



Of interest to other Judges

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**

Case no: JR 1909/15

In the matter between:

BMW (SOUTH AFRICA) (PTY) LTD

Applicant

and

**NATIONAL UNION OF METALWORKERS
OF SOUTH AFRICA ('NUMSA')**

First Respondent

MARYNA DAVIS

Second Respondent

WERNER KRUGER N.O.

Third Respondent

CCMA

Fourth Respondent

Heard: 7 September 2017

Delivered: 3 July 2018

Summary: (Review – condonation ruling – review of a discretionary function)

JUDGMENT

LAGRANGE J

Introduction

- [1] The applicant ('BMW') has applied to set aside a ruling condoning the late referral of an automatically unfair dismissal dispute based on age to the CCMA.

Background

- [2] The second respondent, Ms M Davis ('Davis'), retired on 30 November 2014. She alleges that she was forced to retire on that date. Numsa referred an automatically unfair dismissal dispute directly to the Labour Court on 18 December 2014. The applicant filed an answering statement of case on 6 January 2015, in which it raised an *in limine* objection that the dispute had never been referred to conciliation by the CCMA before being referred to the court.
- [3] Numsa claims that the responsible official who referred the dispute had done so under the erroneous impression that the matter had been referred to the CCMA but that a certificate of outcome had not been issued. The anticipated certificate pertained to a separate dispute over the alleged unilateral alteration of retirement ages, which Numsa had referred on behalf of Davis and a number of other employees. BMW disputes that the official in question could have been under such an incorrect impression since that dispute had been withdrawn from the CCMA by Numsa on 1 December 2014, so no certificate of outcome would have been forthcoming from that dispute referral.
- [4] On 26 March 2015, Numsa in consultation with its legal representatives decided that the official should ask for a certificate to be issued as the 30 day period for conciliation had elapsed.
- [5] After learning of this, Davis, on her own accord, referred the dispute to the CCMA on 23 April 2015, without withdrawing the referral to the Labour Court. The first referral of the dispute to the CCMA on 23 April 2015, apart from the issue of the Labour Court referral, was four months late.
- [6] On 14 May 2015, a CCMA Commissioner upheld an objection by the applicant and ruled that Davis could not pursue her referral because the matter was pending before the court. Davis then advised Numsa of the

ruling. Numsa's legal representatives then advised it to withdraw the Labour Court referral and re-refer the dispute to the CCMA.

[7] Numsa withdrew the court referral and on 29 June 2015, it filed a fresh referral with the CCMA accompanied by an application for condonation.

[8] Consequently, the second referral to the CCMA, was six months late.

[9] In the case made out on the merits in her founding affidavit in support of her condonation application, Davis contended that:

9.1 When she was employed by the applicant in 1998 the normal retirement age was 65 years, which was the age mentioned in the so-called 'staff diary', which contained details of employee benefits.

9.2 In 1995, BMW changed the retirement age to 60 years, but gave an election to those employed prior to 1994 to retire at 65 or 60.

9.3 She elected to retire at 65 on two separate occasions in 1994 and 1997, but BMW failed to record her election and her retirement age was recorded as 60 years.

9.4 She attached a copy of a pro forma retirement age election form dated 18 February 1997 to her affidavit, which on the face of it indicates that she did elect to retire at 65.

9.5 In consequence, she claims that BMW unilaterally altered her retirement age.

[10] BMW, for its part, claimed that:

10.1 In so far as Davis claims that there was a unilateral change to her retirement age she did nothing, despite being aware of the alleged amendment in 1994 or 1997 and that all formal employment records recorded her retirement age as 60.

10.2 Davis never did indicate that she wanted to retire at 65. She would not have received an election form in 1994 because she was not a member of the pension fund at that time.

10.3 The benefit statements issued by the various retirement fund administrators at all times, which she would have received, recorded that her retirement age would be 30 November 2014.

10.4 Further, on 3 April 1997 she signed a document confirming her personal details in which it was recorded that her employment would terminate in October 2014.

10.5 The authenticity of the document, referred to in paragraph 9.4 above, which purports to be Davis's election to retire at 65, is disputed because Davis had the opportunity to produce this document for a number of years and even when the collective grievance over the change to retirement ages was being considered she never did so.

[11] It was only in April 2014 when a collective grievance was lodged by Numsa relating to the alleged unilateral alteration of the retirement age that she became a party to any grievance about her retirement age.

The ruling

[12] The arbitrator found that there was no real dispute that Davis had actively pursued her case, even though which he termed 'a comedy of errors' transpired between the date of dismissal and the date of referral of her dispute to the CCMA. He accepted that if she had done nothing for five months after referring a dispute to the union he might have taken a different view. However, because she consulted with the union, referred the dispute on her own and consulted with attorneys to rectify previous mistakes she could not be blamed for the delays.

[13] On the merits of her claim, the arbitrator found that it was difficult to understand why Davis did not rectify her retirement age that was recorded with the HR department as 60, if she had indeed made an election in 1994 and 1997 to retire at 65, or why she had not previously provided the interoffice memorandum allegedly reflecting her election to retire at 65 to BMW. Nonetheless, the arbitrator felt that this was a matter for evidence and she should be given an opportunity under cross-examination to explain her reasons for not rectifying the retirement age recorded on her records.

Grounds of review

[14] It is now trite law that more is required than a mere failure to consider certain factors, and that a review is not an appeal. In order for a misdirection or a failure to consider evidence to amount to a reviewable irregularity, it is necessary for the applicant on review to demonstrate that the failure in question necessarily led the arbitrator to make findings which no reasonable arbitrator could have made on the evidence before them. In *Head of Department of Education v Mofokeng and Others*¹ the Labour Appeal Court has expressed the principle thus:

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.

¹ (2015) 36 ILJ 2802 (LAC) at 2813

[15] BMW advances the following grounds of review:

15.1 The arbitrator should not have granted the condonation application given the failure to explain the full period of the delay and considering the negligence of Numsa and Davis in referring the matter timeously. In particular, BMW contends that the explanation for the delay between 6 January 2015, when the union received BMW's answering statement to the Labour Court referral, and 23 April 2015, when Davis made the first referral to the CCMA, was inadequate considering that Numsa's legal department was involved..

15.2 The arbitrator either did not properly consider the prospects of success, or to the extent that he did so did not apply the correct test. BMW contends that in evaluating the prospects of success he did not attempt to form a view on the prospects, but simply concluded that two outcomes were possible, which was a misdirection. It further contends that, had he had regard to his concerns about her apparent failure to dispute her recorded retirement age earlier all to provide evidence of the document purporting to show her election of a retirement age of 65, he ought to have concluded that she had no prospects of success. He ought not to have held that fairness required the conflicting allegations about the authenticity of the election document and Davis's explanation for not querying her retirement age to be ventilated in a hearing, but simply should have decided on the prospects of success.

15.3 The arbitrator failed to consider the importance of the matter and the prejudice to all parties. In this respect, BMW contends that the arbitrator's failure to mention this factor is indicative of a failure to address the concerns specifically raised by it of the implications of allowing her claim to proceed. In its answering affidavit BMW had contended that Davis could not claim the issue was important to her because she had done nothing about it prior to the termination of her service. Accordingly, she had to accept responsibility for not tackling the issue earlier. In relation to BMW itself, BMW contended that it would suffer significant prejudice if it was compelled to entertain

employees like Davis, who had never elected to retire or pursued any disputes in that regard, because it would interfere with its personnel manning levels operational requirements and career planning as well as its financial contributions made towards retirement funding.

Evaluation

[16] It is important when considering a review of a condonation ruling that the court is considering the exercise of a discretionary power. See ***National Union of Metalworkers of SA & others v Fibre Flair CC***² reaffirmed in ***Coates Brothers Ltd v Shanker & others***³, where the LAC stated the applicable principles in such cases:

"The test for interference in a discretion exercised in terms of s 193(1)(a) of the LRA is thus that formulated in *Ex parte Neethling & others* 1951 (4) SA 331 (A) at 335E:

'Can it be said in the present case that the Court a quo has exercised its discretion capriciously or upon a wrong principle, that it has not brought its unbiased judgement to bear on the question or has not acted for substantial reasons?'

And, as put somewhat differently in *S v Kearney* 1964 (2) SA 495 (A) at 504B-C:

'When a Court of first instance gives a decision on a matter entrusted to its discretion, a Court of appeal can interfere only if the decision is vitiated by misdirection or irregularity or is one to which no Court could reasonably have come - in other words if a judicial discretion was not exercised.'

In *Camdons Realty (Pty) Ltd & another v Hart* (1993) 14 ILJ 1008 (LAC) it was said at 1018F:

'This court may intervene only if it is shown that the Industrial Court has failed to exercise its discretion, or has exercised its discretion improperly or unfairly.'

...

² (2000) 21 ILJ 1079 (LAC)

³ (2003) 24 ILJ 2284 (LAC) at 2286, para [3].

The appellants were unable to show that the court a quo acted capriciously, or upon a wrong principle, or in a biased manner, or for insubstantial reasons, or committed a misdirection or an irregularity, or failed to exercise its discretion, or exercised its discretion improperly or unfairly.⁴

These principles must now also be applied subject to the review principles set out in *Mofokeng* above.

[17] I agreed that the explanation for the failure of Numsa to internalise and address the contradiction between BMW's assertion that the dispute had never been referred to conciliation and its own belief that a certificate was outstanding during the period is wanting and inadequate. The arbitrator clearly took a broader view of the entire time span and accepted that, despite the blundering missteps taken by the applicants, Davis had maintained an ongoing and active interest in pursuing her case. The fact that Numsa, albeit prematurely, filed the statement of case in mid-December 2014 was not indicative of representatives who had taken an idle role in the matter. He also took account of the fact that attempts, however misguided, were taken to rectify the procedural errors in referring the dispute. While another arbitrator may have found the explanation poor enough to dismiss the application, it cannot be said that the arbitrator's effective finding that this was not a case where the interested parties were idle in pursuing the matter, was so unreasonable that it was not necessary for him to even consider other factors, and that he could have decided this application on the basis of the explanation for the delay alone. In passing, it should be mentioned that the first commissioner's ruling that he could not conciliate the first dispute referred in April 2015 was probably wrong, because the fact that there had been a premature referral to the labour court of a dispute which had not been conciliated, and therefore could not be entertained by the court, did not prevent him from considering a referral to conciliation.

[18] Regarding the arbitrator's assessment of the prospects of success, it does appear that he did not form a clear view on whether Davis' had reasonable prospects of success. He also expressed understandable doubts about

⁴ At 1081-2.

Davis's ability to explain to an arbitrator her failure to rectify the allegedly erroneous recording of her retirement age over a number of years and her failure to produce the alleged document purporting to demonstrate that she had exercised her choice to retire at age 65, at an earlier stage. On the other hand, he was confronted with the document, which on the face of it did appear to be one that supported her claim. BMW's answering affidavit disputed the authenticity of the document, but only in broad terms without providing any specificity about why the document could not be authentic, apart from relying on general probabilities why it might be a recent fabrication, in circumstances where Davis could reasonably have been expected to have produced it at an earlier stage. It must also be mentioned, that BMW's case that Davis's retirement age was 60 appears to be largely based not on a document in which she positively elected her preferred retirement age, but on her conduct in not disputing a retirement age of 60, appearing in other documents she signed or saw. Given these circumstances, it was not unreasonable of the arbitrator to take the view that, it was simply not possible in the context of the condonation application to make a provisional finding on the authenticity of the document, which could prove decisive, in assessing the prospects of success.

- [19] It was also not inappropriate, in my view, in the light of these difficulties for the arbitrator to consider them to be factors which gave impetus to the need to allow the matter to proceed to a hearing.
- [20] It is true that the arbitrator does not appear to have expressly considered the relative prejudice to the parties in arriving at his ruling. However, I am not persuaded that if he had, he would necessarily have accepted that the prejudice to BMW of allowing the matter to proceed outweighed the prejudice to Davis of not allowing her claim to be ventilated. BMW contends that allowing the claim to proceed could prejudice all its staff planning activities and retirement funding because it would expose the company to other claims from similarly placed employees. That seems to be a somewhat exaggerated claim. The dispute is simply whether or not one individual's retirement age was 65 or not. On Davis's version, she made an election as BMW required her to, and accordingly was entitled to

retain a later retirement age. She is either right or wrong in this regard. There is no reason why determining that dispute would necessarily have far ranging implications for BMW's staff planning or retirement finances in general. Consequently, I am not persuaded that if the arbitrator had paid attention to the prejudice contended for by BMW that he would necessarily have come to a different conclusion in the exercise of his discretion.

Order

- [1] The review application is dismissed.
- [2] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

G V v.d. Westhuizen instructed by
Norton Rose Fulbright

RESPONDENT:

H Barnes instructed by Ruth
Edmonds Attorneys