

SOUTH AFRICA / JUDGMENT

Khan v MMI Holdings Limited (C384/17) [2021] ZALCCT 38; (2021) 42 ILJ 1737 (LC) (4 May 2021)

[2021] ZALCCT 38

COURT

Labour Court Cape Town

BEFORE

F Coetzee

CASE / FILE NUMBER

C384/17

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IN

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case

no: C384/17

In

the matter between:

BLUMERIUS
LODEWYK EZRA
KHAN
Applicant
and
MMI
HOLDINGS
LIMITED
Respondent

Heard:

16 March, 30 November 2020. 1, 2 and 3 December 2020. Oral
submissions were made on 30 March 2021

Delivered:

This judgment was handed down electronically by circulation to the
parties' representatives by email and release to SAFLII.
The date and time for hand-down is deemed to be 10h00 on 4 May 2021.

Summary:

The applicant claims contractual damages pursuant to an alleged repudiation of an employment contract by the respondent

- Alleged breach of contract in that respondent indicated its intention not to be bound by an employment agreement after 30 June 2016 in informing the applicant that he had reached retirement age and by "forcibly" retiring the applicant - The applicant denied the existence of a retirement age, agreed or otherwise, and accepted the retirement as an alleged repudiation
- Whether the limited damages rule applied limiting the quantum to unpaid notice pay
- Whether there was valid notice of termination for the limited damages rule to apply and whether it applies in the case of an acceptance of a repudiation - Requirements of a valid notice of termination
- Whether a retirement policy or practice constitutes unfair discrimination on the basis of age - Whether for purposes of Section 6 of the Employment Equity Act, Act 55 of 1998, regard may be had to section 187(2)(b) of the Labour Relations Act, Act 66 of 1995 as justification and whether the two statutes must be interpreted consistently

JUDGMENT

COETZEE, AJ

The parties

- [1] The applicant is Blumerus Lodewyk Ezra Khan (Khan). He was previously employed as the CEO of MMI International, a division of MMI Holdings Limited, which is a public company with their registered address in Centurion, Gauteng and conducting business also in Bellville, Cape Town.

The pleaded cases

- [2] The applicant entered into a contract of employment (the contract) with Bankmed on or about 27 November 1995, which contract was partially written and partially oral. The contract, and this is common cause, transferred from Bankmed to the respondent through a number of commercial transactions.

[3] The applicant pleaded that the contract provided that the applicant's employment was covered by the Rules and Regulations of Bankmed. The applicant did not make available a copy of the actual contract of employment but provided a copy of his letter of appointment dated 27 November 1995.

[4] Further to what the applicant pleaded, the letter of appointment provided that the applicant's employment was governed by the " ... Act and the Rules and Regulations ..." of Bankmed. The letter of appointment further stated that:

"Detailed below are the salient points regarding the conditions governing your appointment as contained in the applicable Act and the Rules and Regulations of the Society."

[5] One of the salient points of the conditions of employment was a Housing Loan. In respect of the housing loan the following is explicitly recorded in the letter of appointment:

"You will be allowed to avail yourself of the Society's housing facilities in the form of a first mortgage bond, to the value of R150, 000, in accordance with Bankmed's Staff Housing Loan Scheme."

[6] In respect of Medical Aid as a benefit the letter of appointment further provides as follows:

"Employee subscription will be subsidised on a 100% basis"

[7] Under 'Deferred Benefits' under the heading 'Pension Fund (14% of Total Cash)' the letter of appointment provides the following:

"Membership of the Society's pension fund is obligatory from date of commencement of service. Pension is deductible at a rate of 7.5% of basic salary."

The letter of appointment refers to various other non-cash fringe benefits and deferred benefits as salient points of the conditions of employment.

[8] The Applicant pleaded that "... there was no retirement age determined for employees of Bankmed" as no mention is made of a retirement age in the letter of appointment. It is common cause that the letter of appointment stated that the contract was determinable at the instance of either party, on notice.

[9] The Applicant also pleaded that on 30 May 2016 he received an email from one Flandorp from the respondent's HR Technology and Services Department accompanied by attached documents regarding his alleged

retirement in June 2016. This was followed by a letter from Kruger of the respondent on 30 June 2016 wherein his alleged retirement on the same day was reportedly confirmed.

[10] The Applicant pleaded that as no retirement practice or policy and no agreement was applicable to the applicant, the applicant continued to render services to the respondent in terms of the contract and attended several director's meetings during July 2016.

- [11] It is common cause that the respondent did not pay the applicant's salary on 25 July 2016 despite the applicant alleging that he rendered his services during July.
- [12] The Applicant pleaded that in the absence of a practice or policy or agreed retirement age, the respondent forcibly retired the applicant. Such forced retirement constitutes, according to the applicant, a material repudiation and/or breach of the contract which repudiation and/or breach the applicant accepted.
- [13] It is further the applicant's case that the acceptance of the repudiation rescinded the contract and had it not been for the rescission the applicant would have remained in employment with the respondent until at least
2021. As a result of the rescission of the contract the applicant allegedly suffered damages.
- [14] The applicant claims payment of R55 548 000.00 as contractual damages with interest thereon (the contractual claim) allegedly suffered by applicant.
- [15] The Applicant's claim B is an alternative claim and only if the Court finds that there was an existing retirement policy to which the applicant was bound and therefor that there was no breach or repudiation on the part of the respondent.
- [16] It is applicant's case that the Constitution of the Republic of South Africa, 1998, Convention 111 of the International Labour Organisation and the Employment Equity Act[1] (the EEA) recognises that all human beings, regardless of their position in society, must be accorded equal dignity. Dignity is impaired when a person is unfairly discriminated against.
- [17] The Applicant further pleaded that the alleged retirement policy or practice which the respondent seeks to rely upon is discriminatory and does not promote equal opportunity and fair treatment in the workplace. It pleads that:

"It further fails to address the disadvantages experienced by designated groups and/or individuals as required by section 2

(b) of the EEA."

The applicant in its heads of argument abandoned this part of his claim B.

- [18] The second leg of the applicant's claim B is that the alleged retirement policy differentiates between persons younger than 60 and persons older than 60. This distinction, exclusion, or preference, according to applicant, has the effect of nullifying or impairing the applicant's equal "of opportunity or treatment in his employment" (sic). The discrimination based on age is a listed prohibited ground in terms of section (6) (1) of the EEA and therefore applicant seeks a declarator that such a policy unfairly infringed upon the applicant's rights and the applicant seeks an award of damages under section 50 of the EEA.

[19] The applicant asks the Court for payment of R55 548 000.00 as damages under the provisions of the EEA as the policy prevented the applicant from rendering his services until at least 2021.

[20] The respondent in its amended statement of defence pleads that at all material times during the applicant's employment with Bankmed, the normal and/or agreed retirement age for employees, including the applicant, was 60. This is so because the Bankmed Pension Fund rules formed part of the rules and regulations referred to in the letter of appointment and contained binding terms and conditions of employment. The rules provide for a normal retirement age of 60 and therefor it was a condition of the applicant's appointment that he would retire at 60. That being the case, the retirement age during the subsequent

commercial transactions remained the same and remained binding as between the applicant and the respondent as the retirement fund to which the applicant belonged, at all times contained such a rule.

[21] According to the respondent the applicant reached the normal retirement age of 60 years and retired on 30 June 2016. The applicant's contract terminated by effluxion of time on the agreed and/or normal retirement date applicable to the applicant.

[22] In the alternative, the respondent relies upon a termination clause in the contract of employment that entitled the respondent to terminate the contract upon one month's written notice which it gave on 30 May 2016.

[23] The respondent pleads further that in any event the applicant acquiesced in or tacitly accepted his retirement by complying in full with the contents of Flandorp's email by completing the documents aimed at processing his retirement and withdrawing his retirement benefits.

[24] In the further alternative respondent pleaded that on 30 May 2016 an offer was made to the applicant by Flandorp (in the email) to retire, which offer the applicant at least tacitly accepted.

[25] In respect of the applicant's claim B, the respondent pleaded that in terms of section 186 (1) (a) of the Labour Relations Act^[2] (the LRA) the termination of an employee's employment by an employer constitutes a dismissal. The alleged act of discrimination then must be the applicant's alleged dismissal in terms of the respondent's retirement policy. The respondent justifies the dismissal as fair with reliance upon section 187 (2) (b) of the LRA that provides as follows:

"... a dismissal based upon age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity."

- [26] The Respondent's case therefore is that the applicant cannot admit, on the one hand, that "there is an existing retirement policy or practice to which applicant was bound " while on the other hand he alleges that his dismissal was an act of unfair discrimination under section 6 of the EEA.
- [27] The applicant further contends that on the facts of this case, retirement does not constitute a dismissal. The retirement was forced upon the applicant and the forced retirement constitutes a repudiation of the contract of employment by the respondent. The respondent thereby indicated that it did not recognise the employment contract after 30 June
2016. The applicant accepted the repudiation and contends that the applicant, and not the respondent, terminated the agreement. The respondent thus cannot rely on the limitation of damages rule in the absence of a dismissal.
- [28] The respondent in oral argument submitted that its main submission is that the applicant is only entitled, if it is accepted that the respondent repudiated the contract, to damages in respect of any unpaid notice period. The respondent gave notice and paid notice pay. The notice period that the respondent relied upon was one month while it appeared in evidence that the actual notice period was three months. Nothing however turns upon this as the applicant did not claim any amount in respect of the remaining two months. The respondent referred to this as the limited damages rule and submitted that on whatever construction the contract was terminated, or for whatever reason, the applicant would only have been entitled to any unpaid notice pay. As a result, the applicant is not entitled to payment of any amount.

The issues for determination

[29] The following questions arise for determination:

29.1 Did the respondent or the applicant terminate the contract of employment or did the contract of employment automatically expire?

29.2 If the contract of employment automatically expired, was it in terms of an agreement or a policy?

29.3 Does such a policy unfairly discriminate against the applicant?

29.4 If the respondent terminated the contract of employment on notice, was it a lawful termination?

29.5 Does the limited damages rule apply, and if so does it apply to a termination of the agreement by the respondent and also by an acceptance of a repudiation by the applicant on the part of the respondent?

29.6 If the respondent unlawfully terminated the contract and the applicant either accepted the termination or regarded the termination as a repudiation, what damages is the applicant entitled to?

The limited damages rule

- [30] It is convenient first to deal with the application of the limited damages rule because if it applies, it disposes of the contractual damages claim. It is common cause that the contract of employment was terminable at the instance of either party, on notice. That entitled the respondent to terminate the contract on notice.
- [31] The Labour Appeal Court in dealing with the limited damages rule summarise the common law position in *National Entitled Workers Union v CCMA*:^[3] "Under common law the employer's position was very strong as against an employee. If an employee was dismissed lawfully, even if he was given proper notice of termination of his contract of employment or if he was paid notice pay in lieu of notice, the employee had no remedy in law even if the employer had no reason to terminate the contract of employment or if the dismissal was very unfair. The courts could also not provide any remedy in that situation. If the contract of employment was terminated unlawfully, generally speaking, the only relief that the courts could provide such employee was to award the employee damages which would be equivalent to the notice pay he would have been paid in lieu of notice." (Own emphasis)
- [32] This is authority for the proposition that as long as the employer gives contractual notice of termination, or pays wages in lieu of notice, there is no recognised claim in law. It goes further to say that even if the employment contract is unlawfully terminated as alleged by the applicant, the employee's remedy is limited to damages equal to what he would have earned during the contractual notice period.
- [33] The Labour Court followed this reasoning in *S A Music Rights Organisation Ltd v Mphatso*:
[4]
- "... This approach reflects the conclusion that the purpose of damages for wrongful dismissal is only to protect the worker's interest in remuneration and benefits for the denied period of notice or the unexpired fixed term, and that its quantification is to be conducted on the assumption that the worker's pecuniary losses are limited to that remuneration and those benefits."
- [34] The applicant submits that the purpose of the notification by Flanders to the applicant that the applicant would retire on 30 June 2016 was not to terminate the contract of employment but merely to inform the applicant of the purported retirement and therefore it was not a termination on notice. It therefore distinguishes the above authorities from the facts of this matter.
- [35] However, in *Harper v Morgan Guarantee Trust Co of New York, Johannesburg*^[5]
- the Court per Flemming DJP held as follows:

"5.2.1 The principles are part also of our law. In *Mustapha v Receiver of Revenue* 1958 (3) SA 343 (A) at 358F it was said that in the case of a contract, a party's "reasons or motives for exercising an admitted right of cancellation of that contract are normally irrelevant". The result that the employee ends up with what he would have had if the employer had stayed within his legal right to terminate by notice was stated in *Grundlingh v Beyers* 1967 (2) SA 131 (W) at 142; *Langeni v Minister of Health and Welfare* 1988

(4) SA 93 (W) at 101C.

5.2.2 If in a specific case the right to give notice may only be exercised within some limitation, it would be for the plaintiff to prove and therefore to plead such a term (*Carr v Jockey Club of South Africa* 1976 (2) SA 717 (W) at 728, 729). Plaintiff has not pleaded that her employer's "discretion" – a misguiding word – was a fettered one".

[36] Flemming DJP also cited with approval the decision of the House of Lords in *Johnson v Unisys Ltd*[6] where Lord Hoffman concluded that:

"The action for wrongful dismissal could therefore yield no more than the salary which should have been paid during the contractual period of notice."

[37] Flemming ADJP also cited with approval *Wallace v United Grain Growers Ltd*[7]

where the Court held that:

"The action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship (or pay in lieu thereof) in the absence of just cause for dismissal ... A "wrongful dismissal" action is not concerned with the wrongness or rightness of the dismissal itself. Far from making dismissal a wrong, the law entitles both employer and employee to terminate the employment relationship without cause. A wrong only arises if the employer breaches the contract by failing to give the dismissed employee reasonable notice of termination. The remedy for this breach of contract is an award of damages based on the period of notice which should have been given."

[38] Both the *Johnson* and the *Wallace* cases established the principle that, where an employer has reserved itself the right to terminate an employment contract, the only potential actionable wrong lies in its failure to comply with the applicable notice period. The employee's damages are always limited to their remuneration during the notice period.

[39] Flemming ADJP in *Harper*[8] explained the logic underpinning the limited damages rule as follows:

" There is obvious logic for limiting the damages claim to the equivalent of earnings in the permissible notice period. to put the employee in the position in which you would have been but for the instanter dismissal would leave him exposed to dismissal by notice – and I write to earnings for no more than that period. Even when the step of dismissing is ineffective to end the employer's obligation to pay for the salary, it effectively conveys that the employee must leave and so serves as the giving of notice."

[40] The applicant submitted that, in giving notice of his retirement, the respondent did not seek to terminate the employment contract. The applicant's construction is that the retirement notice amounted to a repudiation of the employment contract that was accepted by him.

[41] The applicant's construction, if it is correct, would not alter the outcome. The limited damages rule applies to all cases of wrongful termination. It applies regardless of whether the breach in question amounts to short or defective notice, or some other breach of the employment contract which gives rise, on the part of the employee, to an election to cancel. This was made clear in the Harper-decision.

[42] In *Volschenk v Pragma Africa (Pty) Ltd*[9] the employee claimed that his employer was in breach of contract with regard to the payment of commission and in other respects. The employee elected to terminate the contract of employment on notice. He then initiated a claim, inter-alia, for payment of damages in respect of future loss of earnings for the period of twelve months. The court held that as the employee terminated the contract on two months' notice, worked during the two months and was paid for the two-month period the employee had suffered no loss as a loss would only have been in respect of the notice period if the employee had not been paid during that time.

[43] The *Volschenk*-matter is on all fours with the case in *casu*.

[44] In *BMW (SA) (Pty) Ltd v National Union of Metalworkers of SA*[10] the employee was given notice to retire at the age of 60 while the Court found that he had exercised an option to remain on a retirement age of 65 but that BMW had failed to record his election and incorrectly retired him at 60. His actual retirement age remained 65.

[45] The unilateral change to the retirement age constituted a repudiation which the applicant accepted, and which constituted an automatically unfair dismissal as the dismissal was based on age discrimination. The LAC held that the employee was entitled, as he claimed, for compensation for the automatically unfair dismissal and for damages in respect of the unfair discrimination. In his cross- appeal before the Labour Appeal Court the employee also claimed contractual damages.

[46] The LAC had the following to say:

"[71] However, even if this court were inclined to find that Mr Deppe has succeeded in proving that BMW repudiated his employment contract by amending his retirement age from 65 to 60 without his consent, Mr Deppe would only be entitled to contractual damages in the amount of one month's notice in terms of his contract of employment. His damages are limited to the

position he would have been in, under the contract, had the breach not occurred. Mr Deppe's contractual claim for five years' damages, therefore, is misplaced as Mr Deppe's contractual claim for wrongful termination of employment is limited to one month's notice pay."

[47] The limited damages rule clearly applies to the applicant's contractual claim. He has no claim as he has not suffered any damages.

[48] The applicant's submission that he was not given notice of termination and that therefore the limitation does not apply, is dependent upon the requirements of a valid and lawful termination by notice.

Termination notice

[49] Where parties are entitled by contract to terminate such contract, termination is a unilateral and final act, requiring no acceptance to be effective.

[50] At common law it is required that the notice must be clear, unambiguous, and unconditional notice to the other party to terminate the agreement.

[51] In *TAWU v Natal Co-operative Timber*[11] the Court considered the requirements for a valid notice of termination:

"It seems to me that the rationale behind the requirements that the notice must be clear and unequivocal and that it must be

unconditional is, as far as the employee is concerned, the same. He must be left in no doubt as to where he stands as far as his

continued employment is concerned and as to what the employer's intentions are with regard thereto. In the case of dismissal, on

notice, for misconduct or incompetence for example, he must know that his employer has elected to terminate his contract from a specific date, so that he may govern his conduct accordingly. He may decide to accept the termination and seek employment elsewhere".

[52] At common law once notice of termination is given, it has the effect of terminating the contract as was held by Cheadle AJ in *Lottering v Stellenbosch Municipality*: [12]

"[17] I take the view that termination on notice involves two discrete elements: the notification of termination (the act of resignation) and the giving of notice. the notification of termination is a unilateral act permitted by the contract – either inherently or specifically. unlike the notification of termination in the form of the cancellation of the contract for material breach, which requires a determination of whether or not the termination is permissible on those grounds, new notification of termination of notice does not require any justification. It is sufficient of itself."

[53] Flandorp on 30 May 2016 sent an email to the applicant. The respondent relies upon this email as notice of termination to the applicant. The relevant part thereof reads as follows:

"Subject: Retirement June 2016 – B Khan Attached are the following documents:

1. Retirement letter
2. UI 2.6 Form (Ask the bank to complete, then hand in to Department of Labour)
3. UI 2.11 (For Department of labour)
- 4.1 Retirement claim form (Please complete and return to me)" The attached letter read as follows:

"RETIREMENT CONFIRMATION

We hereby confirm your retirement effective 30 June 2016.

In terms of your retirement, the following benefits will become payable:

FUNDS BENEFITS

Lump sum from Provident fund: R1 396 817,24 Lump sum from pension fund: R2 501 919,81

The balance from pension fund to purchase compulsory annuity: R5 003 839,22 Please be advised that the figures are an indication of your fund value as at 30/06/2016. Final values will only be available after the disinvestment of funds. Please advise us of your investment options as soon as possible.

UNEMPLOYMENT INSURANCE

Please contact the nearest Department of Labour for further details regarding this benefit. Kindly note the UI-18 form will be submitted

directly to them by the end of 30 June 2016.

Please supply us with a copy of your identity document and keep us informed of your latest address and bank details.

...

We would also like to make use of this opportunity to wish you everything of the best for the future. Please do not hesitate to

contact us directly should there still be anything else of which we can be of assistance."

[54] The termination notice further specified the amount in respect of accrued untaken leave.

[55] The applicant sought to deny that this was a notice terminating his services. He testified that he believed that the email and the letter and other attachments merely pertained to the reinvestment of his pension savings and did not affect his employment as such.

- [56] In my view it is not a rational comment to make that the above notice merely pertained to the reinvestment of pension savings. It deals extensively with termination benefits; it specifies the termination date and it sets out relief that the applicant may obtain from the Department of Labour in the form of unemployment insurance. He is also given best wishes for his future.
- [57] The conduct of the applicant also demonstrates that he understood what the retirement letter conveyed to him. He cashed in his leave pay, he accepted his retirement benefits, he retrenched his Personal Assistant, transferred his medical aid contribution for his own account, vacates his office, went to the USA without applying for leave and did not return to work. His evidence that he only became aware of the fact that his contract terminated when he returned from the USA and he did not receive his salary on 25 July 2016 cannot be accepted.
- [58] There are further reasons why the termination notice was sufficient. In NUMSA obo King and Others v BMW South Africa (Pty) Ltd[13] the Labour Court held that a similarly worded "confirmation of retirement" letter amounted to a dismissal within the meaning of section 186 of the LRA and constituted a termination of employment by the employer.
- [59] In addition, section 187 (2) (b) of the LRA also implies that the legislature regards the termination of employment at an "agreed" retirement age as a dismissal. It provides that:
- "(b) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity."
- (Own emphasis).
- [60] I find that the limited damages rule applies to the applicant's contractual claim and that the retirement letter constituted a valid notice of termination. The applicant's contractual claim stands to be dismissed.

Claim B: The Discrimination Claim

- [61] The applicant's Claim B is conditional on a finding that there is a practice or policy of the respondent that made it mandatory for the applicant's employment to terminate. The pleaded basis for this submission is set out above.
- [62] In view of the conclusion that I arrive at in respect of Claim B it is not necessary to set out the reasons for a finding that there was a practice or policy of the respondent that made it mandatory for the applicant to retire at the age of 60. I am of the view and accept, for purposes of Claim B that the applicant was in fact bound by a policy or practice to retire at the age of 60. It is therefore necessary to deal with the conditional Claim B.
- [63] The applicant submitted that section 6(1) of the EEA provides that no person may unfairly discriminate directly, or indirectly, against an employee in an employment policy or practice on the grounds of age. Section 6(1) reads as follows:

"No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including ... age ..."

[64] Section 6 (1) must be read with section 11(1) that provides as follows:

"11. Burden of proof.—(1) If unfair discrimination is alleged on a ground listed in section 6 (1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination—

- (a) did not take place as alleged; or
- (b) is rational and not unfair, or is otherwise justifiable."

[65] It is common cause that the retirement policy or practice (binding upon the applicant), upon which the respondent relies differentiates between employees younger than 60 and those who are 60 years old and older.

[66] The applicant submits that this constitutes per se unfair discrimination. For this proposition the applicant relies upon *SA Clothing and Textile Workers Union v Rubin Sportswear*.^[14]

[67] The Court in this matter was concerned with a claim of an automatically unfair dismissal. The employer in the *SA Clothing* case for its defence relied upon section 187(2)(b) of the LRA that provides as follows:

187. Automatically unfair dismissals.—

- (1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is—
 - (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to ... age,
- (2) Despite subsection (1) (f)—
 - (a) ...; or
 - (b) a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity."

[68] The Court, however, held on the facts that the employer failed to establish a normal or agreed retirement age and found the termination of employment of its employee automatically unfair. The case, therefore, dealt with, not the fairness of a policy or practice, but an automatically unfair dismissal in the absence of an agreed or normal retirement age.

[69] The same goes for the applicant's reliance on *BMW (South Africa) Ltd v National Union of Metalworkers of South Africa and Karl Deppe*^[15] that dealt with an automatically unfair dismissal in the absence of a normal or agreed retirement age. The two cases are not authority for the proposition that a retirement policy in itself is discriminatory.

- [70] Notwithstanding that the two judgments do not support the applicant's submission that a practice or policy which determines whether employees are obliged to retire, in this case at the age of 60, the applicant still alleges that persons below the age of 60 and above the age of 60 are treated differently and that such differentiation constitutes discrimination which is unfair.
- [71] The respondent pleaded that this claim of the applicant is not actionable under the EEA, which is only concerned with discriminatory employer conduct. On the facts of this matter, according to the respondent, the applicant entered into an employment contract with a binding retirement age (for purposes of the discrimination claim) which means that the employment was for a specified term and the contract simply terminated on the agreed date by effluxion of time. As the applicant's Claim B is premised on a binding termination date there cannot be any claim under the EEA.
- [72] The applicant disputes that its discrimination claim is based upon an agreed retirement age. Therefore, the respondent can only rely upon a normal retirement age which would have a different outcome. The respondent's submission above has no merit as the practice or policy binds the applicant to a retirement age.
- [73] The respondent's second submission, in the alternative, is based upon section 187(2)(b) of the LRA that according to the respondent precisely governs this scenario and pronounces a termination of a contract of employment at a normal or agreed retirement age to be fair. The submission is that the EEA and the LRA must be read consistently.
- [74] The applicant disputes this submission and contends that section 6 of the EEA should be read and interpreted separately from section 187(2)(b) of the LRA. In the applicant's view the EEA and the LRA are two separate statutes and they ought to be read and interpreted separately. What the LRA regards as fair does not necessarily mean that it is fair for purposes of the EEA.
- [75] The respondent relies, for its submission that the two statutes must be interpreted consistently with each other, on *Independent Institute of Education v KZN Law Society*:^[16]

"It is a well-established canon of statutory construction that 'every part of statutes should be construed so as to be consistent, so far as possible, with every other part of the statute, and with every other un-repealed statute enacted by the Legislature.' Statutes dealing with the same subject matter, or which are in *pari materia*, should be construed together and harmoniously. This imperative has the effect of harmonising conflicts and differences between statutes. The canon derives its force from the presumption that the legislature is consistent with itself. In other words, that

the legislature knows and has in mind the existing law when it passes new legislation, and frames new legislation with reference to the existing law. Statutes relating to the same subject matter should be read together because they should be seen as part of a single harmonious legal system."

[76] The respondent further relies upon HOSPERSA obo Venter v South African Nursing Council^[17] where it was held:

"[22] As stated above, the Applicant in this matter elected to refer a dispute in terms of the Employment Equity Act and not the Labour Relations Act. It appears that one of the reasons therefor was that she referred a dispute before she had been dismissed. Nevertheless, I consider the principles encapsulated in section 187 of the Labour Relations Act to provide guidance in handling allegations of discrimination based on age, in the employment context, in terms of the Employment Equity Act. "Employment policy or practice", as defined in s 1 of the EEA, includes dismissal⁴. The proviso in section 187(2)(b) of the LRA that a dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity, appears to me to be no more than a justification for what would otherwise amount to unfair discrimination based on age."

Analysis

of the rule to interpret statutes consistently

- [77] In applying the principle to interpret statutes consistently in accordance with the Independent Institute of Education – case, it is clear that an employee whose employment is terminated through the application of a retirement policy has two potential courses of action. He may institute an automatically unfair dismissal claim under the LRA, or an unfair discrimination claim under the EEA, or both. Both causes of action would arise from the same set of facts. This is a clear indication that the two statutes must be interpreted consistently.
- [78] Further, the legislature could not have intended that the same conduct, termination of employment on an agreed or normal retirement age, could be fair under the LRA and unfair under the EEA. Such an outcome would undermine the principle of legality and employees would simply "forum shop" by bringing claims under the EEA instead of the LRA.
- [79] A further consideration is that the LRA was enacted first and followed by the promulgation of the EEA. The legislature must have been deemed to be fully aware that the employer could fairly apply a retirement policy based on a normal retirement age when the EEA was enacted.
- [80] In summary it is certainly possible to interpret the LRA and EEA in a consistent manner. As Steenkamp J held in HOSPERSA, section 187(2)(b) is no more than a justification ground available to an employer under the EEA which affords the employer a defence under section 11(1)(b) where the alleged discrimination is shown to be rational, not unfair, or justifiable.
- [81] The applicant attacks the retirement policy in its whole as unfair discrimination. It submits that this should not be a retirement age fixed by policy. In this regard the legislation envisages a retirement policy where it gives credence to the termination of employment on the basis of age in section 187 of the LRA by recognising a fair termination in terms of an agreed or normal retirement age.

[82] Applicant's Claim B stands to be dismissed.

Summary

[83] In summary I find that the applicant was bound by a policy or practice of the respondent that set a retirement age. Due to the limited damages rule it is not necessary to give reasons for this finding. The respondent gave valid notice of termination of the employment contract and the limited damages rule applies to the applicant's contractual claim. The claim that a set retirement age by practice or policy constitutes unfair discrimination failed as the EEA and the LRA must be interpreted in a consistent manner. The LRA provides for a fair dismissal at an agreed or normal retirement age and the EEA must be read consistent therewith.

[84] Both parties submitted that costs should follow the result and include the costs of two counsel. The main claim is a contractual claim coupled to a conditional discriminatory claim. There is no reason why costs should not follow the result of the main contractual claim.

[85] The following order is hereby made: Order

1. The application is dismissed with costs, including the costs of two counsel.

F. Coetzee

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Adv A de Wet with Adv LM Olivier SC Instructed by:

Gillan & Veldhuizen Inc

For the First Respondent: Adv LW Ackerman with Adv GA Leslie SC

[1] Act 55 of 1998.

[2] No. 66 of 1995, as amended.

[3]

(2007) 28 ILJ 1223 (LAC) para 15

[4]

(2009) 30 ILJ 2482 (LC) at para 17

[5] 2003 JOL 11932 (W) at para 5.2

[6]

(2001) UKHL 13

[7]

(1997) 152 DLR (4th) 1

[8] Para 5.3

[9] 36 ILJ 494 (LC)

[10]

(2020) 41 ILJ 1877 (LAC)

[11]

(1992) 13 ILJ 1154 (D)

[12]

(2010) 31 ILJ 3923 (LC) para 17

[13] (JS 740/18 [2020] ZALCJB 115 at para 8

[14]

(2003) 24 ILJ 49 (LC)

[15]

(2020) 41 (ILJ) 1877 (LAC)

[16] 2020 (2) is a 325 (CC)

[17]

[2006] 6 BLLR 558 (LC) at para 22

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