IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA/132/17

In the matter Between:

BMW (SOUTH AFRICA) (PTY) LTD **Appellant**

and

NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICA **First Respondent**

VAN DER BANK, MADELAIN **Second Respondent**

Heard: **22 August 2018**

Delivered: **17 October 2018**

Summary: Automatically unfair discrimination on account of age – issue for determination is whether the employee consented to the change of the retirement age from 65 to 60 or whether by her conduct acquiesced to such change – court held that employee's conduct leads to a finding on probabilities that she had acquiesced to the change and that the averment that she had submitted the form indicating her election to retain her retirement age of 65 not consonant with the evidence – Appeal upheld and Labour Court's judgment set aside.

Coram: Musi, Sutherland JJA and Kathree-Setiloane AJA

JUDGMENT

SUTHERLAND JA

Introduction

[1] There is both an appeal and a cross-appeal in this case. The second respondent, Van der Bank, (the respondent) was employed by the appellant who insisted she retire at age 60 years. Respondent claims this constituted an automatically unfair dismissal on grounds of age as contemplated by section 187(1)(f) of the Labour Relations act 66 of 1995 (LRA).[1] The Labour court upheld her claim and it is against that order that the appeal is lodged. The respondent also claimed damages for loss of earnings she alleges she would have earned if she had worked until age 65. That claim was dismissed and respondent has filed a cross-appeal against that order.

[2] The controversies for decision are these:

[3] Was there an actual "dismissal"? Appellant contends respondent retired at an agreed time and on that premise, the duration of employment terminated by effluxion of time; alternatively, if the time was not agreed, in any event, she

[1] The relevant portions of section 187 are:
(1) A *dismissal* is automatically unfair if the employer, in dismissing the *employee* …the reason for the *dismissal* is-
(a) ....(e)
(f) 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;
(g) ….(h)
(2) Despite subsection (1) *(f)*-
(a) ……
(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." It must follow that an onus lies upon an employer to establish the exception in section 187(2)(b).

retired at the "normal retirement age" of the appellant, hence no "dismissal" occurred.

[4] The fact of a "dismissal" turns on whether age 60 was an agreed retirement age or the normal retirement age and in particular whether such agreement or "normality" was established, by conduct in the form of waiver or acquiescence.

[5] By contrast, respondent contends that there was no consent given to her retiring at age 60, and furthermore, upon invitation from the appellant, she elected, in writing, to preserve her vested right, an allegation disputed by the appellant.

[6] Whether a claim by the respondent for damages for the loss of income because she was deprived of five years of employment was proven.

The Controversy

[7] There are a few hard facts in dispute.

[8] The appellant became employed by the appellant in 1986. It is common cause that her letter of appointment was silent about a retirement age. However, the letter incorporated a staff handbook by reference which did stipulate the age as 65. The appellant acknowledged this vested the respondent with that right.

[9] The handbook stipulated that its contents could be varied by the employer, ostensibly unilaterally. However, it is not the case of the appellant that it had a power to unilaterally vary the terms of the employment contract, at least insofar as the age of retirement is concerned and indeed, the appellant did not act as if it had such a right.[2]

[10] In 1994, change was in the air, not least of all within the appellant's organisation. For various reasons, irrelevant to this controversy, it was the wish of the appellant to have a uniform retirement age of 60. It pursued such a policy

[2] See, cf: *Erasmus and Others v Senwes Ltd and Others* (2006) 27 ILJ 259 (T). in this decision it was held that even where a unilateral power exists, it must be exercised reasonably.

change, including an engagement with its collective bargaining partners. At that time, its employees did not all belong to a single superannuation fund. Some belonged to a pension fund and others belonged to a provident fund. The respondent was a provident fund member.

[11] The details of the management and administration of this change to the retirement age are obscure. The appellant claims that in 1995, all employees were notified of the change, but as is evident from events in 1997, the management was not then confident that this really occurred. What is known is that an "inter office memorandum" addressed to pension fund members was supposedly put on a notice board on 28 March 1995. It stated that:

> 'The official company retirement age has now been changed to age 60. Those of you who indicated that you would like to remain at retirement age 65 will be able to do so…. We will make a list of all who specially indicated they would like to keep their retirement age at 65. If you are in doubt, please contact my secretary to confirm what your choice was.'

[12] The BMW Pension Fund board resolved on 5 July 1995 to amend the Rules as follows:

> 'Normal retirement date' shall mean for each member the last day of the month in which the member attains Age 60 years. Provided that each member who was a member on 31 January may elect the last day of the month in which the member attains age 65 years to be the members 'normal retirement date'.

The evidence discloses no similar resolution for the provident fund at this time.

[13] An undated "Managerial notice", not addressed especially to the pension fund members or the provident fund members and seemingly addressed to everyone, was put up on noticeboards which stated that:

> 'As you are aware the official retirement date has been reduced from 65 to 60 years of age with effect from 1 January 1995. This is applicable to all employees engaged from the above date onwards. It is however, the intention to extend this

> condition to all employees in line with current industry standards. Should this present a problem to any one they are requested to indicate in writing to the personnel department their choice to remain on a retirement condition of 65 years of age. This decision must reach the personnel department by not later than 31 May 1995.'

[14] On the evidence, no other form of communication addressed the content of this memorandum. It bears careful examination. Significantly, to belabour the point, these documents and the appellant's expressed stance, point towards the appellant recognising that it could not effect the change to the retirement age unilaterally. It chose to invite employees to put in writing the choice to preserve their rights, failing which the change would apply to them; ergo, absence a written objection, the term of employment would be changed. By implication, employees would be taken to have agreed, by way of an acquiescence to the change.

[15] The respondent says she was unaware of the changes in 1995. Her say-so, on this point, is not seriously challenged; indeed, it would seem likely that the 1995 changes did not affect her personally because the Fund to which she belonged was not yet affected.

[16] Two years passed. What exactly happened during this period is not addressed in the evidence. On 21 January 1997, an inter-office memorandum was addressed to all "BMW provident/non-contributory fund members." Its text is significant. It stated:

> Retirement age:
>
> 'A number of years ago a choice was given to members to elect to retire at age 65 or 60. At the same time the general retirement age was amended to 60 and is since then been a condition of employment. It appears that not all members were aware of this choice. Therefore, a further opportunity is provided to exercise your option if you were a member prior to June 1995.

Please complete the form below and return it to the personnel department before 24 March 1997'.

[*Below this text is set out a form calling for name, age, company number, and the legend with reference to two blocks next to "60" and "65":*

"I hereby elect a retirement age of [60] [65] "

[17] This notice alerts employees that the normal age of retirement is age 60. It cautions employees to react if they wish to be different. The implication is plain that absent a positive intervention by the employee the age of retirement shall be age 60.

[18] The evidence shows that, 10 months later, on 7 October 1997, a resolution to amend the rules of the BMW provident fund was taken to stipulate age 60 as the retirement date effective from 1 January 1997. Why the formalisation was performed retrospectively is unexplained.

[19] The respondent acknowledged that she was aware of this communication of 21 January 1997, a critical admission. She alleged, in her statement of case, that she responded positively to this communication. She filled in the form to elect to retain a retirement age of 65 years. She sent it to the personnel department *via* the internal mail. She kept no copy. She says after she sent it she called a person in the personnel department, whose identity she cannot now recall, to say that it was on its way. She did not follow up to confirm receipt. No direct evidence exists that the election form reached its intended destination. Self-evidently, this is a serious weakness in the respondent's assertion that it was indeed received but is by no means dispositive of that question.

[20] To these averments, the appellant alleged that it has no record of the receipt of such a form from the respondent. The veracity of this assertion is uncontested from 2010 onwards. As to the period 1997 - 2010, the possession of such a document is disputed. The appellant's case is that there was no such form submitted by respondent.

[21] The evidence adduced by the appellant included an exposition of the creation of appellant's database kept on SAP, a software program, onto which all company records were supposedly loaded from 1 March 1997, having formerly been kept both physically and on another software program, Huris. The 1997 data transfer was said by Swarts, the Information Technology techno-boff, who oversaw the process, to have experienced "glitches". The appellant, of necessity, relied on its SAP database, which might or might not have accurately been uploaded with all the staff documentation. Swarts said that staff details were uploaded in stages; the initial information being what was essential to run the payroll and items such as retirement dates later on. In my view, this method points towards significant vulnerability of faulty uploading. Nonetheless, this vulnerability is by no means proof that indeed a particular form was received.

[22] According to the respondent, she was blissfully unaware of any ambiguity about her retirement date until, as a result of others grumbling in the office she applied her mind to her benefit statement from the Fund Administrator in January 2010; ie fully 13 years after the time she claims to have made the election. She read on her annual benefit statement for 2010, that her retirement date was recorded as her 60th birthday which she claimed was wrong as it ought to have been her 65th birthday. She rummaged about her records and found that the benefit statements for 1998 and 1999 stated her retirement age was 65. Only thereafter from 2000 onwards, was it stated differently. As a result, she approached Kelbrick, the head of personnel.

[23] However, prior to her approaching Kelbrick, other events had occurred, beyond her ken.

[24] These events concern discrepancies between the records of the appellant and those of the retirement fund managers which came to light in 2001. This is explained in a letter written on 15 May 2001 by Yvette Badsha, the Divisional Manager of NBC, the Fund Administrator to the appellant to address an erroneous reflection on the benefit statement of retirement ages as 65 and not

60. He apologised and said it was now corrected. This letter goes hand in hand with an undated letter by one, Fegbeul, the chairman of the Board of trustees of the Fund, sent to members. The evidence was that the letter was attached to benefit statements for 2001. It was headed: "Your normal Retirement age". It stated that: "According to our records [ie that of the Fund, not the employer] your normal retirement date is recorded as age 60. A number of members have queried this and the purpose of this note is to give you background.[3]" The letter goes on to recount the history of the changes. It then stated; "What should you do if your records reflect that you elected to retain a Normal retirement age of 65?"…Should your records reflect that you elected to retain your normal retirement age of 65 you are asked to contact your personnel department." Also, members having queries were directed to contact the principal officer of the Fund, Greyling, directly.

[25] Another episode occurred which is relevant to the controversy. Albert Vorster, an employee became aggrieved when he noticed that his retirement date had been changed to age 60. He protested. He alleged he had submitted a form electing age 65. He could not produce a copy. The Board of the appellant met and resolved to accept his say-so. This decision was ostensibly eased by the fund administrator claiming that it had erred, though in what respect was never disclosed. Years later, after retiring, when clearing up after his wife had died, Vorster came upon the copy of his election form he had kept and could not produce at the time it was initially asked for. This evidence was adduced to "prove" that his form was lost by the appellant and did not get captured on the database. Might the same be the case with the respondent? In my view, this evidence does not prove that Vorster sent a form, though the "copy" is strong evidence that he probably did so; whether Vorster's form was actually *received* is an open question. The respondent is a position weaker than that of Vorster

[3] Apparently, a group of aggrieved employees, led by one Jones, had raised the issue, thereby provoking a re-examination.

because there is no objective corroboration, in the shape of a copy of the form, that can be presented.

[26] The respondent, in evidence, said she did not know if she got a copy of the 15 May 2001 letter to members. No direct proof of the letter being sent to anyone exists. On the probabilities, if indeed it was attached to an annual benefit statement, she probably would have got it. Other evidence by the respondent does not suggest that she failed to get all of her annual benefit statements. It must accordingly to taken as established that she did not react to the invitation, if it was, indeed, received by her. It was, however, argued that had she read it she would have had good cause to think it did not apply to her. That is incorrect; the 2000 benefit statement, and all that followed thereafter, stated her retirement age as 60, and all she needed to do was refer to the latest Fund statement to check her own position.

[27] To return to the events of 2010, in January, Kelbrick and respondent met and discussed the issue of her benefit statement "error" about her retirement date. Kelbrick's recollection of what was said is that the focus was on the erroneous recordal of the retirement date. It was in that context that he referred her to the Fund Administrators. What the evidence reliably reveals about this episode is what was captured in respondent's letter of 25 January 2010 to Kelbrick after their meeting. The text of what is recorded is important:

> 'As per your suggestion I contacted Roy Rouke at our retirement fund and he suggested that I take up the matter with you as the date was changed during 2000 by BMW and not by Alexander Forbes. I have documentation up to 1999 stating that my normal retirement date is …age 65 – see attachments. *I do not recall agreeing to any change and therefore request that my retirement age be corrected as 4 05 2019.*
>
> Kindly inform me when the above changes have been made.' (Italics supplied)

[28] The information given to the respondent resonates with the letter of Badsha of 15 May 2001. Notably, no allusion was made by the respondent that she submitted

an election form in 1997. Kelbrick denied flatly that the submission of a form was mentioned in their discussions in 2010, and this e-mail corporates that allegation. Moreover, the emphasised sentence, as cited, is inconsistent with an assertion that a positive election had been made and the choice was age 65. The distinction is significant.

[29] Kelbrick replied to the respondent on 9 March 2010:

> 'Whilst it is acknowledged that a retirement date of 65 appeared on certain benefit statements from the retirement fund …..this was not the information held by the company.
>
> The company changed the retirement age from 65 to 60 during 1995 and gave associates who were employed at the time the opportunity to inform it in writing that they wished to remain on retirement age 65. *We have checked our records and can confirm that we do not have such a notification from yourself.*
>
> It must therefore be concluded that, unless you can prove that such a letter was in fact submitted by yourself at the time, your retirement age is 60 years.' (italics supplied)

[30] This letter ended the exchanges between Kelbrick and the respondent. It must be inferred from these exchanges that the only allusion to a form being submitted was in Kelbrick's explanation of his own enquiries into the records, not a claim by the respondent to having submitted a form. No allegation is made in any follow-up by the respondent that she had done so. An additional aspect to note is the allusion to "1995" rather than to "1997". The tenor of Kelbrick's remarks is consistent with the tenor of the communications of that time, cited above; ie absent an objection, the employee is subject to the change to age 60. If the respondent had said then, as she pleaded in the Labour Court that she had submitted a form in 1997, this reply to her could not have been articulated in this way.

[31] There the matter lay, for about a further three years, until 2014, when respondent's 60th birthday loomed. By then, she had joined NUMSA, sometime in 2013, who it must be presumed, gave her assistance in furthering the matter.

[32] On 7 January 2014, she reopened the controversy when she wrote to the appellant:

> 'As discussed…. *I did not accept the change of retirement date when it was changed after my employment date*
>
> BMW needs to prove that I did accept the change (which I did not). The onus is not on me to prove this…… '(Italics supplied)

[33] The respondent then launched a formal grievance on 31 March 2014. She articulated it thus:

> 'I am pressurised to retire at the age of 60 as opposed to the age of 65, I require proof from the company showing we where I accepted this change."

[34] The tenor of this grievance is a demand that her employer adduces proof to her of her acceptance. Why say this if, in her mind at that time, she knew she had made an election to remain at 65?

[35] The grievance was rejected, on the basis that no documentation could be found or produced by the respondent to show her retirement age was 65.

[36] A further grievance at a higher level was lodged on 8 April 2014. She articulated it thus:

> 'I am pressurised to retire at 60. I require proof from the company….showing me *where I signed that I accept this change*. Employment contract was 65….Change was unlawful.' (Italics supplied)

[37] The articulation of the grievance is inconsistent with a claim that she had made an election. It is glaringly obvious that absence of any reference to a claim that she had indeed submitted the form.

[38] Again, her grievance was rejected. Again, a lengthy exposition by the appellant was given as to why the grievance was rejected. The essential rationale articulated was identical to the outcome of the first grievance enquiry. The portion that is pertinent to the controversy before the court reads thus:

> 'To date two critical pieces of evidence have not been submitted by the employee proving how she took responsibility to keep on file her own proof of retirement age being 65 and not 60:
>
> (i) The 1995 option form completed by the employee to indicate choice of retirement age being that of 65.
>
> (ii) The employee's written response to the corrections made by the principal officer following her email enquiry of 26 January 2010.'

[35] It was argued that this text supported the proposition that she had made a claim to have submitted a form. The argument must fail. Over and above the need to assess evidence holistically, this text blandly records the demand of the employer for evidence of making an election, not a recordal of her claiming she made one.

[36] The respondent, under duress, retired and then litigated her dispute. In her statement of claim for the first time is the averment made that she had made an election and sent in a form.[4]

[37] A traverse of the correspondence shows inconsistency with the notion that her case had always been that she had submitted an election form in 1997. Rather

[4] The respondent had to depose to a condonation affidavit relating to late filing of a statement of case. The condonation issue is immaterial to this judgment. The content of the affidavit is, however, alleged to be material to the credibility of the respondent. With reference to her January 2010 meeting with Kelbrick she says that Kelbrick said to her that she had to provide the form that "…. I had completed in 1995/1997'. She informed him that she did not have a copy of the option form. It was suggested that the hedging remarks about the date, ie 1995/1997' lent weight to the inference of mendacity. I am unimpressed by this particular contention because it seems to me that the drafter of the affidavit, who, certainly was not the respondent herself, sought to hedge, and is so often the case with lay litigants, she was deferential to formulations presented to her by her then advisers. However, as regards the probabilities that need to be assessed, the allusion to the respondent's request to be provided a form is not echoed in the contemporaneous exchanges, as already traversed earlier in this judgment.

there is a consistent thrust that she never surrendered her vested right and she demanded, rhetorically, that her employer prove that she had surrendered it.

[38] It is not possible to ignore the gear change in her case from 2014. A belated claim articulating a submission of an election form is a weakness in her case because it would have been expected that such a pivotal act on her part would be the central bone of contention. It was argued that the tone and content of the correspondence must be read to mean that she, at least, implied that she had submitted a form. Regrettably, for the respondent, the exchanges cannot be fairly read to reach that outcome. Indeed, the tenor of the recorded exchanges including the grievances is that she was repeatedly asked for a copy of the election form but did not counter this by saying that she had submitted the form. Were it otherwise, the grievance reports would necessarily have alluded to her claim of a submission of such a form and that no record was in existence to corroborate the claim. The repeated articulation of a demand to show her where she accepted age 60 is inconsistent with her pleaded claim that she made a positive election to retain age 65.

[39] In my view, the respondent's assertions are properly to be questioned and their shortcomings and anomalies self-evident.

[40] On a totality of the facts, the probabilities are against the respondent's version. In my view, the Court *a quo* never engaged with these issues and in that regard misdirected itself. Its premise was that because the appellant had lost the forms, at least of Vorster, and could not reliably deny receipt of forms, the case of the respondent that she had submitted the form was proven. That premise unduly exaggerates the significance of the appellant's inability to put up a positive rebuttal of receipt of a form; indeed, there is no evidence it was received.

[41] Ultimately, the case to be decided is the case put up by the respondent: did she or did she not submit an election form retaining age 65, or did she acquiesce in the changes. This should not be thought to be reversing the *onus*; the respondent's burden was limited to a burden to adduce evidence of her averment

that she submitted a form which her employer received. Absence a positive finding that the probabilities show that she did elect as alleged, the appellant's case that she acquiesced is made out, by reason of the length of time that elapsed since the change was made, initially until 2010, and then a further period of acquiescence until 2014.

[42] Her claim to have made an election cannot be found to be true.

Conclusions

[43] The finding must, therefore, be that the appellant did not transgress section 187(1) (f) of the LRA. The respondent's employment was terminated at the age constructively agreed upon and, thus, the normal age.

[44] Accordingly, the appeal must succeed.

[45] The counter claim by the respondent in respect of her loss of income earning opportunity to the age of 65 is axiomatically dependent on the dismissal of the appeal. Because the appeal has succeeded the cross-appeal must therefore fail.

[46] As to costs, in the circumstances, no order shall be made in respect of the appeal and cross-appeal, nor of the proceedings *a quo*.

The Order

(1) The appeal is upheld.

(2) The cross-appeal is dismissed.

(3) The whole of the order of the Labour Court *a quo* is set aside and substituted with:

"The Application is dismissed".

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Sutherland JA

Sutherland JA (with whom Musi JA and Kathree–Setiloane AJA concur)

APPEARANCES:

FOR THE APPELLANT:	Adv F Boda SC, with him, Adv G Van Der Westhuizen,
	Instructed by Norton Rose Fulbright Inc.
FOR THE RESPONDENTS:	Adv A-M De Vos SC, with her, Adv I de Vos,
	Instructed by Ruth Edmonds.