THE LABOUR COURT OF SOUTH AFRICA
AT CAPE TOWN

Not reportable/Of Interest to other Judges

Case no: C 69/2024

In the matter between:

SOLIDARITY obo VAN RENSBURG, C K **Plaintiff**

and

XONE CONTROL ROOM MANAGEMENT (PTY) LTD **Defendant**

Heard: 14 – 15 October 2024

Delivered: 22 July 2025

Summary: (Claim of automatically unfair dismissal – Failure to prove that termination was not in accordance with an agreed retirement age – claim dismissed)

JUDGMENT

LAGRANGE, J

<u>Introduction</u>

[1] This is a claim for an automatically unfair dismissal based on age in terms of s 187(1)(f) of the Labour Relations Act, 66 of 1995 ('the LRA'), brought by the plaintiff, Mr C K Van Rensburg ('Van Rensburg') against his former employer ('Xone'), the defendant[1]. Xone defends the claim on the basis that Van Rensburg retired on an agreed retirement age and accordingly was fair in terms of s 187(2)(b) of the LRA. At the time of his termination of service on 30 September 2023, Xone as the Security Contract Manager of the Boschendal Wine Estate employed Van Rensburg.

[2] Prior to the commencement of proceedings Xone belatedly raised a special plea objecting to Van Rensburg's alternative claim of unfair dismissal. It had also questioned whether Van Rensburg was a paid-up member of Solidarity, the union which represented him. Van Rensburg abandoned his alternative claim and Xone abandoned its objection to Solidarity representing Van Rensburg. In consequence, there were no preliminary issues for the court to determine.

[3] Van Rensburg gave evidence on his own behalf and Xone called its managing director, Mr R Groenewald ('Groenewald'), and HR director Ms K Naidoo ('Naidoo') as witnesses.

[4] The crux of the dispute between the parties is whether the agreed retirement age which applied to Van Rensburg was set out in a revision of Xone's retirement policy on 15 March 2023 or was contained in a letter of

[1] The designation of parties has been altered to align with terminology used in Rule 11 of the recently amended Labour Court Rules.

30 August 2022 extending his retirement date from 30 September 2022 to 30 September 2023.

[5] Apart from the chronology of events, a great deal of the evidence concerned each party's understanding of which documents took precedence over the other, which is a matter of legal interpretation.

Outline of events and issues

[6] It is necessary to set out a brief chronology of events.

[7] Since 2013, Van Rensburg had been employed by Xone, with interruptions, for extended periods of time. Prior to his last spell of employment, he was briefly engaged as an acting site manager on a fixed term contract commencing on 4 November and ending on 18 November 2020.

[8] His most recent spell of employment commenced on 19 February 2021, when he was engaged on a permanent basis as a contract manager. His written employment contract made no express mention of a retirement age. The relevant portio s of clause 14 of his employment contract read:

> *"14 POLICIES AND PROCEDURES*
>
> *14.1 All general conditions of service of the Company, as amended from time to time, will be applicable to the Employee to the extent that they not overwritten by any provision of this Agreement.*
>
> *14.2 ...*
>
> *14.3 The employee agrees he shall conform to all policies, rules, regulations and procedures in operation of the Company from time to time. Such policies, rules, regulations and procedures shall form part of the agreement, even if not attached hereto.*

14.4 Upon signature of this document, the Employee undertakes to ensure that he familiarizes himself with all policies and procedures, to which he will be bound within the first two days of his employment with the Company."

(Emphasis added)

[9] Xone did have a retirement policy which came into force on 1 October 2020. The revised policy in effect from 19 May 2022, stated:

> ***"1. The retirement age for or all Xone staff appointed after 1 October 2020 is set at 60 years of age as accepted in their letter of appointment by way of agreeing to uphold all Xone policies, except for:***
>
> *…*
>
> *1.4 We note that there may be scarce skills from time to time with upcoming retirees. Under those circumstances, retirement will continue but the Exco member responsible for the relevant line management might propose a fixed term contract of not more than 12 months for the retention of a particular staff member, subject to approval by the XIS Board. In such cases it must be a goal to deliver adequate skills transfer during such contract."*

(Emphasis added)

[10] A few weeks before he was due to retire, Van Rensburg advised the estate manager at Boschendal, which is the site where he worked, that he was due to retire and would no longer be working there. This came as something of a surprise to the client and this led to a proposal being made that his retirement should be extended for a year. He agreed that the purpose of the extension was to permit a succession plan to be implemented so that could be an orderly handover of the of the site to his successor.

[11] Van Rensburg reached the age of sixty on 28 September 2022. Accordingly, it is common cause that he would have been due to retire at the end of that

month. Nevertheless, for the reasons mentioned above, on 30 August 2022, his employment was extended by postponing his retirement date by a year to 30 September 2023. The notice of extension stated:

> "NOTICE OF EXTENSION FOR RETIREMENT DATE
>
> *Dear Christo*
>
> *This letter serves to confirm that your current retirement date has been extended to 30 September 2023.*
>
> *The extension date of your retirement is <u>subject to the following</u> terms and conditions.*
>
> > *1. <u>All Xone group policies and procedures will remain in place as part of your terms and conditions of employment</u>.*
> >
> > *2. Due to previous normal performance issues at Boschendal your performance will be monitored and measured by us through our performance management process.*
> >
> > *3. This extension <u>cannot be extended further under any circumstances as per Xone's retirement policy</u>.*
>
> *You are requested to sign below is confirmation of receipt and acceptance of this letter."*

[12] The letter was signed by the Group Executive: HR and Transformation, Ms K Naidoo ('Naidoo') & Group Executive: Operations [Western Cape], Mr J Viljoen ('Viljoen'), and Van Rensburg signed that he acknowledged receipt of the letter concerning the notice of the extension of retirement date. According to Groenewald, the extension of the contract was a fixed term contract as contemplated in clause 1.4 of the retirement policy.

[13] Under cross-examination, Van Rensburg agreed that the extension of his retirement dates amended his contract of employment. He also agreed that there was no doubt that his employment was due to terminate on the 30 September 2023. However, he said that at the time he signed this

amendment the applicable retirement policy was the 2022 version, and he understood that if a change in the retirement policy took place in the future, it would apply to him. In his understanding, the amendment of the retirement policy in March 2023 did just that. When Groenewald was questioned about the relationship between the retirement policy and extended contract, his view was that Van Rensburg would have retired at the age of 60 but it was necessary to modify it, so he retired at the age of 61 and it was not affected by the change in the retirement policy 2023. The retirement policy was subject to the fixed term contract that was concluded. Had Van Rensburg not agreed to the fixed term extension he would not even have been employed when the retirement policy was amended. Moreover, paragraph 3 of the extension notice made it clear that no further extensions were possible so the 2023 revision of the retirement policy could not apply to him.

[14] On 15 March 2023, six months before Van Rensburg reached his extended retirement date, Xone amended its retirement policy again. The relevant provisions now read:

> *"**1. The retirement age for all Xone staff appointed after 1 October 2020 <u>is set at 62 years of age</u> as accepted in their letter of employment by way of agreeing to uphold all Xone policies, except for:***
>
> *1.1 …*
>
> *1.2 …*
>
> *1.3 Anyone that is over 60 years of age at the date of this policy being accepted, in which case the retirement age is 65 years.*
>
> *1.4 …*
>
> *1.5 For any exceptions, including appointing anyone or any of the age of 60 years, XIS Board approval is required by way of a written resolution.*

> *1.6 We note that they may be scarce skills from time to time with upcoming retirees. Under those circumstances, <u>retirement will continue but the Exco member responsible for the relevant line management might propose a fixed term contract of not more than 12 months for the retention of a particular staff member</u>, subject to approval by the XIS Board. In such cases it must be a goal to deliver adequate skills transfer during such contract."*

(Emphasis added)

[15] Groenewald testified that the extension of the contract gave the company an opportunity to find a successor to Van Rensburg to ensure a smooth transition. As far as he recalled, they found a replacement sometime around April or May 2023, a Mr J Neville ('Neville').

[16] On 20 July 2023, Van Rensburg emailed Mr J Snyers ('Snyers'), the regional operations manager, as follows:

> *"Good evening Jonathan.*
>
> *Can you please assist with the below.*
>
> *Attached the literature I signed on my retirement extension.*
>
> *At point 1 in the letter it states that Xone policies and procedures will remain in place as part of your terms and conditions of employment [see attached].*
>
> ***The Xone Group Policy on "Retirement" states that all employees that was appointed after 1 October 2020 retirement ages sit at 62 years of age. [See attached].***
>
> *I started in February 2021 portions of which means that according to the current policy, I must retire at 62.*
>
> *I am currently at 60 and 61 in September of this year. According the Policy in place, I still have another year left before turning 62 in September 2024.*
>
> *Please advise..."*

(*sic*)

[17] There was no written response to this letter of inquiry from Xone. Instead, a meeting was convened with him on 23 July 2024 to discuss the concerns he had raised. Naidoo and Mr E Groenewald ('Groenewald'), Xone's managing director, attended the meeting according to Groenewald. However, according to Naidoo, the meeting was held at Boschendal and was attended by Van Rensburg, Snyers and herself. She said that they explained to Van Rensburg that, because he had signed an extension in August 2022, that he will retire in September 2023, the new policy did not apply to him, and it was even stated in the extension letter that it cannot be extended under any circumstances. They also pointed out that his retirement had been arranged to allow his successor to take over.

[18] As far as Groenewald recalled, they did not discuss the letter of extension but rather the question of whether the 2023 amendment of the retirement policy applied. As far as he was concerned, Van Rensburg accepted the explanation that the contract had been extended to facilitate a handover and that the change in the retirement policy did not affect the agreement. Van Rensburg expressed his willingness to cooperate fully in bringing his replacement up to speed. However, Naidoo did not confirm that Groenewald attended the meeting, so the value of any recollection of his of the meeting is doubtful. In any event, following the meeting on 24 July Van Rensburg, did not raise any concerns about his retirement and he retired on 30 September 2023. Groenewald said he was surprised to see Van Rensburg's referral of his complaint of automatically unfair dismissal in October, because there was no indication that the author felt unfairly treated when he retired.

[19] As far as Naidoo understood the retirement policy, it did not apply to Van Rensburg because of extension signed in August 2022, which made it clear there would be no further extensions. She agreed that the one-year extension of his retirement was an extension of his permanent contract. She agreed too that the extension letter did not mention a retirement age, but the change in the retirement policy in 2023 could not override the stipulation in paragraph 3 of the extension agreement that it could not be extended further under any circumstances in accordance with the Xone retirement policy and was 14.1 of his contract provided that it could override the retirement policy.

Evaluation

[20] As mentioned above, the crucial issue in this matter is to determine what the relationship is between the agreement extending Van Rensburg's contract until the end of September 2023, and Xone's retirement policy as varied from time to time. More narrowly, the crisp question is whether the agreed non-renewable extension of his employment until September 2023 was rendered redundant when the March 2023 amendment of the retirement policy raise the retirement age to 62.

[21] The questions must be answered by applying the principles applicable to the interpretation of contractual documents. The standard approach since 2012, is set out in the well-known judgment of the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2], thus:

> *"[18] Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar*

[2] [2012 (4) SA 593 (SCA)

rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School. The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to 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 undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. 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."

(emphasis added, footnotes omitted)

[22] The approach in *Endumeni* has been endorsed by the Constitutional Court *inter alia* in *University of Johannesburg v Auckland Park Theological Seminary and Another* [3]:

"[66] The approach in Endumeni 'updated' the previous position, which was that context could be resorted to if there was ambiguity

[3] 2021 (6) SA 1 (CC)

or lack of clarity in the text. <u>The Supreme Court of Appeal has explicitly pointed out in cases subsequent to Endumeni that context and purpose must be taken into account as a matter of course, whether or not the words used in the contract are ambiguous. A court interpreting a contract has to, from the onset, consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract.</u>

[67] This means that parties will invariably have to adduce evidence to establish the context and purpose of the relevant contractual provisions. That evidence could include the pre-contractual exchanges between the parties leading up to the conclusion of the contract and evidence of the context in which a contract was concluded. As the Supreme Court of Appeal held in Novartis:

> *'This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties — what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. . .. A court must examine all the facts — the context — in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.'*

[68] Let me clarify that what I say here does not mean that extrinsic evidence is always admissible. It is true that a court's recourse to extrinsic evidence is not limitless because 'interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for the court and not for witnesses'. <u>It is also true that 'to the extent that evidence may be admissible to contextualise the document (since "context is everything") to establish its factual matrix or purpose or for purposes of identification, one must use it as conservatively as possible'</u>. "

(emphasis added, footnotes omitted)

[23] The broad context of all the documents, the meaning of which is contested, is they were designed to regulate one or more terms of Van Rensburg's employment relationship. It is not a matter of contention that there are general conditions of service referred to in Van Rensburg's permanent

contract in clause 14 under the heading of "Policies and Procedures", and that those general conditions of employment were applicable to Van Rensburg. The relevant policy is the retirement policy, which was amended in 2022 and 2023. Then there is Van Rensburg's employment contract. The central issue to determine is the relationship between his contract of employment and the retirement policy and how this affected his retirement date. Of particular importance is the amendment to his employment contract to extend his retirement date by a year to allow a proper handover to a successor to take place, which is not a matter of dispute. The purpose of the extension provides the context in which the amendment was concluded, without which the extension could not be explained.

[24] The essence of Van Rensburg's case is that changes in the retirement policy determined his retirement date and that the amendment letter did not affect the primacy of the retirement age set out in the policy in the event the age in the policy exceeded the retirement age agreed on in the extension letter.

[25] In the pre-trial minute, the parties agreed it was a matter of dispute whether the extension notice constituted an agreement which had the effect of amending Van Rensburg's contract of employment and that his employment terminated in accordance with that amendment. In his evidence, Van Rensburg agreed that the extension letter had amended his contract of employment but argued that he would not have signed it, had he known the retirement age in the retirement policy was going to change in March 2023. In argument it was contended even though the extension agreement was concluded that did not mean there was consensus reached between himself and Xone on his retirement age and that the extension

agreement was somehow ambiguous. Consequently, the retirement age had to be determined with reference to retirement policy.

[26] At the time the extension of this employment was agreed upon, Van Rensburg was due to retire in September 2022, having reached the retirement age of sixty, as set out in the retirement policy. His original contract of employment did not specify a retirement date. The extension agreement specifically stipulated that his *"current retirement date has been extended to 30 September 2023"* and that *"(t)he extension date of your retirement is subject to the following conditions…"* (emphasis added). At the time of agreeing to the extension of his retirement date, Van Rensburg knew that he was being exempted from the application of the prevailing retirement age, which was due to take effect shortly.

[27] However, he argues that the language of the extension agreement is ambiguous and therefor the wording of the retirement policy must prevail when determining the retirement date. The main justification advanced for this is that even though the extension agreement extended his retirement for one year, it clearly stated that it was subject to all Xone Group policies and procedures remaining in place as "*part of [his] terms and conditions of employment*", and that it could not be extended further in terms of the Xone retirement policy. In stating that the extension was subject to Xone policies and procedures, which meant that the retirement policy still applied, because it was not excluded. Moreover, the reference to there being no further extension *"under any circumstances as per the Xone retirement policy,"* did not exclude the possibility of any extensions because clause 1.6 of the retirement policy permitted a 12-month extension.

[28] Firstly, I have difficulty with the argument that the extension agreement is ambiguous[4]. It twice makes it clear that his existing retirement date would change to 30 September 2023. What is significant about this is that the agreement was not merely an extension of his employment by another year, but a postponement of his retirement. However, Van Rensburg argues that stating that the extension was subject to all policies remaining in place as part of his conditions of employment, could only mean that if an amendment to the retirement policy took place which was at odds with the agreed date, then the retirement policy date would apply. In dealing with paragraph 3 of the letter Van Rensburg's argument becomes more difficult to understand. Clause 1.6 of the policy made provision for a twelve-month fixed term contract for the purposes of skills transfer, subject to XIS board approval. Even that provision clearly does not anticipate a postponement of the retirement date because it states that the retirement "*will continue*" but a fixed term contract to retain that staff member might be considered, and even that contract may not exceed one year. Thus, while it is strictly true that the retirement policy does not expressly prohibit an extension of a retirement date, the only provision which deals with working beyond the retirement date, limits further employment to twelve months on a fixed-term contract and for the specific purpose of transferring skills. Given the stringent conditions attached before such a fixed term contract can be concluded, it makes no sense to conclude that the retirement policy nevertheless implicitly envisaged the possibility of postponing retirement

[4] As an example of ambiguity which leads to a conclusion that there was no agreed retirement age, Van Rensburg's representative cited the judgment in *Bos v Eon Consulting* (Pty) Ltd (JS948/14) [2016] ZALCJHB 305, but in that case there was simply no document the employer could point to as clear evidence of an agreed retirement age.

without any conditions. If it were intended that the date of retirement could be postponed under the retirement policy, it is highly improbable the policy would not have provide for this expressly. This much is evident from a plain reading of the text of the retirement policy.

[29] Regardless of this, the thrust of Van Rensburg's argument is that when the retirement age in the policy changed while he was still employed it applied to him too and his due retirement date was thereby extended to 30 September 2023.

[30] It is common cause that Van Rensburg's due retirement age of sixty in 2022 was derived from the retirement policy, which was amended earlier that year and the only source of a retirement age of sixty-two was the retirement policy as amended in March 2023. It is also not a contested issue that the retirement policy was a binding policy by virtue of Van Rensburg's written contract. That is made expressly clear in clauses 14.1 and 14.3 of his written contract of employment. Clause 14.1 states at all general conditions of employment were applicable to him, unless overwritten by a term in his contract and clause 14.3 makes it clear that all policies, rules, regulations, and procedures of the company were deemed incorporated into his contract.

[31] Once again, the intention of the clauses 14.1 and 14.3 are clear, namely that policies applicable to employees were applicable to Van Rensburg, unless 'overwritten' by a clause in his employment contract. In passing, I note that it appears that the author of the contract intended to write 'overriden' and that 'overwritten' was a typographical error or spelling mistake. Both parties understood 'overwritten' to have the same meaning as 'overridden' namely, to cancel a previous rule or decision. In any event,

what is important is the hierarchy established by clause 14.1. General conditions and policies were to prevail *unless* overridden by a provision in the employment contract. Thus, an amendment in the employment contract would supersede any contrary provision in a policy. Clause 14.1 does not distinguish between policies drawn up prior to, or after, the conflicting provision came into being in the employment contract. The scope of application of an overriding provision is also not limited to only certain policies or practices. Accordingly, if a contractual provision stipulates an agreed retirement age which differs from that in the retirement policy the contractual version will apply.

[32] Even on Van Rensburg's own version, he had agreed to an extension of his retirement date that was at odds with the retirement age of sixty in the 2022 retirement policy. He did not question that the amendment he had agreed to conflicted with the policy, because the very purpose of the amendment was to allow him to work another year beyond his due retirement date. What he could not accept was when the policy subsequently changed and became more favourable to him than what he had agreed to.

[33] Moreover, Van Rensburg may have queried the effect of the March 2023 amendment to the retirement policy, but after it was discussed with him, he did not raise a dispute until after his termination date, suggesting that he accepted the explanation he was given and he did not query the entry on his unemployment insurance form that his service terminated on account of retirement. His inaction after receiving the explanation why the new retirement applied is indicative that he accepted the extension agreement was unaffected by the change.

[34] For the purposes of s 187(1)(f) of the Labour Relations Act, 66 of 1995 (‘the LRA’), an employer is exempt under s 187(2)(b) from liability for unfair termination of employment based on age if an employee had reached the normal or agreed retirement age. Van Rensburg’s case is that notwithstanding his own express agreement that he would retire at age sixty-one with no further extensions of retirement, that this agreed age was changed when the retirement policy changed the retirement age to sixty-two. What he cannot get around is that his contract specifically provided for himself and Xone to agree to amendment his contract of employment even if conflicted with provisions of general policies that otherwise applied to him. As a result, he had agreed to a retirement age of sixty-one and that agreement took precedent over the subsequent change to the retirement age in March 2023, and his service was terminated in accordance with an agreed retirement age.

[35] The only way that his interpretation of the interrelationship between his contract and the policy could be upheld is if the overriding power of amendment contained in clause 14.4 completely disregarded, which cannot be a sensible interpretation of that provision.

<u>Conclusion and Costs</u>

[36] In the circumstances, for the reasons stated I am satisfied the claim of automatically unfair on account of age must fail.

[37] On the matter of costs, I see no reason for departing from the normal approach in disputes of this nature namely, that each party must bear its own costs.

Order

1. The Plaintiff's claim of automatically unfair dismissal is dismissed.
2. No order is made as to costs.

[redacted]

R Lagrange

Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: --- C Van Wyk from Solidarity

For the Respondent: --- Adv L Ackermann

Instructed by: --- Von Lieres, Cooper and Barlow