THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case No: DA4/2022

In the matter between:

BATA SA (PTY) LIMITED **First Appellant**

SCRIBANTE LABOUR CONSULTANTS **Second Appellant**

And

SACTWU obo MEMBERS **First Respondent**

LISA WILLIAMS DE BEER N.O **Second Respondent**

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Third Respondent**

Heard: **2 March2023**
Delivered: **23 April 2024**
Coram: **Waglay JP, Coppin JA and Savage AJA**

JUDGMENT

WAGLAY, JP

Introduction

[1] This is an appeal against the judgment of the Labour Court in which the application to review and set aside the arbitration award of the second respondent was granted and it was ordered that the dispute be remitted to the Commission for Conciliation, Mediation and Arbitration (CCMA) for arbitration *de novo*.

Condonation

[2] The first and second appellants (appellants) have sought condonation for the late filing of the appeal record and the reinstatement of its appeal. The first respondent (SACTWU) has filed a notice to abide by the decision of this Court in respect of the condonation application. Having considered the reasons for the delay and the length of the delay in filing the record of appeal I am satisfied that condonation for the late filing of the record be granted, and the appeal be reinstated.

Background

[3] Scribante Labour Consultants (second appellant) operates as a temporary employment service (TES) and BATA SA (Pty) Ltd (first appellant) is its client. A number of employees were procured by the second appellant to provide services to the first appellant, including members of SACTWU. On 11 January 2019, SACTWU, on behalf of its members, referred a dispute to the CCMA in terms of section 198D regarding the interpretation and application of s 198A.[1]

[4] The Union contended that its members had been placed with the first appellant for a period exceeding three months and thus were deemed to be employees of the first appellant. It further contended that its members were being treated less favourably than the other employees of the first appellant in respect of their wages and conditions of employment, and argued that, to the extent that a monetary value could be determined in respect of the disparity in treatment, the commissioner was

[1] Section 198A of the Labour Relations Act 66 of 1995, as amended provides as follows:

'(1) In this section, a 'temporary service' means work for a client by an employee –
(a) for a period not exceeding three months;
(b) as a substitute for an employee of the client who is temporarily absent; or
(c) in a category of work and for any period of time which is determined to be a temporary service by a collective agreement concluded in a bargaining council, a sectoral determination or a notice published by the Minister, in accordance with the provisions of subsections (6) to (8).

…

(3) For the purposes of this Act, an employee –
(a) performing a temporary service as contemplated in subsection (1) for the client is the employee of the temporary employment services in terms of section 198 (2); or
(b) not performing such temporary service for the client is –
(i) deemed to be the employee of that client and the client is deemed to be the employer; and
(ii) subject to the provisions of section 198B, employed on an indefinite basis by the client.

…

(5) An employee deemed to be an employee of the client in terms of subsection (3) (b) must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment.'

empowered in terms of s 198D[2] to quantify such monetary amount and to make a monetary award to such an effect.

[5] The appellants on the other hand argued that s 198D did not grant the commissioner the power to quantify the financial effect of alleged disparate treatment or to make a monetary award as prayed.

Arbitration proceedings

[6] A number of preliminary issues arose during the arbitration proceedings including the number of the employees affected; their dates of employment; details of the employees who were dismissed and whether they should be a party to the proceedings; and, the details of the employees' wages. The appellants objected to the list of affected employees provided by SACTWU, who were the claimants in the application, on the basis that many of the listed employees were no longer employed by the first appellant and had not been employed for a considerable period of time.

[7] The parties agreed to attempt to agree on the dates of employment and termination. The parties were unable to reach an agreement on the dates of engagement of the employees but accepted that various categories of employees were involved, including:

7.1 those whose services had been terminated within a period of six months prior to 11 January 2019 and thus were not employed at the time the referral to the CCMA was made;

7.2 those who were employed at the date of the referral but whose services had been or may have been terminated prior to the finalisation of the arbitration; and

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[2] Section 198D provides as follows:

(1) Any dispute arising from the interpretation or application of sections 198A, 198B and 198C may be referred to the Commission or a bargaining council with jurisdiction for conciliation and, if not resolved, to arbitration.

(2) For the purposes of sections 198A (5), 198B (8) and 198C (3) (a), a justifiable reason includes that the different treatment is a result of the application of a system that takes into account –
(a) seniority, experience or length of service;
(b) merit;
(c) the quality or quantity of work performed; or
(d) any other criteria of a similar nature,
and such reason is not prohibited by section 6 (1) of the Employment Equity Act, 1998 (Act 55 of 1998).

(3) A party to a dispute contemplated in subsection (1), other than a dispute about a dismissal in terms of section 198A (4), may refer the dispute, in writing, to the Commission or to the bargaining council, within six months after the act or omission concerned.

…

(5) If the dispute remains unresolved after conciliation, a party to the dispute may refer it to the Commission or to the bargaining council for arbitration within 90 days.'

7.3 Those who were employed at the date of the referral and remained employed for the duration of the arbitration proceedings.

[8] The appellants submitted that s 198A only gave the CCMA the power and jurisdiction to grant declaratory relief as to whether the employees were deemed to be employees of the first appellant and whether there existed a disparity in treatment. The appellants argued that should the above be answered in the affirmative, any redress available to SACTWU had to be based on the other provisions of the Labour Relations Act[3] (LRA), alternatively, the provisions of the Basic Conditions of Employment Act[4] (BCEA) and further that any declaratory relief provided was limited to the employees who were still employed at the premises of the first appellant at the time such relief was granted.

[9] SACTWU's position was that there was no logical basis to adopt the approach referred to by the appellants as the wording and purpose of s 198D was that all disputes fell to be dealt with in terms of that section. It argued that the dismissal of the employees did not affect their right to equal treatment and that the employees remained party to the dispute referred to the CCMA.

[10] The commissioner noted that it was called to determine two issues; (i) whether s 189D applies to employees whose services had been terminated prior to the dispute being referred or heard; and (ii) whether the employees can recover back pay by way of a s 189D referral or whether a commissioner is limited to granting declaratory relief in terms of that section.

[11] The Commissioner found that, based on the Labour Court judgment in *Nama Khoi Local Municipality v SA Local Government Bargaining Council and others*[5] (*Nama Khoi*), only the employees who were still employed by the appellants at the time of the arbitration could be a party to the dispute and that all employees whose employment had been terminated prior to the date of the arbitration ruling were not entitled to approach the CCMA on the basis of s 198D.

[12] The Commissioner further found that, based on *Nama Khoi*, it was limited to granting relief that was declaratory in nature and that any further claims for back pay must be pursued in the appropriate forum. Accordingly, the Commissioner ruled that only those employees who were still employed at the time of the arbitration could be a

[3] Act 66 of 1995, as amended.
[4] Act 75 of 1997.
[5] [2019] ZALCCT 15; (2019) 40 ILJ 2092 (LC).

party to the dispute, that the matter be dismissed in respect of the employees whose employment had terminated prior to the arbitration proceedings and that the relief granted in terms of s 198D was declaratory in nature.

In the Labour Court

[13] SACTWU brought an application in terms of s 158(1)(g) of the LRA to review and set aside the ruling made by the Commissioner on the grounds that, in making the ruling, the Commissioner had made an error in law and incorrectly found that she did not have the necessary jurisdiction to determine the employees' claim against the appellants. The appellants submitted that they agreed with the conclusions reached in *Nama Khoi*, particularly where the court found that the relief provided for in terms of s 198D was declaratory in nature and that such relief was only limited to such employees who were still employed at the time the arbitration was heard.

[14] The court *a quo* was called to determine the correctness of the *dicta* in *Nama Khoi* relied upon by the Commissioner as SACTWU contended that the commissioner had incorrectly followed the *dicta* in making its ruling and in the alternative, that the *dicta* was wrong and should not be followed by the Court.

[15] The court *a quo* found that the court in *Nama Khoi* was incorrect as it failed to consider the provisions of s 138(9) of the LRA and had failed to provide justification for limiting the application of s 198D to that of declaratory relief. The court *a quo* held that there were a number of indications that s 198D was designed to be an all-encompassing provision for any dispute arising from the other provisions of the Act.

[16] The court *a quo,* as I have stated earlier, reviewed and set aside the CCMA award and held that the CCMA had jurisdiction in terms of s 198D to determine any dispute arising from the interpretation or application of ss 198A, 198B and 198C including but not limited to whether the deemed employees were treated on the whole less favourably than other employees of the client performing the same or similar work and, if it is determined that such deemed employees remuneration is less favourable than that of the other employees, to determine such monetary discrepancy and to quantify the back pay due to the deemed employees from the date on which s 198A(3)(b)(i) applied to the respondent workers. The court *a quo* ordered that the matter be remitted to the CCMA for hearing *de novo*.

[17] Leave to appeal was granted by the Labour Court on 9 February 2022.

The Appeal

[18] In 2014, the Labour Relations Amendment Act[6] introduced substantive amendments to the law concerning temporary employment services, fixed-term contracts and part-time employees to provide greater protection to workers and to further regulate non-standard employment. Section 198A(3)(b) of the LRA provides that an employee who is contracted through a TES to a client for more than three months and who earns less than the threshold is deemed to be employed by that client. Subsection (5) further provides that a deemed employee must be treated on the whole not less favourably than an employee of the client performing the same or similar work unless there is a justifiable reason for different treatment.[7]

[19] Section 198D sets out the general provisions applicable to ss 198A to 198C of the LRA and provides that any dispute arising from the interpretation or applications of the abovementioned sections may be referred to the CCMA for conciliation and, if not resolved, to arbitration.

[20] The Constitutional Court in *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa and others,*[8] in interpreting the provisions of s 198A, stated that the purpose of s 198A must be contextualised within the right to fair labour practices and within the purpose of the LRA as a whole and that every provision of the LRA must be read to create "*clear and precise parameters through which both employers and employees can meaningfully participate in labour relations*".[9]

[21] We now have two conflicting Labour Court judgments which deal with the question of whether s 198D gives a commissioner of the CCMA the power to grant relief in instances where employees employed by TES refer a dispute in terms of s 198D on the basis of being treated less favourably than an employee of the client performing same or similar work without justification and whether the relief in terms of s 198D is also available to dismissed employees.

[22] In *Nama Khoi*, the respondent employee was employed on two successive fixed-term contracts, each for a period of three months. Following the non-renewal of the

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[6] Act no. 6 of 2014.

[7] Section 198D(2) provides that a justifiable reason for the differentiation of treatment between deemed employees and the employees of the client includes that the difference in treatment is as a result of the application of a system that takes into account (i) seniority, experience or length of service; (ii) merit; (iii) the quality or quantity of work performed; or (iv) any other criteria of a similar nature and such reason is not prohibited in terms of s 6(1) of the Employment Equity Act.

[8] [2018] ZACC 22; [2018] 9 BLLR 837 (CC).

[9] Ibid at para 43.

second fixed-term contract, IMATU, acting on behalf of the respondent employee, referred a s 198B dispute to the bargaining council in terms of s 198D.[10] The core issue before the commissioner was whether the employee should be deemed to be appointed on an indefinite basis. The commissioner found that, by virtue of s 198B(5), the respondent employees were appointed on a permanent employment contract and ordered that the employee be reinstated with full retrospective effect. In its review application, the employer argued that the employee had not been dismissed as his fixed-term contract had expired and further that the referral of the dispute in terms of s 198D only relates to the interpretation or application of s 198B and does not give the commissioner the power to appoint the employee on a contract, for an indefinite period.

[23] The court in *Nama Khoi* considered the provisions of s 198D and held that the section makes it possible for employees to refer disputes about whether ss 198A, 198B and 198C apply while the employment relationship is ongoing, with the view to obtain declaratory relief as to the status of the employment relationship. It further said that –

'[35] I consider s 198D to be a process designed to be proactive. It places an entitlement in the hands of an employee party to remedy a state of affairs as contemplated by ss 198A, 198B and 198C during the currency of the employment relationship. Section 198D as a dispute-resolution process is not intended to be applied once the employment relationship has terminated. For that, employee parties already have the required protection in the unfair dismissal provisions of the LRA. My view in this regard is further informed by the fact that s 198D does not provide for the kind of relief as contemplated by ss 193 and 194, which only apply in the case of unfair dismissals and unfair labour practices. The relief that flows from s 198D can only be declaratory relief, which may well be moot if the employment relationship has ended by the time it falls to be decided.

[36] It is then in the above context that the interaction between the unfair dismissal provisions of the LRA and s 198B must be considered. I am not suggesting that s 198B cannot be applied once an employee has been dismissed. What I am however saying is that it can only be applied as part and parcel of an employee's case in an

[10] Section 198B deals with instances where an employee, earning below the earnings threshold, is employed on a fixed-term contract.

unfair dismissal dispute as contemplated by either s 186(1)(a) or 186(1)(b) of the LRA.'

[24] On the point of the referral of the dispute in terms of s 198D, the court held that the referral of an unfair dismissal dispute under s 198D amounts to an attempt to bypass the prescribed dispute resolution process as seeking to apply s 198B in a dispute referred to under s 198D could mean that an employee would not have to prove dismissal, and where a commissioner awards reinstatement, such an award is obtained without complying with any of the unfair dismissal provisions of the LRA.[11]

[25] Accordingly, the court held that IMATU had never sought to make out a case that the dismissal of the employee occurred and as such, could only obtain declaratory relief under s 198D to the effect that the employee was indefinitely employed. However, as the employment relationship was no longer in existence, declaratory relief would not be competent as "*it can hardly be said that someone that had already been dismissed is indefinitely employed*" and further that reinstatement could not be awarded if no dismissal had been proven in the first place.[12]

[26] The *court a quo* noted the findings of *Nama Khoi,* particularly the finding that as s 198D does not contain specific relief that may be granted when a dispute is referred, the only relief that can be granted must be declaratory in nature. The court *a quo* drew comparisons between the provisions of s 191 of the LRA and s 198D where s 191 similarly does not contain specific relief but that the relief for disputes referred under s 191 can be found under ss 158 and 193. On this basis, the court *a quo* held that it could not be said that relief granted under s 198D is limited to that of a declaratory order.

[27] The *court a quo* further held that *Nama Khoi* failed to consider the provisions of s 138(9) of the LRA which empowers a commissioner of the CCMA to make any appropriate award in terms of the LRA and that once it is established that a dispute must be resolved by way of arbitration, as set out in s 198D, then the relief a commissioner may grant is governed by s 138(9) in the absence of any specific relief in s 198D.

[28] The court *a quo* held that –

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[11] See *Nama Khoi* paras 38 – 41. See also *National Union of Metalworkers of SA on behalf of Members v Transnet SOC Ltd and others* [2018] ZALAC 3; [2018] 5 BLLR 488 (LAC) at paras 30 - 32.
[12] *Nama Khoi* at para 42.

'[18] Further, there are numerous other indications, both in the wording of s 198D and at common law, that s 198D was designed to be an all-encompassing provision for any dispute arising from the other three sections. (Declaring such rights, if necessary, but, of more importance, giving effect to them and enforcing them.)

18.1 The words 'any dispute arising from' in s 198D(1) are markedly different from, for example, s 24(2) of the LRA which refers to a dispute about the interpretation or application of a collective agreement, and s 198D(1) is significantly more broadly framed.

18.2 Section 198D(2) specifically includes disputes relating to ss 198A(5), 198B(8) and 198C(3)(a), but does not suggest in any manner or form that the application of the section is limited to such disputes or to declaratory relief only.

18.3 Section 198D(3) creates a specific time period for the referral of such disputes, namely, six months after the act or omission occurred.

18.4 Subsections (4), (5) and (6) create a process for the conciliation and arbitration of such disputes.

[19] This structure clearly envisages a single process by which 'any' disputes relating to s 198A, 198B or 198C will be determined. The civil courts have consistently construed similar wording to that of s 198D(1) in private arbitration clauses in favour of a single forum for the adjudication of disputes…

[20] The practical and sensible considerations of a 'one-stop' arbitration process evident in business transactions are equally applicable to the processes under the LRA. In the absence of any indication that s 198A, 198B or 198C disputes should proceed to the Labour Court, they should be resolved in their entirety by the CCMA or a bargaining council in one process in terms of s 198D. Not only is this clear from the plain wording of s 198D but if one considers the section purposively, as one must, it is clear that there is no sensible or discernible purpose to restricting the ambit of s 198D to declaratory relief only.'

[29] Curiously, the court *a quo* did not deal with the question of whether relief as sought through the referral of a dispute in terms of s 198D (whether declaratory or otherwise) would apply to SACTWU members who, at the time of the referral of the dispute, were no longer employed with the first or second appellant. In effect, should the order in the review application be upheld, the commissioner would have jurisdiction under s 198D to determine the dispute in respect of all SACTWU members, both formerly and currently employed.

[30] Section 198D does not set out the specific relief to which litigants are entitled where a dispute arising from the interpretation or application of ss 198A to 198C is referred to the CCMA.

[31] As with any other provision of the LRA, s 198D must be read within the context of the provisions of the LRA as a whole and in particular, the provisions of ss 198A to 198C. In this regard, insight can be gleaned from the Explanatory Memorandum to the Labour Relations Amendment Bill, 2012 which provides that the proposed amendments to the LRA were aimed to respond to the increased informalisation of labour to ensure vulnerable workers received adequate protection and were employed in conditions of decent work, ensuring labour legislation gave effect to the fundamental constitutional rights and that South African labour laws complied with international labour standards. In discussing the introduction of s 198A and specifically subsection (4), the memorandum provides that the subsection was introduced to prevent the abuse of the six-month period[13] that constitutes temporary work and that where a TES terminates an employee's assignment to a client to avoid the implications of the deeming provision as contained in subsection (3)(b), such termination constitutes a dismissal and that "*the fairness of the termination of an assignment may be challenged in terms of the LRA*". Accordingly, dismissed employees can refer an unfair dismissal dispute in terms of s 191 of the LRA.

[32] The Explanatory Memorandum however does not provide much insight to the operation of s 198D, it merely provides a summary of the provision.

[33] The appellants submit that s 198D does not envisage a process by which *any* dispute relating to or arising from ss 198A to 198C will be determined but rather provides that any dispute relating to the *interpretation* or *application* of the sections can be referred to the CCMA for determination. This narrow and restrictive interpretation limits the types of disputes which the CCMA has jurisdiction over in terms of s 198D and in turn, limits the type of relief that can be granted when faced with a s 198D referral.

[34] The purpose of s 198D is to provide a dispute resolution procedure to be followed when parties wish to refer a dispute to the CCMA regarding the interpretation or application of the preceding sections, had the Legislature intended for the CCMA to conciliate and later arbitrate *all* disputes within the context of ss 198A to 198C, the

[13] This period was truncated to three months as appears in s 198A(1) of the LRA.

phrase "*any dispute arising from the interpretation or application"* would not appear in the section. It is trite that, when interpreting legislation, regard must be had to the context provided by reading the particular provision in light of the document as a whole and its circumstances. As held in *Natal Joint Municipal Pension Fund v Endumeni Municipality:*[14]

'… consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation.'

[35] The court *a quo* was not altogether incorrect in stating that s 198D was designed to be an all-encompassing or single process through which any dispute arising from ss 198A to 198C would be resolved. This, however, gives too wide an interpretation to the phrase "*any dispute arising from the interpretation or application*" without consideration being given to the LRA as a whole where dispute resolution processes already exist in respect of unfair dismissal and unfair labour practice disputes. It is clear from the wording of s 198D that the section intends for disputes regarding the status of the employment relationship to be referred to the CCMA for determination. In the case of s 198A(3)(b), the CCMA must determine whether temporary employees are in fact the deemed employees of the client or if they remain the employees of the TES. Once this determination as to the status of the employment relationship is made and the aggrieved employee is deemed to be an employee of the client, the aggrieved employees can then refer any further disputes regarding an alleged unfair dismissal or unfair labour practice in accordance with s 191 or seek contractual remedies in accordance with the provisions of the BCEA. There is no bar to deemed employees from pursuing and enforcing their newly declared rights in terms of the provisions of the LRA and BCEA. This interpretation of s 198D does not

[14] [2012] 2 All SA 262 (SCA) at para 18.

lead to an insensible or unreasonable result, in fact, the determination of the status of the employment relationship will provide better clarity to aggrieved employees in terms of which dispute resolution processes are available to them on the strength of the determination made in the CCMA.

[36] In considering whether substantive relief could be provided under s 198D, *Nama Khoi* was correct in stating that where an unfair dismissal dispute in relation to s 198B is referred under s 198D, the employee would not be required to prove dismissal and where reinstatement (or such other substantive relief) is awarded, such award is made without compliance with the unfair dismissal provisions of the LRA. Essentially an employee who refers a dispute only through s 198D on the basis of ss 198A, 198B or 198C and is successful in their referral would then be granted substantive relief without proving that a dismissal or in *casu,* an unfair labour practice had even taken place. This would result in a commissioner, who was not called to determine an unfair dismissal dispute *per se*, being able to grant substantive relief in that respect. This approach would undermine the provisions and objects of the LRA and would fly in the face of the principle of *audi alteram partem* where the respondent employer, who had not made out a case against the alleged unfair dismissal in the s 198D dispute, would be saddled with the consequence of the commissioner's decision to award substantive relief to an employee based only on their referral in terms of s 198D. This is what the court *a quo's* interpretation of the provisions of s 198D would lead to and it cannot be correct.

[37] There is however nothing stopping an employee from proceeding with an unfair dismissal dispute or an unfair labour practice claim and relying on ss 198B or 198A to counter the employer's claim that there was no dismissal because the termination of employment was a result of the employment contract coming to an end by effluxion of time or to counter the employer's claim that there was a contractual agreement for the employee to be treated less favourably than the other employees of the client doing similar work.

[38] Essentially, I am of the view that s 198D serves to confirm the status of the employee and where it is only the status of the employee that needs to be determined, it does so by interpreting ss 198A to 198C. However, s 198D provides more than that, it is not only the interpretation but also the application of the ss 198A to 198C that 198D is concerned with and this must apply where an order can be made which does not deny an employee who is found to be a deemed employee of

the client of a TES to be treated less favourably than an employee of the client performing the same or similar work for no justifiable reason. This must then include the CCMA granting a declaratory award confirming the status of the employee as a deemed employee and as part of the declaratory order confirming, in cases such as those before the CCMA in this matter, that the employee has been subjected to differential treatment without justification in terms of section s 198D(2). On the basis of this determination, a deemed employee subjected to differential treatment can then refer an unfair labour practice dispute to the CCMA for determination.

[39] Another issue before this Court is whether the CCMA has the necessary jurisdiction to make a declaratory award in respect of the SACTWU members who had been dismissed prior to the referral of the arbitration. *Nama Khoi* held that s 198D regulated ongoing employment relationships and where dismissed employees sought to be declared indefinitely employed in terms of s 198B, such declaration would have no practical effect as the employment relationship had already come to an end. The Judge *a quo* however does not deal with the question of the CCMA's jurisdiction in respect of previously dismissed employees and remitted the matter to the CCMA for an arbitration *de novo* in respect of all SACTWU's members who were parties to the dispute before the CCMA. It is correct that a court cannot issue a declarator on the status of an employee no longer in the employ of the employer but this cannot be a bar against pronouncing on the status of the said employee at the time that the employee's employment came to an end.

[40] I may add that it is not my view that dismissed SACTWU members who, if declared by the CCMA to have been deemed employees of the client and had been subjected to unequal treatment, would not be able, on the basis of this declaration, to approach the CCMA to seek compensation for such unequal treatment. In the ordinary course, a dismissed employee is not barred from relief in terms of the LRA or the BCEA because the employment relationship has come to an end and similarly, it cannot be said that the dismissed employees cannot, because their previous employment fell within the context of s 198A, would not be able to approach the appropriate forum to seek relief.

Conclusion

[41] Finally, I may add that there is simply no reason for s 198D in the Act. There are sufficient provisions in the Act to deal with the enforcement of ss 198A to 198C. where for instance an employee employed on a fixed term contract or through a TES

is deemed to be a permanent employee is dismissed or is a victim of an unfair labour practice dealt with in terms of ss 198A, B or C, such an employee can proceed with a referral in terms of s 191 by claiming to have the status or the right to proceed by virtue of ss 198A, B or C. In any event s 198D does not serve as a bar to an employee contractually employed or employed through a TES to refer a dispute in terms of s 191 and who has not gone through a declaratory process in terms of s 198D to proceed with his/her dispute in terms of s 191 as long he/she adds in the referral that his/her status is that of a permanent employee by reason of the relevant section of ss 198A, B or C (whichever applies). This will then have the effect that both these issues are dealt with in a single process as it should be.

[42] In the result, the appeal should be upheld. With regard to costs, I think this is a matter where a costs order is not warranted.

[43] In the premises, the following order is made:

Order

1. Condonation for the late filing of the record is granted and the appeal is reinstated.
2. The appeal is upheld and the order of the Labour Court is replaced with the following order:

   "The application to review and set aside the award handed down by the CCMA is refused with no order as to costs."

WAGLAY JP
Coppin JA and Savage AJA concur

Appearances

FOR THE APPELLANTS:	G. Kirby-Hirst of Macgregor Erasmus Attorneys Inc.
FOR THE FIRST RESPONDENT:	Adv. P. Schoeman

Instructed by Purdon & Munsamy Attorneys