IN THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PR98/18

In the matter between:

THE NATIONAL UNION OF METALWORKERS

OF SOUTH AFRICAN **First Applicant**

ABA AND 183 OTHERS **Second and Further Applicants**

and

TRANSNET PORT TERMINALS

(A DIVISION OF TRANSNET SOC LTD) **First Respondent**

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **Second Respondent**

MANDY COETZEE N.O **Third Respondent**

Heard: **15 May 2019**

Delivered: **5 June 2019**

JUDGMENT

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MAHOSI. J

Introduction

[1] This is an application brought by the first applicant (NUMSA), on behalf of the second and further applicants, in terms of section 158(1)(g) of the Labour Relations Act (LRA) for an order to review and set aside a jurisdictional ruling (the ruling) issued by the third respondent (commissioner) under the auspices of the second respondent, Commission for Conciliation, Mediation and Arbitration (CCMA) dated 16 April 2018, under case number ECPE4470-14.

[2] Prior to outlining the applicant's claims in detail and considering the issues which give rise to them, it is necessary to summarize the facts that form the relevant background to the dispute between the parties.

Background

[3] On 02 August 2014, subsequent to the first respondent's failure to employ the second and further applicants, NUMSA referred an unfair discrimination dispute to the CCMA. The dispute was unsuccessfully conciliated on 29 September 2014 and was then referred to arbitration, which was scheduled for 23 to 26 November 2014. The arbitration did not proceed as the dispute was withdrawn on 24 November 2014.

[4] On 16 April 2016, NUMSA filed an application to withdraw the notice of withdrawal of the dispute and to have the dispute reinstated, which application was coupled with condonation application. In opposing NUMSA's application, the first respondent raised a point that the CCMA lacked jurisdiction to arbitrate the dispute as the dispute arose on 30 July 2014. The first respondent's contention was that, by referring the dispute to the CCMA, NUMSA had incorrectly relied on section 10(6) of the Employment Equity Act[1] (EEA) that came into effect on 1 August 2014.

[5] Having recorded the arguments in respect of the jurisdictional challenge, the commissioner issued a ruling in terms of which she found that the CCMA lacked

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[1] Act 55 of 1998 as amended.

jurisdiction to arbitrate the dispute. It is this ruling that is the subject matter of this application.

The ruling

[6] In her ruling, the commissioner recorded that the issue before her was whether or not the CCMA had jurisdiction to arbitrate the dispute, given the fact that the dispute arose prior to the date on which the amendments to the EEA took effect, namely 01 August 2014.

[7] In consideration of the arguments before her, the commissioner's point of departure was that it was settled law that there is a general presumption against retrospective application of statutes, the basis of which appear in her award as follows:

> '13. The issue was dealt with by the Supreme Court of Appeal in *Unitrans Passenger Coach Lines v Chairman National Transport Commission and Others* (1999) 4 SA 1 (SCA) where the Supreme Court of Appeal as well as the Labour Court in *Bandat v De Kock and* Others (2015) 36 ILJ 979 (LC) with both courts confirming the position that no statute is to be construed as having retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws), unless the legislature clearly intended the statutes to have that effect.
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> 14. In my view, similar to the issue at hand, the court in *Bandat* dealt with the issue of the statute amending a procedure - specifically the change in onus brought about by the amendments to section 11 of the EEA. The court concluded that the amendments do not apply retrospectively, unless the contrary intention appears from the legislation. It does not. I am of the view that the same approach should be applied to the application of Section 10(6) as it would be absurd for the Labour Court to have approached the enquiry in a fragmented fashion.
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> 15. Counsel for NUMSA on behalf of its members argued that amended EEA essentially creates a choice of forum despite the cause of action straddling between two dispensations further suggesting that the choice of forum has no prejudice to Transnet.

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16. However, the EEA contains no transitional arrangements relevant to the issue at hand and thus the presumption arises. The presumption may be rebutted if there exists particular consideration of fairness and equity to do so and if it can be gathered from the EEA that the legislature intended to be retrospective. At this juncture, it is also prudent to briefly consider that the distinction between amending statutes affecting substantive rights and those affecting procedural rights is no longer regarded as being decisive. In any event, In my view, the substantive rights of the employees cannot be affected by choice of forum which adjudicated or arbitrates the matter as the choice of forum cannot diminish substantive rights. The right continues to exist despite the forum. Even if I am wrong, this was not the argument of the union on behalf of its members.

17. One would thus then have to consider the impact the choice of forum has on the employer. It is common cause that the powers of the CCMA have been significantly increased in relation to the wide-ranging relief it may award and the right of appeal now catered for. Can it be just and fair to subject the employer to relieve which did not exist at the time when the course of action arose? My inclination would be to agree with the arguments put forward by counsel for Transnet. And if it would not be just and fair to do so, then the position favouring the jurisdiction of the CCMA should be rejected. The considerations of fairness and equity in this instance it would seem, do not then invalidate the presumption against retrospectivity.

18. On the issue of retrospectivity, a similar position arose during the transition from the 1956 LRA and the amended 1995 LRA with a change in forum from the industrial courts to the CCMA, all claims pending and which arose before the industrial court had to be finalised under it.

19. While the argument in relation to choice of forum is a seductive one, I am not persuaded that this is what was intended by the legislature. For reference one would not have to look further than the wording of the very EEA in section 10(6) where it prescribes the dispute resolution path. If the legislature intended the dispute resolution path to be one of election despite the date on which the cause of action arose, it would have said so. It does not. The legislation makes no mention of any form of retrospective

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> application and thus one must accept that the legislature is forward looking.'

[8] It was on the basis of the above reasons that the commissioner found that the CCMA has no jurisdiction to arbitrate the dispute. Dissatisfied with the arbitrator's ruling, NUMSA brought this application.

Grounds of Review

[9] The applicant's contention was that the commissioner incorrectly failed to assume jurisdiction to arbitrate the dispute, committed material errors of law, and consequently arrived at an outcome that was both incorrect and unreasonable when she concluded that, on the proper interpretation of the EEA and the fact that the amendments took effect from 1 August 2014, the dispute referred to the CCMA fell to be adjudicated by the Labour Court.

[10] The applicant's further contention was that the commissioner failed to appreciate that the correct interpretation was that the applicant's election is to opt for the forum that they wished to approach, since the amendments had already taken effect when the dispute was referred, be it the Labour Court or the CCMA.

[11] In its supplementary affidavit, the applicant contended that the commissioner erred when she conceptualized the issue to be determined as one concerning whether or not the amendments to the EEA were intended to operate retrospectively. In support of its contention, the applicant submitted that the commissioner was only asked to apply the law as it stood already as at the time when the applicant had to take the next step in the dispute referral process, that is to proceed to arbitration or to the Labour Court for adjudication.

[12] In addition, the applicant submitted that, even if it was wrong in the above submission, the commissioner erred when she found that there was no basis for concluding that the amendments in question did not operate retrospectively. The applicant's view was that some amendments could operate retrospectively and others not. Further that the commissioner had to consider the specific process amendments that had been introduced, and ask herself whether the

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interest of the employer would be unfairly harmed by allowing the applicant to advance the dispute in terms of those amended provisions.

The first respondent's submissions

[13] In opposing the application, the first respondent's contention was that there is a strong presumption against applying legal provisions which were not in existence at the time that the parties' cause of action arose. Further that there has to be strong indications in statute itself for it to be interpreted in this way. The first respondent took a view that labelling the provisions as procedural or substantive in not useful or helpful in this process particularly in the field of labour law.

[14] The first respondent's further contention was that at the time the dispute arose, the individual applicants were not a party as defined in section 10(6)(aA) since the category of employees earning below the threshold had not yet been created.

[15] Furthermore, the third respondent's contention was that there can be no disadvantage to the applicants to have the mater heard in the Labour Court now, rather than the CCMA in due cause.

Interpretation of Section 10 of the EEA

[16] The real question before the commissioner and before this Court was whether the amendments of section 10(6) of the EEA applied to all referrals of unfair discrimination disputes to the CCMA for arbitration, made after 1 August 2014, and whether the CCMA has jurisdiction to arbitrate over disputes which cause of action arose before the amendments to section 10(6) and were referred to it in terms of that section.

[17] Before answering these questions, it is apposite to set out the legal position before and post the amendments.

[18] Prior to the amendments to the EEA, an alleged unfair discrimination dispute could be referred to the CCMA for conciliation. If a dispute was not resolved at conciliation, a party could refer it to the Labour Court for adjudication. The parties to a dispute could also agree to refer the dispute to arbitration.

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[19] Section 10(6), as amended in term of Employment Equity Amendment Act,[2] that came into operation on 1 August 2014 reads as follows:

> '(6) If the dispute remains unresolved after conciliation-
>
> (a) any party to the dispute may refer it to the Labour Court for adjudication;
>
> (aA) an employee may refer the dispute to the CCMA for arbitration if-
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> (i) the employee alleges unfair discrimination on the grounds of sexual harassment; or
>
> (ii) in any other case, that employee earns less than the amount stated in the determination made by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act; or
>
> (b) any party to the dispute may refer it to the CCMA for arbitration if all the parties to the dispute consent to arbitration of the dispute.'

[20] Legal principles relating to statutory interpretation are well documented and have served before the courts innumerable times. In a line of authorities, a general consensus has settled at a position that in our jurisprudence legislation is not intended to be retroactive, nor retrospective.[3] However, the rule of construction is that even if a new statute is intended to be retrospective insofar as it affects vested rights and obligations, it is nonetheless presumed not to affect matters which are the subject matter of pending legal proceedings. In an earlier English case of *Yew Bon Tew v Kenderaam Bas Mara*[4] Lord Brightman said that:

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[2] Act 47 of 2013.
[3] *See: S v Mhlungu and Others* 1995 (3) SA 867 (CC) at paras 65-67).
[4] [1982] 3 All ER 833 at 836.

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> 'Whether a statute is to be construed in a retrospective sense, and if so to what extent, depends on the intention of the legislature as expressed in the wording of the statute, having regard to the normal canos of construction and to the relevant provisions of any interpretation statute.'

[21] The Court held in that matter, that a proper approach to the construction of an amending statute is not about deciding what label to apply to it, whether it speaks to issues of procedure or not, but to see whether the statute, if applied retrospectively to a particular type of matter, would impair existing rights and obligations. It is clear from the decision that presumption is subject to exception in matters of a statute which is purely procedural. There is a presumption against the reading of legislation as being retrospective with the impression that while it takes effect only from the date of commencement, it impairs existing rights and obligations.

[22] The Supreme Court of Appeal (SCA) in *Kaknis v Absa Bank Limited and Another*[5] endorsed the principle that a statute is presumed not to apply retrospectively, unless it is expressly or by necessary implication provided in the relevant legislation. It held that the reason behind this principle is that the legislature, by amendments, only intends to regulate future matters. It is apposite as this point, to quote the example laid out by the SCA in respect of interpretation.[6]

> '[14] It has been held that the crux of the matter is not the prospectivity or retrospecitivity of legislation as such, but the fair treatment befalling those subject to the legislation should the legislation be held to apply in that manner. Nevertheless, where the statutory provision confirms the existing law, it is not a case of true retrospectivity, since true retrospectivity means that at a past date, the law shall be taken to have been that which it is not. <u>Thus, if the legal position is A, and enactment X is designed merely to confirm A, then it cannot be said that, subsequent to the promulgation of X, the legal position has become A. Accordingly, true retrospectivity can only become an issue once X replaces, amends of supplements A</u>.

[5] [2017] 2 All SA 1 (SCA); 2017 (4) SA 17 (SCA)
[6] Ibid at para 14.

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[23] The minority of the Court, in a cautionary note, held however that presumptions are merely an aid to interpretation and must yield to the intention of the legislature as it emerges from any particular statute. In order to answer the question whether a statue has retrospective operation is not a mere inquiry of substantive law or matters of procedure. The true enquiry, according to the Court, is always ascertaining what the intention of legislature was.

[24] Guided by the authorities referred to above, I turn now to the question at hand and that is whether the amendments that were brought by section 10(6) have retrospective effect, that is, do they impact on existing substantive rights or do they make available a new cause of action to the applicants' members.

[25] It is common cause that prior to the introduction of section 10(6), the position in our law was that disputes about unfair discrimination had to be referred to conciliation and should conciliation fail, the dispute would then be referred to the Labour Court for adjudication. In terms of the amendments introduced by section 10(6)(aA), an employee may refer such a dispute to the CCMA for arbitration subject to provisions contained in sub sections (i) and (ii). What section 10(6)(aA) does is to confer powers on the CCMA to arbitrate such disputes. However, does this mean that the insertion of section 10(6)(aA) is to apply retrospectively as contended by the applicants? I deal with this issue hereunder.

[26] The Court was referred to a decision of *Eskom SOC Ltd v De Wet NO and Another*[7], where Basson AJ, dealt with a dispute relating to the interpretation of section (10)(6)(b). In that matter, the Court was concerned with a dispute where the parties had agreed, in terms of the provisions of section 10(6)(b) to have the dispute arbitrated at the CCMA. At arbitration, an objection was raised however that the CCMA lacked jurisdiction as the claim or cause of action arose before the amendments came into operation and that the claim had to be assessed against the law that was in force and that was applicable at the time when the claim was instituted, being 14 August 2014. The Court drew a distinction between situations where the amending statute comes into operation before the procedure is initiated and a case where the amending statute comes

[7] (2018) 39 ILJ 2715 (LC).

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into operation after the procedure has been initiated and is still pending. At paragraph 11, the Court referred with authority to the decision in *Bandat v De Kok and Others*[8] where Snyman AJ, found that the EEA does not apply retrospectively to pending proceedings.

[27] The facts in his matter are distinguishable from the facts in *Eskom*[9]. In that matter, the parties had agreed that the matter be arbitrated by the CCMA. The Court found that the commissioner in that matter was correct in rejecting the applicant's jurisdictional challenge, as the amendments allowed the parties to reach an agreement that the unfair discrimination dispute be referred to the CCMA.

[28] The applicants argue that the commissioner ought to have found that the correct interpretation should be that it had an election as to the forum they wished to approach, since the amendments had already taken effect when they had to refer the dispute for adjudication by the Labour Court or arbitration by the CCMA. This argument is flawed. As I understand it, the amendment was to confer certain powers on the CCMA and not to provide an election on the applicants whose cause of action arose prior to the amendments. On this score, the commissioner, refusing not to be drawn to this debate stated that '*while the argument in respect of choice of forum is a seductive one, I am not persuaded that this is what was intended by legislature'.* [10] I agree. To argue in this line would mean that the applicants are availed to the relief that did not exist at the time when the cause of action arose.

[29] I align myself with the proposition in *Kaknis,*[11] that the legislature is presumed to know the law. The insertion of section 10(6)(aA) was to cloth the CCMA with powers to arbitrate certain disputes that arise under the EEA. There does not seem to be an intention however, to afford parties with a choice of abandoning procedural steps undertaken under the pre-amendments and bringing those under the benefits of the amendment. That is to say, the introduction of section 10(6) itself says nothing about retrospectivity. To my mind, this would disturb

[8] (2015) 36 ILJ 979 (LC)
[9] N 6.
[10] Ruling at para 19
[11] Supra n 4.

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the esteemed principle that amending legislation will affect only future matters and not take away existing rights and further bring chaos to the cause of effective dispute resolution.

[31] Having undertaken the cause of the judgment in the manner that I have above, I deem it not necessary to deal with the grounds of review. The commissioner in this regard, issued not only a well-reasoned award, but demonstrated a reasonable understanding of the related legal principles. Her award is insurmountable and cannot be disturbed on review.

[32] In support of its contention, the applicant submitted that the commissioner was only asked to apply the law as it stood already as at the moment when the applicant had to take the next step in the dispute referral process, that is to proceed to arbitration or the Labour Court adjudication. This argument is not sustainable, for the fact that there is no transitional provision to be found in the amendments to the EEA.

Costs

[33] In deciding on the issue of costs, even though parties argued for costs, and in using my discretion, I am of the view that this is not a matter that should attract an order for costs.

[34] In the premises, I make the following order:

Order

1. The application to review and set aside the jurisdictional ruling issued by the Third Respondent under case no: ECPE4470-14 is dismissed.
2. There is no order as to costs.

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D. Mahosi

Judge of the Labour Court of South Africa

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Appearances:

For the Applicant: Advocate H Van der Riedt SC with Advocate F.E. le Roux

For the First Respondent: Advocate TMG Euijen SC

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