IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA 07/21

In the matter between:

AMALUNGELO WORKERS' UNION obo MAYISELA AND 29 OTHERS	**Appellant**
and	
COMMISSION FOR CONCILIATION, MEDIATION and ARBITRATION	**First Respondent**
ELIZABETH LERUMO N.O.	**Second Respondent**
UNILEVER SOUTH AFRICA (PTY) LTD	**Third Respondent**

Heard: 28 September 2021

Delivered: Deemed to be the date the judgment is emailed to the parties 29 November 2021.

Coram: Davis JA, Coppin JA et Kubushi AJA

JUDGMENT

COPPIN JA

[1] Relying on, *inter alia*, section 198B(3) of the Labour Relations Act[1] ("the LRA") the appellants in the referral to the first respondent ("the CCMA"), contended in essence, that the fixed-term employment of the appellant employees with the third respondent ("Unilever") had been converted into permanent and indefinite employment and sought a declaratory order to that effect.

[2] On 6 September 2018, the second respondent ("the arbitrator"), acting under the auspices of the CCMA, rendered an arbitration award in which she found,

[1] Act 66 of 1995.

essentially, that Unilever was in breach of section 198B(3) of the LRA; that the appellant employees cited in this matter, were deemed to be employed by Unilever on an indefinite basis and were considered permanent employees of Unilever since April 2017. The arbitrator further ordered Unilever to assist the appellant employees to participate in its medical aid, pension, education and home loan schemes and, significantly, that Unilever pay them with effect from April 2017 remuneration at a rate that was not "less favourable" than the rate paid to Unilever's permanent employees who performed the same or similar work as the appellant employees.

[3] On 12 September 2018 the arbitrator issued a variation award in terms of which she varied the award of 6 September 2018 by the insertion of two paragraphs. Firstly, she inserted a paragraph 44 in which she ordered Unilever to hold a meeting with the representatives of the appellant employees by no later than 30 September 2018 to quantify the amounts that were referred to in paragraph 43 of the original award and further ordered Unilever to provide the appellants' representative with "the schedule of quantified sum of money" by no later than 14 October 2018. Secondly, she inserted a paragraph 45 into the original award in terms of which the appellants are directed to approach the Labour Court by way of contempt proceedings if Unilever fails to comply with the newly inserted paragraph 44.

[4] This is an appeal against an order of the Labour Court (Olivier AJ) in which it reviewed and set aside the original and variation awards of the arbitrator at the behest of Unilever; dismissed a stay application brought by Unilever and made no costs order. The appeal is with the leave of that court ("the court *a quo*").

[5] Even though the parties had submitted in the court *a quo* comprehensive heads of argument that also dealt with the grounds of review relating to the merits of the awards, the parties essentially confined their arguments to the following jurisdictional points, namely, firstly, whether the arbitrator had jurisdiction to arbitrate the dispute because it was referred to the CCMA more than six months after the dispute arose and no application to condone such late referral had been brought by the appellants; and secondly, whether the arbitrator had the power (or jurisdiction) to award the appellant employees payments and benefits, such as medical aid, pension, education and home loan schemes, in circumstances where the appellants,

in their referral form to the CCMA only sought a declaratory award that they were permanent employees as envisaged in section 198B read with section 198D of the LRA.

[6] Having concluded that the test was whether the arbitrator was right or wrong in assuming jurisdiction, the court *a quo* went on to consider the arguments made by the parties in respect of the issue of jurisdiction.

[7] Unilever essentially argued the following: section 198D of the LRA prescribes that the dispute arising from section 198B of the LRA must be referred to the CCMA within six months of the dispute arising, failing which, an application for condonation for the late referral ought to be made; that the dispute in this instance (i.e. about whether the appellant employees were permanent or fixed term employees) arose in April 2017, when they were offered fixed term contracts and refused to sign them; the dispute therefore, had to be referred to the CCMA by no later than the end of September 2017; since the dispute was only referred much later, i.e. in May 2018, and no condonation application for the late referral had been brought nor granted, the CCMA had no jurisdiction to entertain the dispute.

[8] In response, the appellants conceded that the dispute arose in April 2017 but argued, in essence, that the dispute was "continuing wrong (akin to an unfair labour practice)" and that there was therefore no late referral to the CCMA.

[9] The court *a quo* concluded that it was common cause that the dispute arose in April 2017. With reference to the question, whether the dispute was a continuing wrong, the court *a quo*, having referred to a passage of the judgement of this court in *SABC*[2], and of the Labour Court in *Eskom*[3], concluded that even though the appellant employees suffered the effects of not been made permanent on a continuous basis, the dispute arose from a single event that occurred in April 2017 and does not constitute a "continuing wrong"; that the very nature of the disputes contemplated in sections 198A, 198B, and 198C is that "they recur on a monthly basis, for example, less favourable monthly remuneration or benefits"; and that there

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[2] *South African Broadcasting Corporation Ltd v Commission for Conciliation, Mediation and Arbitration and others* [2010] 3 BLLR 251 (LAC) para 27.
[3] *Eskom Holdings SOC Ltd v NUM obo Kyaya and others* [2017] 8 BLLR 797 (LC) para 32.

would be no purpose to the time limit prescribed in section 198D(3) of the LRA if all such disputes were considered as a "continuing wrong".

[10] The court *a quo* held that condonation was required and that it was not a matter of unfair discrimination or of an unfair labour practice, as envisaged in section 186(2) of the LRA; and that since section 198D(3) is applicable, there can be no doubt that the failure by the appellants to comply with the time limit stipulated there required condonation. Section 198D(6)) specifically provides accordingly.

[11] The court *a quo* further held that because the referral was late and condonation was a requirement, absence of the same meant that the matter was not properly before the arbitrator; the arbitrator had no jurisdiction to arbitrate the dispute; and on that basis alone the review of the main and variation awards had to succeed and the application for a stay of the implementation of those awards, brought by Unilever, was essentially unnecessary, and had to be dismissed.

[12] Despite having reached such a decisive conclusion the court *a quo* nevertheless went on to consider the second point, namely, whether the arbitrator had the power to award equal benefits even though it had not been specifically requested by the appellants in the referral form. Finding support for its reasoning on this point in the decision of the Labour Court in *Nama Koi*[4] the court *a quo* held that section 198D of the LRA "does not automatically entitle an applicant to compensatory relief in the event of a declaratory order in his favour that his contract of employment is deemed to be of an indefinite nature."

[13] The court *a quo* further held that relevant evidence would be required for the assessment of the compensatory relief before it is granted. It referred in that regard, *inter alia*, to evidence that compares the benefits received by permanent employees to those received by the appellant employees. The court *a quo* further concluded that there was no such evidence on record and since that was lacking it was not within the power of the arbitrator to grant the impugned orders. The court *a quo* concluded finally that the awards should be set aside on the second jurisdictional point as well.

[4] *Nama Koi Local Municipality v South African Local Government Bargaining Council and others* (2019) 40 ILJ 2092 (LC) paras 33-35.

[14] In sum, the court *a quo* accordingly made an order reviewing and setting aside the original and variation awards, and dismissed the stay application brought by Unilever. All these applications had been consolidated and were heard at once. There is no cross-appeal by Unilever against the dismissal of its stay application.

On appeal

[15] On appeal the parties, essentially, made the same arguments on the issues of jurisdiction as they made in the court *a quo*. However, in respect of the main jurisdictional point, the appellants denied that they had admitted that the dispute arose in April 2017, and contended that the "wrong" occurred on the date of commencement of employment of each of the (individual) appellant employees and continued daily until a dispute arose on 12 April 2018. Hence (i.e., according to them) the dispute was timeously referred to the CCMA on 16 April 2018 (as per the award). The appellants also submitted that the dispute concerned "a continuing wrong (akin to an unfair labour practice)". It continued monthly and therefore the referral to the CCMA was not late.

[16] On the other hand, Unilever's counsel argued that the dispute arose in April 2017 when the appellant employees refused to accept and sign written, fixed-term employment offers that were made to them by Unilever; that it was not a continuing wrong and that the dispute had been referred late.

Discussion

[17] It is not at all clear whether the dispute that was referred to the CCMA in this matter was ever conciliated before the date of the arbitration. There is a copy of a certificate in the appeal record, not verified under oath, purportedly dated 16 May 2018 and signed by a commissioner purporting to certify that the matter was referred to conciliation and unsuccessfully conciliated on 19 April 2018. But, worryingly, the arbitration record confirms the contrary. The following was stated by the arbitrator at the outset of the arbitration in that regard: "Today is the 21st August 2018. This case is set down for arbitration. The schedule time was 9 o'clock, then I've noticed that the file, inside the file that the case was never conciliated. However, I offered the parties

an opportunity to conciliate, hence [the] case now remains unresolved, then what is going to happen, I'm now going to proceed with arbitration." The parties did not dispute the truth of that assertion.

[18] Unilever contends that the dispute as contemplated in section 198D of the LRA arose in April 2017. The appellant employees, however, deny that, contend that the dispute only arose on April 2018, and seem to be saying that the wrong giving rise to the dispute occurred since April 2017, and each time since then, when they were not paid the same, or afforded the same benefits as Unilever's permanent employees.

[19] Section 198D(1) refers to "any dispute arising from the interpretation and application of section 198A, 198B and 198C" and provides that such "may be referred" to the CCMA or Council "with jurisdiction for conciliation and, if not resolved, to arbitration." Subsection (3) of that section deals with the actual referral of the dispute referred to in section 198D(1). It provides: "<u>a party to a dispute contemplated in subsection (1)</u>, 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, <u>within six months after the act or omission concerned.</u>" (My emphasis)

[20] The "act or omission" referred to in subsection (3) is clearly that which gave rise to the dispute. And the dispute, as long as it is the same one, only has one initial date on which it arose. The fact that the dispute is ongoing, in the sense that it recurs after it first arose, may be because it is either never resolved, or satisfactorily resolved. But does that not imply that the parties, as it were, necessarily have a new "act or omission" or "wrong" every time the same dispute erupts again.

[21] The appellant employees' reliance on what this court held in *SABC* and what the Supreme Court of Appeal held in *Lombo*[5], or any of the decisions allegedly based on them, is misplaced. The facts of those cases are distinguishable on their facts. There the courts were not dealing with the interpretation of section 198D of the

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[5] *Lombo v African National Congress* 2002 (5) SA 668 (SCA) paras 26-27.

LRA, or anything approximating the wording of that section, or sections 198A, B or C, to which section 198D applies.

[22] In any event, as explained in *Eskom*,[6] not even all unfair labour practices which occur on a monthly basis constitute "a continuing wrong" as envisaged in *SABC*. To use the language of section 198D, what would occur in certain instances is not the act or omission, for example, to promote (as in *Eskom*) or not to employ persons on a permanent basis (as alleged in this instance), but the consequences of the failure to promote or the failure to appoint on a permanent basis, which would constitute the concerned act or omission. However, in light of the outcome of the analysis in this matter, it is not necessary to elaborate on that aspect.

[23] Section 198D does not treat "dispute", and the "act or omission" giving rise to the dispute, as synonymous. Section 198D(3) does not provide that the dispute must be referred within six months of it arising, but that the dispute must be referred within six months after "the act or omission concerned." The section recognises that there is an act, or omission (alleged or otherwise) that gave rise to, or preceded, the dispute. The crucial starting date of the time limit is after the act, or omission, concerned. It is thus important to establish that date in order to determine whether, in more general parlance, the "dispute" was referred in time.

[24] It seems to me that as all acts, or omissions, have consequences, a further distinction needs to be drawn between "the act or omission" and its consequences or effects. Unless such a distinction is drawn the time limits provided in the LRA for referral of a dispute to the CCMA or council, including section 198D, would be entirely valueless and the true rationale for such time bars would be undermined[7]. Since an employee could then basically start counting the time whenever he or she experienced a consequence of the act or omission that gave rise to the dispute, having (arbitrarily, or deliberately, in order to meet the time limit for referral) construed or proffered that as the actual "act or omission". Seemingly, this is what Unilever is effectively suggesting the appellants did in this instance.

[6] See *Eskom* (above) para 32.
[7] Compare *Eskom* (above) para 32.

[25] In terms of section 198D, the clock starts after the act or omission concerned occurs, and not when a consequence of that act or omission is experienced or becomes manifest.

[26] In this instance, it is therefore essential to identify the act or omission that gave rise to the dispute that was referred to the CCMA, to determine when it gave rise to a dispute, and to distinguish it from its consequences or effects.

[27] The act, or omission, the appellants complained of (i.e. in respect of each individual appellant employee) was that they were not made permanent by Unilever (presumably, on their interpretation of the law) as the law requires. As a main argument they contend, essentially, that they were permanent employees from April 2017, having worked for Unilever from that date without written contracts, certain of them who were not employed by then were permanent from inception of their employment - not by agreement with Unilever, but (presumably) by dint of the law, and that the dispute in that regard only arose on 12 April 2018.They denied being offered fixed-term employment contracts in April 2017 and of having refused to sign them.

[28] The version proffered by the appellants is untenable and does not align with the facts, the probabilities and the law. In the first place, it is apparent from the award that all the appellant employees had been engaged by Unilever on fixed-term contracts long before April 2017, and as far back as 2013, 2014 and 2015, and that since April 2017 all the appellant employees were working at Unilever without a written contract. The only witness for the appellants at the arbitration, Mr Quentin Seku, had been employed on a fixed-term contract since August 2013 and without a written contract since April 2017, implying that there was a written fixed-term contract in place since 2013 to April 2017.

[29] Even though the witness for Unilever, Mr Maepa, testified at the arbitration that the appellant employees had been presented with written offers of employment in April 2017 and that they had refused to sign them, the arbitrator (arguably erroneously) found that "no evidence" had been given in that regard. And found that since April 2017 until 18 August 2018 Unilever had failed to give effect to the

provisions of section 198B of the LRA and that the appellant employees were considered permanent employees since April 2017.

[30] These findings of the arbitrator imply that she had found effectively that since 1 April 2017 until 18 April 2017 the appellant employees were employed on a fixed-term basis, albeit tacitly, since there were no written contracts in place to that effect. Unless that was the case Unilever could not have "failed to give effect to the provisions of section 198B of the LRA". That section regulates fixed-term contracts concluded with employees earning below a certain threshold.

[31] But that finding, i.e., effectively, albeit by implication, that there were fixed term contracts in place, was arbitrary and not based on the law or the facts. It is an established principle that unless a contrary intention can be inferred from the facts, it will generally be assumed, if an employee is allowed to work beyond the end of a fixed term contract, that the contract is tacitly converted into one of indefinite duration, terminable by reasonable notice given by either party[8].

[32] Turning to the facts of this case, there is no basis for not inferring or concluding that when the written fixed-term contracts of the appellant employees ended (presumed to be at the end of March 2017), from 1 April 2017 they were no longer employed on a fixed-term basis but on an indefinite basis terminable on reasonable notice. The inference to that effect is strong, but would even be stronger if it is accepted that when Unilever presented the appellant employees with fixed-term offers in April 2017 they refused to accept them.

[33] However, even if the latter evidence is excluded (which would not be justified on the probabilities), it was common cause that when Unilever presented the Appellant employees with written fixed-term offers in March or April 2018 they refused to accept them and, instead referred the dispute, which is the subject of this matter, to the CCMA. Thus, further buttressing the inference that from April 2017 the appellant employees were not on fixed term contracts, but employed on an indefinite basis.

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[8] See, *inter alia*, *Department of Agriculture (Department of Agriculture, Forestry and Fisheries) v Teto and Others* [2020] ZALAC 19; (2020) 41 ILJ 2086; [2020] 10 BLLR 994 (LAC) (28 May 2020) para 20 and the authorities cited there.

[34] If that is so, as it must have been, then Unilever could not in that time, when the employment was for an indefinite period, have been in breach, or in contravention, of section 198B of the LRA. The section would not have been applicable. In any event, section 198B(5) provides: ” Employment in terms of a fixed term contract concluded or renewed in contravention of subsection (3) is deemed to be of indefinite duration.”

[35] The only period relative to the facts of this matter, when Unilever could conceptually have been in contravention of section 198B, is when the fixed-term contacts were in place or were to be renewed, and that period, we know, is the period preceding April 2017. Thus the “act or omission concerned”, being an alleged failure by Unilever to comply with section 198B, could only have occurred before, or in, April 2017. For as long as no fixed-term contracts were in place, the act or omission concerned could not have recurred, nor could it have been “ongoing” in the absence of such contracts.

[36] It was therefore incumbent upon the appellant employees to have referred that act or omission to the CCMA (in this instance) within six months after it had occurred. Essentially it cannot be contested that they only referred that dispute more than a year after the act or omission concerned, by which time it was late. Notwithstanding the condonation that was required for such lateness, as envisaged in section 198D(6) of the LRA, the same was never sought or granted. The arbitrator, apparently, entertained and endeavoured to resolve the dispute oblivious to such lateness.

[37] The court *a quo*’s ultimate finding that the CCMA (and the arbitrator) did not have jurisdiction in respect of the matter is therefore unassailable.

[38] Since that finding on jurisdiction is decisive of the review application in respect of both awards it is not necessary to deal in the circumstances with the question of the arbitrator’s powers to make specific orders for payment, et cetera. That issue, in light of the decision on the jurisdiction of the arbitrator and the CCMA to entertain the matter in the first place, is rendered moot.

[39] It follows that the appeal must fail. As far as the costs are concerned – taking all facts, circumstances, the law and fairness into account, a costs order is not appropriate.

[40] In the result, the following is ordered:

40.1 The appeal is dismissed;

40.2 There is no costs order.

P Coppin

Judge of the Labour Appeal Court

Davis JA and Kubushi AJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT:	Mr M.D Maluleke with Mr SM Sebola Instructed by Sebola Nchupetsang Sebola Inc.
FOR THE THIRD RESPONDENT:	FA Boda SC Instructed by Norton Rose Fulbright Inc.