IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

Case no: CA8/03

In the matter between:-

Rubin Sportswear	**APPELLANT**
and	
SA Clothing and Textile Workers Union	**1st RESPONDENT**
J HENDRICKS	**2nd RESPONDENT**
P MAY	**3RD RESPONDENT**
A FISHER	**4TH RESPONDENT**
Q ADAMS	**5TH RESPONDENT**

JUDGMENT

ZONDO JP

Introduction

[1] This appeal raises the question whether an employer may render a particular age to become the normal retirement age for his employees or a category of his employees as contemplated by sec 187(2)(b) of the Labour Relations Act, 1995 (Act 66 of 1995) ("the Act") by fixing it unilaterally as the retirement age for them. The facts from which this question arises are set out below.

The facts

[2] The appellant and a company called Val Hau et Cie ("Val") concluded an agreement in terms of which the manufacturing part of Val's business was transferred as a going concern to the appellant. That agreement was to take effect on the 1st February 2001. This was a transfer of a business as contemplated in sec 197(2)(a) of the Act[1] as it read in 2001. In terms of sec 197(2)(a) of the Act, as it read in 2001, such a transfer of business or part of a business automatically transferred the contracts of employment of the employees of the business transferor to the transferee. The result of such transfer is that in relation to such employees' contracts of employment with the business transferor, the business transferee stepped into the shoes of the business transferor.

[3] Prior to the transaction the appellant had a normal retirement age for its employees which was 60. Val did not have a normal retirement age nor did it have an agreed retirement age. The second and further respondents were employed by Val for many years until the 1st February 2001 when their contracts of employment were automatically transferred to the appellant by operation of law in terms of sec 197(2)(a). Before the transfer of business could take effect, Val, the appellant and the first respondent – the latter being a registered trade union acting on behalf of, among others, the second to the fifth respondents – concluded an agreement in terms of which they all agreed, among other things, that the same terms and conditions which Val's employees had enjoyed at Val would apply to all Val's employees being transferred to the appellant's employment. That agreement was signed on the 30th January 2001.

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[1] Sec 197(2)(a) of the Act as it read in 2001 provided as follows: " If a business, trade or undertaking is transferred in the circumstances referred to in subsection (1)(a), unless otherwise agreed, all the rights and obligations between the old employer and each employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and each employee and, anything done before the transfer by or in relation to the old employer will be considered to have been done by or in relation to the new employer.". Sec 197(2)(a) now reads: "If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) –

(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer."

By operation of sec 197 (2)(a) of the Act the second to the fifth respondents became employees of the appellant on the 1st February 2001.

[4] On or about the 15th February 2001 the appellant called the second and further respondents and/or the shopstewards and informed them that with immediate effect it was fixing 60 as the normal retirement age for all its employees. This included the ex-Val employees. It presented them with a document which bore the heading: "**Retirement policy: Rubin Sportswear"** which was dated the 1st February 2001. The document read thus: "**As the normal retirement age is 60 years it is the policy of this company that with immediate effect the retirement age for all employees is set at 60. All necessary counseling and assistance will be available. The Company will usually remind employees before the time of this fact."**

[5] It was accepted before us that the second and further respondents did not agree to the appellant's purported fixing of 60 as the normal retirement age applicable to them as well. Indeed, the fact that the dispute arising therefrom led to litigation is a clear indication that the respondents rejected the appellant's idea of fixing 60 as the retirement age applicable to them. Subsequent to its conduct of purporting to fix normal retirement age for the employees from Val at 60, the appellant dismissed the second to the fifth respondents on different dates as they turned 60.

[6] The respondents did not accept the dismissal. The respondents

made the point that the second to the fifth respondents were still able and willing to perform their work beyond the age of 60 and had thus far been performing it satisfactorily and the appellant had not raised any complaints about their performance. They contended that this was a dismissal on grounds of age in breach of sec 187(f) of the Act which rendered the dismissal automatically unfair. Sec 187(1)(f) will be quoted shortly. The appellant contended that the second and further respondents had been dismissed on account of an agreed or alternatively, normal retirement age as provided for in sec 187(2)(b) of the Act which, so the appellant contended, rendered the dismissal fair. A dispute then arose about the fairness or otherwise of the dismissal of the second and further respondents. The resultant dispute was referred in due course to the Labour Court for adjudication. The Labour Court, through Waglay J, held that there had been no agreed nor normal retirement age in relation to the second and further respondents and that, therefore, the dismissal was in breach of sec 187(1)(f) of the Act and, therefore, automatically unfair. It ordered the appellant to pay the second to the fifth respondents certain compensation but made no order as to costs. The Court a quo subsequently granted the appellant leave to appeal to this Court against that order. This, then, is the appeal against that order.

The appeal

[7] Sec 9(1) of the Constitution of the Republic of South Africa 108 of 1996 **("the Constitution")** provides that **"(e)veryone is equal before the law and has the right to equal protection and benefit of the law."** Sub- section (2) provides that **"(e)quality includes the full and equal enjoyment of all rights and freedoms**." It goes on to provide that **"(t)o 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**." In so far as it is relevant to this case, ss(3) provides that **"(t)he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including, … age… ."** Subsection (4) provides that "(**n)o 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." Subsection (5) reads: "**Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."**

[8] Sec 187(1)(f) of the Act reads thus:

> **"(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or if the reason for the dismissal is:-**
>
> **(a) - (e)**
>
> **(f) that the employer unfairly discriminated against an employee, directly or indirectly, on an arbitrary ground, including but not limited to … age…".**

Sec 187(2)(b) provides an exception to the general rule created by sec 187(1)(f). It reads thus:

> **"(2) Despite subsection 1(f)-**
>
> **(b) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity."**

[9] The respondents' complaint against the dismissal is that it offends against the provision of sec 187(1)(f) and that it is, therefore, automatically unfair. The respondents further contend that the appellant's conduct in purporting to unilaterally fix the retirement age at 60 constituted a unilateral change of the second and further respondents' terms and conditions of employment which it had no right to do which was ineffectual in law. In its defence the appellant seeks refuge in the exception created by the provision of

sec 187(2)(b) and contends that the second and further respondents had reached normal retirement age of 60 when they were dismissed and that, for that reason, the dismissals were fair. The appellant does not contend on appeal that the second and further respondents had reached an agreed retirement age when they were dismissed. Accordingly, what needs to be determined is whether there was a normal retirement age of 60 that was applicable to the second and further respondents. If there was not, that is the end of the appeal. If there was, there may or may not be further issues to consider.

[10] It was accepted by all concerned that the second and further respondents' terms and conditions of employment at Val did not include any provision to the effect that their normal retirement age was 60. It was also accepted that those terms and conditions of employment did not include any provision for an agreed retirement age. Accordingly, it follows that in law Val could not have dismissed the second and further respondents on the basis that they had reached an agreed or normal retirement age for persons employed in the capacity in which they were employed. In terms of the agreement concluded between the appellant, Val and the first respondent on the 30th January 2001 as well as in terms of sec 197 of the Act the terms and conditions of employment which the Val employees, including the second and further respondents, enjoyed at Val before the transfer were to continue to apply to them after the transfer. The effect of this was, therefore, that there was no agreed or normal retirement age applicable to them immediately before the appellant purported to unilaterally fix 60 as the normal retirement age for them.

[11] The question that arises is whether the appellant could render 60 to be the normal retirement age for the second and further respondents by simply declaring unilaterally that 60 was their normal retirement age. In acting as it did, the appellant was seeking to in effect introduce a new condition of employment into the terms and conditions of the employment of the second and further respondents. In law it had no right to do that without the second and further respondents' consent. The appellant's conduct in purporting to unilaterally fix 60 as the normal retirement age for the former Val employees including the second and further respondents was a breach of their terms and conditions of employment which it had taken over from Val by reason of sec 197(2)(a) and of the agreement of the 30th January. It was a breach of their contracts of employment in that regard because, with their contracts not containing any clause or provision fixing a retirement age, it was implicit in their contracts of employment that their contracts of employment could not be terminated in the absence of a fair reason and age could not per se be a fair reason for their dismissal. Such conduct constituted a repudiation of the second and further respondents' contracts of employment. The repudiation gave the second and further respondents an election either to accept it or to reject it and hold the appellant to the terms and conditions of their contracts of employment. In this matter the second and further respondents chose the latter course. Accordingly, the purported change of their employment terms and conditions was unlawful, wrongful and of no legal effect.

[12] I have so far dealt with the matter on a particular basis. There is an additional basis on which the matter can be dealt with which relates to

whether the appellant's conduct did make 60 the normal retirement age for the second and further respondents. The appellant's attorney accepted, correctly in my view, that, if the appellant's conduct did not render 60 the normal retirement age, the appeal must fail. Of course, he submitted that the appellant's conduct did render 60 the normal retirement age for the second and further respondents.

[13] I am unable to uphold the appellant's contention that by unilaterally fixing 60 as the retirement age of all its employees including the second and further respondents, 60 became the normal retirement age for such employees. What is normal retirement age depends upon the meaning to be accorded the word "**normal"** in sec 187 (2) (b). The word is not defined in the Act. It, accordingly, must be given its ordinary meaning. Chambers – Mcmillan's South African Student's 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 behavior, 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."**

[14] The adjective **"normal"** and the adverb "**normally**" have also received some judicial attention within the context of different statutes. In **SA Breweries Ltd v Kroonstad Municipality 1913**

OPD 34 the Court had to deal with an Ordinance which provided, inter alia, that the valuer or valuers had to frame the valuation roll in such a manner as to show the **"value of buildings, by which shall be understood the making of an estimated <u>normal</u> valuation."** (Underlining supplied). In discussing the meaning of the word "**normal**" within the context of that Ordinance Maasdorp CJ, with whom Fawkes J concurred, said at 36 **"… the meaning of the word 'normal' according to the English language, as adopted, amongst others, by Webster, is 'in the ordinary way' – the ordinary way in which things are done."**

[15] It would seem that, when in **Jacobs v African Guarantee & Indemnity Co. Ltd** 1964(2)SA 804(C) Corbett J had to decide whether a certain insurance excess was a normal excess, he looked at whether there was a common underwriting policy in regard to excess among the insurance companies. I say this because he held that, without such a common policy, it was impossible to see how it could be said that there was any norm. The matter went on appeal. The decision of the Appellate Division is reported as **African Guarantee & Indemnity Co Ltd v Jacobs 1965 (1) SA 759 (A).** On appeal it was accepted that what had to be decided was whether the excess that the respondent had referred to as normal excess at an insurance company he had dealt with before was normal to that insurance company. The appellant insurance company in that matter contended that excess had not been normal to that earlier company. The Court took the view that there was a fallacy in the appellant insurance company's argument that the excess required of the respondent was not normal to that insurance company. Beyers JA, writing for a unanimous court, said that the

fallacy in the appellant insurance company's argument lay in the assumption that, like other companies, that company had an excess which was normal for all motorists or for motorists generally whereas that company had no such excess. Beyers JA held that in the case of that company any excess was normal only in relation to particular categories of motorists. In other words the normality of a particular excess was determined with reference to the category of motorists into which the insured person fell.

[16] In **S v Phahlaamhlaka 1965 (3) SA 401 (T)** the question was whether a so – called Bantu Affairs Commissioner had been right in finding under the Bantu Urban Areas Act, 1945 (Act 25 of 1945) that the appellant was **"normally unemployed"** and, was, therefore, "**an idle person**" within the meaning of those words as contained in sec 29 (2) (a) (i) of that Act. This was within the context that out of 12 years, the appellant had been employed for the first 10 years, had been in detention or jail for some time during which he, obviously, was not free to work and was unemployed for the previous 6 or 7 months after his release from detention or jail when he was free to look for work before he was arrested and brought to the commissioner for the enquiry.

[17] On appeal in the High Court, Colman J, with Claassen J concurring, took the view that the commissioner had considered only the last six or seven months in the period of 12 years to arrive at the conclusion at which he had arrived. He held that the whole period of 12 years had to be taken into account and, if that was done, there could be no doubt that the appellant had been normally employed for that period. The Court had regard to the

whole period instead of a part of the period to determine whether the appellant was normally employed or normally unemployed.

Colman J said, in relation to the adverb **"normally"**: **"That word was recently introduced into the statute by amendment and there is, as far as I am aware, no judicial authority interpreting it in that context. But its meaning is plain enough. It refers to the ordinary and usual way of life of the person under investigation; not what he has done or failed to do in special circumstances."**

[18] Colman J said that proper weight had to be given to the word "**normally**" and, if that was done, then out of 12 years, the appellant had worked during 10 of the 12 years, had been unfree to work during a further one and a half years and thereafter for 6 and a half years he did not seek employment. All of this, said Colman J, meant that over that 12 year period the appellant was normally employed. Didcott J, with the concurrence of Leon J, subsequently adopted the same approach or test in **re Buthelezi 1976 (1) SA 856 (N)**.

[19] It seems to me that the word "**normal"** as used in sec 187 (2) (b) really means what it says. It means that which accords with the norm. However, it is important to bear in mind that that word is used in relation to persons employed in the same capacity as the person whose dismissal on the basis of having reached normal retirement age is in issue. Sec 187 (2) (b) must, therefore, not be read as if it says **"(d)espite subsection 1 (f), a dismissal based on age is fair if the employee has reached the normal or agreed retirement age."** It includes the words at the end **"for persons**

employed in that capacity." What the section does not make clear is whether the words "**persons employed in that capacity**" refer to such persons who are in the same employer's employ or whether it also refers to persons who are employed in the same capacity by other employers in the same industry or in general.

[20] It seems to me conceivable that one employer could have different normal retirement ages for different categories of employees within its workforce. There may, for example, be different normal retirement ages for professionals and artisans. In such a case the employer cannot retire an employee on the basis of a normal retirement age applicable to employees employed in a capacity different from that of his own. In other words, where an employer seeks refuge in the provisions of sec 187 (1) (b) against a claim of unfair dismissal and his defence is that the employee had reached normal retirement age, he must show not only that the employee had reached normal retirement age but that the retirement age is normal to employees employed in the same capacity as the employee concerned.

[21] In this matter it seems that the appellant sought to make 60 the normal retirement age for all its employees, irrespective of the capacity in which they were employed. Of course, there can be nothing wrong with the fixing of a normal retirement age for all the employees of an employer irrespective of their different capacities in which they may be employed. However, as I have said, the manner in which the appellant sought to achieve the objective of a normal retirement age applicable to Val's former employees in its employ was not lawful. In law the appellant had no right to unilaterally impose such a condition to the employment of the second and further respondents because their terms and conditions of employment did not include a normal retirement age and the appellant was seeking to unilaterally introduce a new condition of employment into their conditions of employment.

[22] In my view a certain age cannot suddenly become a normal retirement age for employees or for a certain category of employees simply because the employer wakes up one morning and decides that he wants a certain age as the normal retirement age for his employees or for a certain category of his employees. He can put a proposal to his employees on what should be the retirement age and, if they agree, then there will be an agreed retirement age in that workplace applicable to all those who have agreed to the proposal. A retirement age that is not an agreed retirement age becomes a normal retirement age when employees have been retiring at that age over a certain long period - so long that it can be said that the norm for employees in that workplace or for employees in a particular category is to retire at a particular age. An example would be where, without any formal agreement, employees in a particular category have over 20 years been retiring at a particular age without fail. The period must be sufficiently long and the number of employees in the particular category who have retired at that age must be sufficiently large to justify saying that it is a norm for employees in that category to retire at that age. If the period is not sufficiently long but the number is large, it might still be that a norm has not been established. If the period is very long but the number of employees in the particular category who have retired at that age is not large enough, it might be difficult to prove that a norm has been established.

[23] It seems to me that, where an employer finds itself in the position in which the appellant found itself with regard to its wanting to

ensure that the former Val employees shared the same normal retirement age as his other employees, one remedy available to him is to institute a lock – out – obviously after complying with all the requirements of the Act – and then compel the former Val employees to agree to 60 as the agreed retirement age for them. Resorting to a unilateral change of the second and further respondents' terms and conditions of employment was not the way to go about it.

[24] Sec 187 (1)(b) creates two bases upon which an employer can justify the dismissal of an employee on grounds of retirement age. The one is an agreed retirement age, the other is normal retirement age. Those are the only two bases. In this case 60 was neither the normal nor the agreed retirement age for the second and further respondents.

[25] In the circumstances the dismissal could not be justified on the basis of sec 187 (1) (b) of the Act but was contrary to the provisions of sec 187(1)(a) and was automatically unfair. In this regard the Court a quo was right in so finding. In the premises the appeal is dismissed with costs.

Zondo JP

I agree.

Willis JA

I agree.

Davis AJA

Appearances

For the appellant	:	Mr H C Niewoudt
Instructed by	:	Deneys Reitz Attorneys
For the respondent	:	Adv. C.S. Kahanovitz with Mr J Whyte
Instructed by	:	Cheadle Thompson Attorneys
Date of judgement	:	9 July 2004