



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case no: JA 100/24

In the matter between:

SOUTH AFRICAN BROADCASTING CORPORATION **Appellant**

and

FAMIDA YACOOB VALLA **Respondent**

Heard: 19 August 2025

Delivered: 22 September 2025

Coram: Mahalelo ADJP, Van Niekerk JA, et Chetty AJA

JUDGMENT

VAN NIEKERK, JA

Introduction

[1] This is an appeal, with the leave of this Court, against a judgment delivered by the Labour Court on 19 July 2023.¹ In its judgment, the Court found that the appellant (the SABC) had unlawfully terminated the respondent's employment

¹ *Valla v SA Broadcasting Corporation SOC Ltd & another* (2024) 45 ILJ 350 (LC).

contract. The Court also found that the SABC had dismissed the respondent for a reason that is automatically unfair, and that her dismissal was an act of unfair discrimination as defined in the Employment Equity Act² (EEA). Finally, the Court ordered the SABC to pay the respondent's costs. The determination of the quantum of compensation and damages was postponed *sine die*.

Background

- [2] The material facts are not in dispute. On 2 April 2013, the SABC offered the respondent employment as a deputy company secretary on what was described as a limited-duration basis. The fixed term for which employment was offered commenced on 1 May 2013 to terminate on 30 April 2018. The respondent accepted the offer on 1 May 2013 and commenced work on the same date.
- [3] At the time that the respondent was employed, the retirement age of employees was regulated by the SABC's policy on retirement and the rules of the SABC pension fund.³ For senior managerial employees engaged on fixed-term contracts (such as the respondent), both the retirement policy and the pension fund rules fixed the retirement age as the date on which their contracts expired. For those senior managerial employees not engaged on fixed-term contracts, the retirement age was fixed at 60. For all other employees, the retirement age was fixed at 63. Regardless of status, the retirement policy provided for the possibility of extended service beyond normal retirement age, on application and with the special permission of the group executive committee.
- [4] The respondent was employed as a senior managerial employee, on scale 120. There is no dispute that, given the level at which she was employed, in terms of both the retirement policy and the pension fund rules, at the time of her

² Act 55 of 1998.

³ The Rules define 'normal retirement age' for group executive or general management members appointed for a fixed period in terms of a service contract as '*the expiry date of such contract provided that it is not renewed*' and at age 60 for group executive members or general management members. (The Rules were amended with effect from 1 August 2022, to increase the retirement age to 63 for both group executive members and general management members.)

appointment, the respondent's retirement age was the date on which her fixed-term contract expired, i.e. 30 April 2018.

- [5] The respondent reached the age of 60 on 22 May 2018, some three weeks after the date on which her fixed-term contract was to terminate by the effluxion of time.
- [6] The SABC's policy both on the use of fixed-term contracts for managerial employees and their retirement ages had been under discussion for some time prior to the respondent's engagement. The discussions over retirement ages were driven by discontent over the differential in retirement ages between senior managerial and other employees, and also the differential in benefits applicable in terms of the pension fund rules as between executive managerial employees and general managerial employees. Although the retirement age for both was 60, the pension benefits of executive managerial employees were more favourable. As far back as 2007, these matters had enjoyed the attention of the SABC's board.
- [7] On 16 September 2013, the group chief executive officer addressed a submission to the board, recommending that the pension fund rules be amended to address what was averred to be the prejudice caused to general managers by a differential in the calculation of benefits as between general managers and executive general management members. (This differential did not find reflection in the SABC's human resource policies, which, as noted above, drew a distinction only between general managerial employees and other employees, with retirement ages fixed at 60 and 63, respectively.) The submission to the board concerned only the distinction drawn in the pension fund rules between general managers and executive general managers, and the calculation of retirement benefits.
- [8] On 18 September 2013, the SABC's group executive committee adopted the following Resolution:

'Resolved that:

- (1) Permission to amend the Pension Fund rules so that the name "Executive General Manager" is removed from the definitions and the entire Pension Fund Document Rules (including changes) to clause 6.1(1) and 6.2(2) and definition pensionable service clause (iv) with the view to changing the General Management Member as per the true definition, be and it is hereby given.
- (2) The calculation of pension fund benefits of General Managers who retire at age 60 (3 years short of the normal retirement age compared to other employees) be aligned to that of Executive General Manager but with the new definition of General Management Member for the purpose of aligning the rules with the SABC Internal governance Definition, i.e. scales 120, 115 and 110.⁴

[9] In October 2014, the group executive: human resources made a written submission to the group executive committee for the following purpose:

'To seek approval of the EXCO for funding based on the rule change approved that defines general managerial employees to include 120, 115 and 110 for the purposes of equitable calculation of termination benefits for this scheme codes.

Alternatively, conversion of GM level fixed term contracts to permanent and extend the retirement age to 63, where positions are deemed permanent in nature.'

[10] On 6 August 2015, the SABC's board, by way of a round robin resolution, resolved to convert general managers to permanent employment. The round robin resolution was ratified by the SABC board on 26 November 2015 (the board resolution). The relevant extract from the board resolution reads:

⁴ Scales 115 and 110 applied to executive managers, levels higher than scale 120, on which the respondent was employed.

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

[11] The respondent testified that after the board meeting, her immediate superior, Ms Geldenhuys, called the respondent to her office and advised her that all general managers were now permanent employees of the SABC. Despite the fact that the resolution makes no reference to any change in the retirement age as set out in the retirement policy and the rules of the pension fund, the respondent testified that she understood the resolution to mean that the conversion of her employment to permanent status meant that she could '*stay on until age 63*'. The respondent further confirmed that the conversation with Geldenhuys was the first time that she had heard of the resolution.

[12] On 18 February 2016, representatives of the SABC and the SABC pension fund and the fund's actuary held a meeting to discuss the fund's benefits for general managers. At the meeting, it was proposed that the normal retirement age for general managers be increased from 60 to 63, and that the pension accruals rate be increased from 2.22% to 2.50% for each year of pensionable service. The actuary was instructed to prepare a report for discussion at the next meeting of the fund's trustees. The actuary duly reported to the trustees. In his report, it is recorded that the SABC had indicated that it was not in a financial position to afford the increased rates of contribution. The respondent stated that she became concerned when she received her pension fund statement in 2016, which did not reflect any change in her retirement age.

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

'...In view of the fact that the Resolution taken by the Board has not been implemented, I am of the view that I am being prejudiced. Given the Board Resolution, I do not see why I have to submit a motivation for the extension of my

contract, as I am supposed to be a permanent employee. Had the Resolution been implemented, as it should have, I would not be placed in this position.

SUGGESTED SOLUTION: The conversion to permanent status is implemented as resolved by the Board in November 2015.'

[14] On 11 December 2017, after a grievance hearing at which the respondent presented her case, her grievance was dismissed.

[15] The board became concerned about the confidentiality of the minutes of its meetings and the consequences of their disclosure, and there was a suggestion that the respondent may have used confidential information for her own benefit. On 27 February 2018, the SABC addressed a letter to invite the respondent to submit written representations in respect of an allegation of the following misconduct:

'...

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

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

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

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

[16] The board ultimately decided, given that in its view the respondent's contract of employment would terminate by the effluxion of time on 30 April 2018, that it would not pursue disciplinary action against her.

[17] On 2 March 2018, the SABC informed the respondent that it had employed her on a fixed-term contract, which would expire on 30 April 2018. The letter read:

'You are hereby advised that the SABC will not be renewing and/or extending your fixed-term contract of employment upon termination on 30 April 2018. The SABC will maintain its contractual obligation with you by remunerating you until 30 April 2018. Your SABC access card, 3G card, laptop, office keys, as well as any SABC equipment you have in your possession, and your forwarding address might be given to the Human resource manager before leaving the service of the SABC on the 30 April to finalise this matter...'

[18] The respondent referred disputes to the CCMA and, after a failed conciliation process, on 31 August 2018, she filed a statement of claim in the Labour Court.

Labour Court

[19] The respondent's referral of her disputes to the Labour Court was made by way of a statement of claim. Regrettably, the statement of claim, while it records the facts on which the respondent relied in fulsome terms, was rather more ambivalent on the legal grounds on which the respondent sought to rely. The four claims that the respondent filed were summarised by her as follows:

'Claim A

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

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

1.1.3 Costs.

1.1.4 Further and/or alternative relief.

1.2 Claim B

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

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

1.2.3 Costs.

1.2.4 Further and/or alternative relief.

1.3 Claim C

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

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

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

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

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

1.3.6 Costs.

1.3.7 Further and/or alternative relief.

1.4 Claim D

- 1.4.1 Declaring that the Labour Court has jurisdiction to deal with Claim D as it is expedient to continue with the procedures in terms of section 158(2)(b).
- 1.4.2 Declaring that the failure by Exco to exercise its discretion in terms of the Policy to extend her retirement age to 63 constitutes an unfair labour practice.
- 1.4.3 Substituting the decision of Exco with an order extending her retirement age to 63 and setting aside the respondent's decision of 2 March 2018 to terminate her contract as of 30 April 2018.
- 1.4.4 Ordering the respondent to reinstate her and to comply with its obligations until she reaches the age of 63.
- 1.4.5 Alternatively, ordering the respondent to pay her 36 months' compensation and three years' pension calculated by an independent actuary.
- 1.4.6 Costs.
- 1.4.7 Further and/or alternative relief.'

[20] The second respondent cited in the statement of claim, the SABC Pension Fund, filed a statement of response, in essence contending that the Labour Court lacked jurisdiction to entertain a dispute between the respondent and the Fund. The respondent ultimately withdrew her claim against the Pension Fund.

[21] At the trial, the respondent was called to give evidence, after which the SABC elected not to call any witnesses and closed its case.

[22] The judgment of the Labour Court deals first with the issue of the respondent's retirement age. The Court noted that the respondent was required, in terms of her fixed-term contract, to retire on 30 April 2018, a date that preceded the respondent's 60th birthday by about a month. On the evidence, the Court held that the 26 November board resolution had the effect first, that the respondent's employment became permanent and secondly, that her retirement age was varied from 60 to 63.

[24] The Court's reasoning can be discerned from the following passage:

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

[23] The Court then moved to consider the question of the existence of a dismissal and concluded that, to the extent that the respondent was permanently employed, '*... the SABC could not rely on the effluxion of time due to her fixed-term contract. Therefore the termination of her employment was a dismissal*'.⁵

[24] In regard to the respondent's' claim of an automatically unfair reason for dismissal and in particular, her contention that the reason for her dismissal was unfair discrimination on the grounds of her age, the Court noted that, once an employee establishes that the reason for dismissal is age, the onus shifts to the employer to establish that the employee had reached the normal or agreed retirement age. To the extent that the SABC had submitted that even if it was accepted that the respondent had become permanently employed, her normal or agreed retirement age was 60, the age she reached a month after the date of termination of the fixed-term contract on which the SABC relied, i.e. 30 April 2018. After a review of the relevant authorities, the Court came to the following conclusion:

'[59] As the Court enunciated recently in *Bester*, only the normal retirement age must be considered if there is no agreed age. In the current matter, the Policy is a contractual term of the employment contract, making the retirement age an agreed age which was changed at the employer's behest through a resolution that Ms Valla accepted. Since the agreed age was 63, the only conclusion that can be arrived at is that Ms Valla was

⁵ Judgment of the court *a quo* at para 41.

dismissed based solely on her age, which was not the agreed retirement age, thereby making her dismissal automatically unfair.'

- [25] Next, the Court considered the respondent's claim that by dismissing her when she turned 60, the SABC had discriminated against her on the grounds of her age, a prohibited ground listed in section 6 (1) of the EEA. The Court concluded:

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

- [26] Under the heading '*Was the contract of employment unlawfully terminated?*', and without any further reference to the evidence, the Court concluded:

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

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

- [27] The Court then addressed the preliminary issue of prescription that had been raised by the SABC. In essence, the SABC submitted that the respondent's claim had prescribed, in that more than three years had passed between the date on which the respondent became aware of the resolution that she contended converted her fixed-term contract of employment to one of permanent status, and

the date on which her statement of claim was delivered, 31 August 2018. The Court concluded:

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

[28] With regard to the respondent's claim of an unfair labour practice (in the form of an alleged failure by the SABC to exercise a discretion to extend the respondent's retirement age to 63), the Court upheld the preliminary point advanced by the SABC that the Court lacked jurisdiction to entertain the claim. The Court held that the unfair labour practice dispute was one required to be determined by arbitration and that, in any event, the respondent had not referred the dispute to conciliation.

[29] The Court then moved to consider the remedies to be afforded the respondent and concluded:

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

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

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

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

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

[30] Finally, the Court considered the issue of costs. The Court considered that, despite the wording of section 162 of the Labour Relations Act⁶ (LRA), the respondent should be awarded her costs on account of the SABC's '*... persistence in defending this application when the validity of its Resolution was*

⁶ Act 66 of 1995, as amended.

not in dispute was unreasonable. Moreover, the manner in which the SABC treated Ms Valla after discovering that her retirement age had not been adjusted in accordance with the Resolution was unfair and demonstrates mala fides.⁷

Grounds of appeal

- [31] The SABC contends that, while it is correct that the 26 November 2015 board resolution provided that general managers should, where the status of the job is permanent in nature, be employed on a permanent basis, the Labour Court erred when it found that the resolution amended the respondent's retirement age to 63. In particular, the SABC contends that the respondent did not rely on or plead any implied term to this effect. The SABC contends further that any change to the retirement age of general managers (including the respondent) could take place only after a change to the rules of the pension fund. Any assurances given to the respondent by her supervisors did not constitute a decision by the board nor the trustees of the pension fund and could thus not have the effect of extending the respondent's retirement age.
- [32] The SABC further submits that the Labour Court's finding that the respondent had been dismissed for a reason that is automatically unfair is dependent entirely on the correctness of its prior finding that her employment contract had been varied to amend her retirement age to 63. The Court ought properly to have found that the respondent's contract terminated by the effluxion of time, and not on account of her age. The same submission was made in relation to the Court's finding that the SABC had discriminated against the respondent on account of her age.
- [33] Insofar as the Labour Court held that the SABC varied the respondent's retirement age and thus repudiated her contract, the SABC submits that the contract was never varied to amend the respondent's retirement age, and that there was no repudiation of the contract, which terminated by the effluxion of time in accordance with its own terms. Regarding the plea of prescription, the SABC

⁷ Judgment of the court *a quo* at para 87.

submits that the Court erred in finding that the respondent's claim had not prescribed, and finally, that the order for costs against the SABC was erroneously made.

Evaluation

[34] In her statement of claim, the respondent referred four alternative claims to the Labour Court for adjudication. These were:

1. that the SABC had unlawfully terminated her employment contract, which the respondent alleged was converted from a fixed-term contract to employment on a permanent basis by way of a resolution ratified by the SABC board on 26 November 2015 and which the respondent alleges had the consequence of extending her retirement age from 60 to 63;
2. that the SABC's conduct in terminating her contract on 30 April 2018 constitutes an automatically unfair dismissal;
3. that the SABC's conduct in 'terminating' her employment on 30 April 2018 (the date of expiry of her fixed-term contract) constituted an act of unfair discrimination in terms of section 6 of the EEA; and
4. that the SABC's conduct in failing to exercise a discretion in favour of extending the respondent's retirement age to 63 constituted an unfair labour practice.

[35] The Labour Court upheld the first three claims and dismissed the fourth. There is no cross-appeal, and the present proceedings concern only the Labour Court's orders in respect of the claims of an unlawful termination of the respondent's employment contract, and her claims of automatically unfair dismissal and unfair

discrimination on the grounds of her age, and the order for costs granted against the SABC.

[36] I deal first with the respondent's primary claim before the Labour Court, the alleged unlawfulness of the termination of the respondent's employment contract. In this regard, the respondent invoked the Labour Court's jurisdiction in terms of section 77(3) of the Basic Conditions of Employment Act⁸ (BCEA). That section provides that the Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment. In essence, the respondent contended that her contract was converted from a fixed-term contract to permanent employment, that her retirement age was extended to age 63, and that the termination of the respondent's contract on the basis that her fixed-term contract had expired was unlawful.

[37] To the extent that the SABC persists on appeal with its defence of prescription, the facts do not disclose, as the SABC contends, that a period of three years elapsed between the date on which the respondent obtained knowledge of what she claims to be the varied terms of her contract and the date on which her statement of claim was filed. The evidence discloses that the respondent became aware of the board's resolution on or about 26 November 2015. She testified that after the meeting, she was called to Geldenhuys's office, where Geldenhuys told her about the resolution. The respondent's statement of claim was filed on 31 August 2018, less than three years later. The Labour Court's conclusion that the respondent's claim had not prescribed thus stands to be upheld, albeit for different reasons.

[38] I turn then to the Labour Court's findings regarding what it suggested was the unlawful termination of the respondent's employment contract.

[39] The respondent's contractual claim was imprecisely pleaded, to say the least. She contended, in effect, that the resolution adopted by the SABC's board varied the terms of her employment contract, both to convert the fixed-term nature of

⁸ Act 75 of 1997.

the contract to employment on a permanent basis and to vary her retirement age to 63. The statement of claim lacks any clear and concise statement of the legal issues that arise from the material facts pleaded⁹ - a generous reading of the statement of claim suggests that the respondent contends (without expressly asserting as much) that the SABC breached the terms of the contract as varied (which she regards as material terms) and that she elected to enforce the varied terms of the contract on which she relied (i.e. she claimed the remedy of specific performance).

[40] In these circumstances, the onus was on the respondent to establish that the resolution adopted by SABC's board on 26 August 2015 constituted an offer to vary her terms and conditions of employment on the terms alleged, and that she accepted that offer. It will be recalled that the Labour Court came to the following findings:

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

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

[41] These findings are far from coherent - what they ignore is that, despite the confused nature of the respondent's claim, properly construed, it comprised two discrete elements. The first is the respondent's claim that her fixed-term contract had been varied to convert the contract into one of permanent employment; the

⁹ As required by the then-applicable Rule 6 of the Rules of the Labour Court.

second, that her retirement age had been varied to age 63. Far from contending that the SABC “*varied the agreed retirement age by terminating Ms Valla’s employment contract when her contract expired on 30 April 2018*”, the respondent’s claim was that the SABC had breached her employment contract by enforcing the fixed-term contract (in particular, the termination of the contract by the effluxion of time) and by refusing to permit her to continue in her employment to age 63.

[42] Counsel for the respondent conceded that any valid variation to the respondent’s fixed-term contract could be effected only by mutual agreement, and there was no evidence of any express offer made by the SABC and accepted by the respondent that served to vary her contract on the terms that she asserted. Counsel relied on statements that were made to the respondent at the time by the respondent’s colleagues, Geldenhuys and Yunus, and what he submitted was the context in which the board resolution had been adopted.

[43] Contrary to what the Labour Court found, there is nothing to suggest that the wording, context and background of the board resolution had the effect of varying the respondent’s fixed-term contract either to convert her employment status to that of a permanent employee, or to vary her retirement age to 63. An examination of the wording of the November 2019 board resolution suggests no more than that, as a matter of policy, SABC employees engaged on fixed-term contracts would be converted to the status of permanent employment. Given the adoption of that policy, it remained for the SABC to implement the resolution by seeking to vary the fixed-term contracts on which employees were engaged. Put another way, the wording of the resolution does not suggest that, without more, its immediate effect was to convert the employment status of all employees engaged on fixed-term contracts to that of permanent employment.¹⁰ The

¹⁰ The Labour Court failed to adopt an interpretation of the resolution consonant with *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para [18] holding that interpretation is, generally speaking, an objective process of attributing meaning to the words used in a document, read in the context of the document as a whole and having regard to the apparent purpose of the words. *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021

wording of the resolution makes clear that the conversion applied only to positions that were permanent in nature and not project-based. Any variation to the terms of existing contracts would necessarily have to be negotiated and agreed with those SABC employees who qualified for conversion of their contracts. It could not be assumed that all employees engaged on a fixed-term contract would, like the respondent, be amenable to the contemplated variation – consent on an individual basis was a necessary requirement for implementation.

- [44] Regarding the respondent's retirement age, the evidence discloses that the respondent relied on the text of the resolution and her subjective view that it necessarily followed from the text of the resolution that her retirement age had been varied to 63. She said the following:

'MS VALLA: Well when I started it was on a contract basis for five years, meaning I would have to retire at the age of 60, but having this being converted to permanent meant that I could stay on until age 63, and I was quite happy with that.'

- [45] Even if the resolution in and of itself varied the respondent's status from fixed-term employee to permanent employee, it does not follow that the adoption of the resolution varied the respondent's retirement age. Counsel for the respondent did not dispute that, on a plain reading, the resolution makes no reference to any change in retirement age, least of all does it reflect any increase in retirement age for general managers from 60 to 63. Counsel submitted that the variation to the terms of the respondent's contract to fix her retirement date at 63 could be discerned from the context in which the resolution was adopted. That context is one of a complex and long-standing internal debate on a change to retirement age, as reflected in the extracts of the memoranda referred to above, involving the SABC's human resources management, the board and the trustees of and advisers to the pension fund. That debate was resolved only in 2022, when the

(6) SA 1 (CC) para [65] held that it is a unitary exercise which must be approached holistic ally: simultaneously considering the text, context and purpose.

trustees adopted an amendment to the pension fund rules, addressing both the retirement benefits of general managers and the change in retirement age from 60 to 63 for those who accepted the conversion to permanent employment status.

- [46] In terms of the SABC's retirement policy and the rules of the SABC pension fund, the respondent's retirement age remained fixed at the date of expiry of her fixed-term contract, being 30 April 2018. Even if the board resolution effected a valid variation to the status of the respondent's fixed-term contract by converting that contract to one of permanent employment, in terms of the SABC's retirement policy and the pension fund rules then applicable, and by virtue of the respondent's status as a senior managerial employee, the respondent's retirement age was 60.
- [47] In short: in the absence of any mutually agreed variation to the respondent's fixed-term contract, her employment terminated on 30 April 2018, which also constituted her normal retirement age for the purposes of the pension fund rules. There was no breach of the contract by the SABC – the respondent's contract terminated by the effluxion of time, and there was thus no unlawful termination of the contract as alleged by the respondent.
- [48] Insofar as the respondent's claims of an automatically unfair dismissal and unfair discrimination are concerned, the fact that the respondent's fixed-term contract expired on the agreed date has the consequence that there was no 'dismissal' as defined by section 186 (1) of the LRA. The Labour Court thus lacked jurisdiction to entertain the respondent's claim of unfair dismissal. Further, the differential in retirement ages on which the respondent relies to assert that the SABC discriminated against her (i.e. the retirement age of 60 for managerial executive and general managerial employees, as opposed to 63 for other SABC employees) is clearly based on occupational category, not age. The Labour Court's findings that the SABC had discriminated against the respondent on a prohibited ground (age) cannot be sustained. The Labour Court's judgment

stands to be set aside, as must its order that the SABC pay the respondent's costs.

Costs

[49] Finally, in relation to the costs in these proceedings, the rule applicable in this Court is that costs do not necessarily follow the result, and that any liability for costs falls to be determined on the requirements of law and fairness. The first element of the respondent's claim was brought under section 77 (3) of the BCEA. This Court has held that where the Labour Court exercises its concurrent jurisdiction, the rule as to costs applied in the civil courts should apply. In the present instance, the contractual claim is a single element of her claims referred to the Labour Court. She is an individual who, in good faith, challenged a decision by her employer that she perceived to be unjust. In these circumstances, the requirements of law and fairness are best satisfied by each party bearing its own costs, both in the Labour Court and in this Court.

Order

1. The appeal is upheld, with no order as to costs.
2. The orders granted by the Labour Court are set aside and substituted with the following:
 - '1. The applicant's claims are dismissed, with no order as to costs.'

André van Niekerk
Judge of the Labour Appeal Court

Mahalelo ADJP and Chetty AJA concur.

APPEARANCES:

FOR THE APPELLANT: P Maserumule, Puke Maserumule Attorneys

FOR THE RESPONDENT: AP Landman, instructed by Mahomed Randera & Associates