THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR2568/14

In the matter between:

ESKOM HOLDINGS SOC LIMITED	**Applicant**
And	
COMMISSIONER R DE WET N.O.	**First Respondent**
CCMA	**Second Respondent**
NUMSA OBO SITHOLE AND OTHERS	**Third Respondent**

Heard: **11 July 2018**

Delivered: **16 August 2018**

Summary: **Review of jurisdictional ruling in CCMA. Retrospectivity of section 6(4) of Employment Equity Act. Dispute arose before amendment to Employment Equity Act, but was referred to CCMA after amendment became operative. Dispute determined in accordance with amended provisions. Reasonable attempt was made to resolve the dispute.**

JUDGMENT

BASSON. AJ

Introduction

[1] The insertion of section 6(4) the Employment Equity Act[1] (EEA) declaring the differentiation between employees performing the same or substantially the same work, or work of equal value, as unfair discrimination, provided that such differentiation is directly or indirectly based on any one or more of the listed grounds, became effective on 1 August 2014.[2]

[2] Another amendment to the EEA that also became operative on the same date, is section 10(6)(b) which provides that if the dispute remains unresolved after conciliation, any party to the dispute may refer it to the Commission for Conciliation, Mediation and Arbitration (CCMA) for arbitration if all the parties to the dispute consent to arbitration of the dispute.

[3] The issues that arise for determination in this review are firstly whether the CCMA has jurisdiction to determine a dispute referred to it in terms of section 6(4) of the EEA where the dispute arose before the amendments became operative i.e. 1 August 2014, but where the dispute was only referred to the CCMA after that date in accordance with an agreement between the parties and secondly whether a reasonable attempt was made to resolve the dispute.

Background

[4] The applicant took a decision to address salary disparities in the workplace and in November 2013 decided to adjust the salaries below a certain threshold. According to the applicant, the third respondent did not qualify for the adjustment. On 24 March 2014 the third respondent lodged a grievance, which went through various stages without the grievance being resolved. On 26 May 2014 the applicant communicated its decision to the third respondent and indicated that they did not meet the criteria. On 14 August 2014 the third respondent referred a dispute to the CCMA in terms of section 6(4) of the

[1] Act 55 of 1998, as amended.
[2] The grounds listed in section 6(1) are race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.

EEA summarising the dispute as "*a difference in terms and conditions of employment between employees of the same employer performing the same work of equal value*". In the Labour Relations Act[3] (LRA) 7.11 form the third respondent indicated the date on which the dispute arose as 24 May 2014.

[5] The dispute was set down for conciliation on 3 September 2014. A certificate was issued that the dispute remained unresolved. The parties however, at conciliation concluded a written agreement, signed by both parties, in terms of which they consented to arbitrate the dispute before the CCMA. On 5 September 2014 the third respondent referred the dispute to arbitration.

[6] The arbitration was set down for 14 October 2014. The day before the arbitration, the applicant launched an application in terms of rule 31 of the CCMA rules to challenge the jurisdiction of the CCMA to arbitrate the dispute. The main thrust of the argument put forward by the applicant was firstly that the amendments to the EEA containing the equal pay provisions only came into effect on 1 August 2014 and do not operate retrospectively, and secondly that the grievance procedure that was followed did not deal with equal pay as envisaged in section 6 of the EEA.

[7] The CCMA found firstly that the claim must be assessed against the applicable law that was in force at the time of institution of the claim (14 August 2014) and that the EEA, as amended, would apply, secondly that the act or omission complained of was an ongoing dispute and thirdly that there was a reasonable attempt to resolve the dispute. The CCMA therefore dismissed the challenge to its jurisdiction. The applicant now seeks this Court to review and set aside the ruling by the CCMA.

<u>Retrospectivity of section 6(4) of the EEA</u>

[8] The first ground of review is that the CCMA lacked jurisdiction to arbitrate the dispute, since the dispute arose before the amendments to the EEA became

[3] Act 66 of 1995, as amended.

operative. The issue for determination is thus whether the jurisdiction of the CCMA is determined at the date on which the cause of action (or dispute) arose, or on the date when the action is instituted.

[9] The principle that legislation will affect only future matters and not take away existing rights, is founded on the rule of law.[4] The time-honoured principle is that no statute is construed as having retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws, unless the legislature clearly intended the statute to have that effect.[5] This principle is not only time-honoured but also one of global application. It also follows that, if the court is left in doubt as to the retrospective effect of a provision, the presumption against the retrospectivity would not be rebutted.

[10] In *S v Mhlungu and Others*[6] Kentridge AJ explained that there is a presumption against retrospective and retroactive legislation. By retroactive legislation is meant legislation which invalidates what was previously valid, or vice versa, i.e. which affects transactions completed before the new statute came into operation. It is legislation which enacts that as at a past date the law shall be taken to have been that which it was not. Retrospective legislation takes effect only from its date of commencement, but impairs existing rights and obligations, eg. by invalidating current contracts or impairing existing property rights. The general rule therefore is that a statute is as far as possible to be construed as operating only on facts which come into existence after its passing.

[11] The applicant relied in argument before the CCMA and this Court on the judgment in *Bandat v De Kok and Others* [7] where the Labour Court found that the EEA does not apply retrospectively to pending proceedings. This decision is undoubtedly correct. In *Bandat* the applicant resigned in July 2013 and the

[4] *Veldman v Director of Public Prosecutions, Witwatersrand Local Division* 2007 (3) SA 210 (CC) at para 26.
[5] *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission, and Others; Transnet Ltd (Autonet Division) v Chairman, National Transport Commission, and Others* 1999 (4) SA 1 (SCA) para 12.
[6] 1995 (3) SA 867 (CC) at para 65 (references omitted).
[7] (2015) 36 ILJ 979 (LC) at para 14.

CCMA issued a certificate of non-resolution in August 2013. When the matter came before the Labour Court in August 2014 the question arose whether the amended version of section 11, dealing with the burden of proof, ought to be applied in the proceedings before Court. Snyman AJ found that there is nothing in the EEA or in the amendment thereof which indicates that it must be applied retrospectively where the claim arose, the statement of claim was filed, and pretrial proceedings were concluded before the amendment came into effect. In the circumstances the existing procedure prior to the amendment was applied.

[12] The facts of the matter before me is distinguishable from those in *Bandat* where the cause of action arose and the action was instituted before the amendment to the EEA became operative. In the matter before me the action was instituted after the amendment became operative.

[13] Mr Boda SC appearing on behalf of the applicant urged me to draw a distinction between amendments relating to procedure and amendments relating to substance where the jurisdiction of the institution considering the dispute is abolished and transferred to another institution. According to this argument, where an institution's jurisdiction is abolished and transferred to another institution, the general rule that jurisdiction is determined at the date of institution of the proceedings should not apply, but the jurisdiction should be determined at the date when the cause of action arose.

[14] I am not convinced that such a distinction is useful, or that it is justified in the circumstances of the case. In *Unitrans* (supra) the Court considered that there was a time when a distinction was made between amending statutes affecting rights and those affecting procedure only, but went on to hold that the distinction cannot be decisive, because many amending statutes may appear to be procedural in nature but in fact impact on substantive rights.

[15] The same difficulty in distinguishing between substantive rights and procedural rights occurs here. The amendment to section 6 of the EEA introduced a new substantive right in the form of unfair discrimination relating

to pay differentiation. The section must, however, not be read in isolation, but must be read in the context of the EEA as a whole and in concert with the rest of the provisions. Once it has been determined that a new substantive right has been created, the question that always follows is what procedure must be followed to exercise such right. The procedure is to be found in section 10(2) of the EEA which provides that any party to a dispute in terms of Chapter II of the EEA may be referred to the CCMA for purposes of conciliation within six months after the occurrence of the act or omission that allegedly constitutes unfair discrimination. Thereafter the dispute is to be referred to the Labour Court for adjudication in terms of section 49 of the EEA, alternatively to the CCMA in accordance with an agreement concluded between the parties in terms of section 10(6)(b). The new substantive right introduced by section 6(4) can thus not be divorced from the procedural rights contained in section 10.

[16] The applicant challenged the jurisdiction of the CCMA to determine the dispute between the parties. Insofar as the dispute between the parties need to be categorised, it is more of a procedural dispute than a dispute relating to the substantive nature of the right. To attempt to draw a distinction between substantive and procedural rights in this matter is not of any practical use in determining the challenge to the jurisdiction of the CCMA.

[17] A useful and necessary distinction may be drawn between the situations where the amending statute comes into operation before the procedure is initiated, and the case where the amending stature comes into effect after the procedure has been initiated and is pending. I will accordingly proceed to deal with the present application on this basis.

[18] Where the legislature introduces an amendment to the procedure, the rule operates as follows: If the action is instituted after the amendment becomes operative, the new procedure applies as the old procedure is not part of the law any more. If the action is instituted before the amendment becomes

operative, the old procedure remains intact.[8] It therefore follows that the procedure is determined at the date on which the action is instituted and not on the date when the cause of action arises.

[19] The action was instituted by the third respondent by referring the dispute to the CCMA on 14 August 2014, thus after the amendments to the EEA became operative. It therefore follows that the new procedure applies and that the old procedure was not part of the law any more. The new procedure allows for parties to reach an agreement that the unfair discrimination dispute be referred to the CCMA by agreement between the parties. This was done. The Commissioner's rejection of the applicant's challenge to the jurisdiction of the CCMA based on the retrospective application of the EEA is therefore beyond reproach.

[20] In view of my finding that the dispute was correctly referred to the CCMA in accordance with the amended provisions of the EEA and the agreement between the parties, it is not necessary for me to express any view on whether the dispute is of an ongoing nature and I therefore refrain from doing so.

<u>Internal remedies</u>

[21] The second ground of review raised by the applicant is that the third respondent failed to exhaust the internal remedies and that the grievance did not deal with the unfair discrimination dispute, but with matters relating to experience. I am of the view that the applicant's categorisation of the dispute as one relating to experience and not one relating to pay discrimination is without merit. The summarised grievance reads as follows:

> "During 2003 Eskom took a decision to implement the income differential to those employees meeting the set criteria. The criteria was discussed and accepted by all Eskom stakeholders hence the implementation in November 2014. When Eskom approved the criteria there were other employees who

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[8] *Unitrans* (supra) at paras 17 – 19.

> claim that they were left behind and did not benefit whilst other employees who have the same related experience benefited from this exercise. Unit controllers at Camden claimed to have been disadvantaged as they believe they also meet the criteria stipulated as some of the colleagues benefited from this exercise."

[22] It is evident from the grievance that the employees believed that there was a differentiation between them and other employees, despite the fact that they had the same experience. This is clearly a dispute relating to the differentiation between employees performing the same or substantially the same work based on an arbitrary ground. It is accordingly a dispute as contemplated in section 6(4) of the EEA.

[23] Section 10(4)(b) of the EEA requires that the party that refers a dispute must satisfy the CCMA that the referring party has made a reasonable attempt to resolve the dispute. I am satisfied that the nature of the dispute remains the same and that a reasonable attempt has been made to resolve the dispute. This ground of review is accordingly also rejected.

[24] In the circumstances the following order is made:

<u>Order</u>

1. The application for review is dismissed.
2. There is no order as to costs.

J. Basson

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Advocate F Boda SC
Instructed by:	Cliffe Dekker Hofmeyr
For the Respondent:	None