IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: CA3/2018

In the matter between:

BLUMERIUS LODEWYK EZRA KHAN **Appellant**

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **First respondent**

N E ISAACS N.O. **Second respondent**

MMI HOLDINGS LIMITED **Third respondent**

Heard: **14 March 2019**

Delivered: **03 May 2019**

Coram: Coppin JA, Murphy AJA and Savage AJA

JUDGMENT

SAVAGE AJA

[1] The appellant, Mr Blumerius Khan, referred an unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration ("CCMA") on 24 August 2016 claiming that he had been "forcibly retired" from his employment with the

third respondent, MMI Holdings Ltd ("MMI") on 25 July 2016. The CCMA found that the appellant's date of dismissal was 30 June 2016 and the appellant sought that the late filing of his dispute be condoned. Condonation was refused by the CCMA and the appellant applied to the Labour Court for the review of that ruling. This appeal, with the leave of the Court a *quo*, is against the Labour Court's dismissal of such review application.

[2] The appellant was employed on 2 January 1996 and had more than 20 years' service with Bankmed before his transfer to Metropolitan Holdings Ltd and its merger into MMI. In August 2013, he was appointed Chief Executive Officer of MMI International. In September 2015, he was informed by the CEO of MMI, Mr Nicolaas Kruger, of his 2016 salary, his 2015 bonus award and the long-term incentive share allocations which would be payable to him in 2017, 2018 and 2019 provided he remained in MMI's employ.

[3] During April 2016, the appellant's redeployment back into MMI's health company was discussed and negotiations ensued regarding his new role in the group. He stepped down as CEO of MMI International and negotiated a three-year fixed term contract as an independent contractor with MMI on the basis that he was "…*going to stay on…for 3 years on contract*…[but] *had to exit the share scheme and the pension fund*". The appellant ultimately elected not to enter into the contract.

[4] On 13 May 2016, Kruger informed staff that a new CEO had been appointed to replace the appellant with effect from 1 July 2016 and that the appellant would focus his work on the public health sector in South Africa and selected African countries. The appellant assisted Kruger in drafting this communication. On 30 May 2016, the appellant received a letter from MMI's human resources department confirming his retirement on 30 June 2016. This accorded with the company's retirement fund rules that the "normal retirement age" was 60 as well as a decision of MMI's human resources steering committee in May 2015 that the company retirement age would remain 60.

[5] The appellant did not respond to the letter of 30 May 2016, apparently on the basis that "*it was clearly incorrect and not in accordance with my contract of*

employment and/or any [MMI] *policy*…”. When retirement fund and UIF forms were received by him on 28 June 2016 he again did not respond, apparently as he “*regarded these further documents as merely an administrative process regarding the re-investment of retirement funding*…”. He was paid out his retirement and UIF benefits and on 30 June 2016 his retirement came into effect.

[6] In refusing to condone the late referral of the dispute, the second respondent (“the commissioner”) noted that the appellant’s dispute referral was 65 days late. This was calculated as the period between the date of dismissal and the date on which the condonation application was filed. The period between the date of dismissal and the date on which the dispute was lodged, albeit without the condonation application required by CCMA Rule 10(2), was 24 days. The commissioner found that good cause for the late referral of the dispute had not been shown since the appellant had been given notice of his retirement prior to the letter confirming his retirement on 30 June 2016. Given his seniority, his conduct in waiting to see if he would be paid on 25 July 2016 was found unreasonable. Furthermore, in negotiating a three-year contract, at his request, on the basis that he would be an independent contractor, his conduct was found not to be that of a permanent employee still in the employ of the respondent.

[7] The Labour Court found that the ruling and the discretion exercised by the commissioner was not open to review in that the conclusion reached by the commissioner was reasonable and neither capricious nor arbitrary. The review application was dismissed and since the matter was found voluminous and complex enough, the costs of two counsel was ordered.

[8] Courts are slow to interfere with the exercise of a discretion by a commissioner,[1] with a party seeking to review or appeal the exercise of such a discretion required to show that the decision-maker “*acted capriciously, or upon a wrong principle, or in a biased manner, or for unsubstantiated reasons, or*

[1] *Seardel Group Trading t/a Romatex Home Textiles v Petersen* [2011] 2 BLLR 211 (LC) at para 13.

committed a misdirection or an irregularity, or failed to exercise its discretion, or exercised its discretion improperly or unfairly".[2]

[9] In *NUM v Council for Mineral Technology,*[3] this Court made it clear that without a reasonable and acceptable explanation for the delay, an application for condonation should be refused. In finding that the appellant had not put up an acceptable explanation for the delay, the commissioner relied on *Moila v Shai N.O*[4] in which this Court held that where there was either no acceptable explanation or no explanation at all for the delay the refusal to grant condonation fell to be dismissed without a consideration of the prospects of success.[5]

[10] The commissioner cannot be faulted for concluding that an acceptable explanation for the delay had not been put up by the appellant. The appellant was aware that his services had been terminated on 30 June 2016. He had received notice of his retirement in different communications from his employer prior to this date, to which he elected not to respond, and had been paid out the retirement and other employment benefits due to him. He was aware that the retirement age reflected in the retirement fund rules was 60 and he was under no illusion at 30 June 2016 as to his position. The suggestion by him that it was only when he did not receive his salary that he became aware of his dismissal is, on the facts, implausible. He was party to communications that his position had been filled by a replacement and it was at his instance that a three-year consultancy contract with MMI was negotiated, which contract he ultimately elected to refuse.

[11] The commissioner's refusal to grant condonation in such circumstances, having regard to a full conspectus of the facts, was not unreasonable. This was so even given the commissioner's reliance on a 65-day delay. To the extent that this constituted an error, it did not alter the explanation put up by the appellant, nor did it result in a misdirection, irregularity or an improper or unfair exercise of a discretion by the commissioner. The prospects of success also do not aid the

---

[2] *Masuku v Score Supermarket (Pty) Ltd* (2013) 34 ILJ 147 (LC) at para 10.
[3] [1999] 3 BLLR 209 (LAC) at 211G-H.
[4] [2007] ZALAC 1; [2007] 5 BLLR 432 (LAC).
[5] At para 37.

appellant. Given the clear evidence that the appellant had retired, that his retirement had accorded with the retirement fund rules and the employer's own policy, he had accepted his retirement benefits, raised no objection to his retirement and had sought the conclusion of a three-year contract as an independent contractor his prospects of proving an unfair dismissal on the facts were poor. In such circumstances, the decision to refuse condonation cannot be faulted.

[12] It follows that the review application was correctly dismissed by the Labour Court and that the appeal must fail. As to costs, there is no reason as to why costs should not follow the result. No basis has, however, been put up to justify the costs of two counsel and the nature and complexity of the matter does not warrant such an order.

Order

[13] For these reasons, the following order is made:

1. The appeal is dismissed with costs.

____

SAVAGE AJA

Coppin JA and Murphy AJA agree.

APPEARANCES:

FOR THE APPELLANT: A de Wet

Instructed by Gillian & Veldhuizen Inc.

FOR THE THIRD RESPONDENT: G A Leslie & L W Ackermann

Instructed by Louis van Zyl Attorney