IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JS 600/07

In the matter between:

ATTONIO LINO MENTEIRO COSME APPLICANT

AND

POLISAK (PTY) LTD RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] The issue for determination in this matter is whether the applicant's dismissal was automatically unfair in that it was as alleged to due to discrimination because of his age and thus contravened s 187(1) (f) of the Labour Relations Act 66 of 1995 (LRA). The alternative prayer is that the dismissal was automatically unfair due to it, as alleged, being a response to the grievance which the applicant had lodged against one of the managers of the respondent and consequently such a dismissal amounting to victimisation as envisaged in section 187(1)(i) of the LRA.

[2] The applicant has also filed an application for the late filing of his statement of case.

[3] The respondent is a company registered in terms of the company laws of South Africa and is involved in the business of polypropylene bags which are manufactured through the use of recycled material. The respondent opposed the applicant's claim and contended that the dismissal was in accordance with its policy of retirement which required employees to retire from its employ at the age of 65 (sixty five) years. In this respect the respondent contended that the applicant's employment was terminated because he had reached the age of 65 (sixty five) years.

Background facts

[4] The applicant who was employed as a loom technician and was also in charge of training. He was employed by the respondent during 2003. His responsibility included preparing the machines and ensuring smooth flow of production. At the time of his employment the applicant was already 63 (sixty six) years of age. At the time of entering into the employment relationship with the respondent the applicant did not sign any contract for that purpose.

[5] The applicant signed an employment contract during February 2007. According to him he signed the contract in Mr Mkhondo's office, the HR Manager of the respondent. The signing process was overseen by Mkhondo's secretary who also signed on behalf of the respondent. The respondent disputed the legitimacy of this contract and the authority of secretary to sign it on its behalf.

[6] The facts which the applicant relies on in support of his claim relates to what happened between him and Mr Tayob, the managing director of the respondent on the 26th September 2006. According to the applicant on that day whilst busy on the factory floor he was confronted by Tayob who complained that the machines were dirty and also insulted him by using foul language. He also called him a *"stupid bastard."* This was according to the applicant not the first time that Tayob had treated him like that.

[7] Arising from the above incident the applicant addressed a grievance regarding the conduct of Tayob. In the grievance letter the applicant demanded that Tayob should apologies for his conduct. At a meeting convened by the respondent, Tayob apologised for his conduct.

[8] After the meeting and on arrival at his workstation the applicant found that the two assistants who were working with him had been removed and placed under the supervision of another supervisor from another section. Although another person had been given the supervisory position in his section he continued with his duty of preparing the machines. He believed that the other person was appointed a supervisor as a revenge for lodging the complaint against the managing director.

[9] On 19th March 2007, the applicant received a letter informing him that his employment was terminated. The applicant had prior to receipt of this letter held a meeting with the management of the respondent including Tayob. At this meeting Tayob enquired about the age of the applicant from Mkhondo.

When the applicant responded by indicating that he was 65 (sixty five) years old, Tayob then said to Mkhondo, the HR manager that it was better to terminate his employment because of age.

[10] The applicant testified during cross examination that Tayob raised the question of his age when he was arguing with him about having removed people from his section without informing him first.

[11] The second witness of the applicant was Mr Opperman (Opperman), the former human resource manager of the respondent who was in the employ of the respondent between 2003 and 3006, testified about the incident when Tayob insulted and used foul language against the applicant. He also confirmed that Tayob did ask Mkhondo how old the applicant was during the meeting and after receiving the answer that he was 65 (sixty five) years old he then said that the applicant was old enough to be retired.

[12] Opperman testified further that the respondent did not have a policy regarding the retirement age during his employ with the respondent. He further disputed that the policy document which the respondent sought to rely on in its defence was never placed on the notice board. According to him every document placed on the notice board had to have his signature before being placed there. The policy document which the respondent sought to rely on is dated 23rd May 2005. At that time Opperman was already appointed a general manager, commencing from February 2005.

The case of the respondent

[13] The essence of the respondent's case is that the applicant's employment was terminated in terms of its retirement policy which it had concluded with the relevant representative unions and that policy was at that time placed on the notice board for the employees to see. It was on the basis of this that it was contended on behalf of the respondent that the employee ought to have been aware of the existence of the policy.

[14] The first witness of the respondent was Mkhondo who as indicated earlier was the HR manager for the four groups to which the respondent was a member and had assumed that position on the 1st April 2005. His testimony centred around the fact that at the time of the termination of the employment relationship with the applicant the respondent had in place a policy that regulated retirement and provided for the age of retirement as 65 (sixty six) years. According to him he compiled this document in consultation with NUMSA and Solidarity being the two recognised unions at the respondent's work place. The document was developed pursuant to instruction by managing director and on its completion was according to him placed in a *"big board with glasses."* According to him he placed the document in the glass secured notice board on the 23rd May 2005. At that stage Opperman was the general manager but was excluded from the negotiations with the unions

about the policy document because the NUMSA had accused him of negotiating in bad faith.

[15] In relation to the incident where it is alleged that Tayob confronted the applicant, Mkhondo denied that the incident occurred on the 26th of September 2006 as according to him on that day the two of them were out in Mogwase at one of the other companies of Polisak. However, he did not deny having received the grievance letter from the applicant on the 27th September 2006. Subsequent to receipt of this letter Mkhondo arranged a meeting with the applicant and Tayob for the purposes of discussing the issues raised in the letter. The outcome of the meeting was that Tayob apologised for what may have happened according to him before the 26th September 2006.

[16] According, to Mkhondo a process that led to the termination of the applicant's employment was initiated by him through a letter dated the 19th March 2007 which read as follows:

> *"Re: Termination of services due to old age*
>
> *You are hereby requested to attend (sic) meeting on the 22nd day of March 2007 time 14:00pm.*
>
> *Venue HR-Office*
>
> *Agenda:*
>
> *1. Alternatives to be considered.*
>
> *2. Effective period*
>
> *3. Severance pay*

4. Ex-gratia amount

We further advise you of your legal right of representation morso (sic) to be represented by a fellow Employee of your choice or a shop steward.

Hoping you'll find the above in order.

Yours truly."

[17] This letter was apparently handed to the applicant on the 6th of March 2007. According to Mkhondo he advised the applicant that he should choose whoever he wished, including an attorney, to assist him in the process.

[18] On the same day, the 19th March 2007, the respondent received a telephone call from a Mrs Van Niekerk of the attorneys of record of the applicant regarding the issues raised in the above letter. During the telephone conversation a meeting was arranged for the 23rd March 2007. On the 23rd March 2007, the meeting had to be postponed to the 27th March 2007 because Mrs Van Niekerk was not available to attend.

[19] On the 27th March 2007, the respondent addressed a letter to the applicant which reads as follows:

"Re: Termination due to old age (Retirement)

We refer to our previous meetings held with yourself from the 06th day of March 2007 regarding your retirement and also a follow-up meeting on the 19th day of March 2007 whereby you requested to consult with your

Legal representative and as a result the matter was postponed to the 23rd day of March 2007.

Final meeting held on this the 27th day of March 2007 whereby you personally (sic) submitted that you don't accept the offer same supported by the Letter (sic) dated the 27th day of March 2007. Save to say on various occasions you (sic) flatly failed to come-up with your proposal.

We further refer you to the policy of the Company which is self explanatory morso (sic) Regarding the issue of retirement and save to say its been consistently applied. We Further discharge our obligation of giving you a notice till the 27th of April 2007.

However we (sic) would like to draw your attention to Section 38 of the BCEA which Permits (sic) the payment of remuneration instead of notice. Save to say you will be remunerated till the 27th day of April 2007.

Wishing you the best in future.

HR-Department."

[20] The applicant's attorneys of record addressed a letter to the respondent dated 30th March 2007 and at paragraph 4 of the said letter stated the following:

> *"We place on record that upon enquiring that the name of the policy of the company that you referred to in your letter dated the 27th March 2007, you indicated that it does not have a name and that it comprises of three pages. The writer enquired from you exactly what*

was the wording of such policy and you indicated that all employees in the employ of your company are obligated to take their retirement as soon as they attain the age of sixty five years old. The writer indicated that although you refer to such a policy, it was in her instructions that at no state had such a document of the required age for retirement been brought to our client's attention before and after taking up employment with your company. It is also interesting to note that our client's contract of employment makes no reference to (sic) his policy document of the company or that he is obliged to take retirement at the age as stated by yourself."

[21] The letter continues at the unnumbered paragraph 9 to state the following:

"*Based on the fact that the policy of the company was not supplied or brought to the attention of Mr Cosme in writing, that he was employed at the age of sixty three by your company, that he only signed his contract of employment in February 2007, which makes no mention of the fact that he would have obligated to take pension this year, we believe that the severance package suggested to him is unfair. Further, the way in which this matter has been dealt with by the company and the short notice involved, are contributing factors."*

[22] Mkhondo testified further that the contract which had been signed by the applicant. In this respect he indicated that the first time he saw the contract of employment was at the first meeting he had with the applicant and did not

know who signed on behalf of the respondent. He further indicated that all contracts of employment are to only be signed by himself on behalf of the company.

[23] Mkhondo was cross-examined at length about the policy he claimed was in existence regarding retirement and the applicant and which he claimed had been posted on the notice board of the respondent. He was cross-examined in particular about the period that the document is supposed to have come into existence because it provides for leave to receive military training. The document under the heading of *"Special leave policy"*, and at point 3 (three) provides as follows:

> *"On condition that acceptable documentary proof is submitted to substantiate the specific application, special leave may be considered in the following instances*
>
> *3. To receive military training."*

[24] The document further provides under the heading *"To receive compulsory military training"*, that:

> *"Special leave to attend a military training course or camp may be granted subject to the submission of the written call-up instructions."*

[25] The cross-examination also focused on the delay and the period it took Mkhondo to produce the said policy document. When asked as to why was document produced a day before the Court hearing Mkhondo responded by

saying that the reason for that was because he had handed all the documentation relating to this matter to Mr Modiba the attorney who was initially instructed by the respondent to deal with this matter.

[26] In his answer about the same subject matter, Mkhondo, focused on the settlement proposal which the applicant had made. The settlement proposal was for six months compensation. He disagreed with the proposition that the settlement of the matter could have been reached earlier had he made the said document available earlier. He however conceded that the six months compensation was made on the basis of lack of knowledge about the existence of the document in question.

[27] Mkhondo testified further that the services of Mr Modiba as the instructing attorney for the respondent had never been terminated. When asked as to why he did not produce the document at the pre-trial meeting Mkhondo replied in essence as follows:

"You see if I knew where to get Mr Modiba at that stage I should have driven through to that hospital or home or wherever, but now it was difficult even to reach Mr Modiba at that stage, but I knew for a fact, he has been hospitalised for a quite a long time, and that he is not around Pretoria again."

[28] When it was put to him that the applicant's attorneys never had any dealings with Mr Modiba, except for himself and that they had to approach this Court for an order to compel a holding of a pre-trial conference including notices which were addressed to himself as HR manager of the respondent he responded along the following lines:

"Exactly, and I have been taking everything to the office of Mr Modiba. The secretary can confirm I have been handling all- whatever documents I have got from the applicant and hand it over to Mr Modiba."

[29] Mkhondo was further asked about the provisions of the pre-trial minutes where an undertaking was made that the policy document would be made available to the applicant. The pre-trial minutes provides at paragraph 18.3 as follows:

"Respondent will discover the notice it is referring to on its notice board."

[30] Mkhondo responded to the above question along the following lines:

"On the 25th I drove from Brits to Mr Modiba's offices in Pretoria. Then I arrived in Mr Modiba's offices I was told that no, Mr Modiba is hospitalised he is not there. He is not in the offices then it was already late. I could not even drive from that office, go back to Brits and come to Court, it was already late. Because I arrived at Mr Modiba's office 08:00. Then I was told he was not there."

Legal principles

[31] The case of the applicant is that his dismissal was automatically unfair in that he was dismissed because of his age, when he was still able to perform his duties. As indicated earlier the case of the applicant is based on the provisions of section 187(1) (f) of the LRA. In the alternative the claim of the applicant is based on the provisions of section 187(1) (d) of the LRA. It therefore means that the evidentiary burden to produce evidence that is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place rests on the applicant. If the applicant succeeds in discharging his evidentiary burden then the burden to show that the reason for the dismissal did not fall within the circumstances envisaged by section 187(1) of the LRA rests with the respondent. This approach was followed in *Van der Velde v Business and Design Software (Pty) Ltd and Another (2006) 27 ILJ 1738 (LC)* and confirmed on appeal in the same case.

[32] This Court in the case of *Viney v Barnard Jacobs Mallet Securities (Pty) Ltd (2008) 29 ILJ (CC)*, in dealing with the issue of automatically unfair dismissal held that:

"37 In order to ascertain whether a dismissal constitutes an automatically unfair dismissal in terms of s187 of the LRA, onemust ascertain the true reason for such a dismissal. See Kroukam v SA Airlink (Pty) Ltd [2005] 12 ILJ 2153 (LAC) at 2162F; .NUMSA & Others v Driveline Technologies (Pty) Ltd & Another 2000 ILJ 142 (LAC) at 152J; SA Chemical Workers Union (SACWU) & Others v Afrox Ltd 1999 ILJ 1718 (LAC) at 17260; Van der Velde v Business Design Software (Pty) Ltd & Another (2) 2006 ILJ 1738 (LC) at 1745 I; Jabari v Telkom SA (Pty) Ltd 2006 ILJ 1854 (LC) at 927A-B."

The court went further to say in *Viney's case* and relying on the decision in *Kroukam v SA Airlink (Pty) Ltd 2005 ILJ 22153 (LAC)* to say*:*

"53 The starting point in this inquiry… is to determine whether the employee has produced sufficient evidence to raise a credible possibility that an automatically unfair dismissal has taken place. Having discharged the evidentiary burden of showing that the dismissal was for an impermissible reason, it is upon the employer to discharge its onus of proving as provided for in terms of s192 of the LRA that the dismissal was for an impermissible reason, it is upon the employer to discharge its onus of providing as provided for in terms s 192 of the LRA that the dismissal was for a permissible reason as provided for In terms of s188 of the LRA"

[33] The approach to be adopted when dealing with the claim that the dismissal was also dealt with by the Labour Appeal Court in the case *SA Chemical Workers Union & others v Afrox Ltd (1999) 20 ILJ 1718 (LAC)* (at para 32), where Froneman DJP formulated it as follows:

> *"The enquiry into the reason for the dismissal is an objective one, where the employer's motive for the dismissal will merely be one of a number of factors to be considered. This issue (the reason for the dismissal) is essentially one of causation and I can see no reason why the usual two-fold approach to causation, applied in other fields of law should not also be utilized here (compare S v Mokgethi & others 1990 (1) SA 32 (A) at 39D-41A; Minister of Police v Skosana 1977 (1) SA 31 (A) at 34)."*

Evaluations

[34] In dealing with the facts in the present matter, it is important in my view, to note firstly the age at which the applicant was employed by the respondent. There is no evidence indicating that anything was said to him regarding the age of retirement being 65 (sixty five) years of age at the time of his appointment. At that stage the applicant was left with only two years, being 63 (sixty three) years of age, to reach the age of 65 (sixty five) years. Similarly the existence of the policy regarding retirement is also critical in the evaluation and the assessment of the claim of the applicant.

[35] The respondent in its heads of argument submitted that on the balance of probabilities the policy regarding retirement at the respondent's work place was in place at the time of the termination of the applicant's employment and that the termination was due to applicant having reached the age of retirement. The respondent further submitted that they complied with the requirements of a fair labour practice in that in terminating the applicant's employment on the basis of retirement they consulted with him. The respondent further submitted that the applicant's argument that the termination of the contract was as a result of the incident of 26th September 2006 should be rejected because the termination only occurred after a period of six months had expired. In this regard the respondent argued that had it intended to arbitrarily use his age to get rid of the applicant it would have started the process immediately after the incident and thus long before the applicant was approaching his 66th birthday.

[36] In my view the non existence of the retire policy of the respondent is beyond doubt. Contrary to his attempt to indicate that the respondent had a policy governing retirement, Mkhondo hopelessly failed. His version is unsustainable because it is clearly a distortion and he was a downright unreliable and untruthful witness. In this respect it had to be noted that the said document was produced after more than two years after the applicant's attorneys had requested its disclosure. The document was not produced at the CCMA hearing neither was it produced after the pre-trial conference even though the respondent had undertaken to do so. The document was also not disclosed

even after the respondent was made aware during March 2009 that it had until 3 April 2009 to discover all documents it intended to rely on at the hearing of the matter. The explanation, by Mkhondo that the document could not be furnished to the applicant earlier makes no sense. He says that the document could not be disclosed because it had already been given to the respondent's attorney. Modiba. Even if it was to be assumed that the document was with Modiba, Mkhondo had all the time to collect it from his office and make it available to the respondent much earlier that a day before the hearing of the matter.

[37] Mkhondo who claimed to be the author of the document could not explain certain of its parts in relation to the context of the period the document is supposed to have come into existence. In this respect he could not explain reference to "compulsory military training" document dated 2005, a period after which the practice of compulsory military training in South Africa was no longer applicable.

[38] In my view the attempt to consult with the applicant before his dismissal does not address the underlying reason for the dismissal because it has to be looked at in the context and circumstances of this case. This dismissal in this matter happened in the context where the applicant had challenged conduct of the managing director who it would appear had the habit of treating employees as sub-human beings by screaming, shouting and using inappropriate language when speaking to them. The applicant had enough of his abuse and took a firm and brave stand of asserting his dignity and the right to be treated with respect

by his employer. He demanded an apology from his employer which was clearly not unconditionally given because in retaliation thereto, the applicant's status as a supervisor changed. Another person was made responsible for those employees who used to report to the applicant. The employee made matters worst for himself by questioning his authority and it was for this reason that he had to find a way of getting rid of him. It was at this stage that he enquired as to the age of the applicant. The probabilities strongly point to the fact that but for demanding an apology after the abusive language by Tayob and engaging him with regard to the issue of his status as a supervisor, the issue of age would never have arisen. Thus age used by the respondent to justify the termination of the employment relationship and accordingly making the dismissal automatically unfair in terms of section 187 (1) (f) of the LRA.

[39] The dismissal would still have been unfair even if it was incorrect to conclude that it was automatically unfair because it was based on age discrimination. The above analysis indicates that the probabilities support the version that the dismissal was motivated by victimisation in contravention of section 187 (1) (d) (i) of the LRA. Having arrived at the conclusion that the dismissal of the employee was automatically unfair I see no reason in the circumstances of this case why he should not be awarded the maximum compensation as provided for in section 194 (3) of the LRA.

[40] As concerning costs there is no doubt, regard being had to the circumstances of the matter and the manner in which the respondent conducted the matter that the appropriate approach to adopt is to award punitive costs. The

applicant had to obtain a court order compelling the respondent to attend the pre-trial meeting

[41] In the premises the following order is made:

1. The late filling of the statement of case by the applicant is condoned.

2. The dismissal of the applicant was automatically unfair.

3. The respondent is to compensate the applicant in the amount equivalent to 24 (twenty four) months, calculate at the rate of his salary as at the date of his dismissal.

4. The respondent is to pay the costs of the applicant on the scale of attorney and client.

Molahlehi J

Date of Hearing : 26th August 2009

Date of Judgment : 22nd January 2010

Appearances

For the Applicant : Adv Ackerman

Instructed by : De Oliveira Serrao Attorneys

For the Respondent: Mr JF Du Toit of Kloppers Theron Inc