IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: C384/17

In the matter between

BLUMERIOUS LODEWYK EZRA KHAN **Applicant**

and

MMI HOLDINGS LTD **Respondent**

Heard: 2 March 2018
Delivered: 20 April 2018
Summary: Determination of exception raised in respect of amended statement of claim; two complaints that claims do not disclose a cause of action considered.

JUDGMENT

RABKIN-NAICKER J

[1] The respondent (MMI) has excepted to applicant's statement of claim, as amended on 28 September 2017, on the basis that it lacks averments necessary to sustain a cause of action. It raises complaints in respect of Claim A and Claim B.

Claim A

[2] Applicant's statement of claim reads as follows in respect of Claim A:

"CLAIM A

DAMAGES AS A RESULT OF THE REPUDIATION AND CANCELLATION OF THE CONTRACT OF EMPLOYMENT

41. Applicant's forced retirement constitutes a material repudiation and/or breach of the Contract of Employment which repudiation and/or breach Applicant accepted alternatively accepts herewith.

42. As a result of the accepted repudiation and breach the Contract of Employment was rescinded.

43. Had it not been for the rescission of the Contract of Employment Applicant would have remained in the employ of the Respondent and rendered his services for which he would have been remunerated until at least 2021.

44. Applicant's remuneration at the time of the cancellation of the Contract of Employment is as set out in the remuneration statement dated 24 June 2016. A copy of the statement is attached hereto marked "BK10".

45. As a result of the rescission of the Contract of Employment Applicant has suffered damages in the amount of R55 548 000.00 as at 1 February 2017 calculated and arrived at as set out in the actuarial report of Mr Smit of 13 Actuaries and Consultants dated 15 March 2017. A copy of the aforesaid report is attached hereto marked "BK11"."

The Complaint

[3] MMI's Complaint as far as Claim A is concerned reads as follows:

"1.The applicant's Claim A is founded on an alleged breach of his contract of employment, the written part of which is annexed to the statement of claim as Annexure BK1.

2. Annexure BK1 contains the following express terms:

> "*TERMINATION OF SERVICE*
>
> *You will be required to serve a three month probationary service period. During this time, notice of termination will be in accordance will be in accordance with appropriate Act.* *Thereafter, a notice period of one month will apply to either side.*
>
> *Notice of termination will at all times be in writing, and may not be given during periods of absence on paid leave or sick leave to which you may be entitled.*" (emphasis added).

3. The applicant pleads, in paragraph 7 of the statement of claim, that he completed his probationary period. His contract of employment was thereafter terminable on one month's written notice by either party.

4. In paragraph 35 of the statement of claim, the applicant pleads that he received correspondence from the respondent on 30 May 2016, annexed as BK8 to his statement of claim.

5. Annexure BK8 records the following (inter alia):

> *"RETIREMENT CONFIRMATION*
>
> *We hereby confirm your retirement effective 30 June 2016.*"

6. The statement of claim read together with its annexures, established that:

6.1 The respondent had a contractual right to terminate the applicant's employment on one month's written notice;

6.2 The respondent gave the applicant one month's written notice of the termination of his contract of employment on 30 May 2016, as it was entitled to do.

7. For these reasons, as regards Claim A, the statement of claim fails to disclose a cause of action."

Evaluation of Complaint A

[4] The function of an exception is to dispose of the case, in whole or in part and this avoids the unnecessary leading of evidence[1]. An exception must therefore be determined on the pleadings as they stand, assuming the facts stated therein to be true; and no facts outside those stated in the pleading can be brought into issue and no reference may be made to any other document. [2]

[5] In order to succeed an excipient has the duty to persuade the court that upon every interpretation which the pleading in question, and in particular the document upon which it is based, can reasonably bear, no cause of action or defence is disclosed: failing this the exception ought not to be upheld[3]. MMI referred the court to the following dictum[4] in order to submit that an annexure to the statement of claim could be taken into account for the purposes of the exception:

"[7] It is trite law that an exception that a cause of action is not disclosed by a pleading cannot succeed unless it be shown that ex facie the allegations made by a plaintiff and any document upon which his or her cause of action may be based, the claim is (not may be) bad in law. In the circumstances of this particular case (putting aside for the moment the complication to which I shall return in para 8) that means that the excipient (respondent) had to show that ex facie the written documents relied upon by appellant it will not be possible to identify the res vendita on the ground and that there is no reason to suppose that any admissible evidence could conceivably exist which would enable that to be done. In my view, the respondent failed to establish that such was the case for reasons to which I shall return and the exception should have been dismissed on that ground alone." (emphasis mine).

[1] Barclays National Bank Ltd v Thompson 1989 (1) SA 547 (A) at 553F – I

[2] Shell Auto Care (Pty) Ltd v Laggar and Others 2005 (1) SA 162 (D) at 170D-E

[3] Theunissen en Andere v Transvaalse Lewendehawe Koöp Bpk 1988 (2) SA 493 (A) at 500E – F; and see also Erasmus Superior Court Practice at B1 – 151

[4] In Vermeulen v Goose Valley Inv (Pty) Ltd 2001 (3) SA 986 (SCA)

[6] The SCA in **Vermeulen v Goose Valley**[5] dealt with the sale of land and contractual formalities required by the Alienation of Land Act 68 of 1981, in particular the description of the *res vendita*. The Court held that the test for compliance was whether land sold can be identified on the ground, by reference to provisions of the contract, without recourse to evidence from parties as to their negotiations and consensus. In my view, there is no basis for the reliance placed by MMI on this case given the above. The documents referred to in that case were those required to be annexed to particulars of claim by Rule 18 of the Uniform Rules and the Statute in question.

[7] In distinction, the annexure referred to by MMI is **BK8** and consists of email correspondence from MMI to the applicant and attachments, i.e. a 'Retirement letter'; U.I. 2.8 form; U.I. 2.11 form and Retirement form. These are the 'documents' which MMI proposes are to be considered as a document on which the applicant's cause of action is based. The annexure is attached to the statement of claim in order to support the setting out of the material facts on which the claim is based. Its purpose is to demonstrate that MMI alleged that the applicant was subject to a retirement policy. The reliance on **Vermeulen v Goose Valley** is thus misplaced.

[8] MMI further relies on a dicta contained in the judgment of **Figo Putso Constuction CCv Lereko Mining Supplies (Pty) Limited** [6], an unreported judgment of the North Gauteng High Court. The judgment states that 'annexures to pleadings constitute pleadings themselves'. In that matter the annexures in question were what the plaintiff contended were "the written part of the agreement" relied on in its claim. The defendant contended that the particulars were vague and embarrassing and did not contain sufficient particularity in order to plead its defence. Again, these annexures were required to be annexed to the Particulars in terms of Rule 18(6) of the Uniform Rules in terms of which a written contract is required to form part of the Particulars of Claim. A defendant is required to plead to the Particulars reading these together with the written contract annexed thereto.

[5] Supra at paragraph 6 and 7
[6] (32630/13)[2014]ZAGPPC 134 (12 March 2014)

The dictum relied on here by MMI does not carry any wider import and reliance on it is misplaced.

[9] Applicant argues that the statement of claim does not allege that his employment was terminated in terms of Clause 6 of his contract of employment. Rather, his cause of action is that his contract was terminated in light of an alleged unwritten compulsory retirement policy applicable at MMI.

[10] I must agree. On a clear reading of the statement of claim, and in particular of Claim A, there is no reference to clause 6 of the written contract of employment nor do the allegations in the statement of claim referring to correspondence he received from MMI make mention of clause 6 of the contract of employment, but rather to his alleged compulsory retirement in June 2016.

[11] In view of my evaluation above, I find there is no merit to Complaint A.

Claim B of the Statement of Claim

[12] Applicant's statement of claim reads as follows in respect of Claim B:

> "CLAIM B
>
> UNFAIR DISCRIMINATION IN TERMS OF THE EMPLOYMENT EQUITY ACT ("EEA")
>
> 46. In the alternative and only in the event of the Court finding that there is an existing retirement policy or practice to which Applicant was bound and therefore that there was no repudiation or breach of Applicant's Contract of Employment, Applicant avers that:
>
> 46.1 The Constitution, Convention 111 of the International Labour Organisation and the Employment Equity Act recognises that all human beings, regardless of their position in society, must be

accorded equal dignity. Dignity is impaired when a person is unfair (sic) discriminated against.

46.2 Respondent has a duty to act in a fair, equitable and consistent manner which must be in accordance with the values and underlying principles espoused in the Constitution, which it failed to do;

46.3 The alleged retirement policy which Respondent seeks to rely upon is discriminatory and does not promote equal opportunity and fair treatment in the workplace. It further fails to redress the disadvantages experienced by designated groups and/or individuals as required by Section 2(b) of the EEA;

46.4 The alleged retirement policy further differentiates between persons younger than 60 and people older than 60. The aforesaid distinction, exclusion or preference has the effect of nullifying or impairing Applicant's equality of opportunity or treatment in his employment;

46.5 Respondent's discrimination on Applicant on age is a listed prohibited ground in terms of Section 6(1) of the EEA;

46.6 Applicant has never agreed nor was a term of his Contract of Employment as set out above to be subject to any such discriminatory policy or practice;

46.7 To the extent that Respondent relied on a policy to require Applicant to retire at age 60, Applicant seeks a declaratory that such a policy unfairly infringed upon his rights and seeks an award of damages, under section 50 of the EEA;

46.8 Respondent's alleged policy, as applied to Applicant, directly prevents Applicant from continuing in permanent employment with

Respondent. As such the policy discriminates against Applicant on the basis of his age;

46.9 Applicant has suffered damages due to the fact that his Contract of Employment was terminated on 30 June 2016 by Respondent in terms of the alleged retirement policy or practice;

46.10 Applicant suffered damages in the amount of R55 548 000.00 as at 1 February 2017 calculated and arrived at as set out in the report of Mr Smit attached hereto as "BK.11" as a result of the alleged policy or practice;

46.11 Applicant referred a dispute in terms of section 10 of the EEA to the CCMA and a certificate of no-outcome was issued on 31 March 2017."

[13] MMA's Complaint in as far as Claim B is concerned reads as follows:

"8. The applicant's Claim B is pleaded in the alternative "and only in the event of the court finding that there is an existing retirement policy or practice to which Applicant was bound".

9. In this event the applicant pleads that:

9.1 the retirement policy discriminated against him on the basis of his age.

(SOC para 48.8);

9.2 he has suffered damages "due to the fact that his Contract of Employment was terminated on 30 June 2016 by Respondent in terms of the alleged retirement policy or practice"

(SOC para46.9).

10. In terms of section 186(1)(a) of the LRA, the termination of an employee's employment by an employer is dismissal.

11. The alleged act of discrimination complained of is the applicant's dismissal in accordance with the respondent's retirement policy.

12. Section 187(2)(b) of the LRA provides 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."

13. Section 187(2)(b) of the LRA, means that a dismissal carried out in accordance with an applicable retirement policy or practice;

13.1 is fair, and

13.2 in particular, does not constitute an act of unfair discrimination.

14. The applicant cannot admit, on the one hand, that "there is an existing retirement policy or practice to which Applicant was bound" (SOC para 46), while on the other hand alleging that his dismissal was an act of unfair discrimination under section 6 of the Employment Equity Act 55 of 1998 ("the EEA").

15. The applicant's admission that there was an existing retirement policy or practice which applied to him is a concession that there was a "normal… retirement age for persons employed in [his] capacity" and consequently that:

15.1 his dismissal was fair; and

15.2 his dismissal was not an act of unfair discrimination.

16. For these reasons, as regards Claim B, the statement of claim fails to disclose a cause of action."

Evaluation of Complaint B

[14] Claim B is an alternative claim, premised on the trial court finding for MMI on Claim A, i.e.that there was no breach of contract because there was a retirement

policy to which the applicant 'was bound'. MMI submits that the Claim 'falls squarely' within the ambit of section 187 of the Labour Relations Act dealing with automatically unfair dismissals, in particular dismissals for the reason: "that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;". MMI refers to section 187 (2)(b) which in relevant part provides that:

"(2) Despite subsection (1) (f) -

(a) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job;

(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."

[15] MMI's Complaint to Claim B is thus premised on the following: that if a dismissal caused by unfair discrimination is considered fair under the LRA's Section 187(2)(b), it cannot amount to unfair discrimination under the EEA.

[16] Chapter 2 of the EEA applies to all employees (i.e. not just employees from designated groups) and reads:

"5 Elimination of unfair discrimination

Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. (my emphasis)

6 Prohibition of unfair discrimination

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

(2) It is not unfair discrimination to-

(a) take affirmative action measures consistent with the purpose of this Act; or

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job…….”

[17] It is noteworthy that section 6 of the EEA, while including the ‘inherent requirements of the job’ defence, as contained in the LRA, does not include any similar provision to section 187(2) (b).

[18] In the Court’s view, the submission made by MMI in respect of the LRA provision cannot be correct. The existence of a retirement policy cannot *per se* shield employers from an unfair discrimination claim. A simple example of this proposition is a situation in which the content of the policy differentiated between the ages of male and female retirees. In *casu* the applicant does not have knowledge of the content of the employment policy in question. He is unaware who it targets amongst the workforce or whether it applies to all levels of the workforce or in general, the way it has been applied in the past.

[18] Complaint B, while thought provoking, simply does not therefore stand scrutiny. The exception therefore cannot succeed. This is a matter in which costs should be awarded to the successful party. I therefore make the following order:

Order

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

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances

For the Applicant: LM Olivier SC with A de Wet instructed by Gillan & Veldhuizen Inc

For Respondent: G. Leslie with LW Ackermann instructed by Loouis van Zyl Attorneys