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Seokwane v Bidvest Prestige Cleaning Services (Pty) Ltd (8 November 2023)

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INTRODUCTION

The Applicant, Ms. Seokwane, was employed as a general worker at Tsebo (Pty) Ltd, ("**Tsebo**") who had a cleaning contract at Volkswagen Group SA ("**VW**"). VW terminated three cleaning contracts with Tsebo and appointed Bidvest Prestige Cleaning Services (Pty) Ltd ("**the Respondent**") to take over the cleaning contact. At the request of VW, the Respondent continued to employ the Applicant in terms of a 3-year fixed term employment contract ("**Contract**").

The Applicant's Contract cited the retirement age being 60 years old, however, when the Applicant was appointed in terms of the Contract, she was already 62 years old. The Respondent's retirement policy stated that an employee's employment contract would automatically terminate after s/he reached the retirement age. The Applicant, however, expected that she would be employed for the full 3-year fixed period. On the Applicant's version, during the Covid-19 lockdown in May 2020, the Respondent informed the Applicant that she is being retrenched and that she would receive a retrenchment package. After requesting reasons, she was told that the reason for her retrenchment was because she had exceeded the retirement age. After a further enquiry, in June 2020, the Respondent confirmed that they expected a reduction of the Respondent's work force by one person under the VW cleaning contract. The Applicant's Contract terminated on 30 June 2020.

The Respondent denied that they told the Applicant that she would be retrenched before informing her that the reason for the termination of her services was retirement. On the Respondent's version, the Applicant who, upon being informed of her retirement, requested to be retrenched instead so that she could benefit from an insurance policy. The court found the dispute of which party initiated the idea of retrenchment is immaterial because it is common cause that the official reason for the termination of the Applicant's Contract was the Applicant surpassing the retirement age.

In terms of section 6(1) of the Employment Equity Act 55 of 1998 ("**EEA**"), direct and indirect unfair discrimination of employees based on age is prohibited. Section 187(2)(b) of the Labour Relations Act 66 of 1995 ("**the LRA**"), however, provides that "a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity"'.

THE LABOUR COURT ("the Court")

The Contract provided that when an employee reached the age of 60 years his or her employment contract would expire automatically. When the Applicant was employed, however, she had already passed the retirement age. The Court held that the Contract which provides for continuation of services past the normal retirement age cannot be relied upon by the Respondent because the clause implies that the employment relationship must have commenced before the employee reached the normal retirement age, which is not the case with the Applicant.

The Court further accepted that the Respondent could not rely on section 187(2)(b) of the LRA. The Court reiterated that to rely on section 187(2)(b), the direct cause of termination must be that the employee has already reached retirement age and the employer cannot invoke the defence in section 187(2)(b) where the real reason for the dismissal is based on operational requirements, misconduct or incapacity. As such, to use section 187(2)(b) as a defence, it is not enough for the employee to have reached the retirement age only, it must also be established whether the employer is not using the retirement age as a means of dismissing the Applicant for another reason.

The Respondent testified that VW decided to reduce the Respondent's staff at VW's premise, which was referred to as the "sell down". When the "sell down" arrived at VW the respondent decided to retire the Applicant to avoid a retrenchment. Due the change of the VW contract, the Respondent had to remove one employee from VW i.e. its operations therefore required one less employee.

The Court concluded that the real reason for the Applicant's dismissal was due to the Respondent's operation requirements and as such the Respondent's conduct falls outside the ambit of section 187(2)(b) of the LRA.

The dismissal of the Applicant was found to constitute unfair discrimination because when the Respondent was anticipating reducing the staff by one member, they selected the Applicant based on her age. The Respondent's conduct rendered the Applicant's dismissal automatically unfair, and the Applicant was awarded 12 month's compensation.

CONCLUSION

Employers must tread carefully when it comes to dismissing an employee due to their age, as age should never be a sole determinator for dismissing an employee.

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