Age-Based Dismissals After Retirement: *Motor Industry Staff Association and Another v Great South Africa Autobody CC t/a Great South Panelbeaters & Solidarity obo Gerhardus Viljoen Strydom and Others v State Information Technology Agency Soc Limited* [2024] ZACC 29

SUMMARY

The Constitutional Court's judgment in *Motor Industry Staff Association* addressed whether employers can fairly dismiss employees based on age after they have worked beyond retirement age. The case consolidated two appeals: *Landman*, concerning an employee dismissed ten months after reaching retirement age and S*olidarity*, involving six employees dismissed after working past retirement age. The Court produced three divergent judgments. Chief Justice Zondo's first judgment rejected the *Waco* precedent, holding that age-based dismissals are only fair if made exactly at retirement age. This strict interpretation aimed to protect workers from potential abuse of age-based dismissals. Justice Van Zyl's second judgment applied contractual principles, arguing employers must exercise their right to dismiss within a reasonable time after retirement age. Justice Rogers' third judgment permitted dismissals any time after retirement age with reasonable notice, emphasising workforce renewal and youth employment opportunities. The split decision reflected South Africa's complex socioeconomic context, with 45.5% youth unemployment in late 2024 creating pressure for workforce renewal, while also needing to protect vulnerable older workers, particularly those disadvantaged by apartheid. The judgments also highlighted tensions between textual and purposive approaches to statutory interpretation in constitutional democracy. The Court ultimately dismissed *Landman*'s appeal but upheld *Solidarity*'s with compensation, as their contract specifically allowed work until age 67. The lack of judicial consensus suggests legislative intervention may be needed to establish clearer guidelines for post-retirement dismissals, balancing worker protection with South Africa's pressing needs for youth employment and workplace transformation. The case demonstrates the ongoing challenge courts face in interpreting employment law provisions while promoting constitutional values and addressing practical workplace realities.

1 Introduction

The Constitutional Court's judgment in *Motor Industry Staff Association and Another v Great South Africa Autobody CC t/a Great South Panelbeaters & Solidarity obo Gerhardus Viljoen Strydom and Others v State Information Technology Agency Soc Limited* [2024] ZACC 29 (hereinafter *Motor Industry Staff Association*) addressed a critical question in South African employment law: whether employers may fairly dismiss employees on grounds of age after they have worked beyond their normal or agreed

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retirement age. The consolidated appeals challenged a longstanding precedent, which had permitted such dismissals. Through three divergent judgments, the Court grappled with interpreting section 187(2)(*b*) of the Labour Relations Act 66 of 1995 in light of constitutional principles, worker protection, and South Africa's socioeconomic realities. The case highlighted fundamental tensions between protecting older workers' rights and facilitating workforce renewal in a country with high youth unemployment and ongoing workplace transformation needs. This note then explores the provision's underlying purpose, particularly in South Africa's context of high youth unemployment and workplace transformation. Finally, it critically examines the different interpretative approaches adopted by the judges, drawing on academic commentary about statutory interpretation in South Africa's constitutional democracy.

2 Background

The judgment of *Motor Industry Staff Association* concerns two consolidated appeals regarding the interpretation of section 187(2)(*b*) of the Labour Relations, which deals with age-based dismissals in employment (para 1). The section provides that, despite section 187(1)(*f*) of the Labour Relations Act, a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity. Section 187(1)(*f*) provides that a dismissal is automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to, amongst others, age. The first appeal, hereinafter referred to as the *Landman* case, involved Willem Frederick Landman, who was dismissed by Great South Autobody CC ten months after reaching his agreed retirement age of 60 (para 14). The second appeal, hereinafter referred to as the *Solidarity* case, involved six employees who were dismissed by the State Information Technology Agency SOC Ltd (SITA) after they had worked beyond their retirement age (paras 79-80). The key legal question was whether an employer may fairly dismiss an employee on grounds of age when the dismissal occurs *after* the employee has already worked beyond their normal or agreed retirement age (para 22). This issue had previously been addressed in the 1998 Labour Court case of *Schweitzer v Waco Distributors (A division of Voltex (Pty) Ltd)* 1999 2 BLLR 188 (LC) (hereinafter *Waco*), where it was held that such dismissals were fair (paras 9-10). However, as Chief Justice Zondo noted in *Motor Industry Staff Association*, this precedent – which he himself wrote – was established just "four years after this country had become a democracy and under two years since the adoption of the final Constitution" (para 11). The Constitutional Court was thus required to reconsider whether *Waco* had been correctly decided, particularly in light of constitutional principles regarding fair labour practices and protection against unfair discrimination (paras 11, 26-27).

3 Facts of the case

3 1 Facts of the *Landman* case

The *Landman* case was presented to the Labour Court as a stated case between the Motor Industry Staff Association and Willem Frederick Landman (as applicants) and Great South Autobody CC (as respondent) (para 13). Landman began working for the respondent as a procurement officer in November 2007, and in January 2008, they concluded a written contract of employment which specified that his retirement age would be 60 years (para 14). When Landman reached 60 on 15 March 2018, the respondent was aware but did not dismiss him at that stage; instead, Landman continued to work and receive his regular pay throughout 2018 with no reference made to his retirement age (para 14). On 14 January 2019, approximately ten months after Landman had reached the agreed retirement age, the respondent gave him a letter stating that his services would terminate on 12 February 2019 because he had reached the retirement age of 60 years (para 14). Notably, Landman was a member of the Motor Industry Provident Fund, whose Collective Agreement provided for a retirement age of 65, though the parties agreed to proceed on the basis that Landman's agreed retirement age was 60 (para 14). At the time of his dismissal, Landman's gross monthly remuneration was R34,800.00 (para 16). After his dismissal, he received R1,034,430.13 from the Motor Industry Provident Fund, though had he been allowed to work until age 65, he would have received R1,674,127.56 (para 19). Landman had not yet found another job (para 19).

The Labour Court, through Judge Van Niekerk, followed the precedent set in the *Waco* decision and ruled that the respondent was entitled to dismiss Landman on the grounds of reaching the agreed retirement age, even though the dismissal took place many months after he had reached the agreed retirement age of 60 years (para 20). The Labour Court concluded that Landman's dismissal was fair and dismissed his claim (para 20). When Landman appealed this decision, the Labour Appeal Court, in a judgment by Kathree-Setiloane AJA and concurred in by Waglay JP and Coppin JA, upheld the Labour Court's conclusions (para 21). Both courts thus effectively endorsed the principle established in *Waco* that an employer could fairly dismiss an employee on grounds of age even after allowing them to work beyond their agreed retirement age.

3 2 Facts of the *Solidarity* case

The *Solidarity* case involved a registered trade union bringing an application on behalf of six individuals who were dismissed by the SITA (para 79). The employees were Christopher Gerhadus Viljoen Strydom, Alwyn Enslin, Andreas Olivier, Wilma Ena Smith, Sonia du Plessis (who had passed away by the trial's end) and Petra Van den Berg (para 80). The employment conditions at SITA specified that retirement age would be set according to the rules of the relevant pension funds (para 92).

Under these rules, the normal retirement age was "the last day of the month in which a member reaches the age of 60" (para 93). However, significantly, the rules also stated that "subject to the consent of SITA, a member who has reached his normal retirement date and normal retirement age of 60 or 65, whichever is applicable, may remain in service and retire at a date not later than the last day of the month in which the member attains the age of 67" (para 93). In October 2017, SITA began issuing dismissal letters to these employees, who had all worked beyond their retirement age. For example, Ms Van den Berg received a letter stating that according to employment conditions she was due to retire at the end of August 2015, and her services would end on 31 December 2017 (para 98). All the individual applicants received similar letters with different dates (para 98). After receiving these letters, each individual lodged a grievance with SITA, which the respondent considered and rejected (para 99).

The Labour Court, through Judge Nkutha-Nkontwana, concluded that the dismissals were not automatically unfair (para 105). The Court's reasoning was based on the principle that "once an employee has worked beyond the date on which he or she reached the normal retirement age, the employer is entitled to dismiss him or her at any time thereafter on the basis that the employee has reached the normal retirement age" (para 105). This decision essentially relied on the *Waco* precedent to dismiss Solidarity's claim (para 105). When Solidarity applied for leave to appeal, the Labour Court dismissed the application, stating there were no reasonable prospects of success (para 105). Subsequently, Solidarity petitioned the Labour Appeal Court, but this petition was also dismissed (para 106). The Labour Appeal Court, comprising Waglay JP, Coppin JA and Setiloane AJA, briefly stated that they were "in general terms, in agreement with the judgment and order of the Labour Court" and saw no reasonable prospects of success for the appeal (para 106). They also found no compelling reason why leave to appeal should be granted (para 106).

4 Findings of the court

4 1 The first judgment (Zondo CJ, with Chaskalson AJ, Mathopo J and Schippers AJ concurring)

The first judgment, led by Chief Justice Zondo, fundamentally rejected the *Waco* precedent –

> even though this precedent was set by Zondo himself – and provided a new interpretation of section 187(2)(*b*) of the Labour Relations Act. The judgment held that a dismissal based on age is only fair under section 187(2)(*b*) if the employee is dismissed on the exact date when they reach their normal or agreed retirement age, with the only exception being where an agreement allows for retirement at the end of the month in which that age is reached (para 2).

This interpretation was grounded in several key legal principles. First, the judgment emphasised that section 187(2)(*b*) must be interpreted in light of section 39(2) of the Constitution, which requires legislation to be interpreted to promote "the spirit, purport and objects of the Bill of Rights" (para 69). The judgment also highlighted the constitutional protection against unfair discrimination based on age under section 9 of the Constitution, noting that such discrimination is presumptively unfair unless proven otherwise (para 27).

Chief Justice Zondo found that the *Waco* interpretation was problematic because it left employees vulnerable to abuse. For example, employers could use age-based dismissal as a pretext for dismissing employees for their participation in lawful strikes or to avoid paying retrenchment packages (paras 59-60). The judgment emphasised that section 187(2)(*b*) should be interpreted restrictively as it limits the constitutional right not to be unfairly discriminated against on the ground of age (para 65). Regarding procedural requirements, the first judgment held that where a dismissal occurs on the retirement age date, there is no obligation on the employer to follow procedural fairness requirements beyond giving contractual notice (para 57). This is because the employee has previously agreed that the employer may dismiss them upon reaching that age (para 57).

In terms of the specific cases, the first judgment found that Mr Landman's dismissal was automatically unfair as it occurred nine months after his retirement age (para 73). Similarly, in the Solidarity case, the dismissals were found to be automatically unfair not only because they occurred after the retirement age, but also because once SITA had consented to the employees working beyond age 60, they had acquired a right to work until age 67 under the applicable contractual arrangements (paras 117-119).

The judgment concluded by awarding maximum compensation of 24 months' remuneration to both Mr Landman and the Solidarity employees, noting the serious nature of automatically unfair dismissals and the substantial financial losses suffered by the employees (para 74, 76, 133). This interpretation represents a significant departure from previous case law and establishes a strict temporal requirement for age-based dismissals, aimed at providing greater protection for older employees while still recognising employers' legitimate interests in workforce renewal.

4 2 The second judgment (Van Zyl AJ)

The second judgment by Justice Van Zyl presented a distinct interpretation of section 187(2)(*b*) based primarily on contractual principles. The judgment held that when an employee reaches their normal or agreed retirement age, the employer gains an election (a legal right to choose) whether to terminate the employment relationship (paras 150-151). This election must be exercised within a reasonable

time period, or the employer might be deemed to have chosen to keep the employment contract in place (paras 151-152).

The judgment's reasoning was firmly grounded in contractual law principles. It explained that when a party to a contract becomes entitled to exercise a right, either under the contract's terms or by operation of law, the principle of election applies (para 151). As Justice Van Zyl explained, quoting from *Segal v Mazzur* 1920 CPD 635 644-645 "where a contracting party has a choice of two courses [he] is entitled to a reasonable time in which to make up his mind, but once he has made his election he is bound by that election and cannot afterwards change his mind but once he has made his election he is bound by that election and cannot afterwards change his mind." (para 152).

Importantly, the judgment emphasised that for an election to be valid, the party must have knowledge of both their legal rights and the relevant facts (para 167). This knowledge requirement became crucial in the judgment's application to both cases. In both *Landman* and *Solidarity*, the employers had acted based on their understanding of the *Waco* precedent, which suggested they could dismiss employees at any time after retirement age (paras 175-176). Therefore, they could not be said to have made an informed election about waiving their rights to dismiss the employees (para 177).

The judgment also addressed the broader policy implications of this interpretation, suggesting it struck a balance between protecting older workers' rights and allowing employer flexibility. It argued that this approach better served "to promote the extension of the working life of active older employees without unduly restricting the entry of younger persons to the labour market" (para 160). Based on this reasoning, Justice Van Zyl would have dismissed both appeals. However, his conclusion differed from both the first and third judgments, as it was based not on the merits of the dismissals themselves, but on the fact that the employers could not be deemed to have made an election due to their misunderstanding of the law at the time (paras 179-180). This interpretation represents a middle ground between the strict temporal requirement of the first judgment and the open-ended approach of the third judgment, grounding its analysis in established principles of contract law while attempting to balance practical workplace considerations.

4 3 The third Judgment (Rogers J, with Dodson AJ, Kollapen J and Tshiqi J concurring)

The third judgment, led by Justice Rogers, provided a markedly different interpretation of section 187(2)(*b*) of the Labour Relations Act based on both textual analysis and policy considerations. The judgment held that an employer may fairly dismiss an employee based on age at any time after the employee has reached their normal or agreed retirement age, provided reasonable notice is given (para 200). This interpretation was

founded firstly on a careful analysis of the statutory language. Justice Rogers argued that the plain meaning of the phrase "has reached the normal or agreed retirement age" encompasses not just the exact retirement date but continues thereafter (para 184). He illustrated this with a practical example: "If somebody asks me today if I have reached my 65th birthday, I would say yes, even though today is not my 65th birthday" (para 184).

The judgment identified two main policy objectives underlying section 187(2)(*b*). The primary purpose was to ensure equitable distribution of employment opportunities by making jobs available to younger jobseekers, addressing South Africa's chronic unemployment problem (para 186). A secondary purpose was to permit the dignified ending of employees' careers without requiring potentially humiliating incapacity hearings as employees age (para 187). Justice Rogers criticised the first judgment's interpretation, arguing it would likely result in more elderly employees being dismissed on their exact retirement dates, as employers would fear losing the right to make age-based dismissals (paras 195-196). He also disagreed with the second judgment's election-based approach, noting that the concept of election usually applies to unexpected events, whereas reaching retirement age is entirely predictable (paras 198-199). Regarding procedural requirements, while the judgment left open the question of whether employees are entitled to a hearing before age-based dismissal, it strongly encouraged employers to provide one as a matter of "decency, dignity and compassion" (para 206). The judgment emphasised that reasonable notice must be given for such dismissals (para 202).

In applying this interpretation to the specific cases, Justice Rogers would have dismissed Landman's appeal but upheld the Solidarity appeal. The crucial difference was that in Solidarity, the contractual arrangements provided that once SITA consented to employees working beyond 60, a new retirement age of 67 came into operation (para 214). Therefore, their dismissals before age 67 were automatically unfair (para 214). This interpretation sought to provide flexibility while maintaining fairness, allowing employers to retain valuable older employees without fear of losing their right to later effect age-based dismissals, while still protecting employees through notice requirements and potential procedural safeguards.

4 4 The final order

Although all judges agreed that the Court had jurisdiction and that leave to appeal should be granted, there was a split on the outcome in the *Landman* case. The first judgment would have upheld the appeal and awarded Landman compensation equal to 24 months' remuneration with costs. However, the second and third judgments, albeit for different reasons, concluded that the appeal should be dismissed with no order as to costs. Since this latter disposition commanded a majority, the final

order was that leave to appeal was granted but the appeal was dismissed (para 5).

For the *Solidarity* case, there was again unanimity that the Court had jurisdiction and that leave to appeal should be granted. The first judgment concluded that the appeal should succeed and that the six employees should be awarded compensation equal to 24 months' remuneration with costs. While the second judgment would have dismissed the appeal, the third judgment agreed with the first judgment's disposition based on the particular facts of the case, though it disagreed about awarding costs. Therefore, there was a majority in favour of upholding the appeal and awarding the employees 24 months' compensation, but no majority supported awarding costs (para 6).

The final order therefore reflected these majority positions: the *Landman* appeal was dismissed, while the *Solidarity* appeal was upheld with the employees receiving compensation but no costs order (paras 1, 6). This complex outcome reflects the Court's divergent views on the interpretation of section 187(2)(*b*), even though it was able to reach majority decisions on the practical outcomes of both cases.

5 The purpose of the provision

The Constitutional Court's divergent judgments in these cases illuminate a fundamental tension in South African employment law regarding the balance between protecting older workers' rights and facilitating workforce renewal. This tension manifested differently across the three judgments, each offering distinct approaches to resolving it. Chief Justice Zondo's first judgment prioritised worker protection by interpreting section 187(2)(*b*) restrictively. His judgment emphasised that allowing employers unlimited discretion to dismiss employees after retirement age could lead to abuse, with age being used as a pretext for dismissals actually motivated by factors such as participation in strikes or to avoid paying retrenchment packages (paras 59-60). This interpretation sought to protect vulnerable older workers by limiting age-based dismissals to a single point in time – the exact retirement date – thereby preventing potential discriminatory practices (para 65). Orton's theoretical framework provides crucial support for this protective approach. He argues that the constitutionalisation of labour law fundamentally transformed its purpose, such that "the overriding purpose of labour law became to protect the dignity of employees" (Orton *The Constitutionality of Mandatory Retirement in South African Labour Law* (LLD thesis 2024 UP) 100). This represents a significant departure from the traditional social justice framework that merely sought "to restrict the power of employers to impose their will so that employees are treated fairly" (Orton 93). Under Orton's dignity-centred approach, Chief Justice Zondo's restrictive interpretation aligns with constitutional imperatives because it prioritises the protection of employee dignity over employer convenience. Orton emphasises that this transformation means labour law must now be understood as serving "the protection of the dignity of

employees" rather than maintaining a supposed balance between employer and employee interests (Orton 94).

The third judgment by Justice Rogers, however, approached the issue from a broader socio-economic perspective. His interpretation acknowledged South Africa's "chronic problem of unemployment" and identified the main policy underlying section 187(2)(*b*) as ensuring "the equitable distribution of employment opportunities by making jobs available to younger jobseekers and making advancement available for younger employees" (para 186). Rogers J argued that his more flexible interpretation, allowing dismissals any time after retirement age, would actually benefit older workers by making employers more willing to retain them beyond retirement age, knowing they retained the right to later effect age-based dismissals (paras 196, 201). Justice Van Zyl's second judgment sought to reconcile these competing interests through contractual principles. By requiring employers to make an election within a reasonable time about retaining post-retirement age workers, this approach aimed "to promote the extension of the working life of active older employees without unduly restricting the entry of younger persons to the labour market" (para 160). This interpretation attempted to balance protection of older workers with employer flexibility in workforce planning.

The practical implications of these different approaches are significant. As Rogers J pointed out, requiring dismissal exactly on the retirement date might paradoxically harm older workers, as employers would likely dismiss them immediately rather than risk losing the right to make age-based dismissals (paras 195-196). However, his own approach of allowing indefinite post-retirement dismissals raised concerns about potential abuse, as highlighted in the first judgment (paras 59-61). The lack of consensus among the judges, reflecting the complex interplay between worker protection and workforce renewal, suggests that this fundamental tension may require legislative intervention to establish a clearer framework. This is particularly evident in the way each judgment struggled to balance constitutional protections against age discrimination (para 27) with the practical needs of workplace succession planning and youth employment opportunities (para 186). The split decision ultimately demonstrates how the interpretation of section 187(2)(*b*) must grapple with broader societal challenges of managing an aging workforce while addressing youth unemployment, a balance that proved too complex for judicial consensus to emerge.

As Smit shows ("Age Discrimination and Labour Law in South Africa: Intersectional and Intergenerational Challenges" 2015 *Studies in Employment and Social Policy* 379 382), South Africa has a generation of elderly, previously disadvantaged people who rely primarily on means-tested old-age grants due to lack of qualifications and limited chances of formal employment (382). These individuals face particular challenges due to higher illiteracy rates and the legacy of racial discrimination (Smit

381). Simultaneously, there is pressure for transformation, potentially requiring the replacement of experienced and skilled (white) older employees at senior levels with younger persons from disadvantaged backgrounds (382).

This situation is complicated by South Africa's youthful demographics. According to the World Bank, as of 2022, approximately 5.89 % of South Africa's population is over the age of 65, meaning that a small percentage of the population falls into this age bracket (tradingeconomics.com (last accessed 2025-02-10)). In 2024, about a third of South Africa's population was made up of people aged 15 to 34, which is considered a youth population (www.dsac.gov.za (last accessed 2025-02-10)). The country faces significant youth unemployment challenges. In the third quarter of 2024, the youth unemployment rate was 45.5 %. This was a decrease from 46.6 % in the second quarter of 2024 (www.statssa.gov.za (last accessed 2025-02-10)). These competing pressures create tension in how courts approach age discrimination cases. As Smit notes, "the real concern regarding youth unemployment and the need for redistribution […] appears to outweigh an enhanced emphasis on the elderly in the workplace" (394). This helps explain why judges might take different approaches when balancing worker protection against workforce renewal needs.

So too, Bosch ("Section 187(2)(B) and the Dismissal of Older Workers – Is the LRA Nuanced Enough? 2003 *ILJ* 1283) has identified the fundamental tension between protecting older workers and facilitating workforce renewal. This tension centres on balancing the protection of vulnerable older workers against the pressing need for workforce renewal and transformation. He argues that while mandatory retirement is often justified as creating opportunities for younger workers, this reasoning is fundamentally flawed: "While mandatory retirement might open up positions in an organisation, it does not create new jobs. Unemployment is predominantly determined by industrial restructuring, technological change and economic trends, not by the lack of movement of workers through businesses" (1299).

This tension manifests directly in the Constitutional Court's split decision. Rogers J's judgment which emphasises workforce renewal and youth employment opportunities, reflects what Bosch identifies as traditional justifications for mandatory retirement. In contrast, Zondo CJ's approach prioritises worker protection and prevention of discriminatory practices, aligning with Bosch's concerns about the potential misuse of age-based dismissals. The persistent relevance of this tension, despite two decades of jurisprudential development, suggests that South African labour law continues to grapple with balancing these competing interests in a way that advances both social justice and economic development.

6 The difference in interpretative approaches

The Constitutional Court's judgments in these cases highlight a fundamental tension in statutory interpretation within South Africa's constitutional democracy, particularly regarding how courts should approach legislation like section 187(2)(*b*) of the Labour Relations Act. Justice Rogers' third judgment exemplified a textual approach, grounding its analysis in the ordinary meaning of statutory language. He argued that the plain meaning of the phrase "has reached the normal or agreed retirement age" naturally extends beyond the retirement date itself, explaining this through everyday language: "If somebody asks me today if I have reached my 65th birthday, I would say yes, even though today is not my 65th birthday" (para 184). His judgment suggested that if Parliament had intended to restrict dismissals to the exact retirement date, it could have explicitly drafted the provision to read: "a dismissal is fair if the employee is dismissed on the date on which he or she reaches the normal or agreed retirement age" (para 185).

In contrast, Chief Justice Zondo's first judgment adopted a purposive approach, emphasising that section 187(2)(*b*) must be interpreted through the lens of section 39(2) of the Constitution, which requires legislation to be interpreted to promote "the spirit, purport and objects of the Bill of Rights" (para 69). This approach focused particularly on protecting vulnerable employees from potential abuse, noting that employers might use age-based dismissal as a pretext for discriminatory practices (paras 59-60). Orton's analysis reveals the constitutional inadequacy of Rogers J's approach. He demonstrates that "the South African constitutional regime generally requires that a very high degree of empirical scrutiny should be applied to justifications for impairing conduct, which means that justifications that are based on stereotyping, conjecture and prejudice ought to be unworthy" (Orton 39). Rogers J's assertion that disputes about discriminatory motives can simply be "resolved with reference to the evidence" (para 194) fails to engage with this constitutional standard. Moreover, Orton critiques the Constitutional Court's traditional approach of treating "the interests of employers and employees as notionally equal in the context of the right to fair labour practices", arguing that this formulation "originates from a legal regime that was not subordinate to a constitution that entrenches human rights and that accedes to the dignity premise" (Orton 68-69; see also Orton "Dignity and the Purpose of Labour Law" 2024 *ILJ* 2157). Rogers J's judgment perpetuates this pre-constitutional thinking by prioritising employer flexibility over constitutional protection of employee dignity.

The judgment emphasised that section 187(2)(*b*) should be interpreted restrictively because it limits the constitutional right not to be unfairly discriminated against on the ground of age (para 65). The practical implications of these different interpretative approaches were significant. The textual approach argued that flexibility in timing would benefit both employers and employees, suggesting that employers would be more likely to retain valuable older employees if they maintained the

right to later effect age-based dismissals (paras 201-203). Conversely, the purposive approach emphasised that such flexibility could leave older employees vulnerable to arbitrary treatment and discriminatory practices (paras 59-61). The second judgment by Justice Van Zyl attempted to bridge these interpretative approaches by focusing on contractual principles, though it ultimately couldn't resolve the fundamental tension between textual and purposive interpretation (paras 150-152). The lack of consensus among the judges demonstrates the ongoing challenge South African courts face in balancing traditional textual interpretation with the Constitution's transformative mandate, particularly in cases involving fundamental rights and workplace fairness. This divide in interpretative approaches ultimately influenced the practical outcome of both cases, leading to split decisions that reflect the continuing challenge of reconciling textual and purposive interpretation in South African constitutional democracy (paras 1-6).

I recently had occasion to comment on the interpretive approach employed by Rodgers in another judgment (see Van Staden "Teleological Interpretation of Section 189A of the Labour Relations Act and Procedural Fairness in Large-scale Retrenchments 2025 *TSAR* 172). Again, several criticisms can be levelled against the learned judge's interpretative approach in the judgment. Firstly, Rogers J's emphasis on plain meaning and grammatical interpretation appears to revert to a more literalist approach that South African courts have deliberately moved away from post-1994. When interpreting section 187(2)(*b*), Rogers J relies heavily on what he terms the "straightforward" and "plain meaning" of the phrase "has reached the normal or agreed retirement age" (para 184). This approach seems to conflict with South Africa's distinctive shift toward teleological interpretation that looks beyond literal text to consider purpose in light of constitutional rights and values (see, for example, *African Christian Democratic Party v The Electoral Commission* 2006 3 SA 305 (CC)). While Rogers J does consider policy implications, his analysis focuses primarily on practical employment considerations rather than deeper constitutional values like dignity and equality that should inform interpretation in South Africa's constitutional democracy. Recall that section 39(1) of the Constitution obliges courts when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights.

The judgment also appears to overlook what Klare ("Legal Culture and Transformative Constitutionalism" 1998 *SAJHR* 146) identifies as the crucial influence of legal culture on interpretive practices. Rogers J's approach reflects what could be characterised as an embedded cultural paradigm that may systematically impede transformative initiatives through interpretation. This is particularly evident in his dismissal of concerns about potential abuse of elderly employees as simply matters to be resolved through evidence (para 194). Rogers J's judgment reflects a deeper issue in South African legal culture that can impede transformative constitutionalism. Klare argued that legal practitioners often become so embedded within their cultural paradigms that they

become either unconscious of, or insufficiently attuned to, the manner in which cultural codes shape their conceptual frameworks and responses to juridical challenges. This cultural embeddedness is evident in Rogers J's treatment of potential abuse concerns. His assertion that disputes about the true basis of dismissal "has to be resolved with reference to the evidence" (para 194) demonstrates an insufficient engagement with how legal culture mediates transformative possibilities. The judgment approaches the issue through a traditional labour law lens that prioritises formal equality and evidence-based adjudication, rather than engaging with the substantive inequalities and power imbalances inherent in the employer-employee relationship.

Orton's work reinforces this critique by demonstrating how traditional labour law approaches fail to account for constitutional transformation. He argues that the Constitutional Court's conceptualisation of fair labour practices as requiring balanced consideration of employer and employee interests "was conceived in the [Industrial Court] era" and reflects "a legal regime that was not subordinate to a constitution that entrenches human rights" (Orton 68-69). This pre-constitutional thinking manifests in Rogers J's technical, evidence-focused approach that treats discrimination concerns as mere factual disputes rather than constitutional imperatives. Orton's analysis suggests that such approaches systematically undermine the transformative potential of constitutional labour law by perpetuating power imbalances that the Constitution was designed to address.

The approach particularly fails to consider what Devenish (Devenish "*Department of Land Affairs v Goedgelegen Tropical Fruits*—A Triumph for Teleological Interpretation, an Unqualified Contextual Methodology and the Jurisprudence of Ubuntu" 2008 *SALJ* 231 238) termed the "unusual spiritual quality" that should inform interpretation in South Africa's constitutional democracy. Interpretation should recognise deeper communal and human dimensions beyond technical legal considerations. Rogers J's technical, evidence-focused approach to potential abuse reflects a cultural predisposition that may subtly but systematically impede transformative initiatives.

So too, Bosch critiqued literalist interpretations of section 187(2)(*b*). His argument for a purposive approach that emphasises constitutional values closely mirrors the methodological tension between Rogers J and Zondo CJ. Bosch contends that section 187(2)(*b*) "should be read restrictively given that it apparently limits an employee's rights to fair labour practices" (1286). This restrictive reading, he argues, must be guided by constitutional principles rather than literal textual interpretation. The parallels with Zondo CJ's judgment are striking – both emphasise the need to interpret the provision through the lens of constitutional rights and values, particularly the protection against unfair discrimination. In contrast, Rogers J's textual approach, focusing on the "plain meaning" of the phrase "has reached the normal or agreed retirement age", exemplifies precisely the kind of literal interpretation

that Bosch cautioned against. Bosch's observation that the provision's impact on constitutional rights necessitates a more nuanced interpretative approach remains particularly relevant: "Whether the limitations that section 187(2)(*b*) imposes are constitutionally acceptable hinges on whether the section passes the limitations test imposed by section 36 of the Constitution" (1284).

When courts interpret legislation to align with the Constitution, section 36 determines if an interpretation is constitutionally compliant through specific steps: first identifying if multiple reasonable meanings exist in the text, then examining if these interpretations align with the Bill of Rights, assessing if any rights are limited and if such limitations are justifiable. When multiple interpretations limit constitutional rights, the one with lesser impact is preferred. Section 36 is fundamentally value-based, centred on "an open and democratic society based on human dignity, equality and freedom", making it crucial for teleological interpretation, where the goal is to implement statutory provisions in accordance with constitutional values (Van Staden "The Theoretical (and Constitutional) Underpinnings of Statutory Interpretation) in Strydom and Botha (eds) *Selected Issues on Governance and Accountability Issues in Public Law* (2020) 30). Orton provides detailed guidance on applying this section 36 analysis. He explains that the Constitution "imposes a very high threshold for the justifiable impairment of human rights", requiring that "the limitation serves a purpose of great import; if there are persuasive reasons for believing that the limitation would achieve said purpose; and it is realistically not possible to achieve said purpose except with the limitation" (Orton 217). Furthermore, Orton notes that justifications for limiting rights must meet an exceptionally demanding standard where "the limitation must serve a purpose that most people would regard as compellingly important" and there must be "no other 'realistically available' way in which the purpose can be achieved without restricting rights" (Orton 39). Applied to section 187(2)(b), this analysis suggests that any interpretation permitting broad employer discretion in age-based dismissals would struggle to meet these constitutional requirements.

Smit has critiqued how South African courts have generally interpreted age discrimination provisions restrictively (390). Firstly, Smit demonstrates that South African courts have historically been unsympathetic towards elderly employees who work beyond retirement age (Smit 390). This unsympathetic approach has persisted except in very specific circumstances where explicit agreements existed to allow continued employment past retirement age. The courts' restrictive interpretation is particularly evident in how they have handled cases involving retirement ages. Smit notes that courts have generally refused to assist employees who continue working beyond mandatory retirement age, instead taking the view that their contracts simply lapsed due to reaching the agreed or normal retirement age (Smit 392). This interpretation effectively limits employees' protections against age discrimination once they reach retirement age.

According to Smit, a significant aspect of this restrictive approach appears in how courts have interpreted the concept of "inherent requirements of the job" as a defence against age discrimination claims. While age could theoretically qualify as an inherent requirement in appropriate circumstances, South African courts have interpreted this defence quite narrowly in practice (Smit 387). However, this narrow interpretation of the defence hasn't necessarily translated into broader protections for older workers. Smit also highlights how courts have sometimes diminished the impact of age discrimination by limiting compensation awards. She points out that compensation awarded to claimants of unfair discrimination is often negatively impacted when the ground is age (Smit 394). This suggests a judicial tendency to view age discrimination as somehow less serious than other forms of discrimination. The courts' approach appears to be influenced by broader socioeconomic considerations. Smit explains that South Africa's focus on youth activation rather than promoting active ageing strategies has influenced judicial interpretation (394). This reflects a broader policy choice to prioritise addressing youth unemployment over protecting older workers' rights.

An important contextual factor in this restrictive interpretation is what Smit describes as South Africa's "distinctive conundrum"—the need to balance protecting older workers while simultaneously addressing youth unemployment and promoting transformation in the workplace (382). This complex backdrop has contributed to courts' generally conservative approach to interpreting age discrimination provisions. This restrictive interpretation has particular implications for South Africa's transformation agenda. Smit notes that age discrimination often intersects with race, gender, class and status (394), making the courts' narrow interpretation particularly problematic for achieving broader equality objectives. The overall effect of this judicial approach, according to Smit, is that while age discrimination is formally prohibited, the actual protections offered by the courts have been limited by restrictive interpretations that often prioritise other policy considerations over protecting older workers from discrimination. Therefore, while Rogers J's judgment offers practical considerations, his interpretative approach appears to diverge from the justice-oriented, value-laden approach that is essential to statutory interpretation in South Africa's constitutional democracy. A more constitutionally aligned interpretation would need to more deeply engage with transformative constitutionalism and the advancement of substantive justice through interpretation.

7 Conclusion and recommendations

The Constitutional Court's split decision in *Motor Industry Staff Association* reveals deep tensions in South African employment law regarding age-based dismissals. The three judgments offered distinctly different interpretations of section 187(2)(b) of the Labour Relations Act. The first judgment by Chief Justice Zondo adopted a strict temporal approach, allowing dismissals only on the exact retirement date. Justice

Van Zyl's second judgment applied contractual principles of election, while Justice Rogers' third judgment permitted dismissals any time after retirement age with reasonable notice.

These divergent approaches reflect broader challenges in balancing worker protection with workforce renewal in South Africa's unique context. The country faces high youth unemployment while also needing to protect vulnerable older workers, particularly those disadvantaged by apartheid. The split also highlighted tensions between textual and purposive interpretation approaches in constitutional democracy. The case outcomes demonstrate how complex factual scenarios can lead to different results even under competing legal interpretations. The lack of judicial consensus suggests that legislative intervention may be needed to establish clearer guidelines for post-retirement age dismissals, particularly given South Africa's pressing need to balance protection of older workers with youth employment opportunities and workplace transformation.

Orton provides a sophisticated framework for constitutionally compliant analysis of mandatory retirement that could guide future judicial decision-making. He develops a three-step dignity framework specifically designed to determine whether age-based employment practices unjustifiably impair constitutional rights (134-135). The framework requires courts to: first, "provisionally determine the meaning of the older person's self-fulfilment dignity and whether it had been impaired by [mandatory retirement] provisions in relation to individualistic considerations"; second, "verify whether there are [mandatory retirement] justifications that are worthy of shaping the provisional meaning of an older person's self-fulfilment dignity" through rigorous section 36(1) proportionality analysis; and third, "establish what the meaning of an older person's self-fulfilment dignity is, with due regard to worthy [mandatory retirement] justifications, and whether this final version of self-fulfilment dignity had been impaired" (Orton 134-135). This framework addresses the Constitutional Court's interpretative challenges by providing a structured methodology that prioritises constitutional values while allowing consideration of legitimate competing interests. Crucially, Orton emphasises that justifications must be "empirically verified by applying the proportionality inquiry in terms of section 36(1) of the Constitution with due regard to applicable social justice norms|" (134). This approach would prevent the kind of superficial balancing evident in Rogers J's judgment while ensuring that any limitations on older workers' rights meet the Constitution's demanding justification standards.

What is evident, however, is that legislative reform is needed to address the uncertainty caused by the Constitutional Court's split decision. Such legislative reform should incorporate Orton's insight regarding the "façade of chronological age" in employment contexts (109-110). He demonstrates that "functional human performance is, contrary to what broader society had come to believe, not directly

correlated with chronological age" and that individual ageing processes are "so different that [...] probably no two individuals will ever be found to manifest aging in precisely the same fashion" (110). This research undermines the constitutional legitimacy of blanket age-based policies and supports more individualised approaches to employment decisions affecting older workers. Any reformed legislative framework must account for this constitutional imperative by requiring genuine assessment of individual capacity rather than relying on chronological age as a proxy for competence or productivity.

Given the constitutional incompatibility of section 187(2)(*b*) with the foundational principles of human dignity and equality, and its failure to withstand rigorous constitutional scrutiny under the section 36(1) limitations analysis, the inexorable conclusion is that complete repeal of the provision represents the only constitutionally sound remedy. The provision's blanket authorisation of age-based dismissals cannot be reconciled with South Africa's transformative constitutional mandate, particularly given the absence of compelling justifications that meet the demanding proportionality requirements inherent in constitutional rights protection. Consequently, legislative intervention through outright repeal emerges not merely as a preferred policy option, but as a constitutional imperative.

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