



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not reportable

Case no: C279/2017

DANIEL CORNELIS THEUNISSEN

Applicant

and

LEGAL AID SOUTH AFRICA

Respondent

Heard: 24 May 2018

Delivered: 20 June 2018

Summary: The Applicant seeks an order declaring his retirement age to be 65 and that the termination of his contract of employment when he turned 60, constituted a breach of contract. The Applicant's contract of employment provided for retirement at the age of 65 and early termination constituted a breach of contract. Applicant reinstated retrospectively.

JUDGMENT

PRINSLOO, J

The material facts

- [1] The material facts that are common cause in this matter can be summarised as follows:

- [2] The Applicant has been employed by the Respondent since 1 May 2008 in the position of a High Court legal practitioner. The Applicant was issued with a written employment agreement wherein the terms and conditions of his employment, as supplemented by the Respondent's policies and procedures, were recorded. The Respondent regarded this as the Applicant's individual contract of employment (the contract).
- [3] The contract did not provide for a fixed term of employment or an automatic or compulsory retirement date. The terms and conditions contained in the Respondent's 'Human Resources Policy and Procedure Manual 2007' (the Manual) were incorporated and formed part of the Applicant's individual contract of employment. Clause 3.7.1 of the Manual provides that the retirement age for all employees is 65 years.
- [4] It was an express and written term of the Applicant's employment that his retirement age was contractually agreed to be 65.
- [5] The Respondent changed the retirement age by way of the 'Legal Aid South Africa Terms and Conditions of Employment' in 2009 (the 2009 Policy), which replaced the 2007 Manual.
- [6] The Respondent published a document titled 'Legal Aid South Africa Terms and Conditions of Employment' (the 2015 policy) which purports to be approved by the Respondent on 28 February 2015 and by the Minister on 10 November 2015 and to be effective from 1 December 2015. Clause 3.9 thereof deals with the issue of retirement and provides that the retirement age of employees is 60. The retirement age is contentious and I will fully deal with it *infra*.
- [7] On 29 August 2016 the Applicant received a letter from the Respondent's human resources manager, Mr Richard Baloyi (Baloyi) wherein he reminded the Applicant that he was due for retirement as from 30 June 2017, when he turned 60 and Mr Baloyi informed the Applicant that his employment with the Respondent would terminate with effect from 30 June 2017. The Applicant responded to this and indicated that his retirement age is 65 and that it could not be changed unilaterally, as it would constitute a breach of contract.

[8] The Applicant's services were indeed terminated on 30 June 2017.

Relief sought

[9] The Applicant has approached this Court for an order declaring that his retirement age in terms of his contract of employment is 65, that the termination of his employment at the end of June 2017 constituted a breach of his contract of employment and that the termination of his employment be set aside and that he be re-instated retrospectively.

Retirement age

[10] The first issue to be considered is whether the Applicant's retirement age is 65.

[11] It is common cause that the Applicant's agreed retirement age was 65 when he commenced employment with the Respondent and that the terms of the Manual, which provided for a retirement age of 65, were incorporated into the Applicant's contract of employment.

[12] The Respondent's case however is that the Manual did not remain applicable and in force in its 2007 form, but was changed in subsequent years. The retirement age was changed by way of the 2009 Policy from 65 to 60 years.

[13] Clause 3.8.1 of the 2009 Policy has the same wording as clause 3.9.1 of the 2015 policy and any reference to clause 3.8.1(i) is to be understood to include clause 3.9.1(a) of the 2015 Policy, without specifically referring to it. Clause 3.8.1 of the 2009 Policy has set the retirement age at 60 years 'save in respect of employees :

- i. Expressly entitled to retire at 65 in terms of their individual contracts of employment with Legal Aid SA; or
- ii. who had reached the age of 55 years on or before 1 August 2009 whilst being in the permanent employment of Legal Aid SA, in respect of whom the retirement age shall be 65.

- [14] The Respondent's employees are subject to the new retirement age of 60 years, subject to their falling into one of the two exceptions.
- [15] The Applicant does not dispute that the Manual was changed in subsequent years and that the retirement age was changed to 60, but his case is that the subsequent changes had no effect on his retirement age as he was saved by the exception in clause 3.8.1(i) (the savings clause). The Applicant argued that the savings clause made the new retirement age inapplicable to him. Clause 3.8.1(ii) is not applicable and needs no consideration.

The savings clause

- [16] The essential issue is whether the Applicant is saved by the savings clause and whether he is to retire at the age of 65 in terms of his individual contract of employment.
- [17] The Respondent's case is that the Applicant falls outside the savings clause. Much turns on the interpretation of the savings clause and particularly what is meant by the phrase 'individual contracts of employment with Legal Aid SA.'
- [18] The Respondent accepts that the Applicant's letter of appointment is regarded as his individual contract of employment. However, so the Respondent's argument goes, the phrase 'individual contract of employment' cannot be taken to refer to every employee whose contractual deal (in the Applicant's case contained in his letter of appointment and the 2007 Manual) entitled them to retire at the age of 65 because, prior to 2009, the contractual deal for all the Respondent's employees had a retirement age of 65. If that is so, there would have been no need to insert clause 3.8.1(i) to indicate exceptions to the change in the retirement as there would have been nothing 'individual' about those contracts. 'Individual' connotes something unique or particular and clause 3.8.1(i) must have been referring to something indicating a retirement age of 65 which was not applicable to all employees.
- [19] The Respondent further submitted that the reference to 'their' contracts in clause 3.8.1(i) must be taken to refer to a particular contractual arrangement between employees and the Respondent, not one that is universally

applicable. If the intention was to exclude everyone who had a retirement age of 65 at the time the change was introduced in 2009, the 2009 Policy would simply have said so.

- [20] The Respondent submitted that this Court should interpret the savings clause to mean that the reference to 'individual contracts of employment' must be a reference to employees who did not just have a retirement age of 65 by virtue of the Manual, but that it was expressly referred to somewhere else, *id est* their letters of appointment.
- [21] The Supreme Court of Appeal (SCA) in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹ affirmed the principles applicable to the interpretation of legislation and contracts. What the judgment underscores is that the exercise of interpretation does not require a court to discern the intention of the legislature or the parties to a contract only by reference to plain meaning of words with a deferential nod, if necessary, in the direction of the *Oxford English Dictionary*. It was held at paragraph 18 that:

'The present state of the law can be expressed as follows: interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.... The "inevitable point of departure is the language of the provision itself" read in context and having regard to the purpose of the provision and the background to the preparation and production of the document....'

¹ 2012 (4) SA 593 (SCA).

[22] The SCA held² further that where the court is faced with two or more possible meanings that are to a greater or lesser degree available on the language used, in selecting the proper meaning the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.

[23] In *Bothma-Batho Transport (Edms) Bpk v S Bothma and Seun Transport (Edms) Bpk*³ the SCA also considered the principles applicable to the interpretation of legislation and contracts and held that:

'Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is essentially one unitary exercise.'

[24] In interpreting the terms of the savings clause, this Court should have regard to the words used, the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.

[25] The process leading to the adoption of the 2009 Policy provides some context to the savings clause.

[26] It is evident from the documents before me that when the change of the retirement age from 65 to 60 years was proposed and discussed in 2009 and subsequent to the Applicant's appointment, the Respondent received comments from its employees and the trade union, SAPTU. The comment

² At para 26.

³ 2012 (2) ALL SA 517 (SCA) at para 12.

made in respect of clause 3.8.1 was that the retirement age should remain at 65 years for all the Respondent's employees and it is clear that the employees and union did not agree to the change. Pursuant to the negotiations, the 2009 Policy was adopted wherein the compromise was reflected by way of the savings clause, which was also included in the 2015 Policy.

- [27] The savings clause must be considered within the context that the parties could not agree to a change to the retirement age and the savings clause was included in the 2009 Policy to protect employees and to preserve existing rights of employees who have contracts specifically entitling them to retire at the age of 65. The Respondent is by law not permitted to unilaterally amend terms and conditions contractually agreed to.
- [28] The words 'individual contracts of employment' should be given its ordinary meaning and in the context of the savings clause the plain meaning thereof is that 'individual' pertains to the person in question and the contracts belonging to the individuals concerned. It means the individual's personal contract, regulating their own terms and conditions of employment, as set out in the relevant documents (eg letter of appointment, Manual etc). 'Individual contract' refers to the individual's contract and is in the context not a reference to a single, separate or self-contained document.
- [29] Applying the principles applicable to the interpretation of contracts and considering the savings clause in the broader context, I cannot but find that the 'individual contract of employment' the savings clause referred to, is the Applicant's contract of employment with the Respondent.
- [30] This Court should give an interpretation to the savings clause that would save and protect individual rights and that would give effect to the provisions of the law and the operation of the employment contract.
- [31] The savings clause was included to preserve the employees' existing rights of retirement at the age of 65 and the intention, given the aforesaid context, was to exclude everyone who had an agreed to retirement age of 65 at the time the change was introduced in 2009.

- [32] If the Respondent's interpretation is to be accepted, it would lead to impractical, unbusinesslike and oppressive consequences that would stultify and undermine the broader operation and purpose of the savings clause.
- [33] It is common cause that the Applicant's agreed retirement age at the time of his appointment was 65 years. The savings clause applies to the Applicant's contract of employment and he is saved by the clause and therefore excluded from the new retirement age as contained in the 2009 and 2015 Policies.
- [34] The Applicant's retirement age is, as agreed between the parties and as incorporated in the terms and conditions of his employment, 65 years.

Breach of contract

- [35] Having found that the Applicant's contractually agreed to retirement age is 65, the next question is whether the termination of the Applicant's contract of employment at the age of 60 constitutes a breach of contract.
- [36] The Applicant's case is that the early termination of his employment was in breach of his contract of employment.
- [37] The Respondent submitted that the Applicant's difficulty is to demonstrate how the Respondent breached his contract of employment. This is so because the Applicant's retirement age was 60 years and his employment was merely brought to an end once the agreed retirement age was reached. For reasons already stated, this argument is without merit.
- [38] Alternatively and in the event this Court finds that the Applicant's retirement age was 65 years, the termination of his contract of employment was lawful and valid. The Respondent submitted that the Applicant's claim presupposes that the termination of his contract could only be effective if he had reached retirement age.
- [39] Mr Bosch for the Respondent argued that there is no requirement in the Applicant's contract of employment that his employment can only be terminated after certain requirements have been met and for his contract to be lawfully terminated, all that is required is that he be given one month's notice.

There is no requirement for a particular reason, nor that a certain procedure needs to be followed prior to termination. The fact that the Respondent may have been mistaken in thinking that it was entitled to retire the Applicant as of 30 June 2017 is neither here nor there. The Respondent in any event gave the Applicant notice significantly more than what is required.

[40] The Respondent's arguments are flawed and without merit.

[41] The Applicant's contractually agreed retirement age is 65 years. Mr Baloyi issued a letter to the Applicant, informing him that his employment with the Respondent would terminate due to retirement with effect from 30 June 2017, when the Applicant turned 60 years old. The Applicant responded to Mr Baloyi's letter and pointed out that his retirement age was 65 years and that this could not be changed unilaterally. The Respondent did not respond to the Applicant's letter but proceeded to terminate his services at the end of June 2017. The Respondent terminated the Applicant's contract of employment due to retirement at the age of 60 and did so in breach of the contract of employment, which provided for retirement at the age of 65.

Specific performance

[42] The Applicant seeks the primary relief of specific performance for the breach of his contract, which is to include an order re-instating him retrospectively on the same terms and conditions of employment as applicable at the time of the termination of his contract.

[43] Section 77A(e) of the Basic Conditions of Employment Act⁴ (BCEA) empowers this Court to make an order for specific performance.

[44] The Applicant is entitled to seek specific performance of his contract and to the restoration of the *status quo ante* the termination of his services.

Costs

[45] This Court has a broad discretion in respect of costs.

⁴ Act 75 of 1997.

[46] In argument Mr Steltzner for the Applicant and Mr Bosch for the Respondent both submitted that the costs should follow the result.

[47] I see no reason to deviate from the ordinary rule that costs should follow the result.

[48] In the premises I make the following order:

Order:

1. The Applicant's retirement age in terms of his contract of employment with the Respondent is declared to be 65 years;
2. The Respondent's decision to terminate the Applicant's employment on 30 June 2017 upon his attaining the age of 60 years constituted a breach of the terms of the Applicant's contract of employment;
3. The termination of the Applicant's employment is set aside;
4. The Applicant is reinstated in the Respondent's employ on the same terms and conditions which applied as at 30 June 2017, retrospectively with effect from 1 July 2017;
5. The Respondent is to pay the costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate R G L Stelzner SC

Instructed by: Arlene Duval Attorneys

For the Respondent: Advocate C Bosch

Instructed by: Legal Aid South Africa

LABOUR COURT