

IN THE LABOUR COURT OF SOUTH AFRICA
(CAPE TOWN)

CASE NUMBER:

C832/2016

5 DATE:

15 NOVEMBER 2017

In the matter between:

BLUMERUS LODEWYK EZRA KHAN

Applicant

and

COUNCIL FOR CONCILIATION, MEDIATION

10 **AND ARBITRATION (CCMA)**

1st Respondent

N.E. ISAACS N.O.

2nd Respondent

MMI HOLDINGS LIMITED

3rd Respondent

15

J U D G M E N T

STEENKAMP, J:

20 This is an application to have a condonation ruling by the
second respondent, Commissioner N E Isaacs, a commissioner
of the CCMA, reviewed and set aside. It arises from a referral
of an automatically unfair dismissal dispute by Mr Blum Khan,
the former CEO of the third respondent, MMI Holdings Ltd. Mr
Khan submitted in his main referral that he was dismissed and
25 that that dismissal was automatically unfair based on his age
/RG /...

as there was no agreed or normal retirement age. In the course of the dispute MMI raised a point *in limine* that his referral was late as his employment was terminated on 30 June 2016 and he only referred a dispute to the CCMA on 25 August 5 2016 without an application for condonation.

Mr Khan countered that, as far as he is concerned, he was dismissed on 25 July 2016, which is the date on which his salary was not paid. The commissioner that presided over the 10 conciliation made a ruling that he had to apply for condonation. He did so four days later, on 3 October 2016, and the condonation application was then heard by Ms Isaacs.

The commissioner accepted at first in her ruling that “the 15 referral together with his application for condonation” was 65 days late. It has become apparent that that is incorrect. Although his application for condonation may have been submitted 65 days late, his actual referral was only some 25 or 26 days outside of the 30 day time period provided for in s 20 191(1)(b)(i) of the Labour Relations Act.

The applicant's case before the arbitrator was that he was not subject to any specific retirement age. It has indeed become common cause that no retirement age was specified in his 25 contract of employment. However, it was stated in the

Bankmed Pension Fund Rules that the normal retirement age is 60. He had a meeting with the deputy CEO, Mr Willem van Zyl and the CEO of MMI Holdings, Mr Nicolas Kruger, in July 2013. He says the normal retirement age was not raised in
5 that meeting and that he was not aware of any policy. That is denied by MMI in its answering affidavit and the arbitrator had to consider that allegation in the context of the evidence as a whole before her.

10 The arbitrator, in considering the extent of the delay, had to then consider whether Khan was dismissed on 30 June 2016 or 25 July 2016. She took into account that he received a letter on 30 May 2016 confirming his retirement from 30 June, and another on 30 June. I will return to that in a moment. She
15 also took into account that he entered into an independent contractor agreement with MMI with effect from 1 July 2016.

Against that background she found that the correct date was indeed 30 June and that that was the date from which he had
20 to refer the dispute. She then applied the established principles in Melane v Santam Insurance Company Limited 1962 (4) SA 694 (A) and found that the reason for the delay was not a valid or reasonable one for the following reasons:

“The applicant had been notified of his pending retirement prior to being issued with a retirement letter from the Group CEO on 30 June 2016. The applicant stated he waited to see if the respondent would pay him
5 on 25 July 2016 as he had attended various board meetings. I do not find this the conduct of a reasonable employee who had received a letter from the group CEO advising him of his retirement. In addition, I believe the applicant to be a seasoned and sophisticated employee.
10 The applicant did not dispute this letter in any way. In fact, the applicant conceded that he was negotiating a three-year employment contract, alternatively, at his request, as an independent contractor. I do not find this is the conduct of a permanent employee who believed he
15 was still in the permanent employ of the respondent. The applicant failed to present a reasonable explanation for waiting before challenging his alleged unfair dismissal.”

20 Having found that the employee had not shown good reason for the late referral of his dispute, the arbitrator then referred to the well-known case of the Labour Appeal Court in Moila v Shai N.O. 2007 (28) *ILJ* 1028 (LAC) where that Court confirmed the principle that, “where no explanation has been
25 given for the delay or an explanation has been given but such

explanation amounts to no explanation at all, it is not necessary to consider the prospects of success.”

In those circumstances she exercised her discretion to refuse
5 condonation. It is that ruling that the employee seeks to review on three grounds.

He says in his founding affidavit that, firstly, the arbitrator
“committed gross irregularities during the hearing by refusing
10 to have regard to facts pertinent to my prospects of success and issues of public interest in coming to her decision”.

Secondly, he avers that there is no rational objective basis justifying the connection she made between the evidential
15 material before her and the conclusion she eventually arrived at. He states his belief that the award is not reasonable and that no reasonable decision maker could have reached same conclusion.

20 Thirdly, he says that, having regard to the facts and the applicable legal principles, the arbitrator’s finding was “incorrect” and should be set aside.

Mr *Leslie*, who appeared for MMI together with Mr *Ackerman*,
25 submitted that the test to be applied in reviewing a
/RG /...

condonation ruling has to take into account that it is an interference with a discretion and that, therefore, the test of correctness is not the one that should be used. He noted that a party seeking to review and even appeal the exercise of a discretion must show that the decision maker “acted capriciously, or upon a wrong principle, or in a biased manner, or for unsubstantial reasons, or committed a misdirection or an irregularity, or failed to exercise its discretion or exercised its discretion improperly or unfairly”, referring in this regard to Masuku v Score Supermarket (Pty) Ltd 2013 (34) *ILJ* 147 (LC) at paragraph 10, although that was in the context of an appeal. He also referred to Coates Brothers Limited v Shanker [2003] 12 BLLR 1189 (LAC) where the Labour Appeal Court held that errors by the court *a quo* in the context of an appeal, both in relation to the explanation for delay and prospects of success, were not sufficient to interfere with the exercise of a discretion. The appellant had to show further that the court *a quo* did not exercise its discretion at all or exercised it improperly or unreasonably.

20

I agree with him that the applicable legal principles were correctly summarised by this Court in Seardel Group Trading t/a Romatex Home Textiles v Petersen [2011] 2 BLLR 211 (LC) par 13 as follows:

25

/RG

/...

“When a commissioner is endowed with a discretion this court will be very slow to interfere with the exercise of that discretion. The commissioner’s exercise of discretion will be upset on review if the applicant shows,
5 *inter alia*, that the commissioner committed a misdirection or irregularity, or that he or she acted capriciously or on wrong principle, or in bad faith, or unfairly, or that in exercising the discretion the commissioner reached a decision that a reasonable
10 decision maker could not reach.”

That overlaps fairly neatly with the grounds of review raised by Ms *De Wet* for the employee, namely that the commissioner either committed a misdirection or that she acted unfairly, or
15 that in exercising the discretion she reached a decision that a reasonable decision maker could not reach.

It is of course trite that the onus is on an applicant to persuade a decision maker to grant him the indulgence to
20 allow condonation.

The principles are also trite. They were set out in Melane v Santam Insurance Company Limited 1962 (4) SA 694 (A) at 663 e-f and those are indeed the principles that the
25 commissioner applied, together with the one that I have
/RG /...

already cited, set out in Moila v Shai.

It is against that background that this Court must decide whether she exercised her discretion unfairly, or whether she
5 committed a misdirection, or that she acted capriciously or on a wrong principle, or in bad faith, or ultimately, that another reasonable decision maker could not reach the conclusion that she did.

10 Further, the test is a stringent one, as was highlighted in the case cited by Mr *Leslie*, which is Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd v National Bargaining Council for Road Freight Industry 2009 (3) SA 187 (W) 201 D-E, cited by this Court in Department of Health (Western Cape) v Denosa
15 on behalf of Cloete (2016) 37 *ILJ* 2398 (LC) at paragraph 29, which is:

“As the famous saying goes, ‘*Quot homines, tot sententiae*’. Opinions, even among reasonable men and women, may differ and, at times, quite markedly. If the
20 test in a challenge to an administrative action is whether the decision was one that no reasonable decision maker could reach, it will in practice be very difficult to succeed.”

That is of course even more so where it involves the exercise
25 of a discretion.

That brings me, then, to the evidence that was led before the arbitrator and the factors that she took into account. Ms *De Wet* complained that the arbitrator did not take into account all
5 the facts that were placed before her. The award is a short one, and of course it does not set out every single fact that appears in the affidavits that served before her. However, those affidavits are before Court and the Court is in a position to consider whether the commissioner exercised her discretion
10 fairly and reasonably. I have briefly set out the history of the matter, but the pertinent point in that history reaches its climax on 30 May 2016 when -- it is beyond dispute -- one Winnie Flandorp, an employee in the Human Resources Department of MMI, sent an email directly to Mr Khan. It is common cause
15 that he accepted and received that email. The subject line of the email is: "**Retirement June 2016 – B KHAN.**" It indicates various attachments. Ms Flandorp then says:

"Good morning Mr Khan.

20

Attached are the following documents:

1. Retirement letter for your attention.
2. UI 2.8 form (ask the bank to complete, then hand in to Department of Labour).
- 25 3. UI 2.11 form (for Department of Labour).

/RG

/...

4. Retirement Claim Form. (Please complete and return to me).

UI-19 to follow.

5

Do not hesitate to contact me should you require any assistance.”

The fact that Mr Khan did not contact her, given his version
10 before the arbitrator, beggars belief. The attached letter could not be clearer. It starts off by saying, “Dear Mr Khan”, and then in bold capital letters: **RETIREMENT CONFIRMATION**. The very next line reads: “We hereby confirm your retirement effective 30 June 2016.”

15 It then spells out in no uncertain terms: “In terms of your retirement, the following benefits will become payable.”

It then sets out his fund benefits, employer benefits, a gift of more than R274 000.00, and his accumulated leave estimated at R787 023.34. Of course, as Mr *Leslie* pointed out, if any
20 doubt could conceivably have remained, a high ranking employee such as the former CEO would be under no misapprehension that his employment was being terminated when his accumulated leave is being paid out. That is apart from the clear wording of the letter confirming his retirement
25 effective 30 June 2016.

/RG

/...

Khan did not query that at all, did not bother to respond to it, and in his affidavit he blithely says he “did not take much note of it”. That is inexplicable. As if the body of the email and
5 covering letter is not clear enough, it attaches the unemployment insurance form, UI2.11 that had already been filled in. It sets out that the claim for benefits in terms of the Unemployment Insurance Act that was being processed for Mr Blum Khan. It gives his identity number. And it says that the
10 reason for termination was retirement. It also attaches the relevant form UI19 where, again, the reason for retirement is given as code 3 which is “retired”. Yet Mr Khan did nothing and carried on attending board meetings.

15 When the date of his actual retirement arrived on 30 June 2016 he was no longer dealing with a lowly employee whom he thought he could simply ignore. Instead, he received a letter from no less than the group CEO, Mr Nicolas Kruger, that stated the following:

20

“Dear Blum

THANK YOU

We refer to the letter dated 30 May 2016 confirming your normal retirement effective 30 June 2016 and your
25 subsequent withdrawal of retirement benefits dated 13

/RG

/...

June 2016.¹

I would like to take this opportunity to thank you for the significant contribution you have made to MMI (and Metropolitan prior to the merger) during your tenure.

5 ...

As discussed with you, we would like to engage you on a potential consulting role on projects in MMI.”

Again, this letter from the group CEO could not be any clearer.

10 It confirms Mr Khan’s retirement effective 30 June, it refers to his tenure that had now clearly come to an end, it refers to the fact that he could perhaps in the future play a consulting role as opposed to a role as an employee, and it could leave no doubt in his mind that he had now been retired. Inexplicably
15 he did not respond or object to that letter either.

Furthermore, as Mr *Leslie* pointed out, it was left to MMI to bring these documents to the attention of the arbitrator. In his founding affidavit that served before the arbitrator he simply
20 referred to the email from Ms Flandorp without attaching those documents. He says that he did not take much note of it and then says that he received further documents from her on 28 June 2016 to which he again paid no attention, without disclosing that in fact those were attached to the email of 30

¹ My underlining.

May 2016.

The arbitrator quite properly took into account those letters and had to weigh that up on affidavit against Mr Khan's bland
5 statement -- without having attached the documents -- that in his mind he had not retired, simply because there was no retirement policy in his contract of employment; and against the backdrop of the facts that he sets out, for example, that he had attended a meeting where it was not discussed and that he
10 had continued to act as a director.

Ms *De Wet* quite correctly pointed to the relevant test to be used in cases like that, being the well-known test in Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd 1984 (3)
15 SA 63 (A) at 65C, reiterated in the case that she referred to, namely National Scrap Metal Cape Town (Pty) Ltd v Murray and Roberts Limited 2012 (5) SA 300 (SCA) at paragraph 21 where the SCA said:

20 "As the High Court was called on to decide the matter without the benefit of oral evidence, it had to accept the facts alleged by the appellants (as respondents below) unless they were so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the
25 papers. An attempt to evaluate the competing versions

/RG

/...

of either side is thus both inadvisable and unnecessary as the issue is not which version is the more probable but whether that of the appellants is so far-fetched and improbable that it can be rejected without evidence.”

5

In this case the arbitrator had to decide on the evidence on affidavit before her which version to accept where there was this dispute of fact. I do not think it was at all unreasonable for her to accept that the version of MMI was not so far-fetched and improbable that it could be rejected without evidence. In fact, given the contemporaneous documentation, and especially the letters directly addressed to Mr Khan to which he did not bother to respond, clearly support the version of MMI.

15

It is so that the arbitrator did not set out in detail every other factor that Mr Khan relies on, but as I have said this is an informal procedure before the CCMA on paper where the arbitrator only has to give brief reasons. She did note that Khan stated that he waited to see if MMI would pay him on 25 July as he had attended various board meetings. She also considered the fact that he was negotiating a three year contract. She also noted that he did not dispute the fact that the three year contract as an independent contractor was negotiated at his own election. It is against that background

25

that she found that his explanation was not reasonable, given that his employment clearly ended on 30 June 2016.

Having come to that conclusion she then properly applied the
5 authority of the Labour Appeal Court in Moila v Shai N.O. and
concluded that it was not necessary to consider the prospects
of success. That is not a conclusion that was capricious or
arbitrary. In fact, it was entirely reasonable; and I would go so
far as to say that it was the correct one. And even if she were
10 to have taken the prospects of success into account, I am of
the view -- and this is *obiter* -- that his prospects of success
would in any event have been poor, given the clear evidence
that he had retired and had raised no objection thereto on 30
May or on 30 June. It is likely that, had the matter gone to
15 arbitration, it would have been difficult for him to show that he
did not at least tacitly consent to his retirement.

In short, the ruling and the discretion exercised by the
arbitrator is not open to review. That leaves the question of
20 costs. Both parties asked for costs to follow the result. I see
no reason in law or fairness to interfere with that request.
There is no longer any employment relationship between the
parties and the applicant is a person of some means. And this
is not a lowly unemployed employee who would be severely
25 prejudiced by paying the respondents' costs.

The one remaining questions is whether it warranted the costs of two counsel. On balance, even though the matter is not unduly complex, I accept that it is at least voluminous and complex enough; and, as Mr *Leslie* pointed out, it involved significant amounts of money -- for example, the pay-out on which the SARS directive was based was more than R5 million. I accept that the employment of two counsel was not unreasonable.

10 **THE APPLICATION IS DISMISSED WITH COSTS, INCLUDING**
THE COST OF TWO COUNSEL WHERE SO EMPLOYED.

15

STEENKAMP, J

20

APPEARANCES

APPLICANT: Alma de Wet

5 Instructed by: Gillian & Veldhuizen Inc.

THIRD RESPONDENT: Graham Leslie

(with him Lourens Ackermann)

Instructed by: Louis van Zyl.