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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

2005-05-17 CASE NO: JS749/03

In the matter between

**W W BOTHA** Applicant

and

**DU TOIT VREY & PARTNERS CC** Respondent

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J U D G M E N T

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REVELAS, J:

[1] When the services of the applicant were terminated by the respondent on 30 June 2003, he was 66 years old. He had been engaged by the respondent as an appraiser assistant since 1 September 1995. The reason advanced by the respondent for his dismissal was that the respondent was of the view that the applicant had already reached his retirement age in October 2001 and that the time had come for his services to be terminated on the basis of his age.

[2] The applicant referred a dispute about an automatically unfair dismissal in terms of section 191(5)(1)(b)(ii) of the Labour Relations Act 66 of 1995 ("the Act"), read together with section 187(1)(f) of the same Act, to this court alleging that he was discriminated against because of his age.

[3] According to him he was entitled to work until he himself decided to retire or when he became unable to work as so many appraisers in the field

continued to work until very late in life.

[4] At this point I may mention that the evidence was, as I understand it, that the nature of the work is not physically demanding and in that particular occupation one does not see as many changes as in other fields. In South Africa, a dismissal based on an employee's age would be regarded as fair provided "the employee has reached the normal or agreed retirement age for persons employed in that capacity (see section 187(2)(b) of the Act).

[5] The respondent contended that the termination of the applicant's services was indeed fair since there was a tacit or implied agreement between the parties that the age of 65 years would be the applicant's retirement age. In the alternative it was contended that 65 years was the "normal" retirement age for assistant appraisers. In support of the aforesaid, reliance was placed on the fact that the applicant had previously been employed by a local municipality (Roodepoort) where the retirement was set at 65 as in other municipalities and it was an implicit term and condition of employment of the applicant and other appraisers employed by municipalities.

[6] The respondent had also pleaded that it was its policy that the normal retirement age of employees would be 65. The last and only retirement prior to that of the applicant was the retirement of Mrs van Niekerk who retired in 2002 at the age of 65. There was also evidence led by Mr du Toit (one of the partners of the close corporation) that Mrs van Niekerk and her husband were going on a caravan trip together. It is therefore not quite certain in my mind, that it was well-known and the policy of the company that 65 was the retirement age. Mrs van Niekerk could very well have decided that in her 65th year that she wanted to resign to go on the caravan trip rather than because of her age. She did not testify.

[7] According to the respondent, the fact that the applicant's continued his employment well beyond his 65th birthday, was for humanitarian considerations. At any time after the applicant attaining the age of 65, the respondent contended, it was entitled to terminate his services. The

respondent did precisely that on 30 June 2003, when the applicant was handed a letter wherein he was given notice that his retirement date had been fixed by the respondent as 31 July 2003. In other words, he was given one month's notice. Reference was also made in the same letter, to the fact that on 2 October of that same year he would be 67 years old and that he had already reached the retirement age when he became 65 years old.

[8] This letter was also preceded by a meeting held between the two partners of the respondent, the applicant and a secretary (Mrs van den Berg). At the meeting the declined income of the deceased estates department of the respondent was discussed. This meeting was held on 15 April 2003. It was felt by the respondent that the applicant should endeavour to get more businesses for the firm by approaching executors' houses and the like. Mention was also made of the fact that he should send out advertisements. In evidence Mr du Toit said that the applicant made no efforts to comply with these suggestions.

[9] The applicant's main function was the administering of deceased estates. It was stated at this meeting (the one held on 15 April 2003) that should matters not approve the deceased estates department of the respondent would have to close down. Evidence was also led by the respondent that there was a decline in work. The applicant believes that there was an ulterior motive behind his dismissal or it was not really necessary for him to be dismissed.

[10] It was common cause between the parties that appraisers practise their professions until very late in life. Examples were given of octogenarians who were still in practice. Mr du Toit, one of the two of the respondent's partners, testified that he was turning 64 himself this year. He explained that whereas it was open to him and the other partner in the close corporation partnership, to work beyond the retirement age of 65, the same did not apply the employees of the partnership. He emphasised that the

applicant was an assistant appraiser as opposed to a learner appraiser. He could therefore not be registered as a proper appraiser. As such he was employed by the Roodepoort Municipality as stated hereinbefore. There the retirement age, he said, was 65 years and in the municipal sector that was the normal retirement age. The applicant was also employed by the former City Council of Johannesburg. In fact that was where Mr du Toit and the applicant had met.

[11] From Mr du Toit's evidence I gained the impression that he resented the applicant's failure to qualify himself further and that he did not do enough to attract more work to the respondent's deceased estates department. In the four months prior to the termination of the applicant's services, only one deceased estate was dealt with by the aforesaid department, said Mr du Toit. He also made mention of the applicant's temper that was becoming shorter. This Mr du Toit attributed to old age. I formed the view that while listening to Mr du Toit's testimony, that the reason for the applicant's dismissal was not because he had reached the retirement age but rather for reasons relating to his work performance and the respondent's operational requirements.

[12] Instead of embarking on a process of counselling or a consultation process with the applicant, the respondent simply invoked the question of the applicant's retirement age.

[13] The question I have to decide was whether the respondent was entitled to do so and whether the manner in which it did so, was fair.

[14] It is common cause that none of the partners ever told the applicant that his retirement was 65 years of age. The employment contract between the applicant and the respondent was an oral one. Save for Mrs van Niekerk, there is no example of someone employed by the respondent who left their services when or because they became 65 years old.

[15] On the above facts, there was clearly no agreement that the retirement age was 65. The applicant's 65th birthday came and went. Not a word was

mentioned of retirement. Does this mean that the applicant could continue to be employed by the respondent until he (the applicant) terminated the agreement? The answer to this question must be no. In the absence of an agreed retirement age, the respondent was entitled to determine the applicant's retirement age at the standard or normal retirement age in the field he was working in. On the facts of the matter this age is 65. That age is also consistent with the normal retirement age in many other sectors in this country where appraisers are employed and otherwise. Whereas it is indeed so that appraisers are often literally capable of working until their death, such a choice could not be imposed on such an assistant appraiser's employer. For obvious reasons persons in private practice who run their own businesses, may very well work until they choose to retire. Unfortunately the same does not apply to their employees. It would not be fair to expect of an employer to keep an employee in its employ indefinitely. The reasons for this proposition are quite clear and logical. Whereas I agree with counsel for the applicant, that much benefit can be derived from keeping elderly persons in the job market beyond retirement age, the decision to do so falls within the managerial prerogative and is not a question which is to be decided by the employee. Accordingly, the respondent was entitled to rely on a retirement age of 65, based on the retirement age set in the municipal sector for this particular profession, namely that of an assistant appraiser. The employee's consent is not required in such a case, there being no agreement.

[16] What does concern me is the question that his retirement age was not discussed even after his 65th birthday. He continued to work after that age. There was no agreement between the parties on an extended retirement age either. The applicant did not know when his services would come to an end. He never thought of it. In such circumstances some form of consultation is required, and so demands the decrees of fairness.

Obviously such a consultation process would not have the same purpose as the contemplated in section 189 of the Act, namely to avoid dismissal. In my view the employer in the position of the respondent should have raised the question of retirement with the employee concerned, that is the applicant, and discussed some possible dates which could be determined as the date of retirement. In certain situations one can imagine that alternatives to an immediate retirement date could be discussed. This opportunity was not open to the applicant.

In my view it just seems very unfair to present an employee, such as the applicant with a notice terminating his services within one month without any prior discussion. It is no small wonder that he was shocked and hurt. The meetings held on 15 April previously where the decline in work was discussed, certainly did not serve as a consultation process which preceded the letter which was handed to him in June 2003. His career was simply ended by the letter given to him.

[17] The far greater part of an adult person's life is spent at work, if he or she has the good fortune to be employed. In most cases a career is that which is the driving force in a life. It determines a person’s self-worth and worth in society. The end of such a career or working life should not be imposed as a form of shock where the person’s services are terminated on the basis of age, even if the employer is legally entitled to do so. Whereas the termination of the applicant's services were substantively fair, he should be entitled to compensation because the termination of his services was procedurally flawed. Since the respondent was permitted to act in law as he did, and the applicant’s services would be terminated eventually, consultation may not have changed the position much. The lack of consultation before an inevitable event does not warrant substantial compensation. The purpose of the consultation needed in this matter was to avoid surprise and indignation, not to save the applicant’s job. I also have to consider the fact that no employee can reasonably expect, in the

absence of an agreement on retirement, to be employed for purposes of his or her convenience and for an indefinite period. The Act also does not prescribe any procedure to be followed before a retirement age is announced, but for the reasons set out above, I believe there should be one.

In my view, compensation equal to three months' remuneration is appropriate in this case. The respondent is therefore ordered to pay such compensation accordingly. The respondent is further ordered to pay the applicant's costs.

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E.REVELAS

Reportable

DATE OF HEARING: 17 May 2005

DATE OF JUDGMENT: 17 May 2005

ON BEHALF OF THE APPLICANT: Adv C. Bezuidenhout

INSTRUCTED BY: MT De Bruin Attorneys

ON BEHALF OF THE RESPONDENT: Adv. E. Kromhout

INSTRUCTED BY: Strydom Botha Inc.