



(1) Reportable Yes/No
(2) Of interest to other Judges: Yes/No
(3) Revised

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JS816/21

In the matter between:

WILHELMUS JACOBUS NEL

Plaintiff

and

CITY OF JOHANNESBURG METROPOLITAN

MUNICIPALITY

Defendant

Heard: 4 to 7 May 2026

Delivered: 20 August 2026

JUDGMENT

PHEHANE, J

Introduction

[1] The plaintiff (Dr. Nel) brings this referral under the provisions of section 187(1)(f) read with section 191(5)(b)(i) of the Labour Relations Act¹ (LRA). He claims that his dismissal from the defendant's employment on 30 April 2021 when he reached the age of 65 years is unfair because he had reached an agreement with the then Executive Director of Transport, Ms. Lisa Seftel on

¹ Act 66 of 1995, as amended.

31 July 2018 to extend his retirement age from 63 to 70 years, in accordance with the rules of the e-Joburg Pension Fund that he was a member of. According to the e-Joburg Retirement Fund Rules, the normal age of retirement is 63 years but could be extended to no more than 70 years on agreement with the member's employer. The plaintiff seeks compensation in terms of section 194 (3) of the LRA.

- [2] The defendant opposes the referral and raises a defence in terms of section 187 (2)(b) of the LRA; that is, Dr Nel's dismissal based on age is fair as he attained the agreed retirement age of 65 years in terms of the provisions of a collective agreement concluded in 2012 between the defendant and two trade unions, namely the Independent Municipal and Allied Trade Union (IMATU) and the South African Municipal Workers Union (SAMWU) (the collective agreement).² The defendant denies that an agreement was reached between the plaintiff to work beyond the agreed retirement age of 65 years.

Applicable legal framework

- [3] Section 9 of the Constitution of the Republic of South Africa, 1996, (the Constitution) makes provision for the right to equality and the prohibition of unfair discrimination on the listed grounds in subsection (3) and reads as follows:

- '(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.

² Trial bundle, Vol 1 at pp 41 to 60.

- (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.' (Own emphasis)

[4] The Employment Equity Act³ (EEA), is one of the pieces of national legislation that prevents and prohibits unfair discrimination in the workplace.

[5] Sections 5 and 6 (1) and (2) of the EEA provide as follows:

'5. Elimination of unfair discrimination. – Every employer must take steps to promote equal opportunity in the work-place by eliminating unfair discrimination in any employment policy or practice.

6. Prohibition of unfair discrimination.

(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 purposes of this Act; or
- (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of the job.'

[6] In *Lewis v Media24 Ltd*,⁴ the Court held as follows:

'The concept of discrimination is made up of three issues: differential treatment; the listed or analogous grounds; and the basis of, or the reason

³ Act 55 of 1998.

⁴ (2010) 31 ILJ 2416 (LC) at para 36.

for, the treatment. Once a *difference* in treatment is *based on a listed ground*, the difference in treatment becomes discrimination for the purposes of s 9 of the Constitution and s 6 of the EEA.’

[7] The age of retirement for employees is not specified in our law. Employers are however, entitled to rely on a normal age of retirement which is often specified in the employer’s internal policies or in collective agreements. The normal age of retirement may also be established with reference to the pension scheme that employers participate in.

[8] In *Cash Paymaster Services (Pty) Ltd v Browne*,⁵ the Labour Appeal Court (LAC) stated as follows:

‘The retirements are dispensations provided for in section 187(2)(b) of the Act is one that works based on the basis that, if there is an agreed retirement age between an employer and an employee, that is the retirement age that governs the employee’s employment. This is the case even when there is a different normal retirement age for employees employed in the capacity in which the employee concerned is employed. The provision relating to the normal retirement age only applies in the case where there is no agreed retirement age between the employer and the employee.’

(Own emphasis)

[9] In *Bos v Eon Consulting (Pty) Ltd*,⁶ this Court stated as follows with reference to the concepts of an agreed age of retirement and a normal age of retirement:

[37] As to these two bases referred to, it has to be one or the other. It cannot be both. A normal retirement age can only apply where there is no agreed retirement age...

[38] Turning firstly to an agreed retirement age, there can be no question of what an agreed retirement age means. In order for an agreed retirement age to exist, it has to be shown that the employer and the employee achieved consensus on the actual age of retirement of the

⁵ [2006] 2 BLLR 131 (LAC) at paras 25 and 26. See also: *Rubin Sportswear v SA Clothing and Textile workers Union and Others* (2004) 25 ILJ 1671 (LAC).

⁶ (JS948/14) [2016] ZALCJHB 305 (12 August 2016) at paras 37 to 43.

employee and that this retirement age gives rise to the compulsory retirement of the employee from the employ of the employer at that age. This agreement need not be in writing, although this would be preferable. A retirement age stipulated in the employment contract of the employee would constitute such an agreed retirement age.'

[39] As to what constitutes a normal retirement age, the Court in *Rubin Sportswear* said:

'... What is the normal retirement age depends upon the meaning to be accorded the word "normal" in section 187(2)(b). The word is not defined in the Act. It, accordingly, must be given its ordinary meaning. Chambers-Mcmillan's *SA Students Dictionary* describes the word "norm" thus: "You say that something is the norm if it is what people normally or traditionally do". It further says: "Norms are usual or accepted ways of behaving". It describes the adjective "normal" as meaning "usual, typical or expected". The word "normality" is described as "the state or condition in which things are as they usually are". The *New Shorter Oxford English Dictionary* describes the word "norm" as meaning, among others "a standard, a type; what is expected or regarded as normal; customary behaviour, appearance". As to the adjective "normal", one meaning that the latter dictionary gives is "constituting or conforming to a standard; regular, usual, typical, ordinary, conventional".

After analysing a number of judgements the court concluded:

"It seems to me that the word "normal" as used in section 187(2)(b) really means what it says. It means that which accords with the norm."

[40] A retirement age that accords with the norm, as contemplated by section 187(2)(b), can be established both internally in an employer, or externally in a particular industry if there is no norm in the employer itself.

...

[42] When it comes to the norm in an employer, this must equally be established by evidence. This evidence would include evidence about a practice in the employer, when other employees may have retired,

policy provisions of regulation, or pension/provident funds rules or annuity provisions... The easiest way of establishing a retirement age norm in an employer would of course be by way of a retirement policy.

- [43] It is not required that employees have to be consulted on, or that they have to agree to, the retirement age stipulated by the employer in the retirement policy. In principle, an employee is entitled to unilaterally fix, and then implement, a normal retirement age...'

(Own emphasis)

Common cause facts

- [10] Dr. Nel was employed by the defendant initially, on a five-year fixed-term contract with effect from 1 September 2009, in the role of Director: Legal and Regulatory Compliance within the defendant's transport department. In line with the provisions of his fixed-term contract, Dr. Nel took up membership with the e-Joburg Retirement Fund, the rules of which became part of his conditions of employment.

- [11] Rules 2.4.20 and 8.1 of the e-Joburg Retirement Fund Rules are summarised as follows:⁷

The normal retirement age is 63, but the member may retire earlier, if agreed with his employer, but not earlier than age 55. The member may retire later, if agreed with his or her employer, but not after the age of 70.⁸

- [12] Various disputes and litigation ensued between the defendant, IMATU, and SAMWU, including the conversion of 1005 employees at levels 3 and below, collectively referred to as "*the affected employees*," from fixed-term contract employment to permanent employment. Dr. Nel was one of the affected employees. As a result of these disputes, the settlement agreement was concluded on 1 October 2012 to resolve them.

- [13] In terms of the settlement agreement, the parties agreed *inter alia*, that the retirement age would be 65 years. It is not disputed that the affected

⁷ The Rules of the e-Joburg Retirement Fund appear at pp 181 to 250 of Vol 2 of the trial bundle. Rule 2.4.20 is at p 191 and Rule 8.1 is at p 204.

⁸ Pre-trial minute at para 5.3.

employees were members of different pension funds with varying normal retirement ages. The result of the settlement agreement was uniformity, as the parties agreed that 65 years of age would be the agreed retirement age for the affected employees.

- [14] Clause 5.1⁹ of the settlement agreement provides that it constitutes a collective agreement and its legal effect is as contemplated in section 23(1)(d) of the LRA.¹⁰ Therefore, the settlement agreement binds IMATU, SAMWU, their members, and affected employees who are not members of IMATU and SAMWU.
- [15] Clause 7.8¹¹ of the settlement agreement provides *inter alia*, that the affected employees who are members of and contributed to any of the defendant's accredited retirement funds would continue with such membership and participation. It is common cause that the e-Joburg Retirement Fund was an accredited retirement fund of the defendant and therefore, Dr. Nel remained a member thereof.
- [16] Clause 7.14¹² of the settlement agreement provides that the parties agree that the age of retirement is 65 years.
- [17] Following the conclusion of the settlement agreement, in a letter dated 15 November 2012, the defendant converted Dr. Nel's fixed-term contract of employment to permanent employment. This letter records that the terms and conditions of employment are fully set out in the settlement agreement.¹³

The crux of the dispute

⁹ Trial bundle, Vol. 2 at p 48.

¹⁰ Section 23(1)(d) of the LRA reads:

'A collective agreement binds-

...

(d) *employees who are not members of the registered trade union or trade union party to the agreement if-*

(i) *the employees are identified in the agreement;*

(ii) *the agreement expressly binds the employees;*

(iii) *the trade union all those trade unions have as their members the majority of employees employed by the employer in the workplace'.*

¹¹ Trial bundle, Vol. 2 at p 50.

¹² *Ibid* at p 51.

¹³ Trial bundle, Vol. 1 at pp 61 to 63.

- [18] Dr. Nel's entire case rests on a proposition that on 31 July 2018, Ms Seftel concluded an oral agreement with him which extended his retirement age in terms of the e-Joburg Retirement Fund Rules from 63 years to 70 years of age. Dr. Nel alleges that in extending his retirement age, Ms Seftel exercised her delegations in terms of the approved 2013 Joint and Several Delegations of the Municipality which allowed for the extension of the retirement age.
- [19] Dr. Nel alleges that the Manager of the e-Joburg Retirement Fund was subsequently advised of the oral agreement by the submission of the document at annexure F to the statement of claim.¹⁴ He alleges that the document at annexure F constitutes the "*retirement age extension agreement*" concluded on 31 July 2018.

Issues for determination

- [20] In view of the afore-going, crisply put, the issues that this Court is to determine or whether the settlement agreement was binding on Dr. Nel; and whether an oral agreement was concluded on 31 July 2018 extending Dr Nel's normal retirement age to 70 years.

Evidence and evaluation

Was the settlement agreement binding on Dr Nel?

- [21] Mr. Mbulelo Ruda, the defendant's current Group Executive Director for Corporate and Shared Services, and its head of legal and contracts during 2012, testified that he led the defendant's negotiating team that concluded the settlement agreement. The essence of the settlement agreement was to convert fixed-term contract employees to permanent employment. Mr Ruda's evidence was that the defendant's mayoral committee was delegated to approve the signing of the settlement agreement which was signed in October 2012. He stated that the conclusion of collective agreements is delegated to the mayoral committee, and municipal council approval is not required. Mr. Ruda confirmed that the settlement agreement was incorporated into the

¹⁴ Trial bundle at p 100. The document at p 100A that has the inscription "RETURN TO HUMAN REOURCES FOR PROCESSING" is the correct document that the plaintiff alleges is the form that was submitted to the e-Joburg Retirement Fund following his alleged oral agreement with Ms Seftel.

terms and conditions of employment of the affected employees. The settlement agreement achieved *inter alia*, a uniform retirement age of 65 years for all affected employees, regardless of which pension fund they belonged to. In previous years, the defendant's normal retirement age was regulated by various pension fund scheme rules of its employees which resulted in different ages of retirement. In terms of the settlement agreement, the retirement age of the affected employees was 65 years.

- [22] Dr. Nel conceded that the age of retirement in the settlement agreement is 65 years. He also conceded that he is an affected employee as defined in the settlement agreement and that he is bound by the settlement agreement. The settlement agreement identifies the affected employees and expressly binds them. Dr. Nel is not a member of either trade union, however, it is not disputed that the trade unions have as their members the majority of employees employed by the defendant in the workplace. There is no question then, that the legal effect of the settlement agreement is that it is binding on Dr. Nel as contemplated in section 23(1)(d) of the LRA.¹⁵
- [23] In terms of *Bos v Eon*, both the normal retirement age of 63 years in terms of the e-Joburg Retirement Fund Rules and the agreed age of 65 years in terms of the settlement agreement cannot co-exist: it must be one or the other.
- [24] I therefore find that the retirement age of 65 years applied to Dr. Nel, as he was bound by the settlement agreement.

Did the delegations of authority of 2013 empower delegated officials to vary the settlement agreement and extend the retirement age of 65 years?

- [25] Dr. Nel's evidence is that the 2013 delegations allowed delegated officials to extend the retirement age as specified in the rules of the various pension funds to which employees belonged. According to Dr. Nel, Ms. Seftel was authorized under these delegations to extend his retirement age, and when she signed the form at annexure F, an agreement was concluded with him

¹⁵ See: *SA Medical Association on behalf of Meyer-Van den Heever and Another v University of Limpopo* (2012) 33 ILJ 2954 (LC) at para 29.

that his retirement age in terms of the e-Joburg Retirement Fund Rules was increased from age 63 to 70.

- [26] Ms Seftel's evidence is that she would not have been authorized to extend Dr. Nel's agreed of retirement to an age beyond 65 years in light of the collective agreement that regulated the retirement age.
- [27] Mr. Mbulelo Ruda's evidence was that the delegations cannot supersede a collective agreement and that, in any event, the delegations Dr. Nel relies on were rescinded per council resolution in June 2013.¹⁶
- [28] The aim of the settlement agreement was to regulate the retirement age to make it uniform for all affected employees. Therefore, it is improbable that the defendant would have retained delegations that allow for the extension of the retirement age according to the rules of different pension funds as was the case before the settlement agreement was concluded.
- [29] The settlement agreement was concluded in full and final settlement of all disputes between the parties, including the dispute on the conversion of affected employees. In view of the supremacy of collective agreements recognized in labour law jurisprudence to fulfil the purpose of the LRA in achieving labour peace, democratization of the workplace and effective dispute resolution, delegations of authority cannot supersede collective agreements. Dr. Nel rightly conceded this. They also cannot vary collective agreements. The settlement agreement in its current form is still being implemented to date. This was the undisputed evidence of Mr Ruda.
- [30] Dr. Nel's reliance on the 2013 delegations simply cannot stand, not only for the reason that they have been rescinded, but the delegations do not supersede the collective agreement.

Was an agreement concluded between Dr. Nel and Ms Seftel which extended Dr Nel's retirement age from age 63 to no more than 70 years of age?

¹⁶ Trial bundle, Vol 1 at p 67.

- [31] Dr. Nel's pleaded case is that an oral agreement was concluded between the parties premised on the provisions of the e-Joburg Retirement Fund Rules. His evidence is that annexure F is the agreement.
- [32] Dr. Nel's evidence is that he obtained a blank form at annexure F from Ms Busi Rikhotso (Ms Rikhotso) in the defendant's human resource satellite office, which he completed on 17 July 2018. Thereafter, he gave the form to his direct manager, Mr. Jeff Ngcobo, who took the form to Ms. Seftel. Dr. Nel stated that Ms. Seftel phoned him on 31 July 2018 and confirmed the agreement to extend his retirement age while signing the form. According to Dr. Nel, the extension was open-ended, meaning that he could retire at any time but before the age of 70. Ms. Seftel's secretary returned a copy of the form to him. He thereafter phoned the e-Joburg Retirement Fund in September 2018 and received oral confirmation that the extension had been recorded. He produced no written record of this confirmation and no written confirmation from the defendant.
- [33] Dr. Nel conceded during cross-examination that the settlement agreement was not varied and Ms. Seftel could not vary its terms. Dr. Nel also conceded that the age of retirement of a former employee, Mr Adams, whom he identified as a comparator, was extended to 65 years.
- [34] Ms. Seftel's evidence is that she did not conclude any agreement with Dr. Nel to extend his retirement age. She emphasized that in light of the binding nature of the collective agreement, she would not have had the power to extend the retirement age of Dr Nel beyond age 65.
- [35] Ms. Seftel did not dispute signing the form at annexure F. She provided the following context for her signing: she explained that Mr Ngcobo approached her with the form during 2018, indicating that Dr. Nel wanted to extend his retirement age when he reached 63 years of age. She did not want to retain him in employment due to the many complaints she had received regarding his conduct towards African women, most of whom were young. Mr. Ncgobo reminded her that, under the settlement agreement, the agreed retirement age is 65 years, and he signed the form on this basis. Ms. Seftel explained

that she was not empowered to extend Dr. Nel's retirement age beyond 65 years of age, as the settlement agreement did not provide for this. She denied that the form at annexure F constitutes an agreement to extend Dr. Nel's retirement age to 70 years of age, as the settlement agreement curbed the retirement age to 65 years of age. She could not recall phoning Dr. Nel to discuss the signing of the form.

[36] Mr. Ngcobo confirmed Ms. Seftel's stance that she did not want to retain the services of Dr. Nel beyond his reaching the age of retirement, which, according to the form, is 63 years. Mr Ngcobo reminded Ms Seftel that in the terms of the settlement agreement, the age of retirement of affected employees is 65 years. It was on this basis that she signed the form. Mr Ngcobo, like Ms Seftel, could not recall her phoning Dr. Nel to discuss signing the form.

[37] In view of the afore-going, Dr. Nel failed to prove that he entered into an oral agreement with the defendant which extended his normal retirement age to 70 years.

What then, is the purpose of the form at annexure F?

[38] Mr Ruda's evidence is that the purpose of the form at annexure F is to notify the e-Joburg Retirement Fund that its member wanted to extend the retirement age from 63 years, and in light of the settlement agreement, the extension could not be beyond 70 years.

[39] His evidence in this regard was corroborated by Ms Rikhotso. Ms Rikhotso confirmed that she gave the form at annexure F to Dr. Nel to complete, as he indicated that he wanted to extend his retirement age. Her evidence was that they did not discuss the settlement agreement. She was aware of the settlement agreement, but she did not know whether or not Dr. Nel was an affected employee. Ms Rikhotso stated that as a norm, HR would send the form to the relevant pension fund to indicate that an employee wanted to extend his or her age of retirement. She described the process and application. She could not recall if the e-Joburg Retirement Fund reverted on

Dr. Nel's' application; however, she provided him with contact details to follow up at his own leisure.

- [40] *Ex facie* the document at annexure F, nowhere does it state that it is an agreement. It is merely a form addressed to the Manager of the e-Joburg Retirement Fund entitled: "*Option to remain in Council's services after normal retirement age*". It is a form notifying the e-Joburg Fund that Dr Nel opts to remain in employment after attaining the age of 63 in terms of the Fund's rules, which was approved by Ms Seftel.
- [41] On the common cause facts, the settlement agreement standardized the retirement age, resulting in the agreed retirement age being 65. The form at annexure F is nothing more than an administrative measure to notify the e-Joburg Retirement Fund that the retirement age is extended to 65 years against the backdrop of the settlement agreement.
- [42] In light of the afore-going, the form at annexure F was not an agreement to extend Dr. Nel's retirement age to 70 years as he alleged.

Was the dismissal of Dr. Nel automatically unfair?

- [43] Mr. Ruda explained that the letter dated 15 March 2021 served the purpose of notifying Dr. Nel that he was due to retire at age 63, which would trigger an election by the employee to apply for an extension of his retirement age until age 65. It is common cause that Dr. Nel attained the age of 65 years in 2021, and therefore, the reference to the age of 63 years in the letter dated 15 March 2021 is an error.
- [44] Mr. Ruda explained that the notification letters to Dr. Nel's comparators, namely Messrs Mogamat Farouk Adams (Mr. Adams) and Andre van Niekerk (Mr. van Niekerk) are similar to the letter to Dr. Nel dated 15 March 2021, in that all three individuals being affected employees, received letters informing them that they would retire at age 63 according to their pension fund rules.¹⁷

¹⁷ Trial bundle, Vol 1 at p 101 (Dr. Nel's letter); p 140 (Mr. Adams' letter) and p 146 (Mr. van Niekerk's letter).

These letters are all entitled “*Confirmation of Retirement*” and they are notified that they will reach the age of 63 on their respective dates of birth.

- [45] Mr. Ruda explained that this notification would trigger an application for extension to age 65. Mr. Ruda confirmed that the defendant could have done better in notifying employees that their retirement age would not be extended. He stated that the letter to Mr. Adams is the most appropriately worded, as it informs him that his retirement age is 63 years according to the e-Joburg Retirement Fund Rules, but it may be extended to 65 years. After Mr. Adams received his letter, a submission was made to have his retirement age extended to 65 years, which application was approved.¹⁸
- [46] Mr. van Niekerk’s evidence is that he intends to apply to extend the age of his retirement to 65 years.
- [47] In my view, the notification letter addressed to Dr. Nel is different from the letters addressed to Messrs Adams and van Niekerk, as he was 63 years old in 2019. Therefore, the letter dated 15 March 2021 served the purpose of terminating his employment as he had reached the age of 65 years. Dr. Nel’s evidence is he lodged a grievance to have this letter retracted. The grievance was unsuccessful and he was dismissed.
- [48] The defendant raised a defence in terms of section 187 (2)(b) of the LRA.
- [49] In my view, on the common cause facts, the settlement agreement provided for the agreed retirement age of 65 years for the affected employees, and this is binding on Dr. Nel. His employment was terminated upon his attaining the agreed retirement age. Therefore, his dismissal is fair as contemplated in section 187(2)(b) of the LRA.
- [50] In the premise, the referral does not succeed.

¹⁸ *Ibid* at pp 141 to 144.

Costs

[51] In this Court, the general rule is that costs do not follow the cause.¹⁹ The law and fairness dictate that no order for the payment of costs should be made.

[52] In light of the afore-going, the following order is made:

Order

1. The referral is dismissed with no order as to costs.

M. T. M. Phehane

Judge of the Labour Court of South Africa

¹⁹ See: *Union for Police Security and Corrections Organization v South African Custodial Management (Pty) Ltd and others* (2021) 42 ILJ 2371 (CC).

Appearances:

For the Plaintiff: Dr. WJ Nel (self-representing)

For the Defendant: Adv. SB Nhlapo

Instructed by: Buthelezi Vilakazi Inc.

LABOUR COURT