



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 298/22

In the matter between:

MOTOR INDUSTRY STAFF ASSOCIATION

First Applicant

WILLEM FREDERICK LANDMAN

Second Applicant

and

**GREAT SOUTH AUTOBODY CC t/a GREAT SOUTH
PANELBEATERS**

Respondent

Case CCT 346/22

In the matter between:

**SOLIDARITY obo GERHARDUS VILJOEN
STRYDOM AND OTHERS**

Applicants

and

**STATE INFORMATION TECHNOLOGY
AGENCY SOC LIMITED**

Respondent

Neutral citation: *Motor Industry Staff Association and Another v Great South Autobody CC t/a Great South Panelbeaters; Solidarity obo Strydom and Others v State Information Technology Agency SOC Limited* [2024] ZACC 29

Coram: Zondo CJ, Chaskalson AJ, Dodson AJ, Kollapen J, Mathopo J, Rogers J, Schippers AJ, Tshiqi J and Van Zyl AJ

Judgments: Zondo CJ: [7] to [135]
Van Zyl AJ: [136] to [181]
Rogers J: [182] to [221]

Heard on: 2 November 2023

Decided on: 20 December 2024

Summary: Automatically unfair dismissal in terms of section 187(1)(f) of the Labour Relations Act 66 of 1995 — dismissal based on age — age discrimination — employees continuing in employment after agreed retirement age of 60 years

ORDER

In the *Landman* case, CCT 298/22:

On appeal from the Labour Appeal Court of South Africa (hearing an appeal from the Labour Court):

1. Leave to appeal is granted.
2. The appeal is dismissed.

In the *Solidarity* case, CCT 346/22:

On appeal from the Labour Court of South Africa:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The decision of the Labour Court is set aside and, for it, the following order is substituted:
“(a) The dismissals of Solidarity’s members involved in this case were automatically unfair.

- (b) The respondent must pay each Solidarity member involved in this case an amount equal to his or her remuneration for 24 months calculated at the rate of remuneration applicable to the employee concerned at the time of his or her dismissal. In the case of the dismissal of the late Ms du Plessis, the respondent shall pay Ms Lötter in her capacity as the executrix of the estate of the late Ms du Plessis an amount equal to 24 months' remuneration that was applicable to Ms du Plessis at the time of her dismissal."

JUDGMENT

THE COURT:

[1] These two cases concern the interpretation of section 187(2)(b) of the Labour Relations Act¹ (LRA). The delay in delivering judgment is in part attributable to the fact that the Court has been unable to reach agreement on the matter. The result is that there is no majority on the interpretation of the section. There are, however, majorities for the orders to be made in the two cases.

[2] On the interpretation of section 187(2)(b), four members of the Court (per Zondo CJ, with Chaskalson AJ, Mathopo J and Schippers AJ concurring) (first judgment) conclude that a dismissal on the basis of age is fair in terms of that section only if the employee's employment is terminated on the date upon which the employee attains his or her normal or agreed retirement age, unless the agreement or collective agreement provides that, where the employee reaches the normal or agreed retirement age on a date other than the last day of the month, his or her last working day or his or her retirement date will be the last day of the month. A termination on

¹ 66 of 1995.

the basis of age at a later date is automatically unfair. The first judgment holds that *Waco*² and the cases that have followed it were wrongly decided.

[3] A fifth member of the Court, Van Zyl AJ (second judgment), holds that upon the employee reaching his or her normal or agreed retirement age, the employer has an election whether to terminate the employee's employment on the basis of age. This election is governed by ordinary contractual principles. Such a termination, and notice thereof, may take place on a date later than the employee's normal or agreed retirement age. An employer may, however, be found to have elected *not* to terminate the employee's employment if the employer fails to exercise the termination election within a reasonable period of time. This depends, though, on whether the employer had knowledge of the correct legal position. The second judgment thus also disagrees with *Waco*, but for reasons differing from those contained in the first judgment.

[4] The remaining four members of the Court (per Rogers J, with Dodson AJ, Kollapen J and Tshiqi J concurring) (third judgment) hold that once an employee has reached his or her normal or agreed retirement age, section 187(2)(b) permits the employer, then or at any time thereafter, to terminate the employee's appointment on the basis of age, upon the giving of reasonable notice. The third judgment leaves open the question whether the employer is required to give the employee a hearing, since a decision on that point is unnecessary. It does, however, point to the desirability of affording such a hearing. The third judgment thus accords with the interpretation adopted in *Waco*, albeit for somewhat different reasons to those stated in that case.

² *Schweitzer v Waco Distributors (A Division of Voltex (Pty) Ltd)* (1998) 19 ILJ 1573 (LC) (*Waco*).

[5] As to the order to be made in the first case, CCT 298/2022 (*Landman*), there is unanimity that the case engages the Court's jurisdiction and that leave to appeal should be granted. The first judgment would have upheld the appeal and awarded Mr Landman compensation equal to 24 months' remuneration together with costs in the Labour Court, the Labour Appeal Court and this Court. The second and third judgments conclude, however and albeit for differing reasons, that the appeal should be dismissed with no order as to costs. The latter disposition of the case thus commands a majority.

[6] As to the order to be made in the second case, CCT 346/2024 (*Solidarity*), there is again unanimity that the case engages the Court's jurisdiction and that leave to appeal should be granted. The first judgment concludes – both as a matter of law based on its interpretation of section 187(2)(b) and in any event on the particular facts of the case – that the appeal should succeed, that the six employees in question should be awarded compensation equal to 24 months' remuneration and that the applicants should be granted costs in the Labour Court, the Labour Appeal Court and this Court. The second judgment would have dismissed the appeal with no order as to costs. Based on the particular facts of the case, the third judgment agrees with the disposition proposed in the first judgment, save that the third judgment would not grant the applicants costs in any of the Courts concerned. There is thus a majority in favour of upholding the appeal and awarding the employees compensation equal to 24 months' remuneration, but no majority in favour of awarding the applicants costs in any of the Courts concerned.

ZONDO CJ (Chaskalson AJ, Mathopo J and Schippers AJ concurring):

Introduction

[7] Section 187(1)(f) of the LRA provides:

“(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5, or, if the reason for the dismissal is –

...

- (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;”

[8] Section 187(2)(b) of the LRA makes provision for an exception to section 187(1)(f). It reads:

“(2) Despite subsection (1)(f) –

...

- (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.”

[9] Sitting as a Judge of the Labour Court in June 1998 – twenty six years ago and within a few months after my appointment as a Judge – I handed down a judgment on the meaning of section 187(2)(b) in a matter where an employee had been dismissed from his employment on the basis that he had reached an agreed retirement age. The dismissal in that case occurred more than a year after the employee had reached the agreed retirement age. That employee had challenged the dismissal and contended that his dismissal on the ground of his age was automatically unfair as contemplated in section 187(1)(f). Section 187(1)(f) provided then, as it still does today, that the dismissal of an employee on the ground of age constituted an automatically unfair dismissal. In other words, it prohibits the dismissal of an employee on the ground of age. However, section 187(2)(b) provided an exception to this prohibition. It provided then, as it still does today, that the dismissal of an employee is fair if he or

she “has reached the normal or agreed retirement age for persons in that capacity”. That was the case of *Waco*.

[10] In *Waco* I held that, once an employee had reached an agreed retirement age, his or her dismissal on the ground that he or she had reached an agreed retirement age was fair. I also held that, where, as in that case, an employee was not dismissed on reaching the agreed retirement age but was dismissed long after that date on the ground of age, the dismissal would be fair.

[11] *Waco* has been followed for the past 26 years and has been held to continue to be good law. Now, 26 years later, sitting as a member of this the apex Court of South Africa and as Chief Justice, I find myself taking part in the adjudication of a case which raises essentially the same question as was raised by *Waco* and, therefore, raises the question whether or not *Waco* was correctly decided.³ It was four years after this country had become a democracy and under two years since the adoption of the final Constitution when *Waco* was decided. *Tempus fugit*.⁴ While I dealt with the *Waco* case a few months into my career as a Judge, I find myself dealing with the present matter a few months before I retire from the Bench.⁵

[12] There are two applications for leave to appeal before us. They relate to the *Landman* case and the *Solidarity* case. I will start with the *Landman* case and will, thereafter, follow up with the *Solidarity* case.

³ In our law the fact that a matter raises a question of law that a Judge decided in one way in another case is not a ground for recusal.

⁴ Latin for: Time flies.

⁵ Although this judgment is to be handed down after I had retired, I prepared its first and second drafts when I was still in office as Chief Justice but was about to retire.

*The Landman case**The parties*

[13] This case was presented to the Labour Court as a stated case. The first applicant in the *Landman* case is the Motor Industry Staff Association which represents certain employees within the motor industry. The second applicant is Willem Frederick Landman (Mr Landman). Mr Landman is a member of the Motor Industry Association. The respondent is Great South Autobody CC t/a Great South Panelbeaters. The respondent is the former employer of Mr Landman. It is clear from the respondent's trading name that it runs a panel beating business.

The facts

[14] The agreed facts between the parties were the following:

- 14.1 Mr Landman commenced his employment with the respondent as a procurement officer during November 2007.
- 14.2 During January 2008, Mr Landman and the respondent concluded a written contract of employment.
- 14.3 In terms of the contract of employment the agreed retirement age for Mr Landman was 60 years of age. Clause 9 of the letter of appointment signed by both parties and thus constituting the contract of employment reads:

“Your retirement age will be 60 years of age.”

- 14.4 Mr Landman reached 60 years of age on 15 March 2018.
- 14.5 The respondent was aware on 15 March 2018 that Mr Landman was reaching the retirement age but did not dismiss him at that stage on the basis of the agreed retirement age. After he had reached the retirement age, Mr Landman continued to work as usual and the respondent continued to pay him as usual.

- 14.6 During 2018 the respondent never referred to Mr Landman's retirement age or the retirement clause.
- 14.7 On or about 14 January 2019 – ten months after Mr Landman had reached the agreed retirement age – the respondent gave Mr Landman a letter informing him that his services would terminate with effect from 12 February 2019 as he had reached the agreed retirement age of 60 years.
- 14.8 Mr Landman's last working day was 12 February 2019.
- 14.9 The respondent dismissed Mr Landman due to his age.
- 14.10 Mr Landman was a member of the Motor Industry Provident Fund. The Motor Industry Provident Fund Collective Agreement provided that the retirement age of an employee who was a member of that fund was 65 years.
- 14.11 To the extent that the employer was arguing that Mr Landman's agreed retirement age was 60, the inclusion of this statement in its statement of defence conflicts with that case or contention. However, it is accepted that the parties agreed that the agreed retirement age for Mr Landman was 60 years. Accordingly, the matter must be decided on the basis that the agreed retirement age applicable to Mr Landman was 60 years despite the provision of the Motor Industry Provident Fund Collective Agreement that the retirement age of employees who were members of that fund, like Mr Landman, was 65. I mention in passing that, in the light of the binding nature of a collective agreement as provided for in section 23 of the LRA, the existence of this provision in the collective agreement may well arguably be said to effectively vary or cancel the retirement age provision in the parties' contract of employment. However, in this case it is not necessary to decide this point.

[15] The applicant's case as set out in its pleadings was that by virtue of the parties' conduct as set out above:

- 15.1 a new (second) employment contract came into existence which contract did not contain an agreed retirement age, or at best for the respondent, contained a retirement age of 65 years; alternatively,
- 15.2 the respondent had waived its right to rely on the retirement age as stipulated in the written employment contract, alternatively, Mr Landman and the respondent had waived the retirement clause; further alternatively,
- 15.3 the parties tacitly amended the terms of the employment contract to the effect that the agreed retirement age of 60 years no longer applied; and,
- 15.4 by dismissing Mr Landman during February 2019 on the basis of his age, the respondent unfairly discriminated against him on the basis of his age and, as such, his dismissal constituted an automatically unfair dismissal in terms of section 187(1)(f) of the LRA.

[16] The respondent's defence was that:

- 16.1 Mr Landman's dismissal was fair pursuant to section 187(2)(b) of the LRA as he had reached the agreed retirement age;
- 16.2 essentially, an employer can retire an employee at any time after the employee has reached an agreed retirement age and such retirement will be protected by section 187(2)(b) of the LRA;
- 16.3 as at the date of Mr Landman's dismissal, his gross monthly remuneration was R34 800.00;
- 16.4 the Motor Industry Fund Collective Agreement provides that the retirement age of "an employee" who is a member of the Fund is 65 years of age.

[17] In terms of the stated case, the Court was required to decide whether a new employment contract came into existence between Mr Landman and the respondent. If the Court concluded that no new contract of employment came into existence after Mr Landman had reached the agreed retirement age of 60 years, the Court would decide whether the respondent waived its right to dismiss in terms of the retirement

clause in the written employment contract or whether, “alternatively [it] waived the rights and obligations that [arose] from the said clause as alleged in paragraph 12 of the statement of claim or alternatively [whether] Mr Landman and the respondent amended the written contract as alleged in paragraph 12 of the statement of claim”.

[18] In terms of the stated case, the Court was also required to decide whether Mr Landman’s dismissal by the respondent constituted an automatically unfair dismissal in terms of section 187(1)(f) of the LRA. The Court was additionally required to decide whether, by virtue of section 187(2)(b) of the LRA, the respondent was permitted in law during January 2019 to rely on the retirement age clause as contained in the employment contract to justify the dismissal.

[19] By way of relief the applicants sought an order for the payment of the maximum compensation in the event that the Court found in favour of the applicants. The parties agreed on certain facts that were relevant to the issue of compensation. These were that:

- 19.1 as at the time of the hearing of the matter in the Labour Court, Mr Landman had not as yet found another job;
- 19.2 Mr Landman was 62 years and 8 months old as at 27 November 2020 when the stated case was prepared;
- 19.3 due to Mr Landman’s retirement (dismissal) the Motor Industry Provident Fund paid Mr Landman R1 034 430,13 on 26 March 2019 in respect of provident fund benefits;
- 19.4 if the respondent had not dismissed Mr Landman when it did and had allowed him to continue working until he was 65 years of age, which was the retirement age provided for in the rules of the Motor Industry Provident Fund for its members, the latter Fund would have paid Mr Landman R1 674 127,56;
- 19.5 as at the date of his dismissal, Mr Landman’s gross salary was R34 800,00 per month.

Labour Court

[20] The stated case was argued before Van Niekerk J who followed the *Waco* decision and decided that the respondent was entitled to dismiss Mr Landman on the ground of having reached the agreed retirement age when the dismissal took place many months after Mr Landman had reached the agreed retirement age of 60 years. Accordingly, the Labour Court concluded that Mr Landman's dismissal was fair and dismissed the claim. However, it did not award any costs against Mr Landman. Mr Landman was aggrieved by the decision of the Labour Court and applied for leave to appeal to the Labour Appeal Court against the decision of the Labour Court. The Labour Court granted the applicants leave to appeal to the Labour Appeal Court.

Labour Appeal Court

[21] The applicants appealed to the Labour Appeal Court. The Labour Appeal Court's judgment was written by Kathree-Setiloane AJA and concurred in by Waglay JP and Coppin JA. The Labour Appeal Court upheld the conclusions of the Labour Court and dismissed the appeal. The Labour Appeal Court also did not make any order as to costs.

*In this Court**Jurisdiction*

[22] This Court has jurisdiction because the matter requires an interpretation of the LRA which is a constitutional issue.⁶ The main constitutional issue is whether, upon a proper construction of section 187(2)(b) of the LRA, an employer may dismiss an employee who has been allowed to work beyond an agreed retirement age on the basis that he or she has reached the agreed retirement age. Put differently, the question is whether an employer who does not dismiss an employee when the latter reaches an agreed retirement age but dismisses him or her after the employee has worked beyond such agreed age may rely on section 187(2)(b) as a defence to a claim that the

⁶ *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (2) BCLR 154 (CC); 2003 (3) SA 1 (CC) (*NEHAWU*).

dismissal is automatically unfair. In this case, Mr Landman was allowed to work for many months after he had reached the agreed retirement age before he was dismissed on the basis that he had reached the agreed retirement age. Dismissal on the ground of age also constitutes a limitation of the right not to be unfairly discriminated against on the ground of age as entrenched in section 9 of the Constitution. The constitutional validity of section 187(2)(b) was not challenged in these proceedings.

Application for leave to appeal

[23] This Court grants leave to appeal when it is in the interests of justice to do so. Some of the factors relevant to whether this Court should grant leave to appeal are dealt with below:

23.1 Whether the issue or issues that the Court will have to decide in the appeal, if it grants leave, will affect only the parties before it or whether it will affect significant sections of society. If the judgment of the Court would impact many people, that would be a factor that favours that leave be granted. In the present case there can be no doubt that the question whether an employer who does not dismiss or retire an employee when he or she reaches his or her agreed retirement age but dismisses him or her some time after that date may invoke section 187(2)(b) as a defence.

23.2 Whether there are reasonable prospects of success for the applicants if leave to appeal is granted. The stronger the prospects of success for the applicants the stronger the case for leave to appeal to be granted. In the present case I consider that there are reasonable prospects of success for the applicants despite the fact that on the face of it my judgment in *Waco* – which has stood for 26 years – appears to stand in the applicants’ way. I say this because a reading of *Waco* reveals that, in arriving at the decision in that case, the Labour Court did not consider the provisions of section 39(2) of the Constitution which requires that legislation be interpreted to give effect to the spirit, purport and objects

of the Bill of Rights. It may well be that, when section 187(2)(b) is interpreted with section 39(2) in mind, a different meaning will be given to section 187(2)(b) than the one that the Labour Court gave in Waco.

23.3 The importance of the matter; there can be no doubt that this matter is important and raises important issues.

[24] I conclude that, given the above factors, it is in the interests of justice that leave to appeal be granted.

The appeal

[25] It is necessary to set out the constitutional and statutory framework relevant to the determination of the issue in this appeal. The starting point is the Constitution.

Constitutional and statutory framework

[26] Section 1 of the Constitution reads as follows in so far as it is relevant:

- “1. The Republic of South Africa is one, sovereign, democratic state founded on the following values:
 - (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
 - ...
 - (c) Supremacy of the Constitution and rule of law.
 - ...”

Section 7(1) of the Constitution – which is under the Bill of Rights – provides:

“The Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all the people in our country and affirms the democratic values of human dignity, equality and freedom.”

Section 9 of the Constitution deals with equality. It provides:

- “(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

[27] From the above, it will be seen that section 9(1) of the Constitution provides that “everyone is equal before the law and has the right to equal protection and benefit of the law”. Section 9(3) and (4) prohibits, respectively, the state and any person, directly or indirectly, from unfairly discriminating against anyone on the ground of, among others, age. Section 9(5) is clear. “Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair”. One of the grounds listed in section 9(3) of the Constitution is age.

[28] Section 6(1) and (2) of the Employment Equity Act⁷ reads as follows:

“6 Prohibition of unfair discrimination

⁷ 55 of 1998.

- (1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, *age*, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.
- (2) It is not unfair discrimination to —
 - (a) take affirmative action measures consistent with the purpose of this Act; or
 - (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.”

[29] Section 10 of the Constitution provides:

“Everyone has inherent dignity and the right to have their dignity respected and protected.”

Section 23(1) of the Constitution reads:

“Everyone has the right to fair labour practices.”

[30] The LRA is legislation that was enacted to give effect to, among others, section 23 of the Constitution. Section 39(2) of the Constitution deals with the interpretation of legislation. It reads:

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

In *Hyundai*⁸ this Court explained the spirit, purport and objects of the Bill of Rights thus:

⁸ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Limited: In re Hyundai Motor Distributors (Pty) Limited v Smit N.O.* [2000] ZACC 12; 2000 (10) BCLR 1079; 2001 (1) SA 545 (CC) (*Hyundai*).

“[22] The purport and objects of the Constitution find expression in section 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.”

[31] The purpose of the LRA, as set out in section 1 thereof is important when a Court is required to interpret the LRA. That purpose is to “advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects” of the LRA. Those primary objects include:

“(a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution.”

[32] Section 185 of the LRA provides for a right not to be unfairly dismissed and a right not to be subjected to an unfair labour practice. Section 185 reads:

“185 Right not to be unfairly dismissed or subjected to unfair labour practice:

Every employee has the right not to be –

- (a) unfairly dismissed; and
- (b) subjected to unfair labour practice.”

Section 186 defines “dismissal”.⁹

[33] Section 187(1) of the LRA deals with automatically unfair dismissals. Section 187(1)(f) reads:

⁹ Section 186 is quoted later in this judgment. See [36] below.

“187 Automatically unfair dismissals

- (1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is—

...

- (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;

...”

Section 187(2)(b) of the LRA reads:

- “(2) Despite subsection (1)(f)—

...

- (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.”

[34] Section 188 deals with dismissals other than automatically unfair dismissals. That is “other unfair dismissals” as the heading to section 188 calls them. Section 188 reads:

“188 Other unfair dismissals

- (1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove—

- (a) that the reason for dismissal is a fair reason—
- (i) related to the employee's conduct or capacity;
 - or
 - (ii) based on the employer's operational requirements; and

- (b) that the dismissal was effected in accordance with a fair procedure.
- (2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.”

[35] Against the above constitutional and statutory background, it is now necessary to consider the provisions of sections 187(1)(f) and 187(2)(b) of the LRA to answer the question: is a dismissal of an employee by the employer on the ground that the employee has reached the normal or agreed retirement age automatically unfair when the dismissal takes place after the employee has been allowed to work beyond the day on which he or she reached the retirement age? In other words, may the employer rely on section 187(2)(b) as a defence to justify such a dismissal?

[36] Section 186 of the LRA defines “dismissal” and reads:

“186 Meaning of dismissal and unfair labour practice

- (1) ‘Dismissal’ means that—
 - (a) an employer has terminated employment with or without notice;
 - (b) an employee employed in terms of a fixed-term contract of employment reasonably expected the employer—
 - (i) to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or
 - (ii) to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed-term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee;

- (c) an employer refused to allow an employee to resume work after she—
 - (i) took maternity leave in terms of any law, collective agreement or her contract of employment; or
 - ...
- (d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or
- (e) an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee; or
- (f) an employee terminated employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.”

[37] This was not the definition of “dismissal” at the time of the *Waco* judgment. The definition in section 186(1) then was:

“186 “dismissal” means that –

- (a) an employer has terminated a contract of employment with or without notice;
- (b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it;
- (c) an employer refused to allow an employee to resume work after she—
 - (i) took maternity leave in terms of any law, collective agreement or her contract of employment; or

- (ii) was absent from work for up to four weeks before the expected date, and up to eight weeks after the actual date, of the birth of her child;
- (d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or
- (e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.”

[38] In *Waco*¹⁰ the employee had gone beyond the agreed retirement age by about three years. The agreed retirement age was 65 and he had turned 65 years of age in 1994 and, after reaching the agreed retirement age, the employee had continued to work as usual. He was 67 years of age when he was dismissed. I held in *Waco* that section 187(2)(b) was applicable to that case.¹¹ This meant that, where an employee had gone beyond the agreed retirement age and the employer dismissed him or her on the ground of having reached the agreed retirement age, the employer may rely upon section 187(2)(b) as a defence to an automatically unfair dismissal claim. This meant that the dismissal would be regarded as fair.

[39] In *Waco* I had this to say:

“[16] The conclusion that section 187(2)(b) applies in this case necessarily means that the dismissal of the applicant on grounds of age is not automatically unfair and, therefore, section 187(1)(f) finds no application in the matter. That, however, is not necessarily the end of the matter as the next question is whether the dismissal falls into the category of simply unfair dismissals. If the dismissal is not an automatically unfair one, it may be that it is unfair on grounds other than the grounds referred to in section 187(1). Whether or not the fact that an employee has gone past the agreed or normal retirement age is

¹⁰ *Waco* above n 2.

¹¹ *Id* at para 14.

a fair reason to dismiss depends, in my view, on the meaning of the provisions of section 187(2)(b). I turn to consider those provisions.”¹²

[40] I also said in *Waco*:

“[17] Initially I thought the provisions of section 187(2)(b) could not apply to a matter such as this one where the employee has not only reached but has gone beyond the agreed or normal retirement age. The basis for this thought was that to apply section 187(2)(b) when the employee has gone past the agreed or normal retirement age would be extremely unfair and inequitable because the employer would be dismissing the employee purely on grounds of age and would be doing so in circumstances where there is no complaint that the age of the applicant is affecting his job performance or competence adversely nor would it be in circumstances where there is a complaint that the operational requirements of the employer are adversely affected by the employee’s age.

[18] It seemed to me that whereas prior to an employee reaching the agreed or normal retirement age, a fair reason for dismissal is required to exist before there can even be talk of a fair dismissal that right of an employee to the existence of a fair reason before he can be dismissed comes to an end upon his reaching the retirement age and that there is no such right after the retirement age. I thought that the legislature could never have intended to enact provisions with such far-reaching implications without making that intention clear. Not believing that such a serious inroad into the employee’s right to the existence of a fair reason to dismiss before he can be dismissed could have been intended by the legislature in enacting section 187(2)(b), it appeared to me that section 187(2)(b) applied to a situation where the employee was dismissed on reaching the agreed or normal retirement age and not where he has gone beyond that age.

[19] Ultimately I became convinced that section 187(2)(b) could not apply where a contract of employment came to an end on the employee reaching the normal or agreed retirement age because, if one

¹² Id at para 16.

considers the definition of the word ‘dismissal’ in section 186 carefully, it cannot be said that, in such a situation, the employee is being dismissed. This is so because in that situation the contract of employment comes to an end by the effluxion of time on the employee reaching that age without the employer having to do anything.”¹³

[41] I wish to emphasise the point that there can be a dismissal of an employee when he or she reaches the agreed retirement age where the terms of the contract of employment are not such as to result in the contract of employment coming to an end by the effluxion of time when the employee reaches the agreed retirement age. That means that, if the situation is not one where the contract of employment comes to an end by the effluxion of time, there may be a dismissal of the employee when he or she reaches the normal or agreed retirement age.

[42] Another issue that arose for determination was whether an employer who contemplates dismissing an employee on the ground of age when the employee has long gone beyond the agreed retirement age is obliged to comply with a fair procedure before dismissing the employee. I held in *Waco* that in such a case there was no obligation on the employer to comply with a fair procedure other than giving a contractual notice. I shall deal with this issue when I deal with the *Solidarity* matter later in this judgment.

[43] There are at least three ways in which the employment contract between an employer and an employee may come to an end on the basis of retirement. The first is where the employer and employee are parties to a fixed term contract of employment which provides that the contract will come to an end upon the employee reaching the normal or agreed retirement age. In such a case the contract expires on the day on which the employee reaches the normal or agreed retirement age with neither the employer nor employee having to do anything to bring the contract of employment to

¹³ Id at paras 17-9.

an end. In such a case the contract of employment between the parties expires by the effluxion of time upon the employee reaching the agreed retirement age.

[44] The second and third ways relate to a situation where the contract of employment between an employer and an employee is of an indefinite nature and contains an agreed retirement age. Sometimes the agreed retirement age will be contained in the contract of employment but sometimes it will be contained in a separate document. Such separate document could be the pension fund rules or provident fund rules applicable to the employer and employee. In such a case, the contract of employment between the parties does not come to an end by the effluxion of time or by the operation of law, somebody has to do something to bring about the end of the contract. In such a case, the employer may take the decision to dismiss the employee on the basis of the latter reaching the agreed retirement age. That is the second way. The employee may also terminate the contract of employment on the basis of reaching the agreed retirement age by resigning or retiring. That is the third way.

The meaning of section 187(2)(b)

[45] In order to determine this appeal, it is important to understand the meaning of section 187(2)(b). To understand the meaning of section 187(2)(b), it is important to understand the phrase “. . . if the employee has reached the normal or agreed retirement age . . .”. To determine the meaning of this phrase, an understanding of the verb “reach” the verb “retire” and the noun “retirement” is important.

[46] What does reaching a certain age mean? The Cambridge International Dictionary of English describes the verb “reach” as meaning “to arrive at or come to”. Reaching a certain age means that the person has reached his or her birthday that renders him or her to be a certain age.

[47] What does to “retire” mean? What does “retirement” mean? The South African Concise Oxford Dictionary gives as one of the meanings of the verb

“retire” as “leave one’s job and cease to work, especially because one has *reached* a particular age.” (Emphasis added.) There are two very interesting features about the meaning of the verb “retire” in the context of the present case. Firstly, it is that it clearly says “retire” means leaving your job and ceasing to work. Secondly, it uses the language and tense used in section 187(2)(b) when it says “especially because one has reached” a particular “age”.

[48] One of the meanings that the Cambridge International Dictionary of English gives for the verb “retire” is “to (cause to) leave your job or stop working because of old age or ill-health”. It gives two sentences that are apposite to the present case. The one sentence is: “He is due to retire as the Chief Executive next year”. The other is: “If an employer retires an unwanted employee, they dismiss that person”. The same dictionary gives the following as the meaning of retirement: “Retirement is the point at which someone stops working or the period in their life when they stop working”.

[49] When an employer dismisses an employee because the employee has reached the retirement age, it can also be said that he or she retires the employee. When an employee terminates his or her contract of employment based on age when he or she has reached the retirement age, he or she can also be said to retire. We can say with confidence that, when one talks about the concept of reaching an agreed retirement age, one is talking about a point at which it has been agreed that an employee will retire or will be retired or must leave his or her job and cease working.

[50] Going back to the meaning of the verb “reach”, in the context of reaching a certain age the word means arriving at a certain age or coming to a certain age where the employee will leave her job and cease to work. Given the meaning of the two verbs, “reach” and “retire” in section 187(2)(b) the phrase “. . . *if the employee has reached the normal or agreed retirement age . . .*” refers to an employee ceasing to work or leaving his or her job on grounds of age when he or she arrives at or comes to a certain age that has been agreed upon as the year for the employee to leave work. Agreed retirement age is the agreed point at which retirement will happen. It is an

agreement about a common point at which employees will retire or will be retired. The term “agreed retirement age” means that the parties have agreed that a certain age is the age when employees will retire or will be retired.

[51] Another important consideration is the purpose of fixing or prescribing or agreeing upon a retirement age. What do the parties intend in fixing or agreeing upon a retirement age? When an employer and an employee agree upon a retirement age, for example 65 years of age, the purpose is that, when the employee reaches age 65, he or she will retire. It would serve no purpose for a collective agreement or any agreement to fix a retirement age applicable to a certain employer or group of employers and their employees if the employers are free to retire their employees then if they like or to retire them at any other time thereafter as they please. Such agreed retirement age would in due course become superfluous or redundant. Imagine an employer who decides unilaterally that the agreed retirement age does not suit him and, therefore, never retires his or her employees when they reach the agreed retirement age but always retires them two years after the agreed retirement age.

[52] If the agreed retirement age is 60 years but the employer is free to retire his employees who are subject to that agreed retirement age at 63, then, if he ends up normally retiring his employees at 63, then age 63 will become the normal retirement age as contemplated in section 187(2)(b). What I have just described immediately above can happen if the third judgment’s interpretation is to be the law. The difficulty with the state of affairs that such interpretation creates is this: Section 187(2)(b) refers to both a “normal” and an “agreed” “retirement age”. The “or” between the words “normal” and “agreed” in section 187(2)(b) is disjunctive. The section contemplates that in an establishment there will either be a normal retirement age or an agreed retirement age for employees and that the same employees cannot be subject to both an agreed retirement age and a normal retirement age. A normal retirement age applies where there is no agreed retirement age. To subject employees to both a normal and an agreed retirement age at the same time is the effect of both the judgment (second judgment) by my Colleague, Van Zyl AJ, and the judgment (third

judgment) by my Colleague, Rogers J, both of which I have had the pleasure of reading.

[53] Once an employee is subject to an agreed retirement age, a normal retirement age does not apply. Similarly, if an employee is subject to a normal retirement age because he or she has not agreed to any retirement age, there is no agreed retirement age applicable to him or her. Therefore, as I have said, an employee cannot be subjected to both at the same time. In my view, the interpretation adopted by the third judgment is not what is contemplated by the section.

[54] The second judgment's interpretation could also result in employees being subjected to both an agreed retirement age and a normal retirement age at the same time. The second judgment is to the effect that, where there is an agreed retirement age, an employer is free to dismiss an employee (for retirement purposes) when the employee reaches that age, for example, . on his or her birthday or to dismiss him or her within a reasonable time after that date. It is not clear to me how long the delay would have to be before the delay can be said to be unreasonable. However, if a year later were to fall within the reasonable period, then an employer whose employees are subject to an agreed retirement age of 60 could also, of course, be subject to a normal retirement age of 61 if the employer develops a norm to retire his employees at 61 despite the existence of an agreed retirement age of 60 in the organisation.

[55] Furthermore, imagine an industry where there are about 200 employers all of whom are bound by a collective agreement which provides that the retirement age is 65 years. If every one of the 200 employers is free to disregard the agreed retirement age and choose an age of their choice as the age at which they will retire their employees and still be able to invoke the protection of section 187(2)(b), that would render the agreed retirement age in the collective agreement redundant. If trade unions in an industry or sector concluded a collective agreement with a provision for an agreed retirement age of, for example 65 years of age, and employers simply ignored age 65 for the purposes of the retirement of their employees and they retired

employees at any ages of their choice between 65 and, for example, 75, trade unions would be up in arms against those employers for ignoring a collective agreement.

[56] The third judgment's interpretation of section 187(2)(b) effectively means that it would be in order for employers who are party to agreements on retirement ages to disregard the agreed retirement age and behave as if they are in an industry that has no agreed retirement age. I can see neither sense nor logic in an employer or group of employers in an industry having an agreed retirement age for employees if every employer would be allowed to ignore the agreed retirement age and simply retire their employees at any age beyond the particular agreed retirement age. The interpretation adopted by the third judgment has this effect.

[57] Prior to reaching an agreed retirement age, an employee may not be dismissed, on the ground of age. If he or she is dismissed on such a ground, the dismissal would constitute an automatically unfair dismissal in terms of section 187(1)(f) of the LRA. It would also constitute unfair discrimination on the basis of age and a violation of section 6(1) of the Employment Equity Act where the Employment Equity Act applies. If there is an agreed retirement age and the employer dismisses the employee *upon the latter reaching the agreed retirement age*, section 187(2)(b) of the LRA applies and the dismissal is fair. There is also no obligation on the employer to afford the employee procedural fairness in such a case because the parties agreed that the employee's contract of employment would be terminated upon him or her reaching the agreed retirement age. The employer's decision in such a case does not adversely affect any of the employee's rights because the employee has previously agreed that, when he or she reaches that age, the employer may dismiss him or her. Under the *Solidarity* case, which I deal with later in this judgment, I also deal with the statutory basis for this proposition.

[58] The approach adopted in *Waco* is that an employee who reaches the agreed retirement age but continues to work as usual beyond the agreed retirement age may still be dismissed by the employer on the basis that the employee has reached the

agreed retirement age and such dismissal will be fair. On that approach, the employer may dismiss the employee a few days or a few weeks or months or even some years after the employee reached the agreed retirement age and rely on section 187(2)(b) to defend the fairness of the dismissal. In *Waco* the Labour Court held that in a case where an employer dismissed an employee after he or she has passed the agreed retirement age, there was no duty on the part of the employer to hear the employee.¹⁴ This finding in *Waco* meant that except for the obligation to give a contractual notice of the termination of the contract of employment, the employer had no obligation to follow a fair procedure before dismissing an employee on such a ground in such circumstances.¹⁵

[59] Let me deal with the *Waco* approach to the substantive fairness of a dismissal where the employer dismisses an employee beyond the agreed retirement age on the ground that the employee has reached the agreed retirement age. The *Waco* approach is open to abuse because the employer may dismiss the employee for another reason but rely on the fact that the employee “has reached” the agreed retirement age to justify the dismissal. For example, there could be a lawful or protected strike in which workers who have worked beyond the agreed retirement age participate and the employer may dismiss those employees and say it is because they have reached the agreed retirement age when it is in fact dismissing them for their role in the strike. If there were many such employees and they were dismissed more or less at the same time, it may be that a Court could be persuaded that the reason for their dismissal is their role in the strike and not that they had reached the agreed retirement age. However, if they were dismissed some time after the strike, it may be difficult to show that the reason for the dismissal is their role in the strike even though in truth the reason for their dismissal is their role in the strike.

[60] Another scenario in which the *Waco* approach would be open to abuse by an employer relates to retrenchment. Section 41(2) of the Basic Conditions of

¹⁴ *Waco* above n 2 at para 26.

¹⁵ *Waco* above n 2 at para 33.

Employment Act¹⁶ places an obligation on an employer who retrenches (i.e. dismisses for its operational requirements) an employee to pay such employee severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer unless the employer has been exempted from this obligation.¹⁷ This means that, for example, if an employee has been with the same employer for, for example, 24 years, the severance pay will be equal to remuneration for 24 weeks which is six months' remuneration. If the employer has reason to retrench workers, it would first dismiss those who have gone beyond the agreed retirement age and say the reason for the dismissal is that the employees concerned have reached the normal or agreed retirement age and they are not being retrenched. The employer will know that, if it gives this reason as the reason for the dismissal and says that the workers are not being retrenched, it will not be obliged to pay severance pay to them. The employer will know that, if it says that those employees are being retrenched, it will be obliged to pay severance pay. Such employees are likely to have served the employer for many years and the amounts of severance pay payable to them if they were retrenched after many years of service could be huge.

[61] Another way in which an employer may abuse the interpretation of section 187(2)(b) adopted by *Waco* and by the third judgment is this. If an employer suspects that an employee who has reached the normal or agreed retirement age (as interpreted by *Waco* and the third judgment) of having committed misconduct but either cannot prove it in a disciplinary hearing or does not want to go through the "trouble" of a disciplinary process, it will be able to just dismiss or retire such employee and say the reason is that the employee has reached the normal or agreed retirement age and not that the employee is dismissed for misconduct. The employer would know that, if it gave the reason that the employee has reached the normal or

¹⁶ Act 75 of 1997.

¹⁷ Section 41(2) of the Basic Conditions of Employment Act reads:

"An employer must pay an employee who is dismissed for reasons based on the employer's operational requirements severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer, calculated in accordance with section 35."

agreed retirement age, it would be protected by section 187(2)(b) which would be unlikely to result in a legal challenge whereas, if it said that the reason for dismissal was misconduct, that could be challenged in arbitration.

[62] What also exacerbates the situation is that the playing fields are significantly uneven. An example of this unequal bargaining power is that the employer may hold on to the employee for as long as necessary subject to the employee's willingness to continue working. However, for the employee the employment could be terminated on a week's or month's notice. An employee in such a situation of vulnerability will not be able to plan his or her future or finances properly because, on the approach of the second and third judgments, it is the prerogative of the employer to unilaterally decide when the employee must stop working after he or she has reached his or her normal or agreed retirement age birthday. So, while in this situation, it could be said that either party may terminate the contract of employment on a week's or a month's notice, in truth and reality this is a power that would mostly be exercised by the employer and not the employee. This means that an interpretation of section 187(2)(b) that allows the employer to rely on this provision as a defence when it dismisses an employee after the employee has reached the normal or agreed retirement age renders such category of employees vulnerable to abuse by the employer.

[63] The second and third judgments reject this point on the basis that, if it is suspected that the reason for dismissal given by the employer is not the true reason, what the true reason is will be determined by the court or an arbitrator, as the case may be, when the fairness of the dismissal is challenged. My difficulty with this criticism is this. Let us imagine that, one or two employees who have worked beyond their agreed retirement birthday played a prominent role in organising a protected (lawful) and very effective strike against the employer. After the strike has ended, the employer dismisses them or retires them on the ground that they have reached the normal or agreed retirement age. In such a case, how are employees going to prove that the reason the employer gives for the dismissal of the employees concerned is not the true reason?

[64] If you accuse the employer of actually dismissing them for their role in organising a very effective strike against him, the employer will say: “But the strike they organised was a protected strike and I know that I cannot dismiss them for that. I am telling you that, in terms of the law, once they have worked beyond their retirement age birthday, I may dismiss them on the ground that they have reached the agreed retirement age at any time. It is up to me when I do it.” If the employer says this, it will be almost impossible for anybody to prove that the true reason for the dismissal of the employees is not the one advanced by the employer. So, the employer will be able to abuse the interpretation adopted by the second and third judgments and get away with it.

[65] The interpretation of section 187(2)(b) that allows the employer to choose its own time when to dismiss an employee who has reached the agreed retirement age should be avoided because it is open to abuse by employers. In any event, section 187(2)(b) must be interpreted restrictively because it is a provision that limits the right not to be unfairly discriminated against on the ground of age as entrenched in section 9(3) and (4) of the Constitution. Section 9(5) provides that such discrimination is unfair unless it is established that it is fair. That means that it *prima facie* constitutes unfair discrimination. The *Waco* interpretation places employees who work beyond the agreed retirement age in a vulnerable position. It weakens the position of workers more than it is already weakened. It places the employer in an unduly strong position in relation to workers in such circumstances.

[66] The approach adopted in the second judgment does not focus on the correct interpretation of section 187(2)(b) but rather on whether the employer can be said to have waived his right to dismiss the employee when he did not dismiss him (i.e. the employee) at the time he reached his normal or agreed retirement age. The approach of the second judgment appears to be based, to a large extent, on principles of common law that favour the employer rather than adopt an approach that seeks to take into account the interests of both employers and employees.

[67] The second judgment fails to give effect to the balance which this Court directed in *NEHAWU*¹⁸ should be struck in interpreting the LRA to give effect to the concept of fair labour practices. In *NEHAWU* this Court had this to say which I find important as we consider the meaning of section 187(2)(b):

“[T]he focus of section 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship *on terms that are fair to both*. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed.” [Emphasis added.]

The third judgment also suffers from the same failure as the second judgment in this regard.

[68] Another interpretation of section 187(2)(b) must be sought if there is one that would not strain the language of the section. The *Waco* interpretation is based on interpreting the phrase “has reached the normal or agreed retirement age. . .” in section 187(2)(b) to be wide enough to include the dismissal of an employee long after the employee has gone beyond the agreed retirement age. In other words, on that interpretation, even after a year or two or even three years since the employee reached the agreed retirement age, the employer would be entitled to justify the dismissal with reference to the fact that the employee has reached the agreed retirement age and, therefore, may still be dismissed and in terms of section 187(2)(b) the dismissal would be fair.

¹⁸ *NEHAWU* above n 6.

[69] Another interpretation of the phrase “has reached the normal retirement or agreed retirement age” is that this phrase refers to a situation where an employee reaches or has just reached the agreed retirement age but not one who has worked beyond the day when he or she reached the agreed retirement age. That means that the employee must retire on the day on which he or she reaches the agreed retirement age. In terms of this interpretation the dismissal which section 187(2)(b) says is fair is a dismissal based on age that is effected on the day when the employee reaches the retirement age. It is in respect of such a dismissal that an employer may use section 187(2)(b) as a shield or as protection against a claim for an automatically unfair dismissal. That, in my view, is the correct interpretation of section 187(2)(b) because it heeds the injunction of section 39(2) of the Constitution.

[70] The construction of section 187(2)(b) adopted in this judgment gives effect to the spirit, purport and objects of the Bill of Rights. It is consistent with the right to human dignity and promotes the right to fair labour practice as enshrined in our Constitution. It limits the situations in which discrimination on grounds of age is permitted – which is *prima facie* unfair discrimination – to the absolute minimum. The *Waco* interpretation expands the category of employees on whom this discrimination on grounds of age is visited. The interpretation that *Waco* gave to section 187(2)(b) is not consistent with the fundamental values of our Constitution and is not to be preferred. It allows for the abuse of section 187(2)(b) of the LRA. In this regard I emphasise that in *Waco* the Labour Court did not heed the injunction in section 39(2) concerning the interpretation of legislation. In part this may well have been because our Constitution was relatively new at the time. It was less than two years old.

[71] The interpretation adopted in this judgment limits the period when an employer may dismiss an employee on grounds of age. There is also no room for the employer to abuse the section 187(2)(b) defence or protection. It is only available on the day that the employee reaches the agreed retirement age and on no other day. This will not cause any unfairness to employers because an employer will be able to keep an

eye on when each employee will reach the agreed retirement age and prepare for that eventuality in good time. The employee will also be able to plan his or her life properly knowing exactly when he or she will retire. The employer has to give the employee notice of the termination of the contract of employment or notice pay in lieu of notice when the contract of employment will not be coming to an end by the effluxion of time or by the operation of law.

[72] Obviously, it is up to the employer and the employee to change the agreed retirement age or to conclude a new contract of employment that will govern the period after the agreed retirement age. The conclusion reached above renders it unnecessary to decide the question whether or not an employer who allows an employee who has reached an agreed retirement age to continue working as usual beyond the agreed retirement age waives the right to rely on section 187(2)(b) of the LRA to dismiss the employee. The position is simply that the defence or protection of section 187(2)(b) is only available to an employer who dismisses the employee on the latter reaching the agreed retirement age. That happens if the dismissal is effected on the day the employee turns 60 years of age if the normal or agreed retirement age is 60 years. It is not available to an employer who allows the employee to work beyond the agreed retirement age and dismisses the employee thereafter on the ground that the employee has reached the agreed retirement age. However, if the contract of employment or a collective agreement that makes provision for the normal or agreed retirement age provides that the employee will retire or will be retired on the last day of the month in which the employee reached the normal or agreed retirement age, that will not offend the interpretation of section 187(2)(b) adopted in this judgment.

[73] The result of the above is that the section 187(2)(b) protection or defence upon which the respondent relied to justify Mr Landman's dismissal was no longer available to the respondent when it dismissed Mr Landman nine months after he had reached the agreed retirement age. This, therefore, means that Mr Landman's dismissal is not protected by section 187(2)(b) and there is no other justification advanced for his dismissal other than age. There is no complaint that, because of age,

Mr Landman could no longer perform his duties satisfactorily. Accordingly, the dismissal constitutes unfair discrimination and is a violation of section 6(1) of the Employment Equity Act. This also means that the dismissal was automatically unfair as contemplated in section 187(1)(f) of the LRA. Therefore, the appeal against the decision that the dismissal was fair must succeed.

Remedy

[74] Mr Landman does not seek reinstatement. He only seeks maximum compensation applicable to an employee whose dismissal is found to have been automatically unfair. That is an amount equal to the employee's remuneration over a period of 24 months. If Mr Landman had sought reinstatement, it is likely that an order of reinstatement with retrospective effect would have been granted. In financial terms that would have cost the respondent far more than the compensation equal to 24 months' remuneration. By not claiming reinstatement in a case where his performance of work was not adversely affected by his age, Mr Landman has ensured that the respondent does not have to pay backpay that in terms of retrospectivity of reinstatement would have been more than 24 months' remuneration.

[75] If Mr Landman had sought reinstatement, I cannot see what could have stood in the way of the Court granting such an order. Furthermore, it was not the respondent's case that at the time of Mr Landman's dismissal, he was no longer able to perform his duties satisfactorily as a result of advanced age. That being the case, it is fair to infer that Mr Landman could have continued working for some years before he could reach the point where, as a result of advanced age, he would no longer be able to perform his duties satisfactorily. By dismissing him at the time it did, the respondent deprived Mr Landman of the opportunity of working for at least a few more years before he could reach that point.

[76] Furthermore, it was common cause that the Motor Industry Provident Fund paid Mr Landman R1 034 430,13 but that, if he had been allowed to work until he retired when he was 65 years of age, he would have been paid R1 674 127,56. This

means that Mr Landman was denied the opportunity to earn an extra R600 000,00. Therefore, compensation that is equal to 24 months' remuneration is not excessive. Mr Landman also did not claim any interest to be added to the amounts of this compensation. That has also benefitted the respondent. Furthermore, it was common cause that as at the time of the trial Mr Landman had not as yet found another job. The trial in the Labour Court was on 26 November 2020. That was just under two years since dismissal. He was dismissed on 12 February 2019. In my view, it accords with the dictates of fairness and equity that the maximum amount of compensation be awarded to Mr Landman.

Costs

[77] With regards to costs the law is that in labour matters whether or not costs should be awarded to the successful party depends on what the requirements of law and fairness dictate. They do not automatically follow the result. Yet, a party who is successful must not be placed in a situation where, if he or she is not granted costs, the costs of pursuing the matter will be such that he or she is hardly left with anything. The Court must try and strike a fair balance. A dismissal for a reason listed in section 187(1) of the LRA is a serious violation of the employee's rights. Furthermore, in this case the employer has really benefitted from the fact that Mr Landman did not seek reinstatement. In my view, the respondent should be ordered to pay the applicants' costs in all the Courts.

[78] In the circumstances, the appeal should be upheld and the decisions of the Labour Appeal Court and the Labour Court should be set aside. The order of the Labour Court should be replaced with one that is consistent with the above conclusions.

The Solidarity Case

[79] In the *Solidarity* matter, Solidarity, a registered trade union, makes an application for leave to appeal against a decision of the Labour Appeal Court refusing

it leave to appeal against a judgment and order of the Labour Court. Solidarity brings that application on behalf of six individuals who were its members and were dismissed by the State Information Technology Agency SOC Ltd (SITA), the respondent in the *Solidarity* matter. I shall refer to the respondent as either the respondent or the SITA.

[80] The six individuals on whose behalf Solidarity brings the application are:

- (a) Mr Christopher Gerhadus Viljoen Strydom;
- (b) Mr Alwyn Enslin;
- (c) Mr Andreas Olivier;
- (d) Ms Wilma Ena Smith;
- (e) “Ms Sonia du Plessis (deceased)”; and,
- (f) Ms Petra Van den Berg.

Ms du Plessis had died by the time the trial came to an end in the Labour Court. In its judgment the Labour Court made an order of substitution replacing Ms du Plessis with Ms Theresilda Sieglinda Lötter from Erasmus, Lötter and Co who had been appointed as the executrix of Ms du Plessis’ late estate.

[81] In the founding affidavit in support of Solidarity’s application for leave to appeal, the deponent thereto said that Solidarity was bringing the application on behalf of the six members listed above including Ms du Plessis (deceased). It is not stated that Solidarity brings that application on behalf of Ms Lötter in her capacity as the Executrix of the late estate of Ms du Plessis. Solidarity cannot act on behalf of someone who has died. Only an executor or executrix may do so in the sense that he or she may represent the estate of such a person. Solidarity could, therefore, not act on behalf of Ms du Plessis after she has passed on.

[82] Directions were issued to the parties directing them to clarify the status of Ms Lötter in these proceedings. In other words, the parties were directed to state whether Ms Lötter, in her capacity as the executrix of Ms du Plessis’ estate, is an applicant in these proceedings and whether Solidarity had a mandate to act for her. In response to

the directions, Ms Lötter filed an affidavit. Mr Hendrik van Hoven, who described himself as the Head of the Labour Court litigation in Solidarity, filed a confirmatory affidavit. The SITA did not file anything by the deadline. It is fair to assume that it does not dispute what is said in Ms Lötter's affidavit and in Mr van Hoven's confirmatory affidavit. The essence of what Ms Lötter says in her affidavit is that she had authorised Solidarity to represent her in her capacity as the executrix of Ms Du Plessis' estate. Mr Van Hoven confirms what Ms Lötter says and goes on to say that Solidarity has acted under the authority and instruction of Ms Lötter in her capacity as the executrix of the estate of the late Ms Du Plessis as stated in her affidavit.

[83] It seems to me that Ms Lötter authorised Solidarity to act for her in her representative capacity and bring an application for leave to appeal in this Court. However, strictly speaking, Solidarity did not do so because it never said it was also acting on her behalf in bringing this application. Owing to this omission or failure on the part of Solidarity, Ms Lötter is, strictly speaking, not an applicant before us nor did Solidarity purport to act on her behalf in bringing this application. It said it acted for, among others, Ms Du Plessis whom, technically, it could no longer represent because she had died. Despite the fact that Solidarity did not, strictly speaking, purport to act for Ms Lötter and that Ms Lötter was not an applicant before us, I am of the view that, in the circumstances of this case, this is an omission that this Court may overlook. I say this because:

- (a) in the Labour Court Ms Lötter was substituted for the late Ms Du Plessis.
- (b) Solidarity, in seeking to include Ms Du Plessis, expressly stated that she was "deceased". It is clear that Solidarity sought to include Ms Du Plessis in the matter and put her as one of the persons for whom it was acting;
- (c) Solidarity had been instructed or authorised by Ms Lötter to act for her to bring the application for leave to appeal but it did not carry out this instruction;

- (d) the dispute between the late Ms Du Plessis and the respondent is the same as the disputes between the other individual applicants and the respondent which we are dealing with in this judgment;
- (e) the respondent does not oppose the accommodation of Ms Lötter in these proceedings.

[84] In the light of all this, if there is an order to be made in favour of the other individual applicants, an appropriate order will also be made in favour of Ms Lötter in her representative capacity as the executrix of the estate of the late Ms Du Plessis.

[85] I shall refer to the individuals as the individual applicants even though strictly speaking they were not individuals. I do this for convenience. Before going further, it is necessary to set out the factual background to the Solidarity dispute with the respondent. The dispute between the parties was whether or not the dismissal of the individual applicants by the respondent on the basis that they each had reached the agreed retirement age as contemplated in section 187(2)(b) of the LRA, even though the dismissals had happened months or even a year or some years after each employee had reached the agreed retirement age, were automatically unfair. If they were, the next question will be whether the individual applicants should be paid compensation and, if so, how much compensation they would be paid.

Background

[86] Unlike the *Landman* case, which was adjudicated as a stated case, the *Solidarity* case was a trial. In respect of each individual applicant involved in the case, Solidarity filed and served a statement of claim. The respondent filed a statement of defence or a response to each individual applicant's statement of claim. Solidarity filed one or more amended statements of case. The respondent filed and served its amended statement of defence.

[87] In respect of each individual applicant's case the parties concluded and signed a pre-trial minute. Later, Solidarity and all the individual applicants, on the one hand, and the respondent, on the other, concluded and signed a joint pre-trial minute.

[88] The individual applicants signed contracts of employment with the respondent.

[89] The respondent had its conditions of employment which will be referred to as the SITA Conditions of Employment which were effective from 2 December 2011. Such conditions included the SITA Termination of Employment Policy which became effective from 19 February 2008.

[90] Clause 6.3 of the SITA Termination of Employment Policy bore the heading: "Termination of Services." Clause 6.3.1 has two paragraphs. They read thus:

"6.3.1. Termination on reaching retirement age

The retirement fund provides retirement benefits for employees who complete their careers in SITA's service. The retirement age for employees is as defined in the SITA Conditions of Employment and / or the respective Pension Retirement Fund rules.

An employee may apply to continue working beyond normal retirement age. Any decision to allow an employee to continue working beyond normal retirement age shall be taken by the head of department in consultation with the Human Resources department. Any decision in this regard should be based on operational requirements, fitness of the employee (should be confirmed in writing) and applicable fund rules."

[91] Clause 1 of the SITA Employment Conditions reads as follows in part: -

"Rationale

These employment conditions, with related policies and management directives issued by the SITA from time to time in its prerogative, determine the working conditions within which employees still perform their functions.

When employed by the SITA, it shall be deemed that the employee has accepted these agreed upon employment conditions. Unless otherwise agreed in writing, these employment conditions shall be regarded as an integral part of the service contract between the employee and the SITA.

...”

[92] Clause 9.18 of the SITA Employment Conditions reads:

“Retirement age

Retirement age specifications shall be set according to the rules of the relevant pension or retirement funds.”

[93] Clause 9.19.1(b)(i) and (ii) of the SITA Employment Conditions, which relate to Alexander Retirement Fund, reads as follows:

“9.19.1 Defined contribution funds

(a) Denel Retirement funds

(i) ...

(b) Alexander Forbes Retirement Fund

(i) *The normal retirement age of the fund is the last day of the month in which a member reaches the age of 60. A member who transfers from another company approved pension fund or approved provident fund shall retain his previous retirement age of 65 in terms of the rules of such approved pension fund or approved provident fund.*

(ii) *Subject to the consent of SITA, a member who has reached his normal retirement date and normal retirement age of 60 or 65, whichever is applicable, may remain in service and retire at a date not later than the last day of the month in which the member attains the age of 67. Contributions by and on behalf of the member shall cease after the normal retirement date and*

the employee forfeits the death, disability and funeral benefits should the employee pass away or become disabled while in the service of SITA.” (Emphasis added).

[94] In the trial bundle used by the parties there was a document titled:

“Alexander Forbes Retirement Fund (Pension Section)

Special Rules Applicable to State Information Technology
Agency (Proprietary) Limited.”

The following appeared immediately below this title:

“The General Rules of the Alexander Forbes Retirement Fund (Pension Section) shall be read in conjunction with these Special Rules which shall apply to the Eligible Employees of the Employer with effect from the Participation Date.”

The participation date is 1 April 2005.

[95] Rule 6 of the Special Rules reads:

“6 Normal Retirement Date in terms of General Rule 2:

The last day of the month in which a member reaches age 60 years; provided that a member who transfers from another Approved Pension Fund or Approved Provident Fund or shall retain his previous retirement age of 65 years in terms of the rules of such Approved Pension Fund or Approved Provident Fund.”

[96] However, Rule 5.2, which is titled: “Retirement from Service”, provides as follows in Rule 5.2.1 and 5.2.2:

“5.2.1 A member who has reached age 55 years may retire from Service on the last day of any month occurring before he reaches his Normal Retirement Date provided that a member who is not a member of the Alexander Forbes Retirement Fund (Provident Section) who is at least 50 years of age and is within 10 years of his Normal Retirement Date may retire on the last day of any month occurring before he reaches his Normal Retirement Date.

5.2.2 A member who has not retired in terms of Rule 5.2.1 must retire from Service on reaching his Normal Retirement Date unless his Employer agrees in writing to his remaining in Service after that date.”

[97] Clause 2.1.18 of the contract of employment defines “Termination Date” as meaning “the retirement age specifications set according to the rules of the relevant pension or retirement funds or any other earlier date as envisaged in terms of this Agreement”.

[98] In October 2017 Ms Petra Van den Berg received a letter of dismissal from the respondent dated 11 October 2017. That letter read as follows:

“Dear Ms Petra Van den Berg

Our records indicate that on the 05th of August 2017 you reached another milestone celebrating your 62nd birthday. According to the SITA conditions of employment clause 9.18 you were due to retire at the end of August 2015. We would like to take this opportunity to inform you that your services with SITA will as a result of your retirement come to an end on the 31st December 2017.

Your valuable input in making SITA a success is highly appreciated. We take this opportunity to wish you well in your much deserved rest.

Sincerely

Moeketsi Hlabanelo

Acting HOD: Human Capital

11/10/2017

Date”

All the individual applicants received similar letters except for the differences in the names of the addressees and dates for reaching the retirement age and when each one was advised he or she would leave the organisation.

[99] After each one of the individual applicants had received their respective letters informing them of their respective last days in the organisation, he or she lodged a grievance with the respondent complaining about the letter. The respondent considered the grievances of the individual applicants and concluded that they were without merit and rejected them.

Labour Court

[100] After the respondent had rejected the individual applicants' grievances about their dismissals, Solidarity contended that the dismissals were automatically unfair as they were in breach of section 187(1)(f) of the LRA. The respondent disputed that contention and contended that its decisions to dismiss the individual applicants were covered by section 187(2)(b) of the LRA which meant that the dismissals were fair. These disputes were referred to conciliation but could not be resolved. Ultimately, Solidarity referred these disputes as separate disputes to the Labour Court for adjudication. However, as the individual disputes raised more or less similar legal issues, they were consolidated by an order of the Labour Court.

[101] On the above factual background, Solidarity's case was that the respondent had dismissed the individual applicants on grounds of age and the dismissals constituted unfair discrimination. They also contended that their dismissals constituted automatically unfair dismissals. They accepted that there was a normal retirement age of 60 years applicable to them but made two points in that regard. Firstly, they contended that, since the respondent did not dismiss them when they reached the retirement age of 60 years but dismissed them either months later or a year or two or even three years later, it (i.e. the respondent) had no right to dismiss them at that stage on the basis that they had reached the normal retirement age of 60

years unless it had reached agreement with the employees on a new retirement age which had not happened.

[102] Secondly, the applicants contended that, in any event, the respondent's conditions of employment applicable to them provided that, subject to the respondent's consent, they could continue working beyond the normal retirement age of 60 years in which case they would have a right to retire any day from the normal retirement age of 60 years up to age 67. The applicants then contended that the respondent had consented to them working beyond the age of 60 years and retiring when they reached 67 years of age. In substantiation hereof the applicants pointed out that the respondent allowed the individual applicants to work beyond age 60 and gave them work instructions throughout that period and even gave them salary increases.

[103] In its statement of defence or response to each applicant's statement of case the respondent denied that it had dismissed the individual applicants. Its denial was strange, given its letter to each one of the individual applicants in which it told them when they had reached the normal retirement age of 60 and notifying them of their last working day. In the end the respondent's defence was that, since each individual applicant had worked beyond their normal retirement age of 60 years by the time it dismissed them, the dismissal was fair by reason of section 187(2)(b). In other words, the respondent's contention was that, when an employer does not dismiss an employee when the latter reaches their normal retirement age and allows him or her to work beyond such age, the employer has a right to dismiss the employee at any time it chooses thereafter and such dismissal would be fair in terms of section 187(2)(b). The respondent contended that this was what it had done in this case.

[104] The respondent submitted that, when it did not dismiss the individual applicants when they respectively reached their normal retirement age, it did not waive its right to dismiss them at any time thereafter. The respondent, therefore, invoked section 187(2)(b) to justify the dismissal of each one of the individual applicants. Furthermore, the respondent contended that it never consented that the

individual applicants should work beyond their normal retirement age and retire when they reached 67 years of age. The respondent took this position despite the fact that it was common cause that respondent had allowed the individual applicants to work beyond the agreed retirement age and between that stage and their last day at the SITA had continued to give each one of the individual applicants work instructions.

[105] The Labour Court, through Nkutha-Nkontwana J, concluded that the dismissals were not automatically unfair. The reason given was that, once an employee has worked beyond the date on which he or she reached the normal retirement age, the employer is entitled to dismiss him or her at any time thereafter on the basis that the employee has reached the normal retirement age. It said that the employer is entitled in those circumstances to invoke the section 187(2)(b) shield or protection against a claim that the dismissal is automatically unfair. In essence the Labour Court relied on *Waco* to dismiss Solidarity's claim. Solidarity then applied to the Labour Court for leave to appeal to the Labour Appeal Court against the Labour Court's judgment and order. The Labour Court dismissed that application on the basis that there were no reasonable prospects of success for the intended appeal.

Labour Appeal Court

[106] Solidarity then petitioned the Labour Appeal Court for leave to appeal to it against the judgment and order of the Labour Court. The Labour Appeal Court, through Waglay JP, Coppin JA and Setiloane AJA, dismissed that petition. In its brief reasons the Labour Appeal Court said that essentially it was, in general terms, in agreement with the judgment and order of the Labour Court and took the view that there were no reasonable prospects of success for the intended appeal. It also said that there was no compelling reason why leave to appeal should be granted.

In this Court

[107] Solidarity then applied to this Court for leave to appeal against the decision of the Labour Appeal Court and the judgment and order of the Labour Court.

Jurisdiction and leave to appeal

[108] For the reasons given in the *Landman* case above, this Court has jurisdiction and leave to appeal should be granted.

The appeal

[109] For the reasons given in the *Landman* case above in support of the conclusion that Mr Landman's dismissal was automatically unfair I conclude in the *Solidarity* matter, too, that the dismissals of the individual applicants were automatically unfair. This is because, as in the *Landman* case, the dismissals of the individual applicants in the *Solidarity* matter were not effected on the days on which they reached the normal retirement age but were effected after such dates. I say this mindful of the fact that in the *Landman* case there was an agreed retirement age between the parties whereas in the *Solidarity* matter the agreement between the parties was effectively that the normal retirement age specified in the Rules of the Alexander Forbes Retirement Fund was the normal retirement age applicable to the individual applicants. The reasoning I adopted in the discussion of the *Landman* case applies with equal force to a case such as the *Solidarity* matter where there is a normal retirement age and not an agreed retirement age. However, in the *Solidarity* matter there is a further ground on the basis of which I also conclude that the dismissals of the individual applicants were automatically unfair. I deal with it below.

[110] The applicants also contended that, in continuing to work for the respondent beyond the dates on which they reached the normal retirement age, they did so with the consent of the respondent. They further submitted that, in those circumstances, they were entitled to work until age 67. They submitted that, once the respondent had allowed them to work beyond the normal retirement age of 60, the respondent had no right to retire them against their will before they reached age 67. In this regard they relied on the conduct of the respondent as well as clause 9.19.1(b)(i) and (ii) of the SITA Employment Conditions. These provisions have been quoted above. However,

because of their importance, I consider it important to quote them again. Clause 9.19.1(b)(i) and (ii) reads:

“... ”

[1] (b) Alexander Forbes Retirement Fund

(i) The normal retirement age of the fund is the last day of the month in which a member reaches the age of 60.

... ”

(ii) *Subject to the consent of the SITA, a member who has reached his normal retirement date and normal retirement age of 60 or 65, whichever is applicable, may remain in service and retire at a date not later than the last day of the month in which the member attains the age of 67. . . .* (Emphasis added.)

[111] Clause 9.19.1(b)(i) of the SITA Employment Conditions simply specifies that the normal retirement age is 60 years of age but a member’s last day at work is not necessarily the day on which the member concerned turns 60. It provides that the member’s last day is the last day of the month in which he or she turns 60. This, therefore, means that, unless an employee’s 60th birthday is on the last day of the month, the employee’s last day at work will not be his or hers 60th birthday.

[112] Clause 9.19.1(b)(ii) provides for an exception to the general rule in clause 9.19.1(b)(i) that a member retires on the last day of the month in which he or she turns 60 years of age. The exception for which clause 9.19.1(b)(ii) provides is that, with the consent of the respondent, despite a member having reached his or her retirement age and the last day of the month in which he or she turns 60 years of age, he or she may remain in the respondent’s service “and retire at a date not later than the last day of the month in which the member attains the age of 67. . . .”. What clause 9.19.1(b)(ii) means is that, provided there is the employer’s consent, a member may remain in the employer’s service “and retire not later than the last day of the month in which the member attains the age of 67”.

[113] The right that clause 9.19.1(b)(ii) creates is not an employer's right to retire an employee at any time between the last day of the month in which the employee reaches 60 years of age and age 67. The right that the provision creates is that of the employee. I say this because the provision says ". . .a member. . .*may remain* in service and retire at a date not later than. . .". The provision does not say: ". . .the SITA may. . .". That right only vests in the employee once the respondent has consented to the employee continuing in the respondent's employment beyond the retirement age of 60 years. It is the employee's right to retire any time between the last day of the month in which he or she turned 60 and age 65. The employee should obviously have to give notice of his retirement in the same way that the employer would have to give the employee notice of termination of the contract of employment.

[114] On behalf of the applicants it was contended that each individual applicant remained in the respondent's service beyond the last day of the month in which they turned 60 and that this was with the consent of the respondent. The respondent led the evidence of only one witness, Mr Moeketsi Hlabanelo. Mr Hlabanelo was the Acting Head of Department: Human Capital Management at the time of the dismissals of the individual applicants. At the time of giving evidence Mr Hlabanelo was a Senior Manager: Operations and Logistics within the Facilities Department.

[115] That it was with the consent of the respondent that the individual applicants had continued working for the respondent beyond the last day of the months in which they respectively turned 60 years of age was put to Mr Moeketsi Hlabanelo under cross-examination. He conceded that it was with the consent of the respondent that the individual applicants worked beyond the last day of the months in which they respectively turned 60 and, thus, reached their agreed retirement age.

[116] It is important to refer to the exchange between Mr Hlabanelo and the applicant's legal representative during Mr Hlabanelo's cross-examination. In part it reads:

“APPLICANT REPRESENTATIVE: Okay. I do not want you to digress. It is a very simple question. You see, I see where you and I, where we have conflict in this discussion, is that you are embedding yourself in this argument, that it was a mistake to allow these individuals to continue to work, am I correct?

MR MOEKETSI HLABANELO: Absolutely.

APPLICANT REPRESENTATIVE: Alright. And because you believe it was a mistake, you seem to have difficulty to agree on a very simple proposition that, even if it was a mistake, which I am not conceding, I am saying, even if Her Ladyship accepts it was a mistake, that they were there with the consent of SITA. No-one chased them away.

MR MOEKETSI HLABANELO: *They were there with the consent of SITA, by virtue of the fact that line managers who were acting on behalf of SITA, allowed them to be there.*

APPLICANT REPRESENTATIVE: Yes. But those line managers had a mandate, they were acting on behalf of SITA.

MR MOEKETSI HLABANELO: That is what we are. . .[intervened]

APPLICANT REPRESENTATIVE: Yes, yes, alright. So, basically then, just to summarise, okay. We have heard your answer and your qualification, but basically, you and I seem to be in agreement that in fact yes, *obviously they went and they performed their services after the age of 60 [sixty]*, with the consent of SITA, under those circumstances. We agree on that.

MR MOEKETSI HLABANELO: We do.” (Emphasis added.)

[117] Once one accepts, as one is bound to do after Mr Hlabanelo’s concession, that it was with the respondent’s consent that the individual applicants remained in the respondent’s employment beyond the last day of the month in which each individual applicant turned 60, the next question is whether that had any impact or effect on whether the respondent could dismiss any individual applicant on grounds of age between the last day of the month in which they turned 60 and the date when they

reached age 67. The short answer is that, once the individual applicants continued to work for the respondent beyond the normal retirement age of 60 and did so with the consent of the respondent, they had a right to work until they turned 67 years of age unless the respondent dismissed them on any ground recognised in law such as serious misconduct, incapacity or the employer's operational requirements.

[118] On behalf of the applicants it was also argued that, in order for the respondent to dismiss the individual applicants before they reached age 67, it was necessary that an agreement be reached between the parties on a new retirement age and then the respondent could dismiss them when they reached such retirement age. As there was no such agreement in this case, it is not necessary to decide this point.

[119] In my view clause 9.19.1(b)(ii) means that, once the SITA or respondent had given its consent for the individual applicants to remain in its employ beyond the retirement age, the individual applicants had a right to work until age 67. The respondent had no right to dismiss them before they reached age 67. For that reason, too, the dismissals were automatically unfair because the dismissals were based on age. Section 187(2)(b) was not available to the respondent to use as a shield.

[120] The applicants also contended that the respondent was obliged to have observed procedural fairness in dismissing them but failed to do so. This raises the question whether the statute places an obligation on an employer to observe procedural fairness in cases of automatically unfair dismissals or where the reason for dismissal is one prohibited by section 5 of the LRA or is a reason listed in section 187(1) of the LRA. I consider this issue next.

[121] Earlier on I referred to the fact that one of the issues that arose in *Waco* was whether an employer who contemplates dismissing on grounds of age an employee who has worked beyond the normal or agreed retirement age is obliged to follow a fair procedure. I pointed out earlier that in *Waco* I held that, in such a case there was no obligation on the employer to comply with a fair procedure other than giving a

contractual or statutory notice of termination. I said this on the basis that an employer could dismiss an employee on the grounds of age even long after the employee had reached the normal or agreed retirement age and still enjoy the section 187(2)(b) protection.

[122] On the approach I take in this judgment, as opposed to the one I took in *Waco*, I am of the view that, if an employer wants to dismiss on the ground of age an employee who has continued to work beyond the agreed retirement age, that dismissal cannot be said to be fair by reason of section 187(2)(b) but can only be said to be fair if, by reason of age, the employee is no longer able to do his or her work as required. So, the employer would have to prove this. As far as procedural fairness is concerned, I say it applies in such a case. This is, of course, not the position I took in *Waco*. In *Waco* I took the view that an employer may dismiss an employee on the ground of age any time after the employee has reached and gone beyond the agreed retirement age and the section 187(2)(b) shield or protection would always be available to the employer. I also held that procedural fairness did not apply in such a case. The basis for this was that the dismissal could not be substantively unfair because, if it was based on age as agreed between the employer and employee, there was nothing to inquire into. That dismissal would have happened as agreed. The time from when the dismissal could be effected was also agreed.

[123] My view in *Waco* was that, where the reason for an employee's dismissal was that he or she had reached the normal or agreed retirement age, there was nothing on which the employee needed to be heard. However, I did not need to look that far to find a reason for that view because the statute has the answer. To make the point I need to make, it is important to quote sections 185, 187 and 188 of the LRA. Section 185 reads:

“185 Right not to be unfairly dismissed or subjected to unfair labour practice

Every employee has the right not to be

(a) unfairly dismissed; and

- (b) subjected to unfair labour practice.”

[124] Section 185 creates two rights for an employee. The first is the right not to be unfairly dismissed. The second is the right not to be subjected to unfair labour practice. It is to be noted that in section 185 there is no reference to substantive fairness and procedural fairness. There is simply a right not to be unfairly dismissed and a right not to be subjected to an unfair labour practice.

[125] The heading to section 187 reads:

“Automatically unfair dismissals”

whereas the heading to section 188 reads:

“Other unfair dismissals”.

Here is how sections 187 and 188 read:

“187 Automatically unfair dismissals

- (1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is—
 - (a) that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action that complies with the provisions of Chapter IV;
 - (b) that the employee refused, or indicated an intention to refuse, to do any work normally done by an employee who at the time was taking part in a strike that complies with the provisions of Chapter IV or was locked out, unless that work is necessary to prevent an actual danger to life, personal safety or health;
 - (c) to compel the employee to accept a demand in respect of any matter of mutual interest between the employer and employee;

- (d) that the employee took action, or indicated an intention to take action, against the employer by—
 - (i) exercising any right conferred by this Act; or
 - (ii) participating in any proceedings in terms of this Act;
 - (e) the employee's pregnancy, intended pregnancy, or any reason related to her pregnancy;
 - (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;
 - (g) a transfer, or a reason related to a transfer, contemplated in section 197 or 197A; or
 - (h) a contravention of the Protected Disclosures Act, 2000, by the employer, on account of an employee having made a protected disclosure defined in that Act.
- (2) Despite subsection (1)(f) —
- (a) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job;
 - (b) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.

188 Other unfair dismissals

- (1) A dismissal *that is not automatically unfair, is unfair if the employer fails to prove—*
- (a) *that the reason for dismissal is a fair reason-*
 - (i) *related to the employee's conduct or capacity; or*
 - (ii) *based on the employer's operational requirements; and*

(b) *that the dismissal was effected in accordance with a fair procedure.*

- (2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.” (Emphasis added.)

[126] These headings tell the reader that section 187 relates to automatically unfair dismissals and section 188 relates to non-automatically unfairly dismissals – in other words, another category of dismissals.

[127] It will be seen from section 187 that the statute provides reasons that render a dismissal automatically unfair. It will also be noted under section 187 that there is no provision to the effect that a failure by the employer to afford an employee an opportunity to be heard renders a dismissal automatically unfair. Therefore, a dismissal only becomes automatically unfair on the basis of a substantive reason and not on the basis of a failure by the employer to follow a fair procedure. That, in my view, is because an employer is not supposed to dismiss an employee on any of the grounds listed in section 187(1) except within the four corners of section 187.

[128] If the employer gets the age of the employee wrong or gets the normal retirement age wrong or wrongly thinks that the employee has agreed to a retirement age, the employee will challenge that dismissal in the Labour Court. If the employer fails to show that section 187(2)(a) or (b) applies, the dismissal will be automatically unfair. However, when we proceed to unfair dismissals other than automatically unfair dismissals in section 188 we find that, unlike in the case of automatically unfair dismissals in section 187, the statute provides two reasons which will render a dismissal unfair. The first one is substantive. The second one is procedural. The effect of section 188, read with section 187, is that a dismissal cannot be rendered automatically unfair simply because a fair procedure was not followed by the employer but a dismissal that is not automatically unfair will be unfair on either a

substantive ground only or on a procedural ground only or on both substantive and procedural grounds. As will have been seen above, section 188 reads:

“188 Other unfair dismissals

- (1) A dismissal *that is not automatically* unfair, is unfair if the employer fails to prove-
 - (a) that the reason for dismissal is a fair reason-
 - (i) related to the employee's conduct or capacity;
 - or
 - (ii) based on the employer's operational requirements; and
 - (b) that the dismissal was effected in accordance with a fair procedure.
- (2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.” (Emphasis added.)

[129] The opening part of section 188 expressly excludes an automatically unfair dismissal when the section places upon the employer the burden to prove that the dismissal was effected in accordance with a fair procedure. Therefore, it can be said with confidence that the unfair dismissal regime or dispensation that the LRA created does not require that an employer proves that an automatically unfair dismissal was effected in accordance with a fair procedure. That requirement only applies to the other dismissals dealt with under section 188. In my view, that is the law as it presently stands. The constitutionality of the LRA’s exclusion of the requirement of a fair procedure in respect of automatically unfair dismissals was not challenged in the present case. It is, therefore, not necessary to express a view on its constitutionality. Therefore, it seems to that rightly or wrongly the LRA does not impose on an employer the duty to comply with a fair procedure where a dismissal is for a reason that would ordinarily render the dismissal automatically unfair.

Relief

[130] Initially, Solidarity sought retrospective reinstatement for all the individual applicants if the Labour Court concluded that the dismissals were automatically unfair. It persisted in this position at the time of launching its application for leave to appeal in this Court. However, at the hearing Counsel for Solidarity did not persist in that position and sought, instead, an order for the payment of maximum compensation to the individual applicants. Quite correctly, the respondent did not argue that this was a case where, if the Court concluded that the dismissals were automatically unfair, the individual applicants should not be paid any compensation at all.

[131] In considering whether the individual applicants should be granted maximum compensation, one of the important factors is that the individual applicants' dismissals were not just without a reason but were for a prohibited reason and, therefore, were automatically unfair.

[132] It is important to also bear in mind how much time each individual could have worked before he or she reached the compulsory retirement age of 67.

132.1 Mr Strydom reached 60 years of age in May 2015 and his last working day was 31 December 2017. He could have worked just over four years before reaching age 67 but was denied that opportunity.

132.2 Mr Enslin reached 60 years of age in November 2016. Although his last working day as a permanent employee was 31 August 2017, subsequently he worked for the respondent on a fixed term contract that ended at the end of February 2018. He could have worked for another period of over five years but he was denied that opportunity.

132.3 Mr Olivier turned 60 in November 2016 and his last working day was 30 September 2017. He could have worked another six years before he reached 67 years of age but was denied that opportunity.

132.4 Ms van den Berg turned 60 in August 2015. Her last working day was 31 January 2018. She could have worked for another three and a half years but was denied that opportunity.

132.5 Ms Smith turned 60 in June 2014. Her last working day was 30 September 2017. Since she could have worked until June 2021, she was deprived of the opportunity of working for more than three and a half years.

132.6 Ms du Plessis turned 60 in July 2016 and her last working day was 31 December 2018. She died in January 2021. This means that she could still have worked just over five years before reaching the retirement age of 67. However, since she passed away in January 2021, she was only denied an opportunity to work for a period of three years

[133] Furthermore, the individual applicants are not going to be reinstated which could have had retrospective effect and thus could have meant that the respondent would have had to pay the individual applicants backpay of a number of months probably more than two years' backpay. All that is not being done. In these circumstances I am of the view that considerations of fairness and equity dictate that the individual applicants should be awarded maximum compensation. In the case of a dismissal that has been found to be automatically unfair, that would be 24 months' remuneration.

Costs

[134] With regard to costs, it needs to be emphasised that a dismissal for a reason listed in section 187(1) of the LRA is a serious violation of an employee's right not to be discriminated against unfairly and the right not to be dismissed for any of the reasons listed in section 187(1) except where the LRA permits such dismissal. I am of the view that the requirements of law and fairness dictate, for the same reasons I gave in the *Landman* case above, that the respondent should be ordered to pay the applicants' costs in all the courts.

[135] In the circumstances, I would make the following orders:

135.1. In the *Landman* matter:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The respondent is to pay the applicants' costs (including those consequent upon the employment of two Counsel where two Counsel were employed).
4. The order of the Labour Appeal Court is set aside and replaced with the following:
 - “(a) The appeal is upheld.
 - (b) The respondent is ordered to pay the applicants' costs (including those consequent upon the employment of two Counsel where two Counsel were employed).
 - (c) The order of the Labour Court is set aside and replaced with the following:
 - ‘(i) The respondent's dismissal of Mr Landman was automatically unfair.
 - (ii) The respondent is ordered to pay Mr Landman compensation equal to 24 months' remuneration calculated at the rate of remuneration applicable to Mr Landman at the time of his dismissal.
 - (ii) The respondent is ordered to pay the applicants' costs (including the costs of two Counsel where two Counsel were employed).’”

135.2. In the *Solidarity* matter:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The decision of the Labour Court is set aside and, for it, the following order is substituted:
 - “

- (a) The dismissals of Solidarity's members involved in this case were automatically unfair.
 - (b) The respondent must pay each Solidarity member involved in this case an amount equal to his or her remuneration for 24 months calculated at the rate of remuneration applicable to the employee concerned at the time of his or her dismissal. In the case of the dismissal of the late Ms du Plessis, the respondent shall pay Ms Lötter in her capacity as the executrix of the estate of the late Ms du Plessis an amount equal to 24 months' remuneration that was applicable to Ms du Plessis at the time of her dismissal.
 - (c) The respondent shall pay Solidarity's costs including those consequent upon the employment of two Counsel where two Counsel were employed."
4. The respondent shall pay Solidarity's costs in this Court, including those consequent upon the employment of two Counsel, as well as Solidarity's costs in applying for leave to appeal to the Labour Appeal Court.

VAN ZYL AJ:

[136] I have had the advantage of reading the judgments of Zondo CJ (first judgment) and Rogers J (third judgment). I agree that the issue raised in the two matters engages this Court's jurisdiction and that the applicants must be granted leave to appeal the judgment of the Labour Appeal Court in *Landman*¹⁹ and that of the Labour Court in *Solidarity*.²⁰

¹⁹ *Motor Industry Staff Association and Another v Great South Autobody CC t/a Great South Panel Beaters* [2022] ZALAC 103; (2022) 43 ILJ 2326 (LAC) (*Landman*).

²⁰ *Solidarity on behalf of Strydom v State Technology Agency SOC Ltd* [2022] ZALCJHB 95; (2022) 43 ILJ 1881 (LC) (*Solidarity*).

[137] The issue raised for determination in both *Landman* and *Solidarity* is the effect on the contractual relationship between an employer and employee when the employee, who has elected not to retire upon reaching the normal or agreed retirement age, is permitted by the employer to work beyond the determined retirement age. Put differently, the question raised on the facts of the two matters is what, in the absence of the parties having reached agreement with regard thereto, is the result of a failure by the employer to terminate the employee's employment when the latter has reached retirement age. Does the employer without more lose the protection of section 187(2)(b) of the LRA²¹ as suggested in the first judgment, or may the employer terminate the employment relationship at any time thereafter as suggested in the third judgment?

²¹ Above n 1.

[138] I agree with the finding in the first judgment that the decision of the Labour Court in *Waco*²² and that of the Labour Appeal Court in *Landman* is not correct to the extent that it held without qualification that the employer may terminate the employment relationship at any time after the employee has reached retirement age. As I intend showing, the suggestion is inconsistent with accepted contractual principles. However, I find myself in disagreement with the first judgment in three respects: firstly, the reasoning employed in arriving at the aforementioned conclusion; secondly, and more fundamentally, I do not agree that there is an obligation on the employer to terminate the employment relationship when the employee has reached the determined or agreed retirement age; and thirdly, I find on the facts of the two matters before us that the appeals must be dismissed. Insofar as the third judgment is concerned, I disagree with the reasoning as being inconsistent with the nature of the right which flows from the manner in which the Legislature has chosen to deal with the termination by an employer of the employment relationship upon the employee having reached the determined retirement age.

[139] The nature of the relationship between an employer and employee is contractual.²³ As is the case with any other contractual relationship, the employment contract may be terminated by agreement.²⁴ This may be achieved by an express term in the contract, or tacitly by an unexpressed provision of the contract “which derives from the common intention of the parties as inferred by the Court from the express terms of the contract and the surrounding circumstances”.²⁵ The retirement clauses in both *Landman* and *Solidarity* provides for the termination of the contractual relationship between the employer and the employee by agreement. In *Landman* the employee’s contract of employment provided that his “retirement age will be 60 years

²² Above n 2.

²³ Van Jaarsveld “Labour Law” in *LAWSA* 3 ed (2017) vol 24(1) at para 98 and Grogan *Workplace Law* 12 ed (Juta & Co Ltd, Cape Town 2017) at 31.

²⁴ *Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A) at 588I-J (*Van Streepen*).

²⁵ *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531.

of age”. It must be emphasised that in *Landman* the parties asked the Labour Court to determine the issues raised on the basis of a stated case. To this extent it was an agreed fact that the retirement age was 60 years of age, and the fact that the retirement age was 65 in a collective agreement, was as a consequence of no relevance. In *Solidarity* the employee’s conditions of service read with the rules of the relevant pension fund in turn provided that their retirement age is 60 years, but that an employee may continue to render service with the consent of the employer not extending beyond the age of 67. The rules of the relevant pension fund provided that the employer had to agree in writing to the employee remaining in service, and that the employer “shall retire from [S]ervice on such later date as he agrees with his [e]mployer”.

[140] The effect of the retirement clauses in both *Landman* and *Solidarity* is that the contract of employment terminates by the effluxion of time upon the employee reaching the normal or agreed retirement age. Not unlike any other form of contract, if the parties agree upon a definite time for the expiration of the employment contract, the contract terminates automatically.²⁶ However, it is important to note that this consensual form of termination of the contract must be distinguished from the unilateral exercise by one party of the right to terminate the agreement. Such a right may accrue by operation of law, most commonly on the ground that the other party to the contract is guilty of material misrepresentation or that he or she wrongfully repudiated or breached a material term of the contract. As emphasised in *Van Streepen*,²⁷ these are two different forms of terminating a contract that denote two very different juristic concepts:

“In the law of contract ‘cancellation’ is a well-known term which covers both cancellation by agreement between the parties (or consensual cancellation, to use the phrase adopted by counsel in argument) and cancellation by one party on the ground that the other party has wrongfully repudiated or breached a material term of the contract (see Christie *The Law of Contract in South Africa* at 431, 520 and the cases

²⁶ Grogan above n 23 at 36.

²⁷ *Van Streepen* above n 24 at 588H-J.

there cited; Prof Louise Tager in (1976) 92 *SALJ* at 430-1). These two forms of cancellation denote very different juristic concepts. The first-mentioned form, consensual cancellation, is a contract whereby another contract is terminated. The second-mentioned form, cancellation on repudiation or breach, involves the unilateral exercise by one party of the right to rescind the contract, this right having accrued to him by reason of the other party's repudiation or material breach."²⁸

[141] It is in the context of the contractual nature of the relationship between the employer and employee and the principles applicable thereto that section 187(2)(b) of the LRA must be given meaning. The issue raised is essentially one of interpretation, and its focus is, from an employer's perspective, on the manner in which the employment relationship terminates when the employee has reached the normal or agreed retirement age. For convenience of reference, I quote the relevant portions of section 187:

- “(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is—
- ...
- (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.
- (2) Despite subsection (1)(f)—
- ...
- (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.”

[142] The Labour Appeal Court found that section 187(2)(b) affords an employer the right to terminate the employment relationship on the basis of age when the employee has reached retirement age, and that the focus of the section is not on

²⁸ *Id.*

restricting the exercise of that right to a particular point in time, namely when the employer had reached the normal or agreed retirement age, but rather that the employee has reached or passed that age before the right may be exercised. The Labour Appeal Court reasoned as follows:

“Section 187(2)(b) does not prescribe a time frame within which the dismissal should take place, provided it is after the employer has reached his or her agreed or normal retirement date. Properly construed, section 187(2)(b) affords an employer the right to fairly dismiss an employee based on age at any time after the employee has reached his or her agreed or normal retirement age. This right accrues to both the employee and the employer immediately after the employee’s retirement date and can be exercised at any time after this date. *The focus is not so much on when the employee reached his or her retirement date, but rather that the employee has already reached or passed the normal or agreed retirement age.*”²⁹ (Emphasis added.)

[143] With the qualification, for reasons which I will give shortly, that the exercise of the right must be within a reasonable time after the employee has reached retirement age, and not “at any time [there]after” as the Labour Appeal Court found, I agree with this interpretation. It is consistent with the accepted approach to statutory interpretation. What the proper approach to the interpretation of a statute or any other document is, was dealt with by the Supreme Court of Appeal in *Endumeni*³⁰ and received the approval of this Court.³¹ Aptly described by this Court as a “unitary exercise” in *University of Johannesburg*,³² it is the process of attributing meaning to the words used in the legislation by giving consideration to the—

²⁹ *Landman* above n 19 at para 15.

³⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) (*Endumeni*) at para 18.

³¹ *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28. See also *Municipal Employees Pension Fund v Natal Joint Pension Fund* [2017] ZACC 43; 2018 (2) BCLR 157 (2018) 39 ILJ 311 (CC).

³² *University of Johannesburg v Auckland Park Theological Seminary* [2021] ZACC 13; 2021 (6) SA 1 (CC); 2021 (8) BCLR 807 (CC) (*University of Johannesburg*) at paras 65–7.

“nature of the document, . . . the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermine the apparent purpose of the document. . . . The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”³³

[144] This approach accords with the second of the two approaches mentioned by Schreiner JA in *Jaga*,³⁴ namely that from the outset one considers the context and the language together, and not the one after the other. Of further importance, particularly in the context of the present matter, is the point emphasised by Schreiner JA in *Jaga*, that—

“the context as here used is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the [subject] matter of the statute, its apparent scope and purpose, and, within limits, its background.”³⁵

[145] The interpretation given to section 187(2)(b) by the Labour Appeal Court in *Landman* is consistent with the ordinary grammatical meaning of the words used therein. The verb “reached” simply means that the employee must have attained the required retirement age. It does not carry the implication of not having gone beyond that age. The section simply provides that for the dismissal to be fair, the employee must have attained (“reached”) retirement age. It does not confine the fairness of the dismissal to the date when the employee “reaches” retirement age.

³³ *Endumeni* above n 30 at para 18.

³⁴ *Jaga v Dönges NO; Bhana v Dönges NO* 1950 (4) SA 653 (A) (*Jaga*) at 662G–663A.

³⁵ *Id* at 662H.

[146] The context in which section 187(2)(b) must be interpreted is provided by two things, namely the fact that section 187(2)(b) forms part of Chapter VIII of the LRA which deals with “Unfair Dismissal and Unfair Labour Practice”, and that it provides a defence to what would otherwise have constituted an automatically unfair dismissal as envisaged in section 187(1)(f). Subsection (1)(f) provides that—

“(1) A dismissal is automatically unfair if . . . the reason for the dismissal is—

...

- (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.”

[147] The subject matter of section 187(1)(f) read with subsection (2)(b) is the right of the individual to equal treatment. Subsection (1)(f) gives effect to the constitutionally entrenched right in section 9 of the Bill of Rights.³⁶ Subsection (2)(b) on the other hand places a limitation on that right as envisaged in section 36 of the Bill of Rights.³⁷

³⁶ Section 9 is headed “Equality” and reads:

- “(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

³⁷ Section 36 is headed “Limitation of rights” and reads as follows:

- “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open

[148] Neither the judgment in *Waco* nor that of the Labour Appeal Court in *Landman* provides an adequate explanation for finding that the employment contract does not automatically terminate when the employee has reached the normal or agreed retirement age. In *Waco* the reasoning seems to proceed from the premise that because the employment contract expires by effluxion of time, and there is consequently no dismissal when an employee's contract of employment terminates by virtue of having attained the normal or agreed retirement age, a "dismissal" in section 187(2)(b) can only have been intended to apply to those instances where the employee's services were subsequently terminated after they were permitted to work beyond the normal or agreed retirement age. In *Landman* the Labour Appeal Court on the other hand found that what the LRA contemplates is that where the employee continues to work uninterruptedly after attaining retirement age, the employment relationship and the contract continue: "[in] other words, for purposes of a dismissal in terms of section 187(2)(b), the employment contract does not terminate by the effluxion of time when the employee reaches his or her retirement age but is deemed to continue."³⁸ It is not clear why the employment contract is said to be "deemed" to continue.

[149] On a reading of section 187(2)(b), the reason why the employment relationship does not terminate immediately when the employee has reached retirement age, and that the employer's right to terminate the employment relationship may therefore continue, lies in the fact that the Legislature considers the termination

and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

³⁸ *Landman* above n 19 at para 17.

of the employee's employment by virtue of the employee having attained the normal or agreed retirement age to constitute a dismissal. Section 187(2)(b) in other words brings about a statutory change to the legal consequences that would otherwise normally flow from an employee reaching retirement age where the agreed retirement age is seen as an event, the occurrence of which will automatically bring the contract to an end.³⁹ Section 187(2)(b) alters the legal position by providing for a departure from the automatic termination of the employment relationship when an employee reaches the contractually agreed retirement age. It does that by considering the termination of the employment contract by reason of the employee having reached retirement age to be a dismissal as envisaged in Chapter VIII of the LRA, as opposed to it being the automatic consequence of what is otherwise nothing more than an express term of the contract between the parties that determines the maximum duration of the employment relationship.

[150] Because it is regarded as a dismissal by the Legislature, section 187(2)(b) must be read with section 186(1)(a) of the LRA. A dismissal in terms of the latter section is the termination of the employee's contract with or without notice. A dismissal is accordingly a positive, unilateral act by the employer taken with the intention of terminating the employment relationship between the parties to a contract of employment. Read in the context of Chapter VIII as a whole, the effect of section 187(2)(b) is therefore that, notwithstanding what the employer and employee may mutually have agreed to in their contract of employment, the termination of the employment contract by reason of the employee having reached the normal or agreed retirement age is, from the employer's perspective, a dismissal that requires the employer to make a decision to terminate the employment relationship based on the employee's age. That being so, it must logically follow that unless an employer takes a decision to retire the employee, the employment contract does not automatically end.

[151] The legal effect of section 187(2)(b), on the interpretation given to it in this judgment, is that the employer acquires the right to fairly terminate the employment

³⁹ Grogan above n 23 at 43-5.

relationship when the employee has reached the normal or agreed retirement age. It is a right that accrues to the employer by operation of law. Accordingly, at the point in time when the employee reaches retirement age, the employer is faced with a choice, namely, to elect either to terminate the employment contract as envisaged in section 187(2)(b), or to allow the employment relationship to continue. As in any other contractual relationship where a state of affairs comes into existence in which one party to a binding contract becomes entitled, either under the terms of the contract, or by the general application of the law, to exercise a right, and has to decide whether or not to do so, the principle of election finds application. The decision of the party concerned, being a matter of a choice between two alternatives inconsistent with one another, in law constitutes an election.

[152] As explained in *Segal*,⁴⁰ the principle of election postulates a situation where a contracting party—

“has a choice of two courses. He can either elect to take advantage of the event or he can elect not to do so. He is entitled to a reasonable time in which to make up his mind, but once he has made his election he is bound by that election and cannot afterwards change his mind.”⁴¹

[153] In *Potgieter*,⁴² Centlivres JA quoted with approval the following passage from Pollock:⁴³

“The contract must be rescinded within a reasonable time, that is, before the lapse of a time after the true state of things is known, so long that under the circumstances of

⁴⁰ *Segal v Mazzur* 1920 CPD 635 (*Segal*).

⁴¹ Id at 644–5. This passage was referred to with approval by the Appellate Court in *Du Plessis NNO v Rolfes Ltd* 1997 (2) SA 354 (A) at 364G–365A. See also *Septoo v City of Johannesburg* [2017] ZALAC 85; (2018) 39 ILJ 580 (LAC) at para 19.

⁴² *Potgieter v Van der Merwe* 1949 (1) SA 361 (AD) at 372 (*Potgieter*).

⁴³ Pollock *Principles of Contract: A Treatise on the General Principles Concerning the Validity of Agreements in the Law of England* 8 ed (Stevens and Sons, London 1911) at 629.

the particular case the other party may fairly infer that the right of [rescission] is waived.”⁴⁴

[154] What is important to emphasise from the quoted passages is the fact that the election must be made within a reasonable time. The failure to exercise the right in section 182(2)(b) within a reasonable time is evidence and may be conclusive evidence of an election not to terminate the employment contract.⁴⁵ That the election must be made within a reasonable time is an aspect which the Labour Appeal Court in *Landman* seems to have overlooked. The reason for the Court not to have dealt therewith lies in all likelihood in the fact that it failed to consider the legal consequences arising from the nature of the right that accrues to the employer in terms of section 187(2)(b), with the result that it dealt with the issue purely as one of a waiver as opposed to a situation where the employer is entitled to an election between two alternative rights which are inconsistent with each other. Although election involves the waiver of a right, and while election and waiver are said to be species of the same general legal concept that involves the abandonment of a right and may have the same requisites and may produce the same results,⁴⁶ they are legal acts which arise in different situations. They have their own nuances, and the distinction is best maintained.

[155] The right to terminate the employment contract by reason of age is conferred on the employer by section 187(2)(b). It is therefore a right conferred by law and it matters not that it is in a statutory context, and that it impacts on the contractual relationship between parties. That being so, the decision to exercise that right by terminating the employment relationship rests with the employer.⁴⁷ It does not require

⁴⁴ Id.

⁴⁵ *Mahabeer v Sharma* NO 1985 (3) SA 729 (A) (*Mahabeer*) at 736D-I and *Cook v Morrison* [2019] ZASCA 8; 2019 (5) SA 51 (SCA) at para 30.

⁴⁶ The principle is sometimes conveniently referred to as the principle of waiver by election. See *Delta Petroleum (Caribbean) Ltd v British Virgin Islands Electing Corporation* [2020] UKPC 23 at para 18 (*Delta Petroleum*).

⁴⁷ As the issue was not raised and therefore not addressed, I leave the question open whether the employer may have to comply with the employee’s right to a procedurally fair dismissal in terms of section 188(1)(b) of the LRA when making the decision.

the agreement of the employee concerned and is consequently a unilateral act. In this context, the choice with which the employer is presented by section 187(2)(b) when an employee reaches the normal or agreed retirement age is best described as an election as opposed to the waiver of a right conferred by operation of law.⁴⁸ Waiver by election, or simply “election”, applies in the narrow situation in which there is a choice between two rights or powers:

“When one party to a contract commits a breach of a material term, the other party is faced with an election. He may cancel the contract or he may insist upon due performance by the party in breach. The remedies available to the innocent party are inconsistent. The choice of one necessarily excludes the other, or, as it is said, he cannot both approve and reprobate.”⁴⁹

[156] The election is made unilaterally and arises where, in a contractual context such as in the present matters, there is a choice as to whether or not the contract “lives or dies”.⁵⁰ Although election typically arises when the parties to a contract have to know where they stand, it is a concept which may find application in more than one context. The source of the right or power is therefore not relevant and the principle of election is not confined to remedies arising in a contractual context as the third judgment seems to suggest.⁵¹

[157] The result of an election is that once the election has been made, it is final and binding, and if the party having the election chose to terminate the contract, it can only be revived by an agreement that requires a fresh meeting and concurrence of the

⁴⁸ The bilateral nature of waiver in a purely contractual context is not without controversy and I express no views with regard thereto. See Christie and Bradfield *Christie’s The Law of Contract in South Africa* 8 ed (LexisNexis, Durban 2022) at 533 and Kerr *The Principles of the Law of Contract* 6 ed (LexisNexis, Durban 2002) at 469-93.

⁴⁹ *Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) Ltd* 1996 (2) SA 537 (C) (*Bekazaku*) at 542E. See also Christie and Bradfield *id* at 563-4.

⁵⁰ *Kosmar Villa Holidays plc v Trustees of Syndicate 1243* [2008] EWCA Civ 147 at para 66.

⁵¹ *Delta Petroleum* above n 46 at para 19.

minds of the parties to restore the *status quo ante* (situation that existed before).⁵² Further, and in a contractual context, an election not to terminate the contract means two things: Firstly, not unlike any other contractual relationship where a party has waived a right in law to terminate the contractual relationship, the employment contract as it existed when the right to end that relationship accrued continues to exist.⁵³ Secondly, the right to terminate the relationship for the reason that forms the basis for the existence of the right is lost.⁵⁴ In the context of section 187(2)(b), this means that the employment relationship of the parties continues to be regulated by the same contract and that the employer has lost the right to terminate the contract on the basis of the employee having reached the normal or agreed retirement age.

[158] This result does however not mean that the employer can no longer terminate the employment relationship after having followed a fair procedure for reasons relating to the employee's capacity, the employee's conduct, or if operational requirements necessitate, the termination of the contract. An employment contract that does not specify a date of termination, is otherwise always terminable on any of the grounds accepted in law. Nevertheless, it is always open to the employer and employee to agree on what the result would be in the event of the employer failing to terminate the employment contract when the employee reached the determined retirement age. Subject to any legislative prescription, the parties to an employment contract are, as with any other contract, free to regulate their respective rights and duties in the contract. It may accordingly be open to the parties to agree on a new retirement age or to limit the duration of the employee's employment for a specified period.

[159] The implementation of the prohibition against discrimination on the basis of age required the Legislature to make a choice between competing interests. It is a

⁵² *Desai v Mohamed* 1976 (2) SA 209 (N) at 713. See also *United Bioscope Cafes Ltd v Mosely Buildings Ltd* 1924 AD 60 at 67; *Thomas v Henry* 1985 (3) SA 889 (A) at 896E; *Bekazaku* above n 49 at 542E-J; and *Sewpersadh v Dookie* [2009] ZASCA 78; 2009 (6) SA 611 (SCA) at para 16.

⁵³ Christie and Bradfield *Christie's The Law of Contract in South Africa* 6 ed (LexisNexis, Durban 2011) at 457.

⁵⁴ *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* (2) 2005 (6) SA 23 (C) at para 32.

choice between the need to expand the labour market by increasing the participation of younger workers and protecting the rights of older workers who are possessed of the physical and mental abilities to continue to satisfactorily discharge their functions. The interpretation given to section 187(2)(b) in this judgment and the legal consequences that flow from the nature of the employer's right to terminate the employment relationship are, in my view, consistent with the Legislature having chosen to find the middle ground between the automatic termination of an employee's employment by reason of attaining a retirement age on the one hand, and on the other, the continued employment of those employees who, despite their age, are possessed of the necessary skills and knowledge and the physical and mental ability to satisfactorily continue to perform their contractual duties and remain active in the labour market. The benefit of retaining the services of the older employees is gained by section 187(2)(b) allowing the employment relationship to continue for a reasonable time period. This affords the employer the time and opportunity to give considerations to, and decide whether or not to continue that relationship, as opposed to its automatic termination upon the employee having reached the agreed or normal retirement age that would otherwise be the position, or by placing an obligation on the employer to immediately terminate the employment relationship as suggested in the first judgment.

[160] This interpretation of section 187(2)(b) in my view better serves to promote the extension of the working life of active older employees without unduly restricting the entry of younger persons to the labour market. It provides the employer with an opportunity to consider retaining the services of an employee who has reached retirement age and to reach agreement with the employee with regard to the terms of their continued employment. It further prevents the undue delay of the decision with regard to the tenure of employment of an employee who has reached retirement age by requiring the employer to exercise the accrued right within a reasonable time. It serves to promote fairness to both the employer and the employee. This is consistent

with the provisions of the Older Persons Act⁵⁵ and its objective of giving effect to and protecting the right of older persons to equality as entrenched in section 9 of the Constitution.⁵⁶ The preamble to the Older Persons Act proclaims, among others, the necessity to empower older persons “to continue to live meaningfully and constructively in a society that recognises them as important sources of knowledge, wisdom and expertise”. The general principles set out in section 5 of the Older Persons Act, importantly, are said to “guide the implementation of all legislation applicable to older persons”.⁵⁷ The general principles referred to include the following—

- “(2) All proceedings, actions or decisions in a matter concerning an older person must—
 - (a) respect, protect, promote and fulfil the older person’s rights, the best interests of the older person and the rights and principles set out in this Act, subject to any lawful limitation;
 - (b) respect the older person’s inherent dignity;
 - (c) treat the older person fairly and equitably; and
 - (d) protect the older person from unfair discrimination on any ground, including on the grounds of the health status or disability of the older person.
- (3) In any matter concerning an older person—
 - (a) an approach which is conducive to conciliation and problem-solving should be followed and a confrontational approach should be avoided; and
 - (b) a delay in any action or decision to be taken must be avoided as far as possible.” (Emphasis in original).

[161] The finding in *Waco* and *Landman* that it is open to the employer to terminate the employment contract at any time after the employee has reached retirement age is inconsistent with the ordinary principles of contract that find application to the

⁵⁵ 13 of 2006.

⁵⁶ An “older person” is defined in section 1 as “a person who, in the case of a male, is 65 years of age or older and, in the case of a female, is 60 years of age or older.”

⁵⁷ Subsection (1)(a) of section 5.

exercise of two alternative and inconsistent courses of action. The right the employer acquires when the employee has reached retirement age is the second form of right referred to in *Van Streepen*.⁵⁸ It arises by operation of law, that is, by reason of the fact that section 187(2)(b) affords the employer the right to terminate the employment relationship when the employee has reached retirement age. That right is exercised in the context of the contractual nature of the relationship between the employer and employee. The LRA does not serve to alter the contractual nature of the relationship between the employer and employee or to exclude the application of contractual principles. What it does is simply to regulate the relationship between the employer and employee. To that extent it may intrude on the employment relationship with regard to the terms which govern that relationship and its duration.⁵⁹ It may accordingly override what the parties have otherwise consensually agreed to with the aim of giving effect to the right to fair labour practices and other entrenched rights in the Constitution. The findings in *Waco* and *Landman* further renders the position of the employee after reaching retirement age uncertain. This is inconsistent with the notion of fairness and the aim in section 5(3)(b) of the Older Persons Act to avoid a delay in any action or decision affecting older persons.

[162] The interpretation given to section 187(2)(b) in the first and third judgments is with respect inconsistent, not only with the fact that the Legislature has chosen to regard the termination of the employment relationship based on age as a dismissal, but also with the nature of the right that accrues to the employer when the employee has reached retirement age and the contractual principles that find application thereto. That the contractually agreed retirement age gives rise to an obligation on the part of the employer to see to it that the employee is retired upon reaching the agreed age, as suggested in the first judgment, is premised on the contractual nature of the relationship between the employer and employee. As stated, the Legislature has chosen to intrude on that relationship by regarding the termination of the employment relationship as a dismissal. A dismissal does not contemplate a consensual

⁵⁸ *Van Streepen* above n 24 at 588G-J.

⁵⁹ *National Automobile & Allied Workers Union v Borg Warner* (1994) 15 ILJ 509 (A) at 515G-J.

termination of employment. Further, the suggested interpretation effectively provides for something no different from what would otherwise have been the ordinary consequence of a time clause in an agreement where the employment relationship is immediately terminated upon the happening of the agreed event. If that was the intention, the Legislature could have said so.

[163] Further, instead of serving to protect older, vulnerable employees at the point of retirement, the interpretation of section 187(2)(b) proposed in the first judgment is more likely to result in the termination of the services of an employee who has reached retirement age without any consideration of whether the person's skills and knowledge may continue to be utilised, and whether the employee has the ability to continue to satisfactorily perform their contractual duties. At risk of missing the cut off date and a finding of having discriminated against retiring employees, employers will, generally speaking, now be on their guard, and will likely balk at the suggestion that they must seek to negotiate a new fixed term contract or retirement age should they wish to retain the services of a retiring employee for even a single day beyond the date of retirement.

[164] Further, the suggestion in the first judgment that the failure of the employer to retire the employee on the agreed retirement age, even by a single day, must render it an automatically unfair dismissal without any enquiry into the reasonableness of the delay, is in my view also inconsistent with the basic tenets of fairness. As stated by this Court in *NEHAWU*,⁶⁰ fairness is not confined to workers only. In support of this statement this Court quoted with approval the following passage from *National Union of Metal Workers of South Africa v Vetsak Co-Operative Ltd*:⁶¹

“Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment.”⁶²

⁶⁰ *NEHAWU* above n 6 at para 38.

⁶¹ *National Union of Metal Workers of South Africa v Vetsak Co-operative Ltd* 1996 (4) SA 577 (A).

⁶² *Id* at 589C-D. See also 593E-H.

[165] I also respectfully disagree with the first judgment that an interpretation of section 187(2)(b) that leaves room for an employer to terminate an employee's employment on a date later than the day on which the employee reaches retirement age, is open to abuse by the employer. As the Labour Appeal Court in *Landman* correctly pointed out, it will be impermissible for an employer to invoke the provisions of section 187(2)(b) where the real reason for the dismissal is based on something other than age. When placed in dispute, what the real reason for a dismissal was in any given case will always be a factual question determinable on the facts of the matter. It is an issue that may arise in a variety of contexts under the LRA and not only in relation to the dismissal of an employee who has worked beyond his or her agreed or normal retirement age.

[166] The question is then whether in the present two matters the employers elected not to exercise the right to terminate the employees' contracts of employment when they had reached retirement age.⁶³ Common to both waiver and election is that it is a matter of the intention of the party said to have made the election or waived the right in question. "[W]hether it is the waiver of a right or a remedy, a privilege or power, an interest or benefit, and whether in a unilateral or bilateral form, the starting point invariably is the will of the party said to have waived."⁶⁴ The intention is determined objectively, that is, it is adjudged by its outward manifestation in the form of words, spoken or written, or in the form of conduct or a combination of words and conduct.⁶⁵ This means that mental reservations that have not been communicated are of no legal consequence, and the outward manifestations of the intention of the party faced with the choice between two alternative and inconsistent courses of action are adjudged

⁶³ The issue of estoppel did not arise in either the *Landman* or the *Solidarity* matter.

⁶⁴ Nienaber JA in *Road Accident Fund v Mothupi* [2000] ZASCA 27; 2000 (4) SA 38 (SCA) (*Mothupi*) at para 15.

⁶⁵ *Id* and *ABSA Bank Ltd v The Master NNO* 1998 (4) SA 15 (N) at 28G-J.

from the perspective of a reasonable person in the position of the other party concerned.⁶⁶

[167] Being a matter of intention, election or waiver can only occur when the party on whose conduct reliance is placed had knowledge of the legal right which they are said to have elected to waive, or the right of election which they are said to have enjoyed, and of the facts under which, or from which, the right arose.⁶⁷ In the case of an election, it means that the person making the election must similarly have knowledge of both the facts giving rise to the election, and of the right of election itself.⁶⁸ The required knowledge as an ingredient of the required intention must necessarily also include knowledge of the existence of a choice between what are alternative and inconsistent courses of action.

[168] The burden of proof is on the party who alleges that an election has been made, or that a right has been waived. Election or waiver is not assumed. It must consequently be pertinently raised, and being a factual matter, it must be supported by facts, which must be pleaded. By reason of the fact that no-one is presumed to waive their rights, clear proof is required of an intention to do so.⁶⁹ In *Laws v Rutherford*⁷⁰ the position was stated as follows:

⁶⁶ *Mothupi* above n 64 at para 16. See also *Coppermoon Trading 13 (Pty) Ltd v Government, Eastern Cape Province* 2020 (3) SA 391 (ECB) at paras 24-5; *Multilateral Motor Vehicle Accidents Fund v Meyerowitz* 1995 (1) SA 23 (C) at 27D-E; *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) at 792B-E; *Palmer v Poulter* 1983 (4) SA 11 (T) at 21A; *Traub v Barclays National Bank Ltd*; *Kalk v Barclays National Bank Ltd* 1983 (3) SA 619 (A) at 634H-635D; and *Mutual Life Insurance Co of New York v Ingle* 1910 TS 540 at 550.

⁶⁷ *Ex parte Sussens* 1941 TPD 15 at 20; *Mothupi* above n 64 at para 17; and *Borstlap v Spangenberg* 1974 (3) SA 695 (A) at 704G-H. As stated by Steyn CJ in *Hepner v Roodepoort-Maraiburg Town Council* 1962 (4) SA 772 (A) at 778H-9A:

“In the ordinary case of waiver, the *facta probanda* [(material facts)] would be full knowledge of the rights in question and express waiver or waiver by plainly inconsistent conduct, i.e. knowledge of a particular kind and surrender of the right in a particular manner.”

⁶⁸ See *Feinstein v Niggli* 1981 (2) SA 684 (A) at 698A - 9B and *Pretorius v Greyling* 1947 (1) SA 171 (W) at 177.

⁶⁹ *Ellis v Laubscher* 1956 (4) SA 692 (A) at 702 E.

⁷⁰ *Laws v Rutherford* 1924 AD 261 at 263. See also *Montesse Township & Investments Corporation v Gouws NO* 1965 (4) SA 373 (A) at 381B; *Borstlap v Spangenberg* above n 48 at 704G-H; *Feinstein* above n 6 at 698H, and *Mothupi* above n 64 at para 19.

“The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it.”⁷¹

Further, in *Mothupi*, the Court held that “the conduct from which waiver is to be inferred, must be unequivocal, ‘that is to say, consistent with no other hypotheses.’”⁷²

[169] Making an election accordingly requires an outward representation or some conduct that unequivocally indicates, when interpreted objectively, that the party concerned has made a knowing and irrevocable election.

[170] In *Landman*, the employee pertinently relied on a waiver by the employer of its right to terminate the employment contract by reason of the employee having reached the agreed retirement age. In *Landman*, and for that matter also in *Solidarity*, conduct from which an intention to elect to waive the right in section 187(2)(b) to terminate the employment relationship is to be inferred, can on the facts only consist of the failure of the respective employers to exercise the right within a reasonable time. As stated in the passage quoted earlier from the judgment in *Segal*,⁷³ a party who has acquired the right to terminate a contract and is left with the choice whether or not to do so, is entitled to a reasonable time in which to make that choice. Although each case and the meaning of the particular conduct relied upon depends on the particular facts, in an instance such as the present where the right entitles the party concerned to either terminate the employment relationship or continue with it, certainty requires that the right must be exercised within a reasonable time.

[171] In the absence of anything indicative of a contrary intention, a failure to do so provides strong *prima facie* evidence (evidence based on first sight) which may justify the inference that the employer had elected not to terminate the contract. In

⁷¹ *Laws v Rutherford* 1924 AD 261 at 263.

⁷² *Mothupi* above n 64 at para 19.

⁷³ See *Segal* above n 40 at 644-5 and [152] of this judgment.

*Mahabeer*⁷⁴ the Appellate Division dealt as follows with the correct approach to a failure of a party to a contract to exercise the right to cancel the agreement within a reasonable time:

“It is often said (usually on the authority of Voet *Commentarius Ad Pandectus* 18.3.2) that the right to cancel an agreement must be exercised within a reasonable time. I have no quarrel with that statement – as far as it goes. But it does not follow that failure to exercise the right within such a time results *ipso iure* in its loss. In *Potgieter*’s case *supra* this Court also approved in the present context of a passage which appears in Pollock at 629 to the effect that “the contract must be rescinded within a reasonable time, that is, before the lapse of a time after the true state of things is known, so long that under the circumstances of the particular case the other party may fairly infer that right of rescission is waived.”, which puts failure to exercise the right to cancel within a reasonable time in its true perspective. Depending on the circumstances, such a failure may, [for example], justify an inference that the right was waived or, stated differently, that the party entitled to cancel has elected not to do so (*cf Pienaar v Fortuin* 1977 (4) SA 428 (T) at 433G; *Becker v Sunnypine Park (Pty) Ltd* 1982 (1) SA 958 (W) at 964-5; *Smit v Hoffman en ‘n Ander* 1977 (4) SA 610 (O) at 616 G-H), or it may open the door to some other defence. In such cases the lapse of an unreasonably long time forms part of the material which is taken into account in order to decide whether the party entitled to cancel should or should not be permitted to assert his right. But per se it cannot bring about the loss of the right. (*Cf Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 (T) at 325F-G).”⁷⁵

[172] The time period which had elapsed between the employees in both *Landman* and *Solidarity* having reached their respective retirement ages and the decision of the employers to terminate their services on the basis of their age, fluctuated between a period of six months to three years. In determining what a reasonable period is it is necessary to have regard to all relevant facts and circumstances:⁷⁶

⁷⁴ *Mahabeer* above n 45.

⁷⁵ *Id* at 736E-I.

⁷⁶ *United Democratic Movement v President of the Republic of South Africa (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as Amici Curiae)* [2002] ZACC 21; 2003 (1) SA 495 (CC); 2002 (11) BCLR 1179 (CC) at para 105 and *Annamma v Moodley* 1943 AD 531 at 538- 9.

“‘Reasonable’ is a relative term and what is reasonable depends upon the circumstances of each case (cf *Tiopaizi v Bulawayo Municipality* 1923 AD 317 at 326; *Microutsicos and Another v Swart* 1949 (3) SA 715 (A) at 730). In order to determine what is reasonable within a given factual context one must have regard to the full spectrum of relevant facts and circumstances that bear on the matter in issue. As Corbin (op cit vol 1 at 414 section 96) states. ‘there is a large element of uncertainty in the determination of the length of a ‘reasonable time’ in any particular case . . . Furthermore, there is a difference between what may be reasonable in the light of the circumstances existing at the time the contract is made and what [is] reasonable in the light of the circumstances as they occur during the course of performance.’”⁷⁷

[173] In the present matters there was no evidence of what would have constituted a reasonable time period. It is however not necessary for purposes of the present enquiry to decide what a reasonable time period was within which to decide to terminate the employment relationship or whether that alone is sufficient to conclude that the employers elected to waive their right to terminate the employees’ employment. It will be accepted for purposes of this judgment that the time periods in question were unreasonable. However, the difficulty that presents itself in the present matters is whether it can be inferred, from the assumed lapse of a reasonable period of time, that the employers concerned had the intention to elect to waive their right to terminate the employment contracts. As stated earlier, since election and waiver are a matter of intention, proof of an intention to waive a right can only exist where the party concerned has knowledge of both the facts and the right in question. It is in other words a question of intention based on knowledge.

[174] To emphasise the requirement that a party must possess a comprehensive understanding of both their rights and the relevant facts before any waiver can be

⁷⁷ *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and Other Related Cases* 1985 (4) SA 809 (A) at 830H-831A.

inferred, the Court in *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another*⁷⁸ reasoned that:

“As early as 1891 De Villier CJ said in *Watson v Burchell* 9 SC 2 at 5 that ‘no doctrine is better settled in our law than that a person cannot be held to have renounced his legal rights by acquiescence unless it is clear that *he had full knowledge* of his rights and intended to part with them’.

The reason is plain for, as De Villiers J remarked in *Tighy v Putter* 1949 (1) SA 1087 (T) at 1095, rights cannot be renounced unless the person concerned ‘knew what those rights were both in fact and in law’. Save for a somewhat discordant note sounded in *Schwarzer v John Roderick’s Motors (Pty) Ltd* 1940 OPD 170 at 185, this has always been and still is our law (*Laws v Rutherford* 1924 AD 261 at 263; *Martin v De Kock* 1948 (2) SA 719 (A) at 733; *Feinstein v Niggli and Another* 1981 (2) SA 684 (A) at 698F-G where an election to rescind or affirm an agreement received similar treatment.”⁷⁹

[175] This statement of the law is undoubtedly correct. In *Landman* the employer’s decision to terminate the employee’s contract of employment only sometime after the employee had already attained retirement age is stated to have been made with reliance on section 187(2)(b). The employer’s reliance on section 187(2)(b) is clearly premised on the legal position as it existed for more than 24 years following the judgment in *Waco* and the judgments that have followed thereon.⁸⁰

[176] The *Solidarity* matter is no different. In that matter, by way of example, the employer pleaded in the case of one of the employees, namely Mr Strydom, that he had reached the agreed retirement age; that the termination of his services past that age did not amount to an automatically unfair dismissal; and the fact that he continued to work beyond his retirement age, did not amount to a waiver of the employer’s right to terminate his employment.

⁷⁸ *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 (4) SA 202 (A).

⁷⁹ *Id* at 221F-H.

⁸⁰ See for example *Rubenstein v Price’s Daelite (Pty) Ltd* [2002] ZALC 28; (2002) 23 ILJ 528 (LC) at paras 20-4; *Kutuma v Limpopo Legislature* [2014] ZALCJHB 357 at paras 33-8; and *Bos v Eon Consulting (Pty) Ltd* [2016] ZALCJHB 305 at paras 46-7.

[177] This is consistent with the outcome of the meaning given to section 187(2)(b) in *Waco*, namely that the employer is entitled to act in terms of that section at any time after an employee has reached the normal or agreed retirement age. Having acted on what the employers considered to be the correct legal position, it cannot be said that they had elected to waive their right to terminate the employees' employment. It does not justify a drawing of an inference of such an election. The further difficulty is that it cannot be said that any election which may have been made, was made with knowledge of the facts and the nature of the right the employer was put to an election to exercise.

[178] In *Solidarity* the employees, with reliance on their conditions of employment read with the rules of the relevant pension fund, made the argument in this Court that by allowing them to work beyond their retirement age of 60 years, the employer incurred what was described as "an inherent obligation . . . to engage in consultation and reach accord concerning a [new] retirement age that transcends the threshold of 60 years". This argument is premised on the conduct of the employer having tacitly created a *pactum de contrahendo* (agreement to agree). It is difficult to see how, in the face of the employees having done nothing to enforce their alleged right to negotiate, it is open to them to rely on the employer's failure as the basis for their claim that their dismissal was an automatically unfair dismissal based on age discrimination. Further, as the Labour Court in its judgment in *Solidarity* correctly pointed out, the employees' contract of employment prescribed a procedure should the employee seek permission to work beyond their retirement age, and that "no extension of time, waiver, relaxation or suspension of any of the provisions or terms of [the employment contract] . . . shall be binding unless recorded in a written document signed by duly authorised representatives of the parties".⁸¹

[179] These terms of the agreement were not complied with, and I accordingly find no merit in the submission relied on in argument. However, the more obvious reason

⁸¹ *Solidarity* above n 20 at para 23.

for there being no merit in this submission remains the fact that the conduct on which reliance is placed for the existence of this “inherent obligation”, is equally consistent with the employer having acted in accordance with the legal position arising from the interpretation given to section 187(2)(b) in *Waco* and other decisions of the Labour Court. As a tacit contract cannot be held to exist unless it can be concluded that the parties intended to contract with each other, and as the enquiry is concerned with the proper inferences to be drawn from the facts, the conduct of the employer relied on in *Solidarity* does not, on a preponderance of probabilities, support the inferences sought to be drawn therefrom, namely that the unequivocal conduct of the parties is “capable of no other reasonable interpretation that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact *consensus ad idem*” (a meeting of the minds).

[180] I am accordingly of the view that there exists no reason to interfere with the decisions of the Labour Appeal Court in *Landman* and that of the Labour Court in *Solidarity* in dismissing the employees’ claims. Regarding the issue of the costs of the litigation in this Court, the nature of the issues raised, and its importance in providing clarity with regard to the retirement of employees generally, dictate that it would be fair not to depart from the general rule that the losing party in labour matters should not be ordered to pay the costs of the successful party.⁸²

Order

[181] In the result, and for the foregoing reasons, I propose the following order in both the *Landman* and *Solidarity* matters:

1. Leave to appeal is granted in both matters.
2. The appeals are dismissed.
3. There are no orders as to costs.

⁸² *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Ltd* [2021] ZACC 41; 2022 (1) BCLR 118 (CC); (2022) 43 ILJ 341 (CC) and *National Union of Mineworkers obo Masha v Samancor Limited (Eastern Chrome Mines)* [2021] ZACC 41; (2021) 42 ILJ 1881 (CC); 2021 (10) BCLR 1191 (CC).

ROGERS J (Dodson AJ, Kollapen J and Tshiqi J concurring):

[182] I have had the pleasure of reading the judgments of my Colleagues Zondo CJ (first judgment) and Van Zyl AJ (second judgment). I agree with the first and second judgments that our jurisdiction is engaged and that leave to appeal should be granted. On the merits, I disagree fundamentally with both judgments on the interpretation of section 187(2)(b) of the LRA. In the result, however, I agree with the second judgment that the appeal in *Landman* should be dismissed and with the first judgment that the appeal in *Solidarity* should succeed.

Interpretation of section 187(2)(b)

[183] The case turns on the proper interpretation of section 187(2)(b) of the LRA. The first judgment holds that this provision only permits an age-related dismissal if it occurs on the exact date the employee reaches the normal or agreed retirement age (retirement-age date).⁸³ The second judgment holds that on the retirement-age date the employer is put to an election and that in most instances the election will have to be exercised within a reasonable period of time, failing which the employer might be taken to have elected to keep the employment contract in place. In the two cases before us, the second judgment only avoids the implications of this interpretation by invoking the employers' legal misapprehension brought about by earlier case law.

[184] A dismissal based on age is fair "if the employee has reached the normal or agreed retirement age". The words I have quoted from section 187(2)(b) are straightforward. If somebody asks me today if I have reached my 65th birthday, I would say yes, even though today is not my 65th birthday. If a request is made to a group of people, "Will all those who have reached the age of 65 please raise their hands", nobody would understand the question to be limited to those whose 65th

⁸³ The retirement-age date will not necessarily be a birthday. In *Solidarity*, for example, the retirement-age date was the last day of the month in which the employee turned 60.

birthday it is. All those people who were 65 or older would raise their hands. The state of having reached a specified age starts on the person's relevant birthday and continues thereafter for as long as the person lives. A person doesn't cease to have reached her 65th birthday because she is 66 or 67.

[185] That is the plain meaning of the phrase "has reached the normal or agreed retirement age" in section 187(2)(b). Is there any reason not to give the words their plain meaning? There is nothing in the immediate context that points to a different meaning. On the contrary, the opening words, "a dismissal based on age is fair", favours the plain meaning. Dismissal "based on age" is non-specific as to the age on which the dismissal is based, save that the employee must satisfy the condition of having reached the normal or agreed retirement age. If the lawmaker had intended a fair age-based dismissal to be confined to dismissal on the retirement-age date, the provision would have read: "a dismissal is fair if the employee is dismissed on the date on which he or she reaches the normal or agreed retirement age for persons employed in that capacity".

[186] A statutory provision usually has a purpose informed by a policy choice. In my view, and having regard to South Africa's chronic problem of unemployment, the main policy underlying section 187(2)(b) is the equitable distribution of employment opportunities by making jobs available to younger jobseekers and making advancement available for younger employees. The thinking must have been that all potential employees should have a fair crack at gainful employment and advancement for a fair period of time. It is thus not unfair that people who may have had employment for three or four decades should make way for younger people.⁸⁴

⁸⁴ In *Palacios de la Villa v Cortefiel Servicios SA* [2007] EUECJ C-411/05; [2007] IRLR 989, a decision of the Grand Chamber of the Court of Justice of the European Communities, the policy underlying the Spanish legislation at issue was said to be "seeking to promote better access to employment, by means of better distribution of work between the generations" (at para 53; and see also at paras 58, 65 and 72). Similar justifications have been put up in other age-discrimination cases: see, for example, *Rosenbladt (Social policy)* [2010] EUECJ C-45/09; [2011] IRLR 51 (*Rosenbladt*) at para 43; *Georgiev (Social policy)* [2010] EUECJ C-250/09; [2011] 2 CMLR 7 at para 45; *Fuchs (Social policy)* [2011] EUECJ C-159/10; [2011] IRLR 1043 (*Fuchs*) at paras 56-66 and 75; and *Mallon v Minister for Justice, Ireland, and the Attorney General* [2024] IESC 20 (*Mallon*) at paras 62(5) and 78.

[187] A subsidiary purpose may be to permit the ending of employees' careers with dignity. It would, of course, be highly offensive to suppose that employees who have reached their normal or agreed retirement age have ceased to be capable of doing their work. A generalised assumption like that would also be untrue. But advancing years can negatively affect an employee's abilities. Permitting employers to dismiss employees who have reached their normal or agreed retirement ages, even though they are at that time still fully productive, spares employers and employees the distress and humiliation that could accompany incapacity hearings as the employees get older.⁸⁵

This policy is essentially the "fair innings" justification mentioned in Ter Haar "Is the CJEU Discriminating in Age Discrimination Cases?" (2020) 13 *Erasmus Law Review* 78, though it perhaps also has elements of the "complete life view" justification to which the author refers. For a criticism of the "fair innings" justification, see Fredman "The Age of Equality" in Fredman and Spencer (eds) *Age as an Equality Issue: Legal and Policy Perspectives* (Hart Publishing, Oxford 2003) (Fredman and Spencer) at 47, a critique that may be more compelling in a buoyant economy than in one marked by chronic unemployment.

There may be other job-specific justifications. See the Canadian cases dealing with the mandatory retirement of university academics (*McKinney v University of Guelph* 1990 SCC 60, [1990] 3 SCR 229 and *Dickason v Governors of the University of Alberta* 1992 SCC 30; [1992] 2 SCR 1103) and of hospital physicians (*Stoffman v Vancouver General Hospital* 1990 SCC 62; [1990] 3 SCR 483).

In *Seldon v Clarkson Wright and Jakes (Secretary of State for Business, Innovation and Skills and another intervening)* [2012] UKSC 16; [2012] 3 All ER 1301 (SC) (*Seldon*), Lady Hale spoke of "inter-generational fairness" which is a somewhat wider concept than the "fair innings" idea. She said this of "inter-generational fairness" (at para 56):

"It can mean a variety of things, depending upon the particular circumstances of the employment concerned: for example, it can mean facilitating access to employment by young people; it can mean enabling older people to remain in the workforce; it can mean sharing limited opportunities to work in a particular profession fairly between the generations; it can mean promoting diversity and the interchange of ideas between younger and older workers."

See also para 73 per Lord Hope.

⁸⁵ See *Rosenbladt* above n 84 at para 43 and *Fuchs* above n 84 at para 50. In *Mallon* above n 84 at para 74 the Court said that "the avoidance of individual capacity assessment – both because of the scope for disputes such assessment necessarily involves and because of its potential impact on the dignity of employees – has been recognised as a legitimate aim capable of justifying a general retirement age". See also *Seldon* above n 84 at paras 57-8.

In *Rutherford v Secretary of State for Trade and Industry* [2004] EWCA Civ 1186; [2004] IRLR 892, the British government's justification of the retirement ages in section 109 of the Employment Rights Act 1996 consisted of the following social policies: "enabling employers to meet the expectations of younger employees for advancement; assisting employers to identify their future recruitment needs; and enabling employers to dismiss an older and less capable employee without the need to justify the dismissal" (at para 45). It is of interest to note that section 109 and its predecessors (section 28 of the Industrial Relations Act 1971; para 10 of Schedule 1 to the Trade Union and Labour Relations Act 1974; and section 64 of the Employment Protection Act 1978) had the same practical effect as the interpretation I have given to section 187(2)(b) of the LRA. Section 109 provided that a dismissal was not unfair "if on or before the effective date of termination [the employee] has attained (a) . . . [the] normal retiring age, and (b) in any other case, the age of sixty-five". Fair dismissals can thus take place at any time after the employee has attained the normal retirement age (if there is one) or has attained the age of 65. See Hepple "Age Discrimination in Employment: Implementing the Framework Directive 2000/78/EC" in Fredman and Spencer above n 84 at 93.

[188] It is unnecessary to consider whether these justifications would suffice if section 187(2)(b) were challenged in terms of section 9 of the Bill of Rights, since there has been no challenge to the section in these proceedings. In a constitutional challenge, the justifications for age discrimination might require empirical evidence and are by no means uncontested, as litigation in other countries shows. What can be said is that the main policy I have identified is not offensive in the sense of imputing any age-based loss of capacity to persons who have reached their normal or agreed retirement age.

[189] If the policy underlying section 187(2)(b) is as I have set out above, it does not support an interpretation that insists that an age-based dismissal must occur on the employee's retirement-age date. The policy of older employees making way for younger jobseekers gets stronger, not weaker, as the older employees advance in age beyond their normal or agreed retirement ages. Similarly, the policy of permitting the dignified termination of employment on account of age rather than incapacity is not served by confining the day on which this can happen to the employees' retirement-age dates, quite the contrary.

[190] I cannot think of any other purpose for allowing age-based dismissals, but even if another purpose exists, I cannot conceive of one that would be served by making an age-based dismissal fair on the very date on which the employee reaches the normal or agreed retirement age but not on a later date. Why should it be fair to dismiss an employee on the basis of age because he or she is exactly 65 years old but unfair to dismiss the employee on the basis of age because he or she is 70 or 75? What considerations of policy and legislative purpose could ever justify such a distinction?

[191] The first judgment appears to regard the purpose of section 187(2)(b) as being to achieve uniformity and fairness in the dates on which employees must retire.⁸⁶ However, the desire for uniformity and fairness cannot explain why the lawmaker chose to allow age to be a basis for dismissal. At most it might explain why, once the lawmaker decided to allow age to be a basis for dismissal, it qualified this right with reference to a “normal or agreed” retirement age. However, there is no need to appeal to uniformity. Apart from anything else, employees employed by the same employer or group of employers might have different contractual retirement ages. As to fairness, it would obviously be unfair to allow an employer to dismiss an employee on account of age if there was no normal or agreed retirement age applicable to the employee. Fairness does not, however, compel the conclusion that the dismissal must take place exactly on the employee’s retirement-age date.

[192] The first judgment’s interpretation does not in any event achieve the uniformity it proclaims. The first judgment holds, paradoxically I respectfully suggest, that if the employer “misses the boat” by failing to dismiss the employee on the employee’s exact retirement-age date, the employer cannot put this right by dismissing the employee at a later date. Instead, the employer has to keep the person on indefinitely unless and until there are grounds for a fair dismissal based on misconduct, incapacity or operational requirements. Effectively, the first judgment gives the employer an election, save that it has to be exercised only on the retirement-age date. If the right to dismiss is not exercised on that exact date, the right to dismiss the employee on grounds of age is forever lost. What then becomes of uniformity? The same rhetorical question can be posed with reference to the statement in the first judgment⁸⁷ that an employer and employee are free to conclude a new contract of employment to govern extended employment beyond the initially agreed retirement-age date.

⁸⁶ First judgment at [51] to [55].

⁸⁷ First judgment at [72].

[193] The first judgment states that if the agreed retirement age is contained in a collective agreement, the trade union would be up in arms if an employer failed to comply with it. The employer can indeed disregard the retirement age, except that the employer cannot thereafter dismiss the employee in question on grounds of age. There is nothing the union can do if the employer decides not to dismiss the employee on the latter's retirement-age date. The trade union could not, after the event, obtain an order compelling the employer to dismiss the employee on grounds of age, because by that time dismissal on grounds of age would be automatically unfair.

[194] The first judgment raises the spectre of age being used as a cover for dismissals that are really based on other grounds.⁸⁸ This objection does not in my view carry any weight. There are other circumstances, unrelated to age, in which the true basis of a dismissal may be in dispute. In such a case, the dispute has to be resolved with reference to the evidence. For example, an employer may purport to dismiss an employee for incapacity or misconduct where the true basis is race or that the employee was a strike-leader or a whistleblower. And even in the case of a person who is dismissed on their retirement-age birthday, the true reason for the dismissal may be something else, and this might be inferred from the fact that there were other employees whom the employer did *not* dismiss on their retirement-age birthdays.

[195] It is also legitimate to consider the likely effects of the differing interpretations. On the first judgment's interpretation, most employers are likely from now on to dismiss employees on their retirement-age dates, since keeping them on any longer means that such employees can only be dismissed on conventionally fair grounds such as misconduct, incapacity or operational reasons. Indeed, the first judgment holds that employers are obliged to dismiss employees on their retirement-age dates, so the first judgment must envisage that in future this is what will happen. In the case of employees who are for any reason not dismissed on their retirement-age dates, one will have more instances of employees eventually being subjected to incapacity hearings due to advancing age. This is likely to be distressing for all

⁸⁸ First judgment at [59] to [61].

concerned and perhaps humiliating for the employee, a sad ending to what may have been a happy and productive career.

[196] So the first judgment's interpretation is likely to see more elderly employees dismissed sooner and an increased number of unpleasant incapacity hearings in the case of those elderly employees who are fortunate enough not to be dismissed on their relevant retirement-age dates. It would be a fallacy, therefore, to suppose that, of the competing interpretations, the first judgment's interpretation is the least invasive of section 9 of the Bill of Rights because it limits age-based dismissals to a single date. Instead, age-based dismissals will just be accelerated to take place on that single date.

[197] The second judgment's interpretation is likely to have the same practical effects as the first judgment's interpretation. On the second judgment's approach, the two employers in the present case benefit through a misapprehension of the legal position brought about by *Waco* and the cases that followed it. For the future, however, the position would be that employers will dismiss the employees on or shortly after their retirement-age dates, since any significant delay might give rise to a contention that the employer elected not to invoke its right to dismiss the employee on the basis of age.

[198] There is another objection to the second judgment's interpretation. The proposition that a person has a reasonable period of time to decide whether to exercise an election caters for the situation where the event giving rise to the right to make the election is unexpected. The obvious example is a breach or repudiation of a contract. Once the breach or repudiation occurs, the aggrieved party must in fairness have a reasonable chance to assess its options. If, however, the aggrieved party takes too long, they are at risk of a finding that they elected not to cancel the contract.

[199] This approach to election makes no sense in the context of section 187(2)(b). If there is a normal or agreed retirement age, the employer knows that the employee is reaching that age. The reaching of that age is not an unexpected event. An employer

needs no time in order to decide whether to dismiss the employee now that he or she has reached the relevant age. The employer can consider its options in the weeks before the day arrives.

[200] In my view, the correct interpretation of section 187(2)(b) is that at any time as from the employee's retirement-age date the employer may fairly dismiss the employee based on age. The employer's choice is not time-bound, provided that the relevant birthday has been reached. If the normal or agreed retirement age is 65, the employer may fairly dismiss the employee when she is, say, 67 or 68, because the employee continues to be one who "has reached the normal or agreed retirement age".

[201] To permit this open-ended choice does not increase the vulnerability of elderly employees. As I have shown, the interpretations adopted in the first and second judgments will almost certainly give rise to more elderly employees being dismissed exactly on their retirement-age dates. My interpretation allows for flexibility, since many employers who might otherwise feel forced to dismiss employees on their retirement-age dates will instead retain the employees for whatever period suits the employer.

[202] My interpretation, I must add, does not mean that employees who have gone beyond their retirement-age dates can be told to go on a moment's notice. The employee is still entitled to reasonable notice. What that notice is will depend on the contract of employment and the circumstances of the case. In my view, that is so even if the employer decides to dismiss the employee on his or her retirement-age date. If the employment is to be terminated on the employee's retirement-age date, that notice would have to be given reasonably in advance of the date in question.

[203] Of course, if the post-retirement-age employee does not want to live with the uncertainty of knowing that the employee can terminate his or her services on reasonable notice, the employee can resign or try to negotiate a fixed-term extension. But I venture to suggest that most employees would prefer to keep their jobs subject to

termination on reasonable notice rather than facing dismissal on their retirement-age dates.

[204] In addition to reasonable notice, is an employee who faces dismissal in terms of section 187(2)(b) entitled to a hearing? The question of procedural fairness was not raised by Mr Landman in *Landman*, but it was pleaded by the employees in *Solidarity*. However, the question received no attention in written or oral argument. Furthermore, and for reasons that will appear, the proper disposition of the *Solidarity* case does not require the question of procedural fairness to be determined. In the circumstances, it is undesirable to express a view on this question.

[205] Nevertheless, the following observations are not out of place. There are arguably matters that could form the subject of engagement with an employee facing dismissal in terms of section 187(2)(b). These might include whether there is a normal or agreed retirement age and, if so, what it is; whether (if the employee places this in issue) the true reason for dismissal is age rather than something else; and what would be a reasonable period of notice, having regard to the employee's personal circumstances. Furthermore, although an employer might not ever be obliged in fairness to retain an employee whom it is entitled to dismiss in terms of section 187(2)(b), there might still be value in giving the employee a chance to put up reasons as to why the employer should refrain from exercising its right of dismissal.

[206] Even if an employer is not legally obliged to give an employee a hearing on these or other matters, considerations of decency, dignity and compassion point to the desirability of hearing the employee on them, particularly since the people affected by dismissal in terms of section 187(2)(b) are likely to be long-serving and loyal employees. If an employer voluntarily follows such a course it may obviate a later challenge to the dismissal on grounds of procedural unfairness, a challenge that would then necessitate a decision on the law point which I prefer to leave open in this case.

Landman

[207] If Mr Landman's normal or agreed retirement age was 60, his employer was on my interpretation entitled to dismiss him on the basis of age, even though the dismissal took place nine months after his 60th birthday.

[208] The first judgment makes reference to the retirement age of 65 contained in the Motor Industry Provident Fund Collective Agreement (MIPFCA). However, in his statement of claim Mr Landman referred to 60 as the "agreed retirement age". His case was that, by allowing him to continue working for some months after he turned 60, his employer had waived its right to rely on the agreed retirement age of 60, alternatively that the employment contract had been tacitly amended by making the agreed retirement age of 60 no longer applicable. He also pleaded estoppel, alleging that the employer had represented to him that it would no longer rely on the agreed retirement age of 60. He pleaded, in the alternative, that, by virtue of the same circumstances, a new employment agreement had come into place on terms entitling him to work indefinitely for the employer, alternatively until he reached the age of 65. The age of 65, as an alternative to indefinite employment, was not pleaded with reference to the MIPFCA, of which Mr Landman's statement of claim made no mention.

[209] The stated case accorded with Mr Landman's statement of claim. The stated case was clearly premised on an acceptance that Mr Landman's agreed retirement age had been 60. The Labour Court was asked to decide whether his continued employment beyond that date brought a new employment contract into existence, as alleged in his statement of claim; and, if not, whether the employer had waived the agreed retirement age or whether the existing contract had been amended by doing away with the agreed retirement age, again as alleged in the statement of claim. The Labour Court was not invited to decide whether his agreed retirement age was 65 in terms of the MIPFCA or whether the MIPFCA trumped the agreed retirement age contained in Mr Landman's employment contract.

[210] No evidence was led. The MIPFCA was not placed before the Labour Court and is not part of the record before us. It may well be, indeed I think it very likely, that the retirement age of 65 in the MIPFCA is simply a provision that, for purposes of the Motor Industry Provident Fund, a member must retire once he or she reaches the age of 65. This was not said to be either an “agreed” or “normal” retirement age for employers associated with the Provident Fund. The fact that a person could not be an in-service member of the Provident Fund beyond the age of 65 would not preclude employers associated with the Provident Fund from having younger agreed retirement ages with their employees. The Provident Fund paid Mr Landman a retirement benefit when his services were terminated by his employer, even though he was not yet 65.

[211] Mr Landman did not plead, and the Labour Court was not asked to find, that his dismissal was unfair due to non-compliance with a fair procedure. The question as to whether procedural fairness applies to a dismissal in terms of section 187(2)(b) is thus not applicable in his case.

[212] I would thus dismiss the appeal in Mr Landman’s case, with no order as to costs.

Solidarity

[213] If the retirement age applicable to the employees in *Solidarity* had been and remained the last day of the month in which they turned 60, SITA would on my interpretation of section 187(2)(b) have been entitled to dismiss them when it did, even though they were all dismissed well past their retirement-age dates.

[214] However, the contractual arrangements analysed in the first judgment show that if SITA consented to an employee working beyond the last day of the month in which he or she turned 60, a new retirement age of 67 came into operation. This is what happened in the case of the six employees with which *Solidarity* is concerned. This means that SITA could not fairly dismiss them in terms of section 187(2)(b) until

they reached the age of 67. They were all dismissed well before that age. I thus agree that their dismissals were automatically unfair in terms of section 187(1)(f).

[215] This conclusion makes it unnecessary to consider the employees' pleaded case on procedural unfairness or to decide the legal question that I identified earlier, namely whether an employee who is dismissed in terms of section 187(2)(b) is entitled not only to reasonable notice but also to a fair hearing.

[216] Although SITA did not intend to discriminate on grounds of age (in part SITA was under a misapprehension that the law was as laid down in *Waco* and in part it seems to have misapprehended the applicable contractual arrangements), I agree for the reasons set out in the first judgment that it would be just and equitable to award the employees the maximum compensation of 24 months' remuneration.

[217] I disagree, however, that we should depart from the usual practice of not awarding costs in labour matters.⁸⁹ As I have said, SITA did not act maliciously; it thought it was dismissing the employees in accordance with section 187(2)(b). I do not think we should mulct SITA in costs because of a fear that otherwise the compensation awarded to the employees will be substantially diminished. The litigation was brought on behalf of the six employees by Solidarity, and we have no reason to believe that Solidarity has not covered the costs. There is no evidence that Solidarity has an arrangement with the employees that it will recover costs from any compensation awarded to them. Solidarity as a trade union has been fighting for a principle with ramifications far beyond the interests of these six individuals.

[218] Even if the employees end up bearing their own costs, the costs will be spread among six of them, and they were relatively high earners. Based on the figures

⁸⁹ For the applicable principles, see *Zungu v Premier of the Province of KwaZulu-Natal* [2018] ZACC 1; 2018 (6) BCLR 686 (CC); (2018) 39 ILJ 523 (CC) at para 24 and *Long v South African Breweries (Pty) Ltd* [2019] ZACC 7; 2019 (5) BCLR 609 (CC); [2019] 6 BLLR 515 (CC); (2019) 40 ILJ 965 (CC) at paras 27-30. See also *Member of the Executive Council for Finance: KwaZulu-Natal v Dorkin N.O.* [2007] ZALAC 34; (2008) 29 ILJ 1707 (LAC) at para 19.

contained in their statements of claim and pre-trial minutes, 24 months' remuneration for the six of them will come to R10 586 643. So this is very far from being a case where the successful employees are at risk of being "left with nothing" if they must bear their own costs.

[219] If in this matter we depart from the usual approach in labour cases, we may well end up in a position where in every successful unfair dismissal claim the employer will be ordered to pay the employee's costs. In the absence of a costs order in favour of the employee, the employee's backpay (in the case of reinstatement) or compensation (if there is no reinstatement) will in every case be diminished by the own costs he or she has to bear. And one might just as well ask why an employer that has been vindicated by successfully warding off a claim for unfair dismissal should be positively out of pocket by having to bear its own expenses. Yet we do not routinely award costs in favour of employees or employers in dismissal cases.

[220] I thus concur in the orders proposed in *Solidarity* in the first judgment, save in regard to the costs in the Labour Court, the Labour Appeal Court and this Court, in regard to which I would order the parties to bear their own costs.

Orders

[221] I would thus make the following orders:

221.1. In the *Landman* case, CCT 298/22:

1. Leave to appeal is granted.
2. The appeal is dismissed.

221.2. In the *Solidarity* case, CCT 346/22:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The decision of the Labour Court is set aside and replaced with the following:

- “(a) The dismissals of the six Solidarity members involved in this case are declared to have been automatically unfair.
- (b) The respondent is ordered to pay each of those members, or in the case of late Ms Sonia du Plessis her deceased estate, compensation equal to 24 months’ remuneration calculated at the member’s rate of remuneration on the date of dismissal.”

Case CCT 298/22

For the Applicants:

GJ Ebersöhn
Instructed by Gerrie Ebersöhn Attorneys
Incorporated

For the Respondents:

RJC Orton
Instructed by Snyman Attorneys

Case CCT 346/22

For the Applicants:

C Goosen
Instructed by Serfontein Viljoen and Swart

For the Respondents:

K Tsatsawane SC and N Makhaye
Instructed by Rambevha Morobane

Attorneys