Motor Industry Staff Association & Another v Great South Autobody CC t/a Great South Panelbeaters
(2022) 43 ILJ 2736 (LAC)

Citation	(2022) 43 ILJ 2326 (LAC)
Case No	JA68/2021
Court	Labour Appeal Court
Judge	Waglay JP, Coppin JA and Kathree-Setiloane AJA
Heard	May 12, 2022
Judgment	September 27, 2022
Counsel	*Attorney G J Ebersohn* for the appellants. *Attorney R J C Orton* for the respondent.

Flynote : Sleutelwoorde

Automatically unfair dismissal — Unfair discrimination (s 187(1)*(f)* of LRA 1995) — Age — Employee continuing in employment after normal retirement age of 60 years — Continued employment with termination on notice not automatically unfair dismissal.

Discrimination — Age discrimination — Employee continuing in employment after normal retirement age of 60 years — Termination on notice not automatically unfair dismissal in terms of s 187(1)*(f)* of LRA 1995.

Discrimination — Age discrimination — Section 187(2)*(b)* of LRA 1995 affording employer right to fairly dismiss employee based on age, at any time after employee has reached his or her agreed or normal retirement age.

Discrimination — Unfair discrimination — Age — Employee continuing in employment after normal retirement age of 60 years — Termination on notice not automatically unfair dismissal in terms of s 187(1)*(f)* of LRA 1995.

Retirement — Retirement age — Normal retirement age — Section 187(2)*(b)* of LRA 1995 — Employee continuing in employment after normal retirement age of 60 years — Employer entitled unilaterally to determine retirement age — Termination on notice not automatically unfair dismissal in terms of s 187(1)*(f)*.

Words and phrases — 'Normal or agreed retirement age' (s 187(2)*(b)* of LRA 1995).

Headnote : Kopnota

The second appellant employee commenced employment with the respondent employer during November 2007. On 30 January 2008, they entered into a written employment agreement which inter alia stated that the employee's retirement age was 60 years of age. He turned 60 on 15 March 2018 but was not retired. The employee therefore continued to render his services as usual, and the employer continued to pay him his usual salary. On 14 January 2019, the employer informed him that his services would terminate with effect from 12 February 2019 as he had reached the agreed retirement age of 60. He was accordingly dismissed because of his age. The employee was a member of the Motor Industry Provident Fund, which provided that the retirement age of an employee who was a member of the fund was 65. The employee referred an automatically unfair dismissal dispute to the Labour Court contending that his dismissal constituted unfair discrimination in terms of s 187(1)*(f)* of the LRA 1995.

The Labour Court found that a dismissal based on age was not automatically unfair in circumstances where the employee 'has reached' the normal or agreed retirement age. The court held further that it was of no assistance to the employee to rely on the contract-based assertions that a tacit employment agreement was entered into after he turned 60; that the employer had waived the right to rely on the retirement age stipulated in the contract; and that the employment agreement had been tacitly amended to the effect that the employee would continue to work indefinitely or at least until age 65. The court accordingly dismissed the dispute.

On appeal, the Labour Appeal Court found that s 187(2)*(b)* had to be interpreted in accordance with the established approach to statutory interpretation, and that properly construed, s 187(2)*(b)* afforded an employer the right to fairly dismiss an employee based on age, at any time after the employee had reached his or her agreed or normal retirement age. The court further found that this right accrued to both the employee and the employer immediately after the employee's retirement date and could be exercised at any time after this date. The court found accordingly that 187(2)*(b)* did not envisage a tacit amendment of the contract to the effect that the employee would continue to work indefinitely or that a new retirement age applied.

The court found that so too, where an employer expressly permitted an employee to work beyond the agreed or normal retirement age, this did not constitute a waiver of the right to dismiss that employee in terms of s 187(2)*(b)* of the LRA, unless waiver of that right could be inferred from the clear and unequivocal conduct of the employer.

Applying the law to the facts, the court found that court a quo had correctly concluded that the contract-based arguments advanced 'had no traction'.

In the circumstances, the appeal was dismissed.

Cases Considered

Annotations:

Airports Company SA v Big Five Duty Free (Pty) Ltd & others 2019 (5) SA 1 (CC) (referred to)

Datt v Gunnebo Industries (Pty) Ltd (2009) 30 *ILJ* 2429 (LC) (referred to)

Department of Agriculture, Forestry & Fisheries v Teto & others (2020) 41 *ILJ* 2086 (LAC) (distinguished)

Karan t/a Karan Beef Feedlot v Randall (2012) 33 *ILJ* 2579 (LAC) (distinguished)

Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) (applied)

Road Accident Fund v Mothupi 2000 (4) SA 38 (SCA) (referred to)

Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd 2019 (5) SA 29 (CC) (referred to)

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

Statutes Considered

Statutes

Constitution of the Republic of SA 1996 s 23

Labour Relations Act 66 of 1995 s 162, s 186, s 187(1)*(f)*, s 187(2)*(b)*

Case information

Appeal to the Labour Appeal Court from a decision of the Labour Court. The facts and further findings appear from the reasons for judgment.

Attorney G J Ebersohn for the appellants.

Attorney R J C Orton for the respondent.

Judgment reserved.

Judgment

Kathree-Setiloane AJA:

[1] This is an appeal against the judgment and order of the Labour Court (Van Niekerk J) dismissing the second appellant's claim that his dismissal by the respondent, Great South Autobody CC t/a Great South Panel Beaters (respondent), was automatically unfair as it was

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based on his age, and this constitutes unfair discrimination in terms of s 187(1)*(f)* of the Labour Relations Act. [1]

Background

[2] The parties filed a statement of case in the Labour Court in which they agreed on the following facts:

2.1 The second appellant commenced employment with the respondent during November 2007. On 30 January 2008, they entered into a written employment agreement which inter alia stated that the second appellant's retirement age is 60 years of age. He turned 60 years old on 15 March 2018. The respondent did not retire him when he turned 60. The second appellant therefore continued to render his services to the respondent as usual, and the respondent continued to pay him his usual salary.

2.2 The second appellant continued to work for the respondent for the remainder of 2018, and the respondent never once raised the issue of his retirement in that time. However, on 14 January 2019, the respondent wrote to the second appellant informing him that his services would terminate with effect from 12 February 2019 as he had reached the agreed retirement age of 60. By this point, the second appellant was already 60 years and nine months old. His last day of employment with the respondent was 12 February 2019. It is common cause that the respondent dismissed the employee due to his age.

2.3 The second appellant is a member of the Motor Industry Provident Fund (fund). The Motor Industry Provident Fund Collective Agreement provides that the retirement age of an employee who is a member of the fund is 65.

Labour Court judgment

[3] The second appellant, with the assistance of the first appellant, referred an automatically unfair dismissal dispute to the Labour Court contending that his dismissal constituted unfair discrimination in terms of s 187(1)*(f)* of the LRA, because it was based on his age. [2]

[4] The Labour Court delivered a succinct judgment in which it held as follows:

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> 'In short, the principle established in [*Schweitzer v Waco Distributors (A Division of Voltex (Pty) Ltd*] [3] is that a dismissal based on age is not automatically unfair in circumstances where the employee "has reached" the normal or agreed retirement age. This wording [in s 187(2)*(b)* of the LRA] contemplates a dismissal on account of age that occurs after the retirement date and insulates that dismissal against any assertions of unfairness.' [4]

[5] Additionally, the Labour Court held that since the second appellant had already reached the agreed retirement age of 60 at the time of his dismissal, s 187(2)*(b)* of the LRA applied. It also held that it was of no assistance to the second appellant to rely on the contract-based assertions that a tacit employment agreement was entered into after he turned 60; that the employer waived the right to rely on the retirement age stipulated in the contract; and that the employment agreement was tacitly amended to the effect that the second appellant would continue to work indefinitely or at least until age 65. [5]

[6] The Labour Court accordingly dismissed the appellant's automatically unfair dismissal dispute.

[7] The appeal is before this court with the leave of the Labour Court.

The appeal

Parties' submissions

[8] The appellant's argument is broadly that when an employee reaches the agreed retirement age and he continues to work for the employer, the employer cannot thereafter rely on the (previous) agreed retirement age, as the employment contract terminates by agreement. Where the employee continues to work for the employer after reaching the agreed retirement age, and neither party relies on the fact that the employee reached his agreed retirement age, a new (second) employment contract comes into existence (by virtue of the parties' conduct) which governs their employment relationship. In these circumstances, it is impermissible for the employer to rely on the retirement clause as per the first employment contract, as the employment relationship is now governed by the terms of the new employment contract. Consequently, any dismissal based on age will constitute an automatically unfair dismissal unless the employer can, in terms of s 187(2)*(b)* of the LRA, either prove that the parties had agreed on a new retirement age or that there is a normal retirement age that applies to that employee. To allow an employer to rely indefinitely on an agreed retirement age, ie months or years after the employee reached his retirement age effectively puts the employee at the mercy of the employer and is open to abuse.

[9] The respondents contend, to the contrary, that once an employee reaches the agreed retirement age, the employer can anytime thereafter rely on the agreed retirement age to dismiss the employee,

even if the employee worked for a substantial time for the employer after he had reached the agreed retirement age. On the facts of this case, the employee's employment contract contained a retirement age of 60 years which he reached during March 2018. The respondent was, therefore, entitled to retire the employee during January 2019 in terms of the agreed retirement age, and in terms of s 187(2)*(b)* of the LRA the dismissal was fair.

The cause of action and defence advanced

[10] In terms of s 187(1)*(f)* of the LRA, a dismissal is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to, inter alia age. However, in terms of s 187(2)*(b)* of the LRA, 'a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons in that capacity'.

[11] The second appellant's cause of action (as set out in his statement of case) is that the respondent dismissed him based on his age and, in doing so, unfairly discriminated against him on the grounds of his age in terms of s 187(1)*(f)* of the LRA. He avers that in the light of the respondent's failure to retire him when he reached his agreed retirement age on 15 March 2018, it had waived the right to rely on the retirement clause in the employment contract, alternatively, a (new) second contract came into existence which did not contain a retirement age or at best for the respondent contained a retirement age of 65.

[12] The respondent invoked the defence in s 187(2)*(b)* of the LRA. It denied that the parties had waived the retirement clause in the employment contract and that the parties had entered into a tacit second agreement.

Interpretation of s 187(2)*(b)* of the LRA

[13] The interpretation of s 187(2)*(b)* is central to this dispute. It must be interpreted in accordance with the established approach to statutory interpretation in *Natal Joint Municipal Pension Fund v Endumeni Municipality.* [6]

[14] Section 187(2)*(b)* of the LRA is clear and unambiguous. On its ordinary meaning, once the employer proves that the dismissed employee has reached the agreed or normal retirement age, the dismissal is deemed fair. The use of the phrase 'if the employee has

reached his agreed or normal retirement age' is decisive in denoting that for the dismissal in terms of s 187(2)*(b)* to be fair, the employee must have passed his or her normal or agreed retirement age.

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

[16] For a dismissal in terms of s 187(2)*(b)* of the LRA to be insulated against a claim of unfair discrimination on the grounds of age, the reason for, or proximate cause of the dismissal must be that the employee has already reached retirement age. The appellants contend that if an employer is permitted, on the employee having reached his or her retirement age, to rely indefinitely on an agreed or normal retirement age, this will leave the employee in a vulnerable position by enabling the employer to abuse its position to dismiss the employee based on his age. I disagree. On a proper construction of s 187(2)*(b)* read in the context of the LRA, it is impermissible for an employer to invoke the defence in s 187(2)*(b)* where the real reason for the dismissal is based on operational requirements or misconduct or incapacity. For example, if the most proximate cause of the dismissal is proven to be one based on operational requirements and not age, as contemplated in s 187(2)*(b)*, then it will be open to the Labour Court to, inter alia, order the employer to pay the employee severance pay.

[17] Section 187(2)*(b)* of the LRA contemplates that where an employee continues to work for the employer uninterrupted after reaching retirement age, the employment relationship and employment contract continue. In other words, for purposes of a dismissal in terms of s 187(2)*(b)*, the employment contract does not terminate by the effluxion of time when the employee reaches his or her retirement age but is deemed to continue. This effectively means that the agreed or normal retirement age of the employee remains unchanged.

[18] On this interpretation, a dismissal contemplated in s 187(2)*(b)* would have the same meaning as the definition of dismissal in s 186 [7] of the LRA, which does not include the termination of a contract by effluxion of time as the latter is not a dismissal. Properly construed, s 187(2)*(b)* does not contemplate a new tacit contract coming into existence between

an employer and employee (by virtue of their conduct) which governs their employment relationship when the employee continues to work for his or her employer after reaching

the normal or agreed retirement age. In the same vein, s 187(2)*(b)* does not envisage a tacit amendment of the contract to the effect that the employee would continue to work indefinitely or that a new retirement age applies, as is contended for by the appellant in this appeal.

[19] This interpretation gives effect to the right that accrues to an employer in terms of s 187(2)*(b)* to fairly dismiss an employee who has passed the agreed or normal retirement age. Significantly, it is consistent with the purpose of s 187(2)*(b)* which is to allow the employer to dismiss employees who have passed their retirement age to create work opportunities for younger members in society.

[20] I disagree with the appellants' submission that this interpretation of s 187(2)*(b)* of the LRA is inconsistent with the right to fair labour practices in s 23 of the Constitution [8] because an employee's right to a fair dismissal is integral to that right. There is a distinction in the value that informs the content of fairness relative to employees who have reached retirement age and those who have not. While the dismissal of an employee, on the grounds of age, prior to reaching retirement age may have the effect of impairing the right to human dignity of that employee, the dismissal of an employee who has passed his or her retirement age would not. This is because employees with agreed or normal retirement dates anticipate that they will work until they reach retirement age and are expected to prepare financially for their retirement by contributing to provident or pension funds.

[21] It is not unfair, in these circumstances, for the legislature to expect employees with agreed or normal retirement ages to work until reaching retirement age or for as long as the employer can accommodate them after reaching that age. Construing s 187(2)*(b)* in a manner that allows an employer to create opportunities for a younger and more innovative workforce, especially in a country such as ours with unprecedented unemployment levels, is not inconsistent with the spirit, purport, or objects of the right to fair labour practices in s 23 of the Constitution.

[22] The right that accrues to an employer in terms of s 187(2)*(b)* of the LRA to dismiss an employee who continues to work after reaching the retirement age is sui generis. It is therefore unhelpful, as the appellants would have us do, to attempt to apply the principles established in court decisions which apply to a new contract that was tacitly entered into after the expiry of a fixed-term contract, that expired for reasons other than that the employee had reached his or her retirement age. The appellant's reliance on *Department of Agriculture, Forestry & Fisheries v Teto & others* [9] *(Teto)* is thus misplaced. In *Teto*, this court held that where an employee continues to render services to an employer after the expiry of a fixed-term contract and receives remuneration for rendering those services, the contract is

deemed to be tacitly relocated and novated to one of infinite duration that is terminable by reasonable notice by either party.

[23] The appellants' reliance on *Karan t/a Karan Beef Feedlot v Randall* [10] (*Karan Beef*) is equally misguided as it is distinguishable from the case at hand. In *Karan Beef*, the employee had a retirement age of 60. Prior to turning 60, the employer indicated to the employee, in two letters, that it would like him to continue to work for Karan Beef Feedlot and that the normal notice period would apply if they wanted him to go on retirement. The employee did not respond to the letters but continued to work for the employer after he reached the age of 60. Approximately two years later, the employer dismissed the employee on the basis that he had reached the retirement age of 60. This court held that the employee 'tacitly agreed to work beyond the normal retirement age and left it to [Karan Beef] to determine the retirement age or date on notice to the respondent'. [11]

[24] This court observed that there are possibly two scenarios in which s 187(2)*(b)* confers protection to an employer to dismiss an employee fairly. The first scenario is where an employee has reached the normal or agreed retirement age but continues to work for the employer, and the second is when an agreement is reached between the employer and employee to determine a new retirement age before the latter has reached the normal or agreed retirement age. Consequently, in the latter instance, the employer would continue to enjoy the protection of s 187(2)*(b)* of the LRA, should it terminate the employment of the employee once the new agreed employment date is reached. [12]

[25] Notably, this court concluded in *Karan Beef* that s 187(2)*(b)* was applicable, and that by reserving the right in the two letters to decide when the employee should retire, the employer was entitled to terminate the employee's services two years after the parties had agreed that the employee would continue working beyond the normal retirement age. [13]

[26] The approach adopted by the Labour Court in *Schweitzer* [14] to determine whether a dismissal in terms of s 187(2)*(b)* of the LRA is fair remains good law. There the court held that for a dismissal in terms of s 187(2)*(b)* of the LRA to be fair, the following three conditions must be present: *(a)* the dismissal must be based on age; *(b)* the employer must have an agreed or normal retirement age for employees employed in the capacity of the employee concerned; and *(c)* the employee must have reached the normal or agreed retirement age. [15]

[27] On the facts of this case, it is common cause that the second appellant's dismissal was based on age. The agreed retirement age of 60 applied to him as well as to other employees who worked in the same capacity. He had reached the agreed retirement age nine months prior to his dismissal. Consequently, s 187(2)*(b)* rendered the dismissal fair. Thus, bearing in mind the second appellant's cause of action, that he was unfairly discriminated against on account of his age, I am of the view that the Labour Court cannot be faulted for concluding that 'the defence established by s 187(2)*(b)* comes into play and serves to non-suit the [second appellant]'.

[28] Where an employer expressly permits an employee to work beyond the agreed or normal retirement age, this does not constitute a waiver of the right to dismiss that employee in terms of s 187(2)*(b)* of the LRA, unless waiver of that right can be inferred from the clear and unequivocal conduct of the employer. [16] Equally, an employer's failure to take steps to

secure the retirement of his employee on reaching the agreed or normal age of retirement, does not constitute a waiver of its right, in terms of s 187(2)*(b)*, to dismiss that employee any time after he or she has reached retirement age unless such waiver can be inferred from the clear and unequivocal conduct of the employer. There is nothing in the conduct of the respondent, in this case, from which it can be inferred that: *(a)* by allowing the second appellant to work beyond his agreed retirement date, it waived its right, in terms of s 187(2)*(b)* of the LRA, to dismiss the second appellant on the basis that he had reached the agreed retirement age of 60 or *(b)* it waived the second appellant's agreed or normal retirement age.

[29] Lastly, there is nothing in the conduct of the parties which remotely suggests that a new tacit contract, to the effect that the second respondent would continue to work indefinitely or to at least the age of 65, was entered into by the parties. [17] For these reasons, the Labour Court correctly concluded that the contract-based arguments advanced by the appellant in the Labour Court 'have no traction'.

[30] The second appellant contends that he has lost his retirement benefits because he was dismissed before he reached 65. The second appellant's expectation that he would work for the respondent indefinitely or to age 65 is misconceived as he understood his retirement age was 60 long before reaching that milestone. He was reasonably expected, in the circumstances, to take the necessary steps to prepare for retirement.

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[31] To reiterate, on reaching his retirement age on 15 March 2018, the employment relationship between the second appellant and the respondent continued uninterrupted. Pursuant to s 187(2)*(b)*, the respondent was entitled to dismiss him on the grounds that he had passed his agreed retirement age. Accordingly, the second appellant's dismissal was not automatically unfair.

Costs

[32] In terms of s 162 of the LRA, I consider it fair and just not to make a costs order in this case.

Order

[33] In the result, the following is ordered: The appeal is dismissed.

Waglay JP and Coppin JA concurred.

Appellants' Attorneys: *Gerrie Eberhsohn Attorneys Inc.*

Respondent's Attorneys: *Snyman Attorneys.*

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[1] 66 of 1995, as amended.

[2] The issues for determination by Labour Court as articulated in the stated case were as follows:
'1.1 Whether a new employment contract between the second appellant and the respondent came into existence after he reached the age of 60.
1.2 In the event of a finding that a new employment contract did not come into existence, the court is required to determine:
(a) whether the employee and the respondent waived the retirement clause in the employment contract by allowing the employee to work after he reached the age of 60, and/or
(b) whether the employee and the respondent tacitly amended the employment contract so that the agreed retirement age of 60 no longer applied; and
(c) whether the respondent was permitted in law to rely on the retirement age clause by virtue of the application of s 187(2)*(b)* of the LRA.'

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

[4] *Schweitzer* n 3 above at para 6.

[5] *Schweitzer* n 3 above at para 7.

[6] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) the Supreme Court of Appeal held at para 18: '[C]onsideration 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. . . . A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.' Approved by the Constitutional Court in *Airports Company SA v Big Five Duty Free (Pty) Ltd & others* 2019 (5) SA 1 (CC) at para 29 and *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* 2019 (5) SA 29 (CC) at para 29.

[7] In terms of s 186 of the LRA 'dismissal' means, inter alia, termination of an employment contract with or without notice.

[8] Constitution of the Republic of SA 1996.

[9] (2020) 41 *ILJ* 2086 (LAC) at para 20.

[10] (2012) 33 *ILJ* 2579 (LAC).

[11] *Karan Beef* n 10 above at para 18.

[12] *Karan Beef* n 10 above at paras 19 and 20

[13] *Karan Beef* n 10 above at para 22.

[14] *Schweitzer* n 3 above. *Schweitzer* concerned an unfair dismissal claim in circumstances where the employee had continued to be employed beyond his retirement age of 65. The employer invoked s 187(2)*(b)* contending that it was entitled to terminate the employee's employment on the ground that his age exceeded the agreed retirement age.

[15] *Schweitzer* n 3 above at para 27.

[16] *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA) at para 15.

[17] The facts in this case are distinguishable from those in *Datt v Gunnebo Industries (Pty) Ltd* (2009) 30 *ILJ* 2429 (LAC); [2009] 5 BLLR 449 (LC) where the employee had signed a revised agreement shortly before turning 65 years old setting the normal retirement age at 65 but with the option to continue working with the agreement of the employer. On turning 65, the employer requested the employee to continue working 'until such time as we mutually agree that you should take retirement'. Two years later the employer notified the employee that he must retire. The Labour Court held that this constituted an automatically unfair dismissal because the new agreement had extended the retirement age to an unspecified date and precluded the employer from relying on the defence afforded by s 187(2)*(b)* of the LRA.