



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case numbers: JS 740/18

JS 410/17

JS 177/17

In the matter between:

NUMSA OBO KING AND TWO OTHERS

Applicant

and

BMW SOUTH AFRICA (PTY) LTD

Respondent

Heard: 21-23 October and 2-6 December 2019. Oral argument 29 February 2020

Delivered: 11 March 2020

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. The *doctrine of acquiescence* should not form part of our labour law. The agreed retirement age was 65 years. Dismissing the employees before reaching that agreed age amounts to an automatically unfair dismissal. Held: (1) The breach of contract claims have not become prescribed and unenforceable in law. (2) The declaratory relief is dismissed. (3) The claim for unfair

discrimination is dismissed for want of jurisdiction. (4) The dismissal of the employees is automatically unfair. (5) There is no order as to the trial costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] In this referral, there is no dispute that the dismissed employees were terminated on the basis that they had reached the age of sixty years. It is also common cause that at the commencement of their employment, the agreed retirement age was sixty-five years. Further, it is common cause that in January 1995, the agreed retirement age was changed from 65 to 60. At this stage of the proceedings, the Court is to determine the issue of liability, the *quantum* and relief issues are to stand over for later adjudication. This judgment would only relate to the liability issue and costs related thereto.

Background facts and evidence.

[2] This matter involves the alleged automatically unfair dismissal of three employees, namely; Francis King; Lorraine De Beer and Gail Bester (the dismissed employees) whose employment terminated when they reached the age of 60 years. All the dismissed employees were employed in different capacities by the respondent in the 1980s. When they commenced employment, the applicable staff handbook had, as a term and condition of employment, the retirement age as 65. When they were directed (“forced”) to retire, they had not reached the agreed age of 65. They all testified in support of their respective cases. The general tenor of their testimony was that they did not consent to the change to their retirement age, which change was

heralded in 1995. They became aware of the change at a later stage and attempted to reverse the situation but to no avail. As they were retired before the agreed age, they considered their retirement at the age of 60 as forced and an automatically unfair dismissal. They approached this Court separately, however at the ultimate end their cases were consolidated for the purposes of the trial. They all contended that the respondent breached their employment contracts, which breach entitled them to elect cancellation and are now suing for damages. All of them sought a declaratory relief for failures to consult when the changes were affected. Two others alleged unfair discrimination in terms of the Employment Equity Act¹ (EEA).

- [3] Over and above the defences that the claims of the dismissed employees had become prescribed and that this Court lacked jurisdiction in respect of some of the claims, in the main, the respondent contends that the dismissed employees had *acquiesced* to the change, thus their alleged respective dismissals are not automatically unfair. The respondent led the testimony of two witnesses, namely; Anthony Robert Kelbrick and Sonika Greyling. The general tenor of their evidence is that the dismissed employees knew about the change and did not elect the available option to retire at the age of 65. It is unnecessary in this judgment to punctiliously recount the testimony of each of the witnesses as the central question to be determined in this matter does not command such.

Absolution from the instance

- [4] This application for absolution from the instance was withdrawn on the eleventh hour after two court days were wasted to allow for its conception. It was withdrawn on the basis that this Court had allegedly taken a "*prima facie*" view, when it raised certain questions with the respondent's counsel². I take a view that even if the application was withdrawn, for the sake of posterity and the issue of costs, I shall in this judgment deal with the application as if it was

¹ Act 55 of 1998.

² MR BODA: So, I mean, really, if that is the court's *prima facie* view, I am not going to persist with it...Page 17 Transcript volume 1 04 December 2019.

not withdrawn. After the closing of the applicants' case, the respondent launched an application seeking to absolve itself from the instance. The contention being that the applicants have failed, in their own evidence, to establish a case entitling them to a relief. Substantive heads of argument were filed and oral submissions were made in substantiation and resistance of the application for absolution. The respondent relied on cases dealing with absolution from the instance in an ordinary civil trial. This Court has no qualms with the established principles in that regard. In *casu*, it is common cause that the reason the dismissed employees were terminated is that they had reached a specific age. Section 187 (1) (f) of the Labour Relations Act³ (LRA) provides thus:

“...if the reason for the dismissal is –

(f) that the employer unfairly discriminated against an employee, directly or indirectly, on...age...”

- [5] What the section implies is that if the reason for the termination is age, the employer commits an unfair discrimination. Thus, unfair discrimination is legally presumed. The LRA goes further and rebuts the presumption by effectively providing a defence for an employer accused of unfair discrimination. Section 187 (2) provides thus: -

“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.”

- [6] What this subsection implies is that an employer should lead evidence to prove the fairness of the dismissal. If there is an agreed retirement age or a normal retirement age proven and it is reached, the employer would have discharged its statutory *onus*. Section 192 of the LRA is salutary. It provides that in any proceedings concerning any dismissal the employee must

³ No. 66 of 1995, as amended.

establish the existence of the dismissal. If the existence of the dismissal is established, the employer must prove that the dismissal is fair.

- [7] In this matter, although disputed⁴, in my view, dismissal has been established. Dismissal is defined in section 186 of the LRA, and relevant to this matter, it means that an employer has terminated employment with or without notice. One of the termination letters reads thus:

“Dear Francis Magdalena,

We would like to confirm your forthcoming retirement in terms of which your last working day will be 31 January 2018, BMW Management takes this opportunity to express our appreciation of the contribution you have made over your period of service.

In order to follow the retirement process, please find attached the necessary documents to be completed by you. The documents must be finalised prior to your last working day. Please note, if your retirement claim form does not reflect the correct tax number or is not signed, the transfer of any pension money will be delayed.

You are eligible to continue membership of the BMW Employee Medical Aid Society (BEMAS) if you have been a member of the society including any other scheme for the past 5 continuous years. Contributions will be in accordance with the rules of the society as amended from time to time. To check on the amount payable by you, please refer to the HR Guideline, Medical Aid. You may direct any queries whilst on retirement to the BEMAS call centre on 0860 002 107. As usual, claims may be submitted via e-mail to claims@discovery.co.za, or may be mailed to:

PO Box 652509,

Benmore,

⁴ During oral submissions, it became clear that the basis of disputing dismissal is that, in the respondent's view the underlying right to retire at age 65 has been extinguished by the operation of the Prescription Act.

2010.

Any change of address, telephone or mobile number during retirement should be communicated to the BMW HR Services Department (FUNDS) who will update our records and notify the society.

Please be advised that you are entitled to purchase a BMW vehicle or motorcycle upon retirement, please refer to the applicable Company Policy, Sales to Associates.

You are required to undergo an exit medical examination at the company's medical centre.

If applicable, any performance bonus due to you will be payable electronically at the time of declaration.

Your final payment will be on the last working day of the month provided that your company vehicle has been returned and appraised (if applicable).

We would like to thank you for your valuable contributions and wishing you well for your retirement period – a well-deserved rest!

Yours faithfully”

- [8] A proper reading of this letter reveals that the respondent was terminating employment – a dismissal within the meaning of section 186 of the LRA. I must mention that the fact that, in the body of the letter, the respondent did not use the word ‘dismissal’ is, in my view, inconsequential. The word retirement as employed in this letter means a withdrawal from one’s occupation or position, especially upon reaching a certain age. It is an act of retiring or the state of being retired. All the dismissed employees did not complete forms indicating their wish to retire. They were in fact made to retire. Therefore, they were made to withdraw from their positions because they had reached a certain age – *in casu* – age 60. This conduct, to my mind, is equivalent to termination of employment with notice – a dismissal as defined in section 186 (1) of the LRA.

- [9] In the pleadings, the respondent denied that the applicants were dismissed. However, the reading of the pleadings as a whole seem to suggest that the respondent presented a justification of the termination. As an example, in respect of De Beer, the respondent pleaded thus: -

“10.4 De Beer’s employment with BMW terminated when she retired from BMW’s employment after reaching her agreed, alternatively, normal retirement age.”

- [10] During the cross-examination of Bester, the respondent’s counsel had put a particular version⁵ to Bester. He said:

“MR BODA: And my instructions are that from then on that was what the normal retirement was reflected in these personnel handbooks year after year, and in the current company policies it is still the same, they are now on computer available, the fund rules are there, I am told, but from 1999 everybody knew in the organisation, including you, I am putting to you, that the normal retirement age was now 60. What do you say about what I have put to you, Ms Bester?

MS BESTER: At no stage was my employment contract changed or altered or amended to say that I had changed my retirement date from 65 to 60.”

- [11] It can be observed from the version put that the respondent’s defence to the termination⁶ is that the employees had reached the normal retirement age. In *Rockliffe*, this Court had the following to say: -

“[16] I must mention that this is the justification with which the respondent wishes to defend the dismissal. It can only do so by presenting evidence to prove that 65 years is the normal or agreed retirement age...”

⁵ Which version need to be confirmed in evidence.

⁶ Which termination was effected by the respondent and not the dismissed employees.

[12] A submission was made that given the binding nature of the Rules of the Fund, in terms of sections 12 and 13 of the Pensions Fund Act (PFA)⁷, the change of the retirement age should be accepted as being such. In the first instance, this is a legal submission and belongs to the end of the case. However, section 12 empowers the fund to alter a rule. The evidence so far is that what the respondent altered is a term and condition of employment. The PFA defines rules to mean the rules of the fund. These rules are required before a Pension Fund may be registered⁸. In my mind the terms and conditions of employment are different from the rules of a fund.⁹ Thus, a Pension Fund is not empowered to alter the terms and conditions of employment. If it does, such an act offends section 1 (c) of the Constitution of South Africa¹⁰. A body cannot exercise powers not conferred to it by the legislation that begets it. Generally, terms and conditions of employment relates to those things that have to do with the work of an employee. It may be a term and condition of employment for an employee to join a particular Pension Fund. But the rules of that Fund may not be a condition of employment. Ordinarily, conditions of employment are agreed upon between an employer and employee at the commencement of the employment relationship. The fact that the retirement age is stated in the rules, does not, in my view, detract from the fact that a retirement age is part and parcel of the terms and conditions of employment. That being so, the entitlement to change the rules, does not entitle a unilateral change of the terms and conditions of employment. Section 13 refers to the binding effect of the rules. Since, I firmly hold a view that rules are not terms and conditions of employment, this section is not of assistance to the respondent. The evidence reflected thus:

⁷ Act 24 of 1956.

⁸ Section 4 (2) of the PFA.

⁹ In terms of section 11 of the PFA, the rules shall contain certain aspects tabulated in 11 (a) – (p). In the list terms and conditions of employment of members of the fund are not tabulated.

¹⁰ No. 108 of 1996. In *Gerber v MEC of Gauteng Provincial Government, Development Planning & Local Government* [2002] 4 All SA 518 (SCA) it was pointed out that “the Republic of South Africa is a constitutional state. Local authorities and other State may act only in accordance with powers conferred on them by law. This is the principle of legality, an incident of the rule of law. The late Chaskalson P dealing with the common law principle of ultra vires said the following: “What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality.”

MR VAN DER WESTHUIZEN: I am also putting it to you – and that we will argue at the end of the case; that in terms and in accordance of the provisions of the rules, BMW changed the retirement age, the normal retirement age from 65 to 60. Do you want to comment on that?

MS KING: Ja. I would think that surely if a company cannot assume that you will be happy if they reduce your retirement with five years; surely it should be done in a proper way where they do a contract with you where you agree to the... for the lesser retirement. And that was not done. I think it is such... I would think it is such an important document that surely it should have been done differently.

MR VAN DER WESTHUIZEN: The argument would be that it was changed in accordance with the fund rules by the trustees of the fund. Do you know anything about that?

MS KING: No.”

[13] Reliance on *S A Metal and Machinery Co (Pty) v Samuel Gamaroff*¹¹ and *Legal Aid South Africa v Theunissen*¹² is misplaced at this stage of the proceedings. I shall deal with them in greater details later in this judgment should the need arise. It suffices to mention at this stage that in this matter, it has not been established as being common cause that the rules as changed are binding on the affected parties. Further in cross-examination of all, it was never conceded by them that 60 years was the agreed retirement age. The *Legal Aid SA* case concerned an alleged breach of contract. In *casu*, the Court is dealing with an alleged automatically unfair dismissal.

[14] With regard to De Beer, the respondent challenged her version that she fell within the saving clause¹³. The challenged, but uncontroverted evidence so far is that she made an election to retire at 65. A version was put to her that Mr Kelbrick would dispute that she made such an election. Versions are not evidence. Thus, if her evidence as it is now, is not challenged by way of another countervailing evidence, she would be entitled to the relief sought.

¹¹ [2010] 2 BLLR 136 (LAC).

¹² (2020) 41 ILJ 625 (LAC).

¹³ Normal retirement date shall mean...Member who was a Member on 31 January 1995 may elect the last day of the month in which the Member attains age 65 years to be the Member's Normal Retirement Date.

Thus a *prima facie* case upon which a reasonable Court may grant a relief existed.

- [15] This Court had on an occasion dealt with the issue of absolution from an instance in a matter involving age discrimination. It did so in *Rockliffe v Mincom (Pty) Ltd*¹⁴. The Court concluded thus: -

“Clearly the letter says the basis for termination is age. On the face of it unless justified it is automatically unfair (s 187(1) (f)). In my view there is evidence to raise a credible possibility that an automatically unfair dismissal has taken place.”¹⁵

- [16] In an instance where dismissal is seriously disputed – e.g. the employee resigned and/or absconded or the reason for the alleged automatically unfair dismissal is placed in dispute (e.g. age is not the reason), it is appropriate to seek an absolution from the instance¹⁶. Such is not an instance in this case. The application was bound to have been dismissed had it not been withdrawn. The above would have served as the reasons why the application was to be dismissed. This Court was not particularly impressed with the arrangement of the parties to argue this application for absolution. On the last occasion when the matter sat, this Court adjourned the matter to the week of 2 December 2019 for the continuation of the trial¹⁷. It was only on the morning of 2 December 2019 that the representatives of the parties, who are both senior practitioners, informed the Court that they agreed to argue on Wednesday – 4 December 2019. This meant that two Court days were wasted in this trial. The respondent had submitted that the absolution from the instance should be granted with an order as to costs. The immediate question was, who should bear the costs? Since the application was withdrawn, it is

¹⁴ (2007) 28 ILJ 2041 (LC).

¹⁵ See: *Janda v FNB* (2000) 27 ILJ 227 (LC).

¹⁶ See: *Black v John Snow Public Health Group* [2010] 4 BLLR 374 (LC) and *Kabe v Nedbank* (2018) 39 ILJ 170 (LC).

¹⁷ It bears mentioning that this Court keeps a continuous roll and had it not been for the arrangements of the last occasion, this matter could have been concluded in the week of 21 October 2019. There is a statutory imperative on this Court to resolve labour dispute speedily and effectively.

unnecessary to dismiss it. However, a withdrawn application is as good as been dismissed.

- [17] In my view, on this application, the normal rule of costs following the results should apply¹⁸. The concept of absolution from the instance is foreign in labour disputes. It is a concept borrowed from the civil proceedings. As such, a party who fails to obtain an absolution from the instance must be mulcted with costs. Thus, the respondent should carry the responsibility of the costs occasioned by the launching and arguing of the absolution from the instance application. Involved herein is the wasted costs of 2 and 3 December 2019. I take a view that the 2 and 3 December 2019 were wasted and deserve an order of the payment of wasted costs.
- [18] These type of costs are not dependent on a success of a party. The general rule is that where a party is responsible for a case not proceeding with on the day set down for hearing, he or she must pay costs which are wasted¹⁹. In *Hi Line Investment (Pty) Ltd v Lamprecht*²⁰, it was held that the usual rule where a postponement has become necessary because of the fault of one of the parties, the party at fault must pay the wasted costs occasioned by the postponement. Applying for absolution from the instance is part and parcel of the litigation process. Thus, if a party applies and succeeds, the proceedings are terminated earlier than normal. Ordinarily, such applications are made in the course of a trial without any disruption of the proceedings. However, where a party chooses to bring a substantive application at a very late stage and cause a postponement of a trial, such a party, once he or she fails, fault must fall on him or her for the postponement. By this, I am not suggesting that success becomes a factor, but more the conduct of a party to bring hopeless applications. Section 162 (2) (b) of the LRA dictates that the conduct of the parties is a factor to be taken into account when considering the issue of costs.

¹⁸ Id fn 10 at para 52.

¹⁹ *Jowell v Behr* 1940 WLD 144.

²⁰ [2014] JOL 3283 (ECP)

[19] I take a view that this application for absolution from the instance was not necessary²¹. It should not have been brought²². That being my view, the respondent is at fault for the postponement of 2 and 3 December 2019. Accordingly, the dismissal would have been with a payment of the costs including the wasted costs of 2 and 3 December 2013. The costs in this regard include the costs of employing two counsel, which cost order I still make despite the late withdrawal.

Evaluation and discussion

[20] Later in this judgment, I shall deal with the issue of prescription in relation to the breach of contract claims. It has been submitted by the respondent that the automatically unfair dismissal claim has become prescribed and unenforceable in law. I simply do not agree. Age 65 is according to the applicants an agreed retirement age within the contemplation of section 187 of the LRA. It is fundamentally incorrect to refer to the agreed age as a right to be equated with a debt within the meaning of the Prescription Act²³. A right to claim automatically unfair dismissal arises once an employee is dismissed before he or she attains the agreed and/or normal retirement age. In terms of the LRA, once a dismissal happens, it is required of an employee to refer a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) within 30 days of the dismissal. Once the dispute is certified to be unresolved, within 90 days thereof, an employee is entitled to refer a dispute to this Court for adjudication, if automatically unfair dismissal is alleged. Accordingly, a submission that the right to enforce a retirement age of 65 years no longer exists is rejected. Thus, the contention that the automatically unfair dismissal claim has become prescribed and unenforceable in law is equally rejected as being meritless.

²¹ Hence it was withdrawn on the eleventh hour.

²² *Mashishi v Madlala* [2018] 7 BLLR 693 (LC).

²³ No. 68 of 1969.

[21] There is no validity in an argument that since the underlying contract – containing a term and condition to retire at 65 – was extinguished by application of the Prescription Act, so is the claim to automatically unfair dismissal. This argument seeks to suggest that the contractual claim and a claim for automatically unfair dismissal – owing its origin from the LRA are infused as one. This suggestion was rejected by the Labour Appeal Court.²⁴ As a Court below, I am bound by the *Archer v Public School-Pinelands High School and others*²⁵. In this matter, the relevant factual question to be resolved by this Court is whether the respondent and the dismissed employees had agreed on a retirement age. The dismissed employees allege that the agreed retirement age is 65 years, whilst the respondent alleges that the now agreed retirement age is 60 years. All the dismissed employees were retired at the age of 60 years. It being common cause that they were not retired at 65 years, they (the dismissed employees) alleged automatically unfair dismissal and a breach of contract. It is common cause before me that the reason for the termination is age. In terms of section 187(1) (f) of the LRA, it is an automatically unfair dismissal if an employee is discriminated unfairly on the basis of age. Therefore, if the reason for dismissal is age, as it is the case in this matter, an unfair discrimination is presumed.

[22] For an employer to avoid the consequences of the presumed unfair discrimination, such an employer must show either one of two things, namely; (a) the dismissed employee had reached the normal retirement age or (b) the employer and the employee agreed on a particular age and that age was reached. The Labour Appeal Court (LAC) clarified the position thus in *Cash Paymaster Services (Pty) Ltd*²⁶:

“[25] ...The retirement age dispensation provided for in s 187(2)(b) of the Act is one that works on the basis that, if there is an agreed age between an employer and an employee, that is the retirement age that governs the employee’s employment. This is the case even when

²⁴ *Archer v Public School-Pinelands High School and others* 2020 41 ILJ 610 (LAC).

²⁵ [2018] 8 BLLR 785 (LAC).

²⁶ (2006) 27 ILJ 281 (LAC).

there is a different normal retirement age for employees employed in the capacity in which the employee concerned is employed. The provision relating to the normal retirement age only applies to the case where there is no agreed retirement age between the employer and the employee."

- [23] Therefore, the matter before me falls squarely into the agreed age category. Normality does not arise in this matter. Of course normality ought to be proven, if relied upon, because it is not broad but it relates to employees in a particular capacity²⁷. Although Mr Boda SC, for the respondent, suggested at some point during the trial that the respondent's case is based on normality as well, there is no evidence to suggest that persons employed in the capacity of the dismissed employees normally retire at age 60. The factual dispute to be resolved is whether the agreed age is 60 or 65. With regard to the instance of *onus*, the dismissed employees bore the *onus* to show that age 65 was the agreed age whilst the respondent bore the *onus* to show that the agreed age was 60.

What was the agreed retirement age?

- [24] There is no dispute between the parties that when the dismissed employees commenced employment, the agreed age for retirement was 65 years. It is also common cause that during 1995, the retirement age was changed from 65 to 60. The dismissed employees contend that in effecting the change, the employer did not seek nor obtain their consent. It is indeed so that the dismissed employees did not expressly consent to the change. To that extent, the respondent wishes to rely on the *doctrine of acquiescence* in that the fact that a change was effected was known by the dismissed employees and as such, since they failed to object to the change, they accepted it. This, if shown to be the case, then the agreed retirement age would be 60. Having reached the age, the dismissed employees would be non-suited in so far as the

²⁷ See: *Rubin Sportswear v SACTWU and others* [2004] 10 BLLR 986 (LAC).

alleged breach of contract and the automatically unfair dismissal claims are concerned.

What is the doctrine of acquiescence and how does it apply?

[25] In order to do justice to this question, it is apposite for this Court to discuss the *doctrine* in as far as its origin and acceptance into our law is concerned. There is a maxim known as *qui non negat fatetur* – silence shows consent. S/he who does not deny agrees. As far as I could establish, the doctrine was first heralded into our law in the matter of *Policansky Bros v Hermann and Canard*²⁸, where Wessels J had the following to say:

“It is a principle of our law that if a person has once acquired a right he is entitled at any time to vindicate that right when infringed, provided the period of prescription has not elapsed. This is the general rule, but in course of time exceptions have been grafted on to this rule. The equitable principle that if a person lies by with full knowledge of his rights and of the infringement of those rights, he is precluded from afterwards asserting them, has been adopted by our courts. It forms a branch of the law of *dolus malus*. The principle of lying by is not unknown in our civil law, though its application is not so often met with our system of law as it is in English law. Sometimes the rights are lost through mere acquiescence, at other times by estoppel, as where the element of prejudice exists in addition to acquiescence. Thus acquiescence can be proved by definite acts or by conduct.”

[26] In *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd*²⁹, Friedman AJ had the following to say:

“Acquiescence is, in my view, a form of tacit consent, and in this regard it must, however, be borne in mind that, as Watermeyer CJ said in *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 422:

²⁸ 1910 TPD 1265 at 1278-9.

²⁹ 1974 (2) SA 125 (C).

“quiescence is not necessarily acquiescence”

And that

“conduct to constitute an acceptance must be an unequivocal indication to the other party of such acceptance”

[27] As I understand it, silence does not necessarily mean assent, thus one party cannot without the overt assent of the other impose upon such other a condition to that effect. There was of course a debate whether this equitable doctrine, which bears its origin from English law was fully accepted into our law.³⁰ De Villiers JP in *Hlatshwayo v Mare and Deas*³¹ had the following to say:

“Whether then we base the doctrine of acquiescence on the consent which is implied or the choice which is exercised, or call it waiver makes no difference. At bottom the doctrine is based upon the application of the principle that no person can be allowed to take up two positions inconsistent with one another or as it is commonly expressed to blow hot and cold, to approbate and reprobate. This being so there is no doubt of the actual minimum required by our law in order to constitute acquiescence. And that is before a person can be said to have acquiesced in a judgment, and thereby to have lost the right of re-opening a case or of appeal, a right which clearly has or at all events had, the Court must be satisfied upon the evidence that he has done an act which is necessarily inconsistent with his continued intention to have the case re-opened or to appeal.”

[28] Clearly, in this matter, I must be satisfied that the dismissed employees have done an act which is inconsistent with their contractually acquired right to retire at age 65. The respondent attempted to show that by placing reliance on documents which the dismissed employees may have seen indicating the unilaterally changed position. The *onus* to prove acquiescence lies on the respondent. The dismissed employees’ version on the documents signalling the alleged acquiescence is that either they did not see them and/or they did

³⁰ See: *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A); *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 (3) SA 580 (A) and *New Media Publishing (Pty) Ltd v Eating Out Web Services CC* 2005 (5) SA 388 (CPD).

³¹ 1912 AD at 259.

not pay attention to the demonstrated change. It is important to emphasise that the question whether acquiescence had manifested itself, it's a question of fact and not law.³² Some 104 years ago, the Transvaal Provincial Division (as it then was), in the matter of *Grobler v Schmahmann Bros and A.R.M Belfast*³³, had the following to say:

"We have here to deal with quite a different matter to the question of the peremption of an appeal; we have to consider whether, as a matter of fact, by his subsequent conduct, he has acquiesced in conferring jurisdiction upon the magistrate which the magistrate otherwise did not have. In order to decide that question, we have to be satisfied that he knew of the facts, because a person cannot be said to acquiesce unless he knows the facts. The irregularity complained of in this case is the irregularity of the service of summons by a person who could not serve it under the law, and, unless there is proof before the Court that he knew that the summons had not been served by the proper person, he cannot be said to have acquiesced."

[29] Regard being had to the above, for acquiescence to be proven, I must be satisfied, in this case, that the dismissed employees knew that their consent was required to avoid unilateral change or in order to legalise the change yet they decided to let the respondent go ahead with the apparent illegality - unilateral change – without their required consent. There is no evidence to even vaguely suggest that the dismissed employees were aware of the change at the time it was effected. On the contrary, the documentary evidence placed before me, strongly suggest that the dismissed employees were not alerted of the impending change. The respondent also placed reliance on the inaction on the part of the dismissed employees since the change was introduced. Heavy reliance was placed on the decision of the LAC in *BMW SA (Pty) Ltd v NUMSA*³⁴. In my respectful view, the case is, on the facts, distinguishable.

³² *Re H and others (minors) (abduction: acquiescence)* [1997] 2 All ER 225.

³³ 1916 TPD 218 per De Villiers JP.

³⁴ [2019] 2 BLLR 107 (LAC).

- [30] The *ratio decidendi* of that case was, in my view, largely based on the failure of Van der Bank to prove that she made an election to retain the retirement age of 65. It was her case that she made an election to retire at 65 but she failed to prove that election. The LAC concluded thus:

“[41] Ultimately, the case to be decided is the case put up by the respondent: did she or did she not submit an election form retaining age 65, or did she acquiesce in the changes.”

- [31] On the issue of acquiescence, which in my view was a secondary issue, the LAC concluded that by reason of the length of time that had elapsed since the change was made, a case of acquiescence was made. On the facts, it was found that Van der Bank applied her mind to her benefit statement of 2010, 13 years after the alleged election. Further, the LAC, applying the preponderance of probabilities concluded that Van der Bank did receive the letter of 15 May 2001. This conclusion was reached on the basis that the letter was attached to the benefits statements which she did not dispute receiving. However, before me, the dismissed employees dispute having received the statements and/or the documents allegedly attached to them.

- [32] On the facts of this case, it has been established before me that the change was introduced by the Trustees of the Pension Fund. Having done that, it does seem that the views of the members of the Pension Fund were canvassed. The suggestion seems to be that when the views were so canvassed, members of the Pension Fund assented to the change from 65 to 60 years. The critical period for the dismissed employees before me is in 1994. Around January 1994, a notice was issued to the employees employed before a specific period to either agree to the change from 65 years to 60 years or indicate the retention of the contractually acquired right – retire at 65 years. This notice was not intended for the Provident Fund members, of which two of the dismissed employees were. The Trustees later took a decision to extend the privilege of agreeing to the age 60 or retaining the age of 65 to the Provident Fund members. However, there is no evidence before me that a similar form, as the one in pages 200-1 of Volume 1 of the consolidated

bundle, was provided to the Provident Fund members in 1994. By 1996, the Trustees managed to convince the respondent to amend the staff handbook³⁵ and remove 65 years and replacing it with 60 years for every employee except those who have retained in writing their contractually acquired right of age 65.

[33] Only in the year 1997 was the privilege extended. It bears mentioning that at that time, the change was already effected to the staff handbook. What the respondent was seeking to achieve was to obtain an agreement of the Provident Fund members as it sought to do in 1994, prior to the change, in respect of the Pension Fund members. It is curious to note that in the 1997 election forms reference is made to an election that was afforded some years ago. On the evidence, some years ago, in 1994, only the Pension Fund members were addressed. Of importance for me in this matter is that it remained the unshaken evidence of the dismissed employees that they did not receive the 1997 forms. The respondent needed to show that they indeed received those forms. The evidence of the respondent's witnesses is woefully lacking in this regard³⁶. Therefore, the Court must conclude that by 1997, the dismissed employees were not aware of the change.

[34] The dismissed employees disputed the fact that the staff handbook was distributed to them to have observed the change, particularly the 1996 staff handbook. Again, the respondent needed to prove that. The dismissed employees testified that they did not have access to and/or visited the Rules of the Fund³⁷, whereat, they may possibly have observed the change. Despite the change in 1995/6, the evidence demonstrated that by 1999, the benefit statements were still reflecting the 65 years' age as the retirement age. The situation was apparently corrected in the year 2000. However, the dismissed employees disputed the fact that they regularly received the benefit statements.

³⁵ Therefore, the respondent's case for agreed change can only be made with reference to the staff handbook –containing terms and conditions of employment – and not the rules of the Fund.

³⁶ MR KELBRICK: It is, my understanding is that it was sent out to the various departments for handing out on the line, as well as to the departments where we had members of the provident fund.

³⁷ The Rules of the Provident Fund were only amended 7 October 1997 to reflect the change.

[35] When the dismissed employees ultimately got to know about the changes, they objected to that and lodged grievances³⁸. The question then becomes whether the delay in objecting amounts to acquiescence or not? It is apparent that the LAC in *BMW supra*, took a view that a delay ignites the defence of acquiescence³⁹. However, a Court of equal status in *Turbek Trading CC v A&D Spitz Ltd and another*⁴⁰, had the following to say:

“[15] Turbek’s first line of defence was a reliance on what counsel referred to as an “equitable defence” of delay: if a party delays in enforcing its rights the party may in the discretion of the court either forfeit the rights or be precluded from enforcing them. The factual basis of the defence was, briefly put that Spitz had known since 1 October 2001 of Turbek’s trade mark applications and its use of the mark “KG” on footwear but only took steps to enforce its alleged common-law rights when it instituted the present proceedings during July 2007. This delay, according to the submission, amounted to acquiescence which disentitled Spitz from attacking the registration or obtaining an interdict...During argument it became clear that counsel was unable to contend more than that delay may in suitable case be evidence of intention to waive, evidence of a misrepresentation that might found estoppel, or evidence of consent for purposes of the *volenti non fit injuria* principle. In other words, counsel was unable to substantiate his submission that acquiescence is a substantive defence in our law.”

[36] That the defence of acquiescence is not part of our law was confirmed by the SCA, when citing with approval the *Turbek* decision in *Societe des Products Nestle SA v International Foodstuffs*⁴¹. Like peremption, for the defence of acquiescence to succeed, it must be shown that a party has acted

³⁸ An important factor to be mentioned is that what the dismissed employees were faced with at the time was an anticipatory breach. The time for performance in terms of their contractually acquired right had not yet beckoned.

³⁹ The view I take is that as at the time of the “infringement of the right” the dismissed employees had not as yet acquired a right to claim automatically unfair dismissal. Even if they would have wanted to vindicate their right not to be automatically dismissed, that time had not arrived. For that reason, I am of a firm view that the dismissed employees were incapable of acquiescing the acquired right to retire at 65.

⁴⁰ [2010] 2 All SA 284 (SCA).

⁴¹ [2015] 1 All SA 492 (SCA).

unequivocally. The Constitutional Court in *SARS v CCMA and others*⁴² said the following:

“Peremption is a waiver of one’s constitutional right to appeal in a way that leaves no shred of reasonable doubt about the losing party’s self-resignation to the unfavourable order that could otherwise be appealed against. *Dabner* articulates principles that govern peremption very well in these terms:

“The rule with regard to peremption is well settled and has been enunciated on several occasions by this court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it.”

[37] Therefore, acquiescence must not be questionable. Ineluctably, the party against whom the doctrine must apply, must have been denude by his deport and actions. Other than not doing anything, in the face of the changes, there is no inaction, which is unquestionable, to suggest that the dismissed employees accepted the change. The respondent knew very well that in order to change the terms and conditions of employment, it required the consent of the employees. The 1994 forms clearly ask the critical question – to agree to the change or retain the agreed age.

[38] It does not require a stroke of a genius to observe that in an alleged passive acquiescence, where a party does not take action for reasons such as practicality, availability of resources, bad advice or living with a hope that the situation may change, the doctrine does not find application. I am acutely aware that the LAC applied the doctrine in the *BMW* matter, I, however, obtain fortification from *Turbek* and actually adopt the approach in *Turbek*. I respectfully take a view that *Turbek* is correct. In *Legal Aid SA supra*, the

⁴² 2017 (1) SA 549 (CC) at para 26.

views expressed on acquiescence are, in my view, *obiter*. The *ratio decidendi* is to be found in paragraph 36 of the judgment.

[39] Besides, in *Legal Aid*, there was a clause that allowed flexibility, whereas there is no such a clause in *casu*. The dispute there was purely contractual, hence the LAC specifically had to interpret the saving clause in order to determine whether they found application. Hence the conclusion that “*since Mr Theunissen does not fall into either of these exceptions, he is outside the ambit of the savings clause and is not entitled to retire at the age of 65 years*”. This was determinative of the alleged breach of contract claim as brought by Theunissen in the Labour Court.

[40] For these reasons, this Court is not bound by what was said in *obiter* at paragraph 47 of the judgment. In addition, if what is said in paragraph 47 is part of the *ratio decidendi*, I take a view that the facts as set out in that paragraph are distinguishable from the facts before me. I venture to say that, in employment law, this doctrine of acquiescence is generally not welcomed. If welcomed, it must be received with a great measure of reluctance. I say so for reasons that the LRA is legislation that stems from the Bill of Rights. One of the rights enshrined in the Constitution is the right to strike. Section 64 (4) and (5) of the LRA makes it patently clear that a unilateral change of terms and conditions of employment is inimical to fair and sound labour relations, to a point that the sections designed what may be termed as self-help. An employee by a stroke of a pen may require an employer not to implement the change or if implemented require a restoration.

[41] In terms of the LRA, an employee faced with a unilateral change has as an available weapon, the most valuable and sacrosanct weapon to strike. With that in mind, it appears to be a reversal of the gains of labour rights, to simply allow all of those rights to be swept into oblivion through the application of the doctrine of passive acquiescence. To my mind, such does not augur well with the interest of justice. It must be remembered that one of the remedies that was available to the dismissed employees in 1995 would have been to invoke section 64, if the LRA was herald at that time.

[42] A further point to be made is that, the doctrine is a common law doctrine, bearing its derivation from English law. Section 39(2) of the Constitution of the Republic of South Africa enjoins this Court that when developing the common law, it must promote the spirit, purport, and objects of the Bill of Rights. Recently, the Constitutional Court⁴³ reaffirmed the view that every interpretation must be within the prism of the Constitution. Where a constitutional right is implicated, an interpretation of any law to be favoured, is one that champions the Bill of Rights. In terms of section 23 (1) of the Constitution everyone has the right to fair labour practices. A blunt application of the doctrine implicates this right too. Although change of the agreed terms and conditions of employment has a touch of contract law in it, it also amounts to some unfair labour practice, something inimical to section 23 (1) of the Constitution, hence the enactment of section 64 (4) and (5) of the LRA. The following was observed by the Constitutional Court in the *SARS* matter, and the Chief Justice had this to say:

“Peremption having taken place, the only relevant consideration remaining is whether there are overriding constitutional considerations that justify appealability or the non-enforcement of peremption.”

[28] The broader policy considerations that would establish peremption are that those litigants who have unreservedly jettisoned their right of appeal must for the sake of finality be held to their choice in the interest of the parties and justice. But, where the enforcement of that choice would not advance the interest of justice, then that overriding constitutional standard for appealability would have to be accorded its force by purposefully departing from the abundantly clear decision not to appeal. This principle was laid down by Nugent JA in *SANDU*:

“Bearing in mind the policy underlying [peremption,] it must necessarily be open to a court to overlook the acquiescence where the broader interests of justice would otherwise not be served”

⁴³ *Amalungelo Workers' Union and others v Philip Morris SA (Pty) Ltd and Another* 2020 (2) BCLR 125 (CC) at para 16 of the unanimous judgment.

[43] I, therefore take a view that the application of the doctrine in this matter would certainly not serve the interests of justice. Even if I am wrong in so concluding, I take a view that the doctrine has not been established in this case. The English Courts, being the place of birth of this doctrine, had the following to say about it in the decision of *Ramsden v Dyson*⁴⁴, the House of Lords said:

“Whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial...[it] requires a very much broader approach which is directed rather at ascertaining where, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which...he has allowed or encouraged another to assume to his detriment [rather] than...enquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour”

[44] In another case, Mann J in *Dyson v Qualtex*⁴⁵, had the following to say:

“It is hard to see why, as matter of principle, mere acquiescence or inaction on the part of a right owner [even with knowledge of rights] should make it inequitable to insist on enforcement of rights in future. However, if encouragement or creation of expectation is added, then the picture changes.”

[45] Therefore, as I understand the doctrine from the English law’s perspective, for a party to successfully avail itself to it, it must show (a) that the right holder knew about the infringing activity; (b) the right holder engaged in an act of encouragement. Standing by and not starting proceedings does not amount to ‘encouragement’, there must be something more than that, i. e. a positive act or relevant omission; and (c) the other party has relied upon the act or omission to its detriment.

⁴⁴ [1866] LR 1 HL 129.

⁴⁵ *Dyson Ltd v Qualtex (UK) Ltd* [2004] EWHC 2981 (Ch).

[46] In my view, the evidence before me does not demonstrate that any of the dismissed employees had actively engaged in an act of encouragement. The fact that they failed to observe the infringement of their acquired rights on the documents they engaged with, be it the benefit statements and/or computer generated documents, does not amount to encouragement. The evidence of one of the dismissed employees was to the effect that, had she seen the election forms, she would certainly have indicated that she retains her acquired right. This testimony is profoundly powerful, in that, given the current dispute before me, I must accept that indeed the dismissed employees would have chosen to retain their acquired right, an option that has always been available to them despite the manifested breach.

[47] In addition to the above reasoning, I must carefully consider the election forms. The relevant ones for the two dismissed employees, is the one of 21 January 1997. It read thus:

"A number of years ago, a choice was given to members to elect to retire at age 65 or 60. At the same time the general retirement age was amended to 60 and since then has been a condition of employment. It appears that not all members were aware of this choice. Therefore, a further opportunity is provided to express your option if you were a member prior to June 1995.

NB. Please complete the form below and return to the Personnel Department before 24 March 1997...

...I HEREBY ELECT A RETIREMENT AGE OF 60 or 65."

[48] The evidence before me is that the dismissed employees have not received this form. There is no clear evidence as to how these forms were distributed, particularly to the dismissed employees. Nonetheless, few observations ought to be made with regard to the contents of this letter. In relation to the Provident Fund members it cannot be correct that a few years ago they were given an option to elect. The uncontested evidence was and remained that

the Provident Fund members were given the option for the first time in 1997. In 1994, only the Pension Fund members were given the option. Of critical importance is that the option given to the Pension Fund members was not to elect the retirement age, but to either agree to the change or retain the agreed retirement age of 65 years. This is hugely different from simply electing the retirement age. It called for an assent to the contemplated change at the time. This is significant in more ways than one.

[49] It is quite obvious what the respondent was seeking to achieve in this regard. It was seeking to obtain consent to the contemplated change. In a meeting held on 17 February 1994, the Chairman of the Pension Fund was authorised to canvass the views of the members regarding the reduction of the retirement age from 65 to 60. The minutes of the meeting of 8 September 1994 reflects that the Chairman reported the results of the canvass, which allegedly reflected being in favour⁴⁶. The Chairman was further authorised to make a recommendation to the Board of the respondent regarding Company Policy on the retirement age.

[50] I interpose to mention that in respect of the Pension Fund Members, it does appear that they may have agreed to the change (during the canvass), as such, there is no unilateral change in respect of them, if they signed the form on 201 reflecting 'I agree'⁴⁷. Subsequent to the process outlined above, in June 1995, the Pension Fund Rules were amended to reflect that the retirement age in respect of the members is 60 years unless a member elects the age of 65 years⁴⁸. As a sequel to that, the respondent in its 1996 handbook reflected the change from 65 to 60 years⁴⁹.

⁴⁶ This is observed from the undisputed minutes. However, this Court did not hear from anybody that the dismissed employee who was a member of the Pension Fund at the time specifically agreed to the reduction of her retirement age from 65 to 60.

⁴⁷ This is simply an assumption because there is no direct evidence that the dismissed employee who was a member of the Pension Fund specifically agreed to the change.

⁴⁸ As I have mentioned above, this change of the rules of the Fund is inconsequential in as far as the change of the terms and conditions of employment are concerned.

⁴⁹ The evidence reflects that this was not preceded by an express consent by any of the dismissed employees

[51] Around April May 1995, an undated⁵⁰ managerial notice was issued, which communicated that the age has been reduced from 65 to 60 effective 1 January 1995. Of importance to this matter, the managerial notice recorded that *"it is however the intention to extend this condition to all employees in line with current industries practice. Should this [extension of the reduction]⁵¹ present a problem to any one they are requested to indicate, in writing to the Personnel Department, their choice to remain on a retirement condition of 65 years of age."*

[52] It is important to state that the dismissed employees testified that they did not receive this notice. From the evidence of De Beer, it is evident that her manager alerted her to this notice⁵². In her version, she exercised her choice to remain at age 65 during the year 1994/5. The letter she wrote at the time could not be found. Be that as it may, in terms of this notice, there was only one choice to be made, which is to elect to remain at 65 years despite the unilateral change effective 1 January 1995. On the probabilities, I must find that De Beer indeed wrote such a letter. Personnel Department must have misplaced the copy, given the shambolic state of the respondent's record keeping. In any event, the effect of the letter, is, in law, non-existent and/or inconsequential. I say so because, what was obtaining, legally, at the time was that the respondent had already unilaterally changed the age, which change cannot be given effect in law. The only choice made available was that of rejecting the illegality. Clearly, if the dismissed employees would have seen this notice⁵³, I fail to see how they could not have rejected the illegality in writing as requested. Therefore, the point to be made is that failure to reject the illegality cannot be viewed as an encouragement and certainly, the respondent could not act on that failure to its detriment and consider it to be

⁵⁰ Evidence revealed that its date is 16 May 1995.

⁵¹ My own addition.

⁵² It does seem that both counsel are *ad idem* that the De Beer incident occurred in 1994. On my assessment of the evidence De Beer must have been referring to the 1995 managerial notice. Nonetheless nothing much turns on this. Mr Boda submitted that even if she wrote the letter, such was an inconsequential exercise.

⁵³ The evidence of Kelbrick with regard to this notice is highly ambivalent. He testified that he was not involved in the distribution of the document.

acceptance of the illegality. At the very best, what the respondent called for was a signal to remain at age 65 as failure to accede to the change means that the *status quo* remains as contractually acquired. The respondent did not and could not await an acceptance of the unilateral change.

[53] I fail to see how it can be objectively concluded that the 1997 election form was referring to the managerial notice when reference was made in it of few years ago. This notice was seeking to extend a unilaterally effected change and *ex hypothesi* simply hoping for a rejection and not assent. The 1997 form was hoping for an agreement to the already effected change. In other words, it hoped for an *ex post facto* consent to the change, in the event any of the dismissed employee would have done the unthinkable – tick the age of 60 as opposed to 65. Even if I were to accept, which I do not, that the dismissed employees received the 1997 election form, the fact that they did not elect either 60 or 65 does not mean that they acquiesced to the change. The form still gave them an option to retain the contractually acquired right. It is illogical, in my view, to conclude that having seen the form, which availed them an option to retain their contractually acquired right of 65 years, and having failed to say anything, then the only conclusion to be drawn is that they accepted the change. On the contrary, their silence might also be taken to mean that they confirmed their acquired right, since it was possible for them to choose to retain it by simply putting a cross to the age of 65 years.

[54] In relation to the letter drafted in 2001 by Greyling and signed by Dr Fegbeutel, all the dismissed employees disputed that they received it. I have the following to say about this letter. Its opening gambit is the records as kept by the respondent. It reflects the agreement sourced by the Trustees. According to this letter there was a request by members to reduce the retirement age which was agreed to by the Trustees. The documentary evidence before me shows that the Chairman of the Pension Fund canvassed the views of the Pension Fund members and not that the members requested a reduction to which the Trustees assented to. Out of that canvassing process a decision was reached that the retirement age be changed. The evidence

further shows that members of the Pension Fund, who were over 50 years, were afforded a dispensation to either agree to the reduction or seek to retain the agreed age of 65 years. There is no evidence before me that any of the dismissed employees requested a reduction, which was agreed to by the Trustees. Further, the letter suggests that letters were sent to members advising them of the agreement to the request and an option to retain. The letters and options, in 1994, were addressed to the Pension Fund members only. The two dismissed employees were not members of the Pension Fund.

[55] The letter further alleges that effective 1 March 1997 an agreement came into being that the retirement age would be identical for the Pension Fund and the Provident Fund members. No evidence was tendered to demonstrate that agreement. On the contrary, the documentary evidence was that the Trustees took a decision to extend the changed retirement age and attempted to source an exercise of a choice to remain on 65 years.

[56] In January 1995, a unilateral decision was taken to reduce the retirement age to 60 years. It must axiomatically follow that the records kept by the respondent by 2001, should reflect the unilateral decision in respect of the dismissed employees. The evidence of Greyling is that she personally handed this letter to the dismissed employees when she handed the benefit statements. This is vehemently disputed by the dismissed employees. It is surprising to note that this fact has not been revealed in the respondent's pleaded case. The first time it arose, was when it was put as the version of Greyling to the dismissed employees. Even if I accept that Greyling did provide the dismissed employees with this letter, fact is, there was little, if any, that the dismissed employees could do about it. The letter only served to inform them of the alleged agreements which did not involve them. It may be said that the dismissed employees should have taken action then. However, the fact that they did not, does not suggest an encouragement in order to ignite the doctrine of acquiescence.

[57] I also take a view that there is no case for tacit consent that was made by the respondent. In order to establish tacit consent, two tests are applied by our

Courts. The first of which is known as “*no other reasonable interpretation test*”⁵⁴. This simply entails that there must be unequivocal conduct⁵⁵ from which no other reasonable inference can be drawn other than an intended consent. The second of which is the “*most plausible probable conclusion test*”⁵⁶. This simply implies looking for the most plausible and probable conclusion⁵⁷. The Constitutional Court out of five judgments in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & others (CHRE Amici Curiae)*⁵⁸, made it clear that consent meant not simply acquiescence but voluntary agreement. The Court further stated that consent cannot be conferred unless it is asked for and given. In *casu*, the respondent apparently asked for consent but was not given. Thus consent cannot be conferred. On the facts of this case, an inference of age 60 being consented to is not the plausible and a probable conclusion to arrive at. As pointed out above, the available options were either ages 60 or 65. Thus, the conclusion I arrive at is that no tacit consent to change to age 60 was shown to exist⁵⁹.

[58] Finally, in *casu*, waiver has not been pleaded as a defence, thus this Court shall not entertain it. Only acquiescence was pleaded. However, since the two are cousins, in my view, I have this to say about it. Waiver is a renunciation of a right. It cannot be inferred, it must be clearly evinced⁶⁰ with a clear intention to waive a right⁶¹. There is no evidence that the dismissed employees denounced their acquired and preserved right to retire at age 65.

[59] In conclusion, the probabilities drive me to a conclusion that the agreed retirement age remained that of 65 years in respect of the dismissed

⁵⁴ See: *Standard Bank of SA Ltd v Ocean Commodities Inc* 1983 (1) All SA 145 (A).

⁵⁵ See: *McDonald v Young* 2012 (3) SA 1 (SCA).

⁵⁶ See: *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd; Joel Melamed and Hurwitz v Vornor Investments (Pty) Ltd* 1984 (2) All SA 110 (A)

⁵⁷ Corbett JA in *Joel Melamed supra* stated that “a court may hold that a tacit contract has been established where, by a process of inference, it concludes that the most plausible probable conclusion from all the relevant proved facts and circumstances is that a contract came into existence.”

⁵⁸ 2010 (3) SA 454 (CC).

⁵⁹ In *Standard Bank supra* the court stated that “in order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged.”

⁶⁰ *Stewart v Ryall* 5 SC 153.

⁶¹ *Roodepoort-Maraiburg Town Council v Eastern Properties Ltd* 1933 WLD 226

employees. The unilateral change cannot be imposed on them in law. The common law position is such that a change of the terms of a contract without consent is impermissible in law⁶². In *Mazista Tiles (Pty) Ltd v NUM and others*⁶³, it was confirmed that a unilateral change of the terms and conditions by an employer is impermissible in law. Like its cousin, *estoppel*, the doctrine is not allowed to operate in circumstances where it would have a result which is not permitted by law. The doctrine cannot be upheld if its effect would be to render enforceable what the law has in the public interest declared to be illegal or invalid. In *A Mauche (Pty) Ltd t/a Precision Tools v NUMSA and others*⁶⁴, the LAC held that employees do have a vested right to preserve their working obligations completely unchanged as from the moment they begin work. Thus, the change from 65 to 60 having been effected unilaterally is ineffective in law. A legal option, which was never employed by the respondent, available to the respondent was to impose the change and if any of the affected employees does not accept it, then dismiss for operational requirements, only if it could be shown that the change was operationally related.

Is the dismissal of the dismissed employees automatically unfair?

[60] As pointed out earlier, there is no dispute that the reason for the dismissal of the dismissed employees was given by the respondent as age. That, presumably, amounts to an unfair discrimination. It is common cause that at the time of their dismissal, the dismissed employees had not reached the agreed retirement age. Therefore, the defence outlined in section 187 (2) (b) of the LRA is not available to the respondent. That being the case, I am constrained to arrive at an irresistible conclusion that the dismissal of the dismissed employees is automatically unfair. The issue of the remedy stood down for adjudication in due course.

The breach of contract claim

⁶² See: *Bedderson v Sparrow Schools Education Trust* [2010] 31 ILJ 1325 (LC) and *Evans v Japanese School of Johannesburg* [2016] 27 ILJ 2607 (LC)

⁶³ (2004) 25 ILJ 2156 (LAC).

⁶⁴ (1995) 16 ILJ 349 (LAC).

[61] All the three dismissed employees also presented common law claims of alleged breach of contract. The upshot of their claims is that the respondent was not entitled to unilaterally vary or amend the retirement age from 65 to 60. By so doing, the respondent wrongfully repudiated their respective contracts of employment. In respect of these common law claims, the respondent raised special pleas of prescription. Before I deal with the prescription defence, it bears mentioning that *Archer supra* has fortified the ushered dispensation that an employee may simultaneously launch a contractual claim together with the claim under the LRA. The Labour Court, per Her Ladyship Justice Rabkin- Naicker, had earlier concluded that the Labour Court lacked jurisdiction in the circumstances where Mr Archer had failed in his LRA claim. I did point out above that I am bound by the *Archer* decision. However, what concerns me in this matter is that all the dismissed employees pleaded that they had accepted the repudiation – to unilaterally change the retirement age and forcing them to retire at 60 years. Having accepted that repudiation, they made an election to cancel the employment contracts. In contractual law, an election to cancel paves a way for a damages claim and or *restitutio in integrum* – restoration to the pre-contractual position. However, in Labour Law, where an employee himself or herself cancels an employment contract, there is no dismissal within the meaning of the LRA, unless an employee may allege and prove that the conduct of an employer made continued employment intolerable – constructive dismissal.

[62] The respondent had disputed that the dismissed employees made an election to cancel. There is no evidence before me as to when was the pleaded cancellation effected. The allegation that the dismissed employees did cancel the contract was disputed. Equally, no evidence was led by the respondent to support the said denial. Both parties seem to have simply ignored the legal effect of this alleged but not proven allegation. During argument, I invited the dismissed employees' counsel to address me on the legal effect of the said cancellation. Her submissions were that the cancellation happened simultaneously with the termination of employment. On the other hand, Mr

Boda SC conceded that the cancellation as pleaded has no reference to being not dismissed. The basis for disputing the dismissal is that the underlying right to retire at 65 had prescribed and as such the dismissed employees cannot assert a right not to be automatically unfairly dismissed. I do not agree. The right to retire at 65 years is a contractual right acquired by the dismissed employees. This right is incapable of prescribing in law. What prescribes in law is a debt and not a right of action.⁶⁵ A factor to be added on this point is that the right to claim automatically unfair dismissal is bestowed on an employee once an employer terminates employment on the basis of age. Such an employer has as a statutory defence to state that the agreed date X had been reached. Such is a complete defence to a claim alleging automatically unfair dismissal. Thus, the onus is on an employer to prove that age, however, if an employee alleges another age, the employee has the onus to prove only that age in order to defeat the complete defence of the employer.

Have the claims become prescribed in law?

[63] In terms of section 11 (d) of the Prescription Act, any other debt prescribes after three years. In terms of section 12 (1) of the Prescription Act, prescription begins to run when the debt becomes due. The alleged repudiation – the right to take action (unilateral variation) arose in January 1995⁶⁶. In other words, by January 1995, the dismissed employees acquired the right to make an election either to cancel and sue for damages or claim for specific performance. This type of a breach is referred to in English law, as adopted in our law, as an anticipatory breach. It is a repudiation of the performance at a later stage.⁶⁷ However, an anticipatory breach is meaningless unless an election is made. Once an election is made, only then would the debt become due – the right to claim payment of damages. Mr

⁶⁵ See: *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) and *Cook v Murray Morrison and another* (Case A5058/16 (SGHC)) confirmed on appeal by the Supreme Court of Appeal (2019 (5) SA 51 (SCA))

⁶⁶ The breach occurs on a date of a party becoming aware of the repudiation. *De wet v Kuhn* 1910 CPD; *Tuckers Land Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A).

⁶⁷ See: *Botha v Rich* 2014 (4) SA 124 (CC).

Boda submitted that if what happened in this case is an anticipatory breach, which, he denies it was, then the prescription argument falls flat. For conduct or circumstances to amount to an anticipatory breach it must then be established that a party will likely commit a breach and that that breach will justify cancellation. An anticipatory breach indicating that no performance at all will be forthcoming must necessarily amount to a material breach.

[64] There is no doubt in my mind that by unilaterally amending the age from 65 to 60, the respondent was effectively saying to the dismissed employees that when the performance time reckons, the respondent would malperform. In my book, this is anticipatory breach. Admittedly, there is a thin line between actual breach and anticipatory breach. What puts them apart is the time for performance as agreed. The time to perform in this matter was set in the future. In *Cook supra*, the full bench under the hand of Justice Meyer concluded thus:

“[35] Therefore, the innocent party’s right of action for restitution or for restitutorial damages resulting from defaulting party’s repudiation of a contract only accrues, and the correlative obligation or debt to make restitution or to pay damages becomes due in terms of s 12(1) of the Prescription Act, when the innocent party exercises his or her election to accept the repudiation, rescind the contract and the election is communicated to the party who has repudiated.

[65] The above, is a complete answer to the allegation of the contractual claim having become prescribed in law. The above echoes the sentiments of the Labour Appeal Court in *Solidarity and others v Eskom Holdings Ltd*⁶⁸, Zondo JP (as he then was) stated the following:

“In my view the effect of that election was that the appellants were free to wait for the time in the future when in terms of that agreement between the parties they would be entitled to go on early retirement and when the respondent would be obliged to afford them certain

⁶⁸ (2008) 29 ILJ 1450 (LAC).

benefits...At that point the 'debt' under the Prescription Act would become due and the prescription period would start to run."

- [66] Therefore, in the light of the above authorities, since the dismissed employees made an election when they were terminated, prescription period began to run then⁶⁹. Accordingly, their right to claim damages manifested itself only then. Therefore, their contractual claims have not become prescribed in law.

Was there a breach?

- [67] A breach occurs when one party to an agreement does not perform as agreed or performs deficiently. In *casu*, it is common cause that the dismissed employees have acquired the right to retire at age 65. It is also common cause that the respondent unilaterally took away that right. That constitutes a breach in law. Having made an election to accept the repudiation and to cancel, the dismissed employees acquired a right to sue for damages.

- [68] The respondent argued that it contractually acquired the right to cancel unilaterally. I agree with Barnes SC that such a case was not pleaded and an argument on it is impermissible. Boda SC placed reliance on some allegations pleaded by the respondent that the dismissed employees were bound by the rules of the Fund. It may well be so, but such does not permit the respondent to act unilaterally. Changing the rules of the Fund within the provisions of the PFA does not mean that the Fund is licenced thereby to unilaterally change the terms and conditions of employment.

- [69] Accordingly, I conclude that the respondent has breached the employment contract. The issue of payment of proven damages is to be determined later.

Declaratory relief

⁶⁹ See *Primat v Nelson Mandela Bay Municipality* 2017 (5) SA 420 (SCA).

[70] The applicants, in addition, sought a declaratory relief. I fail to understand this relief. Much as this Court is empowered to make a declaratory order, I fail to see how this Court is empowered to issue a declaratory relief as couched by the applicants. The failures that the applicants contend happened, happened in 1994 or 1995. That being the case, why should a Court, 24 years later, issue a declaratory order? The delay is so unreasonably long that this Court cannot simply ignore it. A declaratory relief is akin to an interdict, it is aimed at preserving and/or protecting rights. Applying the common law undue delay rule, I refuse to exercise my discretion in favour of granting the declaratory relief⁷⁰. Corbett CJ in *Shoba v OC Temporary Police Camp, Wagendrift Dam*⁷¹, laid the following principle with regard to declaratory reliefs: -

“An existing or concrete dispute between persons is not a prerequisite for the exercise by the Court of its jurisdiction under this subsection, though the absence of such may, depending on the circumstances cause the Court to refuse to exercise its jurisdiction in a particular case ... But because it is not the function of the Court to act as an advisor, it is a requirement of the exercise of jurisdiction under this subsection that there should be interested parties upon whom the declaratory order would be binding ...”

[71] In *Proxi Smart Services (Pty) Ltd v The Law Society of SA and others*⁷², the High Court, correctly, in my view, held that the Court will not grant a declaratory order where the issue raised before it is hypothetical, abstract and academic, or where the legal position is clearly defined by statute. For these reasons, the declaratory reliefs are refused.

Unfair discrimination claims in terms of section 6 of the Employment Equity Act

[72] Both Bester and King lodged claims of unfair discrimination. The allegation being that when they were made to retire at the age of 60, they were

⁷⁰ See: *NAPTOSA and others v Minister of Education, Western Cape and others* (2001) 22 ILJ 889 (C).

⁷¹ 1995 (4) SA 1 (A) at 14F-I.

⁷² 2018 (5) SA 644 (GP).

subjected to an unfair discrimination. The respondent placed in dispute the fact that Bester and King had referred the dispute alleging unfair discrimination to the CCMA. In their testimonies, Bester and King did not prove that the unfair discrimination dispute was referred. In their statements of case they allege that a referral for the claim was made, yet the referral forms in the consolidated bundles reflect only an unfair dismissal claim referral. Section 10 (2) of the EEA provides that a party may refer a dispute in writing to the CCMA within six months after the act or omission that allegedly constitutes unfair discrimination. The act that allegedly constituted unfair discrimination is the dismissal on the basis of age. Bester was dismissed on 31 December 2016. Therefore, the dispute for unfair discrimination ought to have been referred to the CCMA in and around June 2017. There is no evidence of such a referral. King was dismissed on 31 January 2018. The dispute ought to have been referred in and around July 2018. There is no evidence of such a referral. The *onus* lied on both Bester and King to show that the jurisdictional requirements – the referral for conciliation – were met.

[73] In terms of section 10 (1) of the EEA, disputes about an unfair dismissal are excluded in the chapter. Therefore, a referral of an unfair dismissal dispute does not include a referral of an unfair discrimination dispute. It is by now settled law that this Court lacks jurisdiction to entertain a dispute if same has not been referred to conciliation as required by the EEA. Accordingly, these claims ought to be dismissed for want of jurisdiction. No order as to costs is made in this regard.

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

Order

1. The absolution from the instance application is confirmed to be withdrawn with costs associated to it, including the wasted costs of 2 and 3 December 2019 and such costs to include the employment of two counsel to be paid by the respondent

2. The breach of contract claims has not become prescribed and unenforceable in law and are thus upheld. The special plea of prescription is thus dismissed.
3. The declaratory relief sought by the dismissed employees is dismissed.
4. The claims of unfair discrimination as alleged by Bester and King are dismissed for want of jurisdiction.
5. The dismissals of De Beer; Bester and King are automatically unfair.
6. The issue of relief stands over to be determined in due course.
7. There is no order as to costs, other than the one relating to the absolution from the instance application.

GN Moshwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Advocate H Barnes SC with her Advocate I De Vos
Instructed by : Ruth Edmonds Attorneys, Observatory.

For the Respondent : Advocate F Boda SC with him Advocate G Van der Westhuizen.

Instructed by : Norton Rose Fulbright South Africa, Sandton.