



**IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN**

Not Reportable  
Case No. D597/22

In the matter between:

**LEONIE EUNICE LEMMER**

**Plaintiff**

and

**Dr. NIRESHA MUDLAY**

**Defendant**

**Heard: 4 & 5 September 2025**

**Judgment: 9 September 2025**

**This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date of hand-down is 9 September 2025.**

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**JUDGMENT**

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**MAKHURA, J**

[1] The plaintiff referred an automatically unfair dismissal dispute under section 187(1)(f) of the Labour Relations Act<sup>1</sup> (LRA). She claims that she was dismissed on 24 August 2022 via a WhatsApp message by the defendant because of her age. In the message, the defendant recommended that the plaintiff retire and rest, and not return to work after her annual leave period. The plaintiff's annual leave was from 25 to 30 August 2022.

[2] The defendant disputes the existence of the dismissal. She stated in her statement of response that she suggested to the plaintiff that she should consider retirement. She further stated that she requested the plaintiff to think about her retirement during her leave. She continued:

'On the 13<sup>th</sup> September 2022, the Applicant's attorneys again placed reliance on the email dated the 24<sup>th</sup> August 2022, alleging that the said email constitutes a dismissal based on the Applicant's age.

On the 20 September 2022, the Respondent's attorneys communicated to the Applicant's attorneys *inter alia*, that the WhatsApp communication from the Respondent required the Applicant to take time off due to her temperament and tiredness, that there was no dismissal suggested, and that the Applicant was required to report for duty.'

[3] The enquiry before this Court is, firstly, whether the plaintiff proved dismissal. If the plaintiff fails to prove dismissal, that is the end of the matter, as this Court would have no jurisdiction to entertain the claim. If she proves dismissal, the second enquiry is whether the dismissal fell within the scope of section 187(1)(f) of the LRA, and if so, the appropriate relief.

[4] On 18 August 2022, the defendant sent the plaintiff a WhatsApp message stating that the plaintiff had not been well emotionally and physically. The defendant stated

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<sup>1</sup> Act 66 of 1995, as amended. Section 187(1)(f) provides that a dismissal is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against the employee, directly or indirectly, on any arbitrary ground, including age.

further that she felt that “*retirement is due*” and that they would chat the following day.

[5] In response, the plaintiff stated that she intended to schedule an appointment with the defendant and requested that they meet before the defendant's clinic opened the following day.

[6] It is undisputed that the proposed meeting did not occur. At 18h13 on 24 August 2022, the defendant sent the plaintiff the following WhatsApp message:

‘Leonie, didn’t get a chance to chat to you ... as you know it’s been hectic.

The practise has grown and I will be extending the hours to a Saturday as well!

I strongly recommend that you retire and rest...

You have worked long enough and the stressors are impacting on you mentally and physically.

I trust you will understand that you should not return after your leave.

Take care and wish you well.’ (Own emphasis)

[7] In response to the defendant’s message, the plaintiff stated that she was shocked and taken aback by the message. She continued:

‘I think it is unreasonable of you to decide to unilaterally end my career after hours with a whatsapp message prior to me taking a couple of days leave.

I specifically asked to meet with you in this regard and refuse to accept your message or to conduct these discussions via whatsapp.

I therefore request again to meet when I return from my leave on the 30<sup>th</sup> August 2022. Kindly confirm your availability.’ (Own emphasis)

[8] On 25 August 2022, the defendant wrote that:

'Unfortunately, I don't think any way of telling you to retire would have been ok...

I am sure I am not the only person to advise you to retire

You know that the demands of work are huge

You have struggled over the past 6 months particularly. But I have kept you on (even through moodiness etc)

I have even advised more frequent leave to be taken which you declined

I am doing this and insisting on it just as much for your sake (not just as an employer and doctor)

Ps Think about it and process it in your leave.

And chat to loved ones who I'm sure will agree that it's the best thing for you.' (Own emphasis)

[9] On 26 August 2022, the plaintiff then thanked the defendant for the message and said that they would discuss on Tuesday (30 August 2022) at 8h00. The plaintiff replied by saying:

'No Leonie ... there is nothing more to say unfortunately.'

[10] The plaintiff then asked her colleague, Kubashnee Govender (Govender), to delete all her personal folders from her email and put all her personal items at the reception for her collection on 30 August 2022. No further correspondence or communication between the parties took place.

[11] On 13 September 2022, the plaintiff's attorneys sent a letter to the defendant. They outlined the facts of the case between 18 and 26 August 2022, as recorded above, and concluded that the plaintiff was dismissed due to her age. The plaintiff was 72 years old. The plaintiff also stated that her employment contract does not specify an agreed retirement age and that she was automatically unfairly dismissed. The plaintiff proposed terms for the settlement agreement.

[12] On 21 September 2022, the plaintiff referred an automatically unfair dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. She stated that she was dismissed on 24 August 2022 and sought maximum compensation.

[13] The defendant responded with a letter from the attorneys dated 20 September 2022, sent to the plaintiff's erstwhile attorneys on 22 September 2022. The defendant disputed the dismissal but argued that the plaintiff needed time off due to her temperament and fatigue at work. The letter recorded that:

'We are further instructed that as per the WhatsApp text which we are in receipt of, our client was clear about your client needing to take time off due to her temperament and tiredness at work...

At no stage whatsoever, was a dismissal suggested...

We are further instructed that our client has been expecting your client to report for duty when she has sufficiently rested.

We therefore are instructed to advise that your client is to report for duty when she has sufficiently rested.'

[14] On 23 September 2022, the plaintiff's attorneys responded to the above letter. The letter reiterated the content of the previous offer to resolve the dispute.

[15] Dismissal in this case is in dispute. Therefore, the plaintiff bears the onus to establish the existence of the dismissal.<sup>2</sup> The upshot of the defendant's case is that the plaintiff was never informed that she was dismissed. The defendant proposed that the plaintiff takes retirement and for these reasons, she was not dismissed.

[16] In *National Union of Metalworkers of SA & others v Abancedisi Labour Services*, the Supreme Court of Appeal held that:<sup>3</sup>

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<sup>2</sup> Section 192(1) of the LRA.

<sup>3</sup> (2013) 34 ILJ 3075 (SCA); [2013] 12 BLLR 1185 (SCA) at paras 15 - 17.

'A refusal to allow an employee to do the work he was engaged to do may constitute a wrongful repudiation and a fundamental breach of the employment contract which vests the employee with an election to stand by the contract or to terminate it. Here, Abancedisi did not just leave the employees to languish in idleness after their exclusion from Kitsankar. It also did not pay them any wages. Thereafter, nothing even slightly resembling the characteristics of an employment relationship remained between the parties beyond the illusory retention of the employees on Abancedisi's payroll upon which Mr Van der Mescht harped. Whether or not Abancedisi intended to repudiate the employment contract, the effect of its conduct constituted a material breach of the employment contract that entitled the employees to cancel it. To that end, the employees took a step that is sanctioned by the law and referred a dispute to the bargaining council.

The LAC made a related finding that this action; ie the employees' referral was made "too soon" and was "premature". With respect, I do not agree. Section 191(1)(b) of LRA expressly requires this to be done in writing within 30 days of the date of the dismissal. Evidently, the employees did not blindly rush to the bargaining council. They were dismissed between 6 and 9 July and approached the bargaining council on 23 July 2001, two weeks already into the four-week period envisaged by the legislature. This was after their union representative, Mr Tshoga, had communicated with Mr Van der Mescht and ascertained Abancedisi's position. The LAC's view that their situation was akin to an "indefinite suspension", with which I disagree as it is not supported by the evidence, and the courses the LAC considered should have been followed by the employees are, with respect, irrelevant.

In deciding whether there was an unfair dismissal justifying the order sought by the employees, reference must first be had to s 186(1)(a) of the Act in terms of which the term dismissal means that "an employer has terminated a contract of employment with or without notice": ie the employer has engaged in an act which brings the contract of employment to an end in a manner recognized as valid by the law...'

- [17] The plaintiff testified that she understood the defendant's message that "*I trust you will understand that you should not return after your leave*" to mean that she was

dismissed. She testified that she was dismissed because the defendant told her not to return to work after her leave and that she must retire. It was put to her that the defendant expressed her feeling and a strong recommendation that she was due for retirement, and that she did not instruct her to retire. The plaintiff insisted that she understood the defendant's statement to mean that she must retire because she was told not to return after her leave.

[18] The defendant disputed that she dismissed the plaintiff. She testified that the plaintiff was on leave from 25 August 2022 to 30 August 2022 and that she wanted the plaintiff to take more time after her leave to discuss her recommendation to retire with her family, to think about the issue, and process it. Asked if she had reached out to the plaintiff after the expiry of her annual leave, the defendant said that she expected the plaintiff to return when she felt rested, until she was served with the attorney's letter. These sentiments are recorded in the defendant's erstwhile attorneys' letter dated 20 September 2022. In that letter to the plaintiff's attorneys, the defendant stated that the plaintiff needed more time off because of her temperament and tiredness, that she was not dismissed and that the defendant expects the plaintiff to return to work when she has sufficiently rested.

[19] The plaintiff was informed in unambiguous terms not to return to work after her annual leave period ended. The reason for this was that the defendant "*strongly*" recommended that she must "*retire and rest*" because she had worked long enough, and the stressors were impacting her mentally and physically. There is nothing in the messages exchanged between the plaintiff and the defendant that suggests that the defendant expected the plaintiff to return to work when she felt rested.

[20] The plaintiff understood the defendant's message to mean that her employment contract was terminated. She expressed shock and informed the defendant that it was unreasonable for her to unilaterally terminate her employment contract in the manner that she did. The plaintiff requested to meet with the defendant when she returned from leave. The defendant did not dispute that she ended the plaintiff's

employment contract, or her “career”. She did not correct the plaintiff and inform her to return to work when she had rested. She did not inform the plaintiff that she would be paid her salary during the period of thinking, processing, and/or discussing the retirement with her family. Instead, she told the plaintiff that she did not think that “any way of telling [her] to retire would have been ok”, that she was doing and insisting on doing this for the plaintiff’s sake, and that she believed that her loved ones would agree that it was the best thing for the plaintiff. When the plaintiff sought to discuss the issue after she returned from her leave on 30 August 2022, the defendant told her that there was “nothing more to say”. The defendant testified that even if the plaintiff reported for duty, she would have disciplined her for alleged misconduct.

[21] In *Ekhamanzi Springs (Pty) Ltd v Mnomiya*<sup>4</sup>, the Labour Appeal Court held that:

‘Acceptance of an employee into an employer’s service has long been recognized by many authors as one of the common-law duties of an employer, non-fulfilment of which would amount to a breach of the employment contract. In *Kinemas Ltd v Berman* the court confirmed the court a quo’s finding that the employer’s refusal to accept an employee’s tender for services constituted a repudiation of the employment contract entitling the employee to damages for breach of contract. The same approach seems to have been endorsed by this Court in the unreported case of *National Electronic Media Institute of SA v Buthelezi*, where the Court dismissed an appeal against an order of the Labour Court declaring an employer’s refusal to allow an employee to tender his service (and to perform his duties in terms of the employment contract) as a repudiation of the employment contract. As was the case in the afore-stated cases, in this matter the respondent tendered to work. The tender was made impossible to carry out by the conduct of the Mission, which the appellant associated itself with by virtue of its acquiescence in the Mission’s denial of access.’

[22] The defendant’s unequivocal communication to the plaintiff not to return to work after her leave and her rejection of the plaintiff’s tender to return to work amount

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<sup>4</sup> [2014] ZALAC 38; (2014) 35 ILJ 2388 (LAC) at para 30.

to a repudiation of the employment contract, entitling the plaintiff to cancel it and claim damages. In this regard, the plaintiff referred an unfair dismissal dispute and claimed compensation in terms of the LRA.

- [23] The defendant's evidence that when she asked the plaintiff not to return to work, she was placing her on an extended leave, is an afterthought and improbable, based on her responses on 25 and 26 August 2022. This version was also not put to the plaintiff during cross-examination.
- [24] The defendant claimed in her legal representative's letter dated 20 September 2022, sent to the plaintiff's attorneys on 22 September 2022, that she did not dismiss the plaintiff and that she expected her to return to work when she had sufficiently rested. This was again an afterthought and a disingenuous strategy to cover up the dismissal. The offer to the plaintiff to return to work was communicated for the first time in this letter, four weeks after the dismissal, 9 days after the defendant received the letter from the plaintiff's attorneys, and one day after the referral of the dispute for conciliation. Instead of retracting or withdrawing the decision to terminate the employment contract, the defendant denied that she had dismissed the plaintiff. Despite stating that the plaintiff was not dismissed, the defendant did not pay the plaintiff's salary for September 2022, which was due and payable on 15 September 2022. The defendant recorded on the Unemployment Insurance Form that the plaintiff retired on 31 August 2022.
- [25] Having considered the evidence, I am satisfied that the plaintiff had discharged her onus in terms of section 192(1) of the LRA. The next question is whether the dismissal was automatically unfair. Again, the plaintiff bears the onus. She has presented evidence that she was dismissed because of her age. That she was dismissed because of her age is not in dispute.
- [26] It is common cause between the parties that there was no agreed retirement age. The defendant invoked section 187(2)(b) of the LRA, and claimed that the plaintiff had reached a normal retirement age. This section provides that:

(2) Despite subsection (1) (f)(a) –

...

(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.’

[27] The defendant contends that because the plaintiff had reached the normal retirement age, she was entitled to terminate her services. The defendant then alleged that the plaintiff had accepted that she had passed the normal retirement age and abandoned her employment.

[28] The onus is on the defendant to prove that the plaintiff reached the normal retirement age for persons employed in the position of Practice Manager.<sup>5</sup> Ms Ntuli, counsel for the defendant, conceded that no evidence was presented in this regard. Accordingly, the defendant’s invocation of the exception was a dismal failure and a non-starter. Her defence fails, and the dismissal is found to be automatically unfair.

[29] The plaintiff seeks maximum compensation. In terms of section 194(3) of the LRA, this Court may order compensation, which must be just and equitable and not exceed the equivalent of the employee’s 24 months’ remuneration, calculated at the employee’s rate of remuneration on the date of dismissal.

[30] Whilst the letter dated 20 September 2022 did not prove that the plaintiff was not dismissed, it nevertheless stated that the defendant expected the plaintiff to report for duty when she had sufficiently rested. Had the plaintiff taken this offer, this matter would not have taken this turn. The offer was made four weeks after the termination of the employment contract. The plaintiff’s refusal to report for duty, whilst I understand that she may have been disappointed and shocked by the dismissal and the manner in which it was communicated to her, was unreasonable.

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<sup>5</sup> See: *Slabbert v Muji Motor Group (Pty) Ltd* [2024] ZALCD 30; (2024) 45 ILJ 2817 (LC).

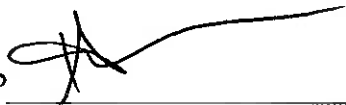
[31] Considering all the factors, I am of the view that compensation equivalent to 6 months, calculated at R20 000.00 per month, which was the plaintiff's monthly wages on the date of dismissal, is just and equitable in the circumstances.

[32] Both parties seek costs. This Court has the discretion to determine the issue of costs in terms of section 162 of the LRA. In deciding whether to award costs, I am guided by the principles of law and fairness. The principle that costs follow the result does not apply in this Court.<sup>6</sup> Having considered the matter and the arguments from both parties, I am not persuaded that there is sufficient evidence and persuasive arguments that justify deviating from the principle that costs do not follow the result. Accordingly, I find that no costs order should be made.

[33] In the premises, the following order is made:

Order

- 1 The plaintiff had discharged her onus in terms of section 192(1) of the LRA, and established the existence of dismissal.
- 2 It is declared that the dismissal of the plaintiff by the defendant is automatically unfair.
- 3 The defendant is ordered to pay the plaintiff R120 000.00, which is the equivalent of 6 months' remuneration.
- 4 There is no order as to costs.

PP 

M. Makhura

Judge of the Labour Court of South Africa

<sup>6</sup> *Zungu v Premier of the Province of KwaZulu-Natal & others* (2018) 39 ILJ 523 (CC); [2018] 4 BLLR 323 (CC); *Union for Police Security & Corrections Organisation v SA Custodial Management (Pty) Ltd & others* (2021) 42 ILJ 2371 (CC); [2021] 12 BLLR 1173 (CC).

Appearances:

For the Plaintiff: Mr C Higgs of Higgs Attorneys

For the Defendant: Ms N Ntuli

Instructed by: Aggie Govender Attorneys

LABOUR COURT