. P. Landman
Instructed by:	Ms Cooray of Ronelda van Staden Attorneys
For the first respondent:	Mr P Maserumule of Maserumule Incorporated Attorneys.