THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 602/14

In the matter between:

JOHN JACOBUS MARAIS **Applicant**

and

AVENG GRINAKER LTA **Respondent**

Heard: **05 September 2019**

Delivered: **10 September 2019**

Summary: Dismissal based on age – presumed to be an unfair discrimination unless – shown that the age is one agreed upon for retirement or a normal retirement one. Where an employee continues to render services beyond the retirement age – dismissal after that on the basis of age not automatically unfair – unless some new employment agreement is shown to exist without an agreed retirement age. No new agreement shown to exist to enable the applicant to claim automatically unfair dismissal. Held: (1) The applicant has not been automatically unfairly dismissed. (2) No order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] In this referral, there is no dispute that the applicant's employment was terminated on 14 October 2013 on the basis that he had reached the age of sixty years. It is also common cause that at the time of dismissal, the

applicant was aged 62 and had worked for two years past the normal retirement age of sixty years. The applicant was aggrieved by his dismissal and referred a dispute alleging automatically unfair dismissal. In justifying the dismissal, the respondent alleged that the applicant had reached the normal retirement age, thus his dismissal is not unfair. In this judgment, given the undisputed fact that sixty years is a normal retirement age, it is unnecessary to traverse all the evidence received by this Court.

Background facts and evidence.

[2] The applicant commenced employment in July 1985. Over the years, the company that employed him merged with another entity to form the respondent before me. In the year 2011, the applicant turned sixty. In the nature of his job, the applicant was more of a globe-trotter. The respondent contended that his continuation to serve it beyond the age of sixty was occasioned by what was referred in evidence as a "*slip through the cracks*". Around October 2013, the applicant together with three of his fellow employees were approached by Mr Randa, the then Human Resources Manager to inform them that owing to their age, their services were no longer required. The applicant was displeased thereby and vouched to obtain legal advice on the issue.

[3] On 14 October 2013, the applicant was furnished with an employment certificate, certifying that he was an employee of the respondent from 01 July 1985 – 31 October 2013. The applicant was aggrieved and proceeded to seek legal advice as vouched when the news was first broken to him and his fellow employees. Such culminated in him referring a dispute to this Court for adjudication on or about August 2014. The referral is opposed by the respondent.

[4] Following a pre-trial conference, the parties produced an agreement. It became common cause that the normal retirement age in terms of the rules of the respondent's retirement plan is 60 years and that the compulsory retirement

age prescribed by the respondent's Employee Benefits Administration Manual (EBAM) is 60 years[1].

[5] In support of his case of alleged automatically unfair dismissal, the applicant testified. He presented a case that sought to contradict the admitted fact of sixty years being the normal retirement age. He testified that since 1985, he knew that his retirement age was set at 65 years and such has never changed ever since. His knowledge was that, like in government, the retirement age for women was 60 years and for men was 65 years[2]. Thus, at the time when he was retired – dismissed due to age, he had not reached the "agreed" retirement age of 65 years. In addition, he testified that since he worked beyond the normal retirement age, his dismissal two years later is automatically unfair. He was promised that for as long as there was work to be performed, which there was at the time he was retired, he shall remain in employment.

[6] In rebuttal, the respondent led the evidence of three witnesses, namely; Mr Richard Derwort; Mr De Grits and Mr Fred Randa. All the witnesses other than Mr Randa presented testimony seeking to prove a common cause fact. Derwort testified that the norm in the construction industry is to retire at the age of 60. Mr De Grits testified that originally, the retirement age was set at 62 years. When Grinaker merged with LTA to form the respondent, the age was reduced from 62 to 60. Since 2001, the position, which was well communicated, remained that 60 years was the retirement age and he also retired at that age.

[7] Mr Randa is the one who discovered that a number of employees were working beyond their retirement age, which was something that slipped through the cracks. At the time when the respondent was undergoing a restructuring process, it was decided that in order to reduce headcount, the issue that slipped through the cracks ought to be revisited. He embarked on a road show process, at which encounter, he discussed with the applicant and his

[1] This meant that it was unnecessary at the trial of the dispute to lead and/or examine evidence on what the normal retirement age was. Once an issue becomes common cause no evidence needs to be led to prove it as such. By being common cause, it becomes fact. Therefore, before me, it is a fact that sixty years was the normal retirement age.

[2] This was the position pre-democracy. With the advent of the constitutional order this position changed.

colleagues that they are to be retired. Indeed, on 14 October 2013, he signed a certificate of service for the applicant.

Evaluation and discussion.

[8] An employee who has been dismissed would either know the reason why he or she has been dismissed or not know the reason. The Labour Relations Act[3] (LRA) is designed in such a way that a dismissed employee chooses a forum and the nature or form of the dismissal. If an employee does know the reason, an employee may fashion his or her dismissal as an automatically unfair one or an ordinary unfair dismissal. In terms of section 191 (5) of the LRA, if an employee does not know the reason of his or her dismissal, he or she must refer the dismissal dispute to the Bargaining Council or the Commission for arbitration.

[9] However, if an employee alleges that the reason for dismissal is automatically unfair, as is the case herein, the employee may refer the dispute to this Court for adjudication. In terms of section 187 (1) (f) of the LRA, a dismissal is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated an employee on the basis of age. The applicant before me chose to peg his case as one of automatically unfair dismissal.

[10] May I point out at this juncture that if the evidence of Randa is carefully analysed, the dismissal of the applicant may have been for operational requirements masqueraded as one based on age. Unfortunately, this is not the case presented for adjudication. It has been held by this Court and the Labour Appeal Court that it is one of the duties of this Court to establish the true reason for the dismissal. However, this Court can only ride that horse – determining the true reason – when parties are in dispute about it. In *casu*, it remains undisputed that the applicant was dismissed for reasons related to his age.

[3] Act 66 of 1995, as amended.

[11] Presumably, dismissing an employee on the basis of age amounts to unfair discrimination. But, that presumption is rebuttable once the provisions of section 187 (2) are met. The section 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."

[12] In *casu*, it is fact that sixty years is a normal retirement age. It is undisputed that the applicant in 2011 reached the normal retirement age. On application of the principle enshrined in *Schweitzer v Waco Distributors (a division of Voltex (Pty) Ltd)*[4], which is (a) was the employee's dismissal based on age? (b) If the answer to question (a) is in the affirmative, the next question is, did the employee have a normal or agreed retirement age for persons employed in the capacity in which the employee was employed? If yes, what was it, (c) if the answer to the first part of the question in (b) is in the affirmative, the next question is; had the employee reached such retirement age at the time of dismissal? If so, then the dismissal of the applicant is fair. As pointed out earlier, the applicant himself alleged that the reason for his dismissal was age related. This, the respondent did not dispute. Also, it is fact that sixty years was the normal retirement age. Lastly and most importantly, the applicant had reached the normal retirement age at the time of dismissal – 14 October 2013.

[13] For reasons that are not convincing to me, the *Waco* decision was heavily criticised, which criticism resonated with my late brother Steenkamp AJ (as he then was) in *Datt v Gunnebo Industries (Pty) Ltd*[5]. I fail to grasp the width and the depth of this criticism. The LRA is premised on the concept of fairness. The fairness contemplated in the Act is not to be one-sided. It must be fairness to both the employer and the employee. The section provides a defence to the

[4] [1999] 2 BLLR 188 (LC).
[5] [2009] 5 BLLR 449 (LC).

claim of presumed unfair discrimination. This defence does not dissipate or morph into something else. Once it presents itself, it shall remain intact and available for the employer irrespective of when it is unleashed. I shall return to this point later. Despite the sharp criticism, the decision was never overruled. In fact it was quoted with approval in the subsequent judgments of this Court[6].

[14] I venture to say that the principle in *Waco* was accepted by the Labour Appeal Court (LAC) in its judgment of *Ivor Michael Karan t/a Karan Beef Feedlot v J W C Randall*[7]*.* The LAC per Tlaletsi JA held thus:

> "[19] There are two plausible arguments concerning the application of section 187(1) (f) and 187(2) (b) in this matter. The first is that where there is a normal or agreed retirement age and the employee has reached that age, the employer shall enjoy protection in section 187(2)(b) from that and at any time thereafter. He or she would be entitled to terminate the employment of the employee on the grounds of age.
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> [20] The second scenario is that, where there is an agreement reached between the employer and the employee before the latter has reached the normal or agreed retirement age, to determine a new retirement age, the employer would enjoy the protection of section 187(2) (b), should he/she terminate the employment of the employee, once the new agreed date is reached."

[15] Clearly, once the day of reckoning arrives – reaching the normal or agreed retirement age – the clock cannot be reversed. The only way to reverse it is to novate[8]. In the nature of novation, the obligation must still be extant at the time of replacement. In my view, once the horse bolts – the retirement age is reached – the retirement age is not capable of being novated. I understand this to be the point made by the LAC in *Karan Beef supra*.

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[6] See: *Deon Bos v EON Consulting* Case JS 948/14 delivered on 12 August 2016.
[7] Case JA 87/10 delivered on 22 June 2012.
[8] Novation means replacing an existing obligation by a new one, the existing obligation being thereby discharged. See*: Van Rooyen v Du Plooy* 1985 1 SA 812 (T)

Was there novation in this matter?

[16] An argument was presented before me that the fact that the applicant worked beyond the normal retirement age, suggests that the applicant cannot be dismissed on the ground of age. In support of the argument, reliance was placed on *Datt supra*. I must state upfront that *Datt* is distinguishable. In *casu,* there were no discussions before or even after the passing of the retirement date. In *Datt*, two months after the retirement age, a letter was sent to Datt asking him to stay on until a date to be mutually agreed upon.

[17] Novation is a matter of intention and *consensus*[9]. When the parties novate, they intend to replace a valid contract by another valid contract[10]. Therefore, once an employee reaches a normal or agreed retirement age, there is no longer a valid and enforceable employment agreement[11]. Perhaps what may come into being is another employment contract, where an employee continues after an employment agreement becomes invalid. However, like any other agreement all the formalities must be present in order to be a valid one. One of the formalities is that there must be a meeting of minds. There must be an offer followed by acceptance. Assuming that when the applicant continued after 2011, he offered his services again. Fact is the respondent did not accept that offer. Silence cannot be acceptance. Quiescence is not necessarily acquiescence and one party cannot, without the assent of the other, impose upon such other a condition to that effect.[12] Clearly, in this matter after 2011, there was no meeting of minds – having slipped through the cracks, as testified, it cannot be said that the respondent was consciously aware that the applicant continued and/or made an offer of his services again. Negligence does not equate intention or consensus. Accordingly, there can never be an agreement to be re-employed in this matter.

[9] See: *Swadif (Pty) Ltd v Dyke* 1978 1 SA 928 (A).
[10] *Acacia Mines Ltd v Boshoff* 1958 (4) SA 330 (AD).
[11] See: *Rockliffe v Mincom (Pty) Ltd* [2008] 29 ILJ (LC) para 26.
[12] *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A0) at 422.

[18] On another level, I part ways with *Datt*, to the extent that it suggests that the employment agreement was novated[13] by the letter of June 2014. At that time, there was no longer a valid employment agreement, it having lapsed in April 2014 when Datt reached the agreed retirement age of 65 years. I take a view that once the age is reached, the contractual obligation is discharged. However, this does not, to my mind, suggest that an employer may not re-hire, as it were, an employee who had reached a normal or agreed retirement age. Therefore, for me what happened in *Datt* is more a re-hire than novation. In such a situation, which situation does not obtain in the matter before me, when an employer terminates the employment of a re-hired employee on the basis of age and it is established that the age at which he or she is terminated is not a normal retirement one or an agreed one, the dismissal that ensues would be automatically unfair. On the evidence before me, the applicant, without any other agreement continued to work. The respondent refers to that as a slip through the cracks.

[19] I therefore conclude that I am respectfully unable to follow *Datt* for reasons set out above. A comment in passing is that, in my view, Mr Datt had reached the agreed retirement age and as such, the defence should have been available to Gunnebo Industries. Therefore, even if the facts were not distinguishable, I would not have, respectfully, followed *Datt*. The defence becomes available once the age reached is a normal retirement one or an agreed one. In *Datt* there was no agreed age as it was still to be mutually agreed upon. However, that does not detract from the fact that age 65 was a normal retirement age for persons in the capacity of *Mr Datt*. It does appear that my late brother was more concerned with the existence of an agreement as opposed to what was normal.

[20] Besides, the LAC in *Karan Beef*, rejected a conclusion that an employer is not entitled to unilaterally determine a retirement date. The Court remarked that

[13] At para 28 Steenkamp AJ (as he then was) stated that notwithstanding that, it made the employee an offer to remain employed until the parties mutually agreed that the employee should retire. The contract of employment would continue on new mutually agreed terms.

there was nothing unlawful or unfair in leaving it to an employer to determine the retirement age or date[14].

Conclusions and remarks

[21] For reasons that are clearly apparent in this judgment, I must conclude that the dismissal of the applicant is fair. In other words, the respondent successfully raised the defence set out in section 187(2)(b) of the LRA. I further conclude that there was no novation when the applicant continued to work silently beyond the normal retirement age. On the assumption, which assumption I am not making in this matter, that the employment agreement continued beyond the normal retirement age of sixty the applicant may have successfully alleged and proved that the true reason for his dismissal was operational requirements disguised as age. However, such a case is not before me.

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

Order

1. The applicant's dismissal is fair.
2. The applicant's claim for automatically unfair dismissal is dismissed.
3. There is no order as to costs.

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GN Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Mr M Opperman of Waks Silent Attorneys, Klerksdorp.

For the Respondent : Advocate H Nieuwoudt

[14] In *Datt* my brother concluded that at the time of the applicant's dismissal the parties had not mutually agreed that he would retire. His dismissal was a unilateral act by the respondent. This conclusion suggests that unilateral determination of a retirement age by an employer is unlawful.

Instructed by : Wilken Inc, Sandton.