

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no JR1461/21

In the matter between

TAKENOTE TRADING (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER VUYOKASI MAY N.O.

Second Respondent

BONISWA MAGODA

Third Respondent

Heard: 24 January 2024

Order: 24 January 2024

Date of Reasons:

REASONS FOR JUDGMENT

SAUNDERS AJ

Introduction

[1] The applicant seeks to review and set aside an arbitration award granted by the second respondent in favour of the third respondent, which award found the dismissal of the third respondent to be procedurally and substantively unfair and awarded the third respondent seven months' compensation. The application for review was unopposed.

[2] On 24 January 2024, this Court handed down an order dismissing the review with no order as to costs. The reasons for this order follow hereunder.

Background

[3] The facts as ventilated in the arbitration are uncontentious. The third respondent was employed as an HR administrator at the time of her dismissal by the applicant. The third respondent's employment was terminated, on the applicant's version, due to the effluxion of time on 25 January 2021 when her fixed-term contract expired. The applicant held that the third respondent had a signed contract with an expiry date, but that the third respondent, in her capacity as custodian of the contracts, had deliberately withheld or destroyed her contract.

[4] A copy of the standard contract was included in the bundle and confirmed to be the contract which the third respondent would have signed at the commencement of her employment. I was referred to this contract in argument.

[5] The third respondent disputed having a contract. She relied on her letter of appointment given to her when she assumed her former position, approximately one month prior. The letter of appointment set a termination date of 30 June 2022. Her case was simply that her termination was premature.

[6] The commissioner applied section 198B of the Labour Relations Act¹ (LRA). She considered that the employee earned R15 000 per month and she therefore fell below the minimum financial threshold set out in the Basic Conditions of Employment Act² (BCEA) and therefore section 198B of the LRA was applicable.

[7] The relevant sections of the LRA are as follows:

‘198B Fixed-term contracts with employees earning below earnings threshold

(1) For the purpose of this section, a ‘fixed-term contract’ means a contract of employment that terminates on –

¹ Act 66 of 1995, as amended.

² Act 75 of 1997.

- (a) the occurrence of a specified event;
- (b) the completion of a specified task or project; or
- (c) a fixed date, other than an employee's normal or agreed retirement age, subject to subsection (3).

(2) ...

(3) An employer may employ an employee on a fixed-term contract or successive fixed-term contracts for longer than three months of employment only if –

- (a) the nature of the work for which the employee is employed is of a limited or definite duration; or
- (b) the employer can demonstrate any other justifiable reason for fixing the term of the contract.

(4) Without limiting the generality of subsection (3), the conclusion of a fixed-term contract will be justified if the employee –

- (a) is replacing another employee who is temporarily absent from work;
- (b) is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months;
- (c) is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession;
- (d) is employed to work exclusively on a specific project that has a limited or defined duration;
- (e) is a non-citizen who has been granted a work permit for a defined period;
- (f) is employed to perform seasonal work;
- (g) is employed for the purpose of an official public works scheme or similar public job creation scheme;
- (h) is employed in a position which is funded by an external source for a limited period; or
- (i) has reached the normal or agreed retirement age applicable in the employer's business.

(5) Employment in terms of a fixed-term contract concluded or renewed in contravention of subsection (3) is deemed to be of indefinite duration.

(6) An offer to employ an employee on a fixed-term contract or to renew or extend a fixed-term contract, must –

- (a) be in writing; and
- (b) state the reasons contemplated in subsection (3) (a) or (b).'

[8] The commissioner correctly held that an employee earning under the threshold and employed in terms of a fixed-term contract will trigger section 198B of the LRA. In those circumstances, the prescripts of the LRA are mandatory.

Evaluation

[9] While there are several grounds of review raised, they are broadly encapsulated into themes. Firstly, that the commissioner misconstrued the law in her application or reference to section 198B(3) of the LRA, failed to consider the evidence that there was a justifiable reason to fix the contract in duration, and misdirected herself as to the nature of the dispute. The commissioner failed to conduct a fair and proper proceeding in terms of the Act.

[10] Secondly, the applicant argues that the commissioner exceeded her powers in that she was required to decide on whether there was a dismissal and whether it was in accordance with a fair reason and a fair process. Instead, the commissioner approached the dispute in terms of section 198B of the LRA. The commissioner should have, on the applicant's argument, limited herself to probing the nature of the contract to arrive at a decision on the fairness of the decision to terminate by the effluxion of time. Instead, the commissioner considered whether there had been compliance with section 198B(3) and (5) of the LRA and this was, on the applicant's argument, acting beyond her powers.

[11] The commissioner correctly found that once an employee who is employed on a fixed-term contract earns below the BCEA threshold, section 198B of the LRA is triggered. In the circumstances, the commissioner did not exceed her powers when approaching the dispute in terms of section 198B of the LRA. Counsel for the applicant conceded this in argument.

[12] Having established that section 198B applies, the commissioner correctly considered that the employer bears the onus to illustrate that the contract is in writing

in terms of section 198B(6) of the LRA and that the contract must state the reasons for the temporary employment.

[13] In this respect, there are two mutually destructive versions. The applicant states that the contract was in writing and that the third respondent destroyed it. The third respondent denies destroying the contract and says that the date for the effluxion of the contract had not yet passed; relying exclusively on her letter of appointment. The third respondent is a layperson and has no knowledge of section 198B of the LRA. She cannot be expected to know of the prescripts of the LRA and the relevance of the BCEA threshold.

[14] In this respect, the applicant argued that the applicant should be given an opportunity to lead the evidence which would support the reasons for fixing the contract. This would be a basis to review the matter and refer it back to the CCMA. I disagree with this argument. The applicant is not automatically entitled to a review to correct the errors of the arbitration.

[15] In the matter of *Piet Wes Civils CC and another v Association of Mineworkers and Construction Union and others*³, the Court considered a dispute with two different groups of employees – those with a contract and those without. The Labour Appeal Court held that in the absence of a written contract, the employees were indefinitely employed. To the extent that the third respondent's version is correct, she would be indefinitely employed.

[16] The applicant, however, relied on a *pro forma* contract included in the arbitration bundle and before this court. This contract had no suggestion of reasons for the fixed-term nature of the contract. If the applicant's version was to be accepted, the applicant would fail on this basis as well. To this extent, section 198B (5) of the LRA is applicable.

[17] In respect of this dispute of fact, the commissioner seized herself with the dispute of fact and made a finding based on the probabilities after assessing the

³ [2018] ZALAC 18; (2019) 40 ILJ 130 (LAC).

facts presented by both parties. There is no reviewable irregularity in this assessment of the probabilities. Even if there were an irregularity, such irregularity would not have impacted the outcome. Even to the extent that the commissioner has considered that the third respondent did have a contract of employment and she had destroyed that contract to circumvent her termination by effluxion of time, it would take the matter no further.

[18] If the *pro forma* contract I was referred to was the contract which the third respondent would have signed, that contract would also have fallen at the hurdle of section 198B of the LRA. In the absence of reasons for the fixed-term contract, an employee is indefinitely employed.

[19] On this basis, the commissioner correctly applied the law in respect of section 198B of the LRA. The commissioner found that the applicant failed to prove the fixed-term contract between itself and the third respondent. However, even if this finding is incorrect, the alternative takes the matter no further because the contract in question would also fall foul of section 198B.

[20] The commissioner may have discounted evidence that there was reason to fix the contract and the third respondent may have been working instead of or temporarily replacing the HR administrator but this too, does not assist the applicant in the absence of reasons, in writing, encapsulated in the contract. No purpose would be served in remitting the matter back to the CCMA in circumstances where the hurdle cannot be overcome. Leading evidence, as proposed by counsel, would not remedy the legislated pre-requisite that the contract be in writing and contain those reasons.

[21] The commissioner correctly seized herself with the dispute, correctly considered the application of section 198B of the LRA and was indeed mandated to consider whether the third respondent could be a permanent employee. The commissioner therefore did not exceed her powers and the award is not reviewable.

[22] The applicant correctly states that the commissioner found the fixed-term contract to be of indefinite duration and simultaneously considers that the first

respondent had a letter of appointment stating that her employment would expire in June 2022, several months after her dismissal. The commissioner considered this in the quantification of the amount of compensation to be awarded to the third respondent.

[23] While I am of the view that the commissioner should have reinstated the third respondent to her previous position with full back pay, this is not a ground of review before me and there is no cross-appeal by the third respondent. Similarly, this is not an appeal court. The commissioner considered that the third respondent presumably believed her contract to be fixed (*albeit* this was an incorrect belief as lawfully she was a permanent employee) and awarded compensation on this basis. The commissioner's ruling in respect of compensation is rational and reasonable.

[24] It was for the aforesaid reasons that the order dated 24 January 2024 was granted.

S Saunders

Acting Judge of the Labour Court of South Africa