Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No. 38035/14

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE _____
SIGNATURE _____

In the matter between

J N T L Plaintiff

and

Road Accident Fund Defendant

Heard : 6 December 2018

Delivered : 7 March 2019

Coram : Munzhelele AJ,

JUDGMENT

MUNZHELELE AJ

Introduction

[1] Plaintiff J N T L was involved in an accident while he was 64 years of age. He was employed as a mining manager at Rooikat Regison Mine in Giyani at the time. During the incident plaintiff was the driver
of the Honda Goldwing motorbike registration number [….].

[2] Plaintiff sustained personal injuries as a result of the accident and issued summons claiming the following damages:

Estimated past hospital expenses	: R83 539.56
Estimated future hospital expenses	: Section 17(4) (a) of the act 56 of 1996
Accrued loss of earnings	: R 187, 000.00
Estimated future loss of earnings	: R 600, 000.00
General damages	: R1, 200, 000.00

Total : R2, 070, 539.56

[3] The plaintiff's accident related injuries, which were recorded on the medical records, and X-Ray report are the following:

- Soft tissue injury of the chest.
- Fracture of the vertebral body of T12
- Abdominal pain
- Several rib fracture on both sides of the lower chest
- Neck injury
- Contusion of the lower back and pelvis
- A non-displaced fracture of the left clavicle
- Bladder injury.

[4] Defendant conceded the merits 100% in favour of the plaintiff. The plaintiff's claim for past medical expenses was also conceded in the amount of R83 539.56 (eighty three thousands five hundred and thirty nine rand fifty six cents). The plaintiff's general damages was also conceded in the amount of R 500 000 (Five Hundred Thousand Rand).

[5] Estimated future medical and ancillary expenses were conceded by the defendant on the basis that the defendant shall forthwith furnish the plaintiff with an undertaking in terms of section 17(4)(a) for 100% future accommodation of the plaintiff in a hospital or nursing home or treatment or rendering of a service or the supplying of goods to him after the costs have been incurred and proof thereof resulting from the accident that occurred on the 31st of March 2011.

Issue for determination

[6] The matter, which is before me for determination is the plaintiff's pre accident retirement age, whether he would have retired at 65 or 75 years. Such determination would require facts led. The plaintiff led evidence and called an industrial psychologist Mr Wessels. The defendant did not call any witness.

[7] An affidavit was handed to court by Advocate Boot of a witness Mr Freeman as evidence. It was clear during the trial that the defendant seemed reasonably requiring the attendance of Mr Freeman for cross-examination. Adducing evidence by means of an affidavit in terms of rule 38(2) required reasons by the plaintiff for court to make an order that such an affidavit should be read during the trial (see uniform rule). No sufficient reasons were furnished by the plaintiff to enable the court to make such an order.

Facts of the case

[8] The plaintiff J N L was a mine manager at Rooikat Regison mine according to his evidence. For 12 years he was working as an expert in blasting and explosives. He claimed that he would have worked and retired at the age of 75 had it not been because of this accident. He testified further that at Rooikat Regison mine there is no policy regarding retirement. It has been a gentlemen's agreement with regard to his employment contract. He testified that at the company there was no one who had retired at the age of 65 years.

Experts' reports

[9] The orthopaedic surgeon Dr D.A. Tonny Birrell said that the plaintiff would have worked comfortably beyond the age of 70 years; and his earlier retirement as a result of the accident is between 9 months and a year. This clearly shows that there is not much difference between his pre accident and the post-accident. Dr Birrell referred the matter to the occupational therapist and the industrial psychologist for further assessment on the issue of retirement pre-accident.

[10] Occupational therapist Carole Pretorius assessed the plaintiff and said that plaintiff has occupational dysfunction compared to his premorbid competencies. He is reliant on others for carrying out physical tasks which he used to do himself and has compromised vocational competitiveness in a specialised field of work. Earlier retirement is foreseen. Mr Lerm was 64 years old at the time of the accident, and a person with good work ethic who valued fitness and outdoor life and was directed towards maintaining his worker role. It

would be reasonable and feasible to expect that he would have remained so, even into his later years, considering that he is in a work environment which does not have regulations related to enforce retirement age.

[11] The industrial psychologist Wessel J Wessels said on his evidence and also on his report that the plaintiff would have remained employed until the age of 75 years. He testified that he had consulted Mr Freeman the director of Giani Regison Mine who informed him that what he requires is the employee's expertise. As such a person could work beyond 65 years.

[12] It had been agreed by the neuro surgeons Dr Menachem Mzabow and Dr Amanda Peta that the plaintiff had chronic psychological adjustment difficulties. It was also agreed that plaintiff has cognitive impairments.

[13] The psychiatrists Dr D.A Shevel and Dr M. Matjane opined that Mr Lerm is suffering from a chronic mood disorder with associated anxiety. It was also agreed that his psychiatric condition is secondary to the physical injuries he sustained.

Arguments by the parties

[14] Arguments by Adv B Boot on behalf of the plaintiff are that the plaintiff is still working at the age of 71 years as such without the accident he would have worked until the retirement age of 75.

[15] Arguments by Adv Mulumbela on behalf of the defendant were that the retirement age which the Road Accident Fund recognises as normal retirement is 65 years as such the retirement at the age of 75 is outside the norm. The defendant objected to the handing in of the affidavit deposed by Mr Freeman and wanted him to have been in court testifying viva voce for cross examination.

Discussion

[16] There is no legal requirement in South African Labour Relation Act 66 of 1995 which stipulates the retirement age, but the age which is generally accepted as retirement age for mine managers is 60 to 65 years. An employer is entitled to insist that an employee retires when he or she reaches the retirement age, as agreed between the employee and the employer, or when he or she reaches the age at which other employees of this employer normally retire.

[17] In the absence of an express agreement between the employer and the employee relating to the retirement age, the employer is nevertheless entitled to insist that the employee retires at the company's normal retirement age. In *Rubin sportswear v SA Clothing and Textile Workers Union and others* (CA8/03) [2004] ZALAC 8 (9 July 2004) DCJ Zondo stated on para 13 that

'….. The word normal is not defined in section 187 of the labour relations act. It accordingly, must be given its ordinary meaning. Chambers- Mcmillan's South African Student Dictionary describes the word "norm" thus: you say that something is a norm if it is what people normally or traditionally do.' It further states that norms are usual ways or accepted ways of behaving. It described the adjective normal as meaning usual, typical or expected'.

[18] A retirement age that is not an agreed retirement age becomes a normal retirement age over a certain long period. The particular number of employees in a particular category who have retired at that age must be sufficiently large to justify saying that it is a norm for that company's employees not to retire but to work even over the age of 75. (see In Rubin sportswear v SA Clothing and Textile Workers Union and others (CA8/03) [2004] ZALAC 8 (9 July 2004))

[19] Whether a company has a normal retirement age for its employees will obviously depend on the facts. The onus is on the plaintiff to prove the facts that determine the normal retirement age at the company in which he was working.

The plaintiff should inform the court through credible evidence as to how long has this retirement norm been practiced. The plaintiff should further through evidence show to the court the particular number of employees in the category of mine managers who have retired at that age of 75. The said employees should be sufficiently large to justify saying that it is a norm for that company.

[20] There has not been enough evidence adduced to show the court that this was a common practice, which has become a norm at Rooikat Regison mine for the mine managers to retire at 75 years or more. The evidence on record by the plaintiff was to the effect that he wanted to retire at 75 and he indicated that there were other employees who were working beyond the age of 75 but it was not indicated whether they were mine managers or not .see *Rubin sportswear v SA Clothing and Textile Workers Union and others* (CA8/03) [2004] ZALAC 8 (9 July 2004). There has been no evidence regarding the plaintiff's company' medical examination and fitness to work assessments reports submitted to prove that plaintiff was fit as it has been common cause that plaintiff had lower limb or hip problems except the plaintiff post morbid medical assessments by the experts.

[21] Employees are required to retire at age 65. However, South African Mine Unions, Ten Mining Houses including Three Gold Mining Companies had already raised the retirement age of their employees from 60 to between 62.5 and 65 years. Similarly, the Chamber of Mines was urged to bring its retirement age in line with this policy. The agreement between the Chamber of Mines of South Africa and the Unions regarding the retirement age for all surface workers will be 63 years as from 1 July 2015, subject to such employees passing company's medical examination and fitness to work assessment as and when required provided that employees who wish to retire at the age of 60 or before 63 shall be entitled to do so.

[22] The evidence adduced by the plaintiff in court does not justify on a balance of probabilities that the plaintiff has discharged the onus rested on him to prove that Rooikat Regison mine managers retire at 75 years or more. In the premises I must find in favour of the defendant on this issue.

[23] **Order**

The following order is made.

- The plaintiff would have retired at the age of 65.
- Draft Order marked '**X**' is made an order of court.

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Munzhelele M.

Acting Judge of the High Court

For the plaintiff: adv B.Boot
Instructed by: Adams and Adams

For the defendant: adv Mulumbela
Instructed by: Tau Phalane Incorporated