



**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH**

Not Reportable

Case no: PA 16/2016

In the matter between:

**NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA**

**(NUMSA) obo MEMBERS**

**Appellant**

and

**TRANSNET SOC LIMITED**

**First Respondent**

**TRANSNET BARGAINING COUNCIL**

**Second Respondent**

**SATAWU**

**Third Respondent**

**UNTU**

**Fourth Respondent**

**Heard: 16 November 2017**

**Delivered: 25 January 2018**

**Summary: Appeal against dismissal of urgent application purportedly brought in terms of s189A(13) of the Labour Relations Act, 66 of 1995 (LRA) for a declaratory order, an interdict, reinstatement and other relief-- Appeal dismissed: case not made out for relief sought and application was rightly dismissed by the Labour Court.**

**Coram: Coppin and Sutherland JJA and Savage AJA**

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## JUDGMENT

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COPPIN JA

- [1] Following a presentation made by the first respondent (Transnet) in the second respondent (Transnet Bargaining Council) on 18 March 2016 indicating, *inter alia*, that it would not be renewing a large number of fixed-term contracts due to depressed economic circumstances, the appellant brought an urgent application in the Labour Court, purportedly in terms of s189A(13) of the Labour Relations Act<sup>1</sup> (LRA), construing Transnet's conduct in that regard as amounting to mass dismissals for operational reasons. The appellant sought, effectively, to compel Transnet to continue employing its members despite the effluxion of the agreed periods of their respective fixed-term contracts and for Transnet to comply with a fair procedure as contemplated in that section.
- [2] The Labour Court (Moshoana AJ) dismissed the application. This is an appeal against that decision, leave to appeal having been granted by that court. No relief was ever sought against the second, third and fourth respondents and they have not participated in the litigation, including the appeal.

### Factual background

- [3] It was not in issue that Transnet had been making use of fixed-term contracts in respect of a particular component of its workforce. These contracts were generally extended successively. On about 15 December 2014, and in the Transnet Bargaining Council, Transnet concluded a collective agreement with the third and fourth respondents, who were the majority unions in its workplaces at the time, to regulate the terms and conditions of its fixed term employees. The parties to the agreement purported to bind not only themselves and the members of the union parties members, but "[a]ll fixed term contract bargaining unit [e]mployees in Transnet Soc Limited including those [e]mployees who are not members of the trade union parties to [the]

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<sup>1</sup> Labour Relations Act 66 of 1995.

agreement" (*emphasis added*). This would include employees who were members of the appellant, even though neither the appellant, that had no organisational rights at Transnet, nor its members, were party to the collective agreement when it was concluded.

- [4] A dispute arose between Transnet and the appellant concerning the applicability of the collective agreement to the members of the appellant. This was exacerbated by the appellant's lack of organisational rights at Transnet's workplaces, which, in turn, seemingly, was further complicated by uncertainty and resultant disputes about the size of its membership at those workplaces.
- [5] The appellant contended, in essence, that the collective agreement did not bind its members, because it was not extended to non-parties in terms of and in accordance with s32 of the LRA; and that their fixed-term contracts were of indefinite duration as contemplated in s198B(5) of the LRA. Transnet contended that the collective agreement was applicable and binding on all the parties and employees identified in it, which would include any members of the appellant. It further contended that the collective agreement had been validly extended to non-parties in terms s23 of the LRA.
- [6] It appears common cause that at least several matters had been referred by the appellant to the Bargaining Council in which the non-renewal by Transnet of those members' fixed term contracts had been challenged on the grounds that the members had a reasonable expectation of renewal; that in at least two of those matters, where that the Bargaining Council had found in favour of the employees, Transnet was challenging the awards in review proceedings brought in the Labour Court.
- [7] Many fixed term contracts were not renewed by Transnet. During about February and March 2016, Transnet had also given written notice to affected employees, informing them of the end date of their fixed term contracts and the reason(s) for the termination of their contracts. On 18 March 2016, Transnet made a presentation in the Transnet Bargaining Council explaining why it would not be renewing some three thousand, of about seven thousand, fixed-term contracts once they terminated by effluxion of time. The reasons it

furnished were essentially financial and operational, brought about by adverse climatic and economic circumstances.

- [8] The presentation and the alleged unwillingness of Transnet to meaningfully engage with the appellant, concerning the non-renewal of fixed-term contracts, resulted in the appellant bringing an application in the Labour Court, in which it cited, as respondents, the parties as they appear in the case heading, and in which it sought the following relief:

‘1. That the matter be entertained on an urgent basis and that the Applicant’s non-compliance with the rules of Court be condoned.

2. That it be declared in terms of Section 189A(13) of the Labour Relations Act, 66 of 1995, as amended (the LRA), that the First Respondent was obliged to invoke the provisions of sections 189 and /or 189A of the LRA relevant to the termination of the employment of the Applicant’s members on or about 31 March 2016 and/or 28 February 2016.

3. That, to the extent necessary, the Applicant’s failure to institute these proceedings within 30 days in respect of those dismissals which took effect on 28 February 2016, be condoned.

4 That the First Respondent be restrained and interdicted from proceeding terminating any of the Applicant’s member’s contracts on the basis of it contending that same constituted fixed-term contracts and that the First Respondent be directed to comply with the provisions of Section 189/189A in respect of any and all contemplated further terminations premised on the erroneous description of employment contracts as fixed term contracts capable of expiring by way of effluxion of time.

5. That, to the extent necessary, it be declared that the collective agreement entered into between the First, Third and Fourth Respondents on or about 15 December 2015 does not bind the applicant and its members and /or same is not a collective agreement as envisaged in Section 198B(2)(c) of the LRA and it accordingly does not have the effect of ousting the provisions of Section 198B of the LRA relevant to the Applicant and its members.

6. That the First Respondent accordingly be ordered to reinstate those of the Applicant’s members whose services were terminated as from 28 February

2016 on the basis of an erroneous contention that these employees were on fixed term contracts of employment and that the First Respondent be directed to comply with Sections 189 and/or 189A of the LRA in respect of meaningful joint-consensus seeking consultations, should it wish to proceed with the termination of services of these employees;

Alternatively, that the First Respondent be ordered to compensate the Applicant's members whose services were so terminated on the basis that same constituted a procedurally unfair dismissal.

7. That the costs of this application be paid by such Respondents who oppose this application jointly and severally, the one paying the other to be absolved.

8. Further and/or alternative relief.'

[9] A Infrastructure-Sector Co-ordinator of the appellant, Mr Viwe James, deposed to the founding affidavit on its behalf. No list of its members is attached to the founding papers, and while names of some employees appear in annexures to the founding affidavit, none of those employees, or persons, on whose behalf it allegedly brought the application, is referred to by name in the body of the founding affidavit, and no confirmatory affidavit by any of them has been filed. The application thus abounds with hearsay information, while an explanation for not filing any confirmatory affidavits is lacking.

[10] The case purportedly made out by the appellant was, in essence, that the collective agreement was not applicable to its members, and that, accordingly, those members' employment contracts were not for a fixed, but an indefinite term; that the termination by Transnet of those contracts amounted to dismissals, and because of their number and the reasons furnished for not renewing them, the dismissals were for operational reasons, which required Transnet to comply with fair procedures as envisaged in sections 189 and 189A of the LRA. The application, according to the appellant, was one in terms of s189A(13) of the LRA, for the relief contemplated in that section.

[11] Transnet opposed the application. It not only took the point that the appellant had failed to prove that it had standing, or to show on whose behalf it was

bringing the application, because of its failure to properly identify its members, but denied that the applicant had made out a case that s189A(13) was applicable, persisted with its contentions regarding the scope of the collective agreement and denied that the fixed term contracts were not justifiable as contemplated in s198B(3) and (4) of the LRA.

- [12] The appellant filed a replying affidavit in which it attempted to address the issues raised by Transnet. While copies of a few membership application forms were attached to that affidavit, not a single confirmatory affidavit of any of its members, or affected members was filed.

#### The Labour Court

- [13] The Labour Court dismissed Transnet's *locus standi* point. Even though the Labour Court, in another context, lamented the fact that the appellant did not "spell out" who its members were, it found that the appellant, "must be having members" on whose behalf it was bringing the application, and that, in any event, as a registered trade union it had an interest in a dispute that involved a mass dismissal of employees and was also permitted in terms of s38 of the Constitution of the Republic of South Africa to allege an infringement of the Bill of Rights.
- [14] The Labour Court found that the Transnet Bargaining Council was a "bargaining council" as envisaged in s213 read with s27 of the LRA; that fixed term contracts were valid and enforceable and that s198B of the LRA did not alter the common law position; that the collective agreement was a "collective agreement" as envisaged in s198B(2)(c) and that the collective agreement permitted the fixed term contracts in terms of which Transnet's employees were engaged; that the collective agreement was validly extended to non-parties in terms of s23 of the LRA even though it was concluded in a bargaining council, alternatively, that non-parties were bound because the contract clearly intended binding them to its terms and they were also bound, *inter alia*, on the basis of the majoritarian principle. The Labour Court found that the appellant did not make out a case for the interdictory relief sought because the fixed term contracts were valid and their automatic termination by

the effluxion of time did not constitute dismissals. In those circumstances, according to the Labour Court's judgment, there was no illegality and therefore no need for an interdict was shown. The Labour Court held further that the provisions of s189B(13) were not applicable, because there were no dismissals; and that a case of reasonable expectation that the contracts would be renewed, as envisaged in s186(1)(b) of the LRA, was not made out. The Labour Court, resultantly, dismissed the application and made no order regarding the costs.

- [15] The appellant applied to the Labour Court for leave to appeal against its order to this Court, and that Court granted the requested leave, but without furnishing reasons for doing so.

#### Grounds of appeal

- [16] The appellant's grounds of appeal, as per its notice of appeal, are brief. It contends, in essence, that the Labour Court's "[f]inding that Sections 198B(3) and 5 of the LRA were not applicable and that these provisions were ousted, in that Section 198B(2)(c) found application" was erroneous; and that it also erred in its "related finding" that the collective agreement was binding on the appellant and its members on the basis that it could be extended to them in terms of s23 of the LRA. According to the appellant, it could only validly be extended to non-parties in terms of s32 of the LRA. The appellant's intended argument before us was thus very narrow in its compass.

#### Consideration

- [17] As I shall shortly demonstrate, despite the possible merit of the grounds relied upon by the appellant in its notice of appeal, that was barely enough to secure it any of the relief it sought in the Labour Court. The application failed for other fundamental reasons not addressed by the appellant in its notice of appeal and, apparently, in its application for leave to appeal in the Labour Court. Those reasons were apparently also overlooked by that Court in deciding to grant the appellant leave to appeal to this Court.

- [18] Regarding the extension of the collective agreement, there is arguably merit in the contention that if the Transnet Bargaining Council was a “bargaining council” as envisaged in s213 read with s27 of the LRA, and the collective agreement was concluded in that Council, it could only be extended in terms of s32 of the LRA and not in terms of s23. Support for this argument is to be found in unanimous *dictum* of this Court in a recent decision that also went on appeal to the Constitutional Court. Neither the representatives of the parties, nor the Court *a quo*, appear to have been aware of it. At the hearing of the appeal, counsel for both sides was made aware of the *dictum*.
- [19] In *Association of Mineworkers & Construction Union and Others v Chamber of Mines acting in its own name and obo Harmony Gold Mining Co. Pty Ltd and Others*<sup>2</sup> this Court, in summary, stated the following on the issue:

‘[43] It is apparent from a reading of ss32 and 23, within their proper contexts within the LRA, that the two sections contemplate, essentially, two different kinds of collective agreement. In s23, collective agreements outside bargaining councils are contemplated and provided for, whereas s32 contemplates collective agreements concluded on a broader basis, and more particularly, within bargaining councils...’.<sup>3</sup>

- [20] Thus, there may be merit in the argument that the collective agreement, which the parties to that agreement purported to extend to non-parties, on Transnet’s version, in terms of s23 of the LRA, could not be so extended. The upshot of such a finding would mean that the collective agreement was not binding on non-parties, including minority unions, who were not parties to that agreement and who did not subsequently subscribe to it. The difficulty confronting the appellant here, of course, is that the case it makes out in its founding papers is to the effect that its members concluded standard form fixed-term contracts with Transnet, and it annexed a copy of a standard form contract in substantiation of that averment to its founding affidavit. One of the standard terms of that contract is that the terms of that contract are regulated by the collective agreement. If that is so then those members of the appellant,

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<sup>2</sup> *Association of Mineworkers & Construction Union and Others v Chamber of Mines acting in its own name and obo Harmony Gold Mining Co. Pty Ltd and Others* (2016) 37 ILJ 1333 (LAC).

<sup>3</sup> *Ibid* at para 43.

who entered into such a contract, are arguably bound by the collective agreement, not by its purported extension to them in terms of s23 of the LRA, but by their individual consent. However, as alluring as an in-depth consideration and final determination of the point, concerning the scope and binding force of the collective agreement might seem, it is not discreet, nor decisive of this appeal. I do not consider this a proper case for deciding that point in light of the other, decisive, fundamental weaknesses in the appellant's case.

[21] It was a misconception on the part of the appellant to believe that a favourable answer on the point referred to in the previous paragraph, was the silver bullet and that it was decisive of the application. A related misconception was that if the collective agreement did not apply to their members, then the fixed-term contracts of their members were automatically ineffective, and that their respective periods of employment were, consequently, indefinite.

[22] Section 198B(2)(c) of the LRA provides that s198B, which essentially regulates fixed-term contracts of employees earning below a regulated earnings threshold, does not apply to "an employee employed in terms of a fixed term contract which is permitted by any statute, sectoral determination or collective agreement." (There are also other listed instances where the provision does not apply, but which are not relevant in light of the facts of this case). If one were therefore to find that the collective agreement did not apply to the appellant's members, it would simply mean that the provisions of the section would be applicable to those members who earned below the prescribed earnings threshold envisaged in s198B(2)(c). But it does not mean that their contracts were, or are, automatically invalid, nor does it mean that their duration was, or is, for an indefinite period.

[23] In terms of s198B(5): "Employment in terms of a fixed-term contract concluded or renewed in contravention of subsection (3) is deemed to be of indefinite duration." (*emphasis added*). Therefore, in order to find that the contracts are of indefinite duration, it must be shown that they were, at least, in contravention of s198B(3). That subsection does not outlaw fixed-term contracts, but seeks to regulate their conclusion. It, in essence, provides that

a fixed term contract, may be entered into with the employee, to whom s198B applies, for a period in excess of three months, provided certain conditions are met, namely: (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.

[24] In s198B(4) justifiable reasons for the conclusion of a fixed term contract are listed. The first respondent's counsel submitted that it was not a closed list. I consider that there is merit in that submission, because subsection (3)(b) is cast in broad terms and does not purport to confine the justifiable reasons to those listed in subsection (4). Fortunately, in light of the view it does not have to be decided in this case whether the list contemplated in that subsection is a closed list. For present purposes we shall confine the discussion to the reasons listed in subsection (4).

[25] In terms of subsection 4, the conclusion of a fixed term contract will be justified if an employee (a) is replacing another employee who is temporarily absent from work; or (b) is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months; or (c) is a student or recent graduate who is employed for the purpose of being trained or gaining work experiencing order to enter a job or profession; or (d) is employed to work exclusively on a specific project that as a limited or defined duration; or (e) is a non-citizen who has been granted a work permit for a defined period; or (f) is employed to do seasonal work; or (g) is employed for the purpose of an official public works scheme or similar public job creation scheme; or (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.

[26] Subsection (6) provides that 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). Of significance, subsection (7) regulates the *onus* of proof and provides that if relevant in any proceedings the *onus* to prove that the fixed term contract was

justified, as contemplated in terms of subsection (3) and that the term was agreed rests on the employer.

- [27] It is trite that an applicant in application, or motion, proceedings must make out a case in its founding papers for the relief it seeks.<sup>4</sup> Another trite principle applicable to such proceedings where final relief is being sought relates to the method used for the resolution of disputes of fact on the papers by application of the, so-called, “Plascon Evans” principle, in terms of which ultimately the matter is decided on the common cause facts and the version of the respondent in respect of truly disputed facts.<sup>5</sup>
- [28] The appellant did not specifically allege that it was bringing the application on behalf of its members who earned less than the prescribed earnings threshold as envisaged in s198B, but merely averred that the section applied, seemingly, labouring under the misconception that it applied to all fixed-term contracts. In support of its averments concerning the applicability of s198B, it relies on a copy of a standard fixed term contract, allegedly utilised by Transnet, that I have referred to earlier, which effectively contradicts its averments that the collective agreement did not bind its members and supports the respondent’s contention that s198B was not applicable. One of the standard terms of that contract is that the terms of the fixed-term contract are regulated by the collective agreement. If its members concluded that standard form contract, as contended by the appellant, they have incorporated the collective agreement into their fixed-term contracts by reference, and are bound by the collective agreement by their consent. If the collective agreement binds them then s198B is not applicable, as contemplated in s198B(2)(c) of the LRA.
- [29] In any event, even if it were to be found that s198B is applicable to the contracts, there is no averment by the appellant that the contracts of its members were in contravention of s198B(3). Even though the employer bears an *onus* to prove, in relevant proceedings, that the fixed term contracts were justified as contemplated in terms of subsection (3) and that the terms of the

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<sup>4</sup> See eg. *Titty’s Bar & Bottlestore (Pty) Ltd v ABC Garage (Pty) Ltd* 1974 (4) SA 362 (T) at 368-369.

<sup>5</sup> See eg. *Fry’s Metals (Pty) Ltd v NUMSA and Others* [2003] 2 BLLR 140 (LAC) at para 37.

contract was agreed, the appellant, unwittingly, assisted in the discharge of that *onus*. For example, as part of its case it annexes a few termination notices to its founding affidavit. The notices are all similar or of standard form and the main body thereof reads as follows: “This letter serves as official notice in terms of your employment contract that your fixed-term employment contract will end on ...This is due to the completion/ stoppage by the client of work on the project/ or end of employment contract”. There is no averment or suggestion that the contracts were terminated before their expiry dates and no version proffered contradicting the reasons given by Transnet for the termination of the contracts. In any event, the appellant’s reliance on vague, general, unexplained hearsay statements, including those that could possibly be construed as alluding to the reasons for the contracts of its members, cannot be of assistance to it.

[30] The appellant, in effect, conceded to its inability to make out a case in the application that any of its members, on whose behalf it was bringing the application, had a legitimate expectation that their contracts would be renewed by Transnet, and that the non-renewal was accordingly dismissals as contemplated in s186(1)(b) of the LRA.<sup>6</sup> This would have required the appellant to, at least, put up facts and circumstances in respect of each affected employee, which would cause a reasonable person, in the position of the particular employee, to expect a renewal of the contract.<sup>7</sup>

[31] The appellant avers that the application is an alternative to the other processes that it has adopted, namely, resorting to arbitrations to prove that their individual members had reasonable expectations of renewal. The appellant refers to two cases where awards were given in favour of their members, which were then taken by Transnet on review to the Labour Court. The appellant complains about the practicalities of running arbitrations on behalf of “literally thousands of employees” and extols the benefits to be derived from the success of the application. Mr James states in that regard:

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<sup>6</sup> Section 186(1)(b) of the LRA provides that the failure to renew a fixed term contract, which an employee reasonably expected the employer to renew on the same or similar terms, or its renewal on less favourable terms, constitutes a dismissal

<sup>7</sup> *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape and Others* (2013) 34 ILJ 1427 (LAC) at paras 25-27.

“...should this Court uphold the applicant's contentions relevant to the applicability of Section 189B to the current situation, this will effectively dispose of all cases and there will be no need to deal with the alternative contentions relevant to a reasonable expectation of permanency.” The reference to s189B appears to be an error, and reference was most likely being made to s198B of the LRA, but that does not detract from the point that the appellant sought to use the application as an alternative, or short-cut strategy, but failed to make out a case for the relief sought.

[32] In summary, the appellant' application was rightly dismissed by the Labour Court. Notwithstanding the perceived merit in the, effectively, singular ground that the appellant chose to pursue on appeal, it had failed to make out a case in the application for the relief it sought. At the core of this failure was its failure to prove that any of its members, on whose behalf it was bringing the application, had been dismissed by Transnet. It failed to show that its members were not bound to the collective agreement by consent, despite having incorporated it into their contracts by reference, and that s198B was therefore applicable. Alternatively, it failed to show, at least *prima facie*, that if the section was applicable that (each of) the contracts of the members, that it was representing, was in contravention of s198B(3), as contemplated in s198B(5) of the LRA. Instead, it put up as part of its case uncontested information that the contracts were justifiable. On the papers as they stand a finding cannot be made that the reasons for the contracts advanced by the first respondent are not justifiable as contemplated in s198B(3) read with subsection (4).

[33] In those circumstances, it also failed to prove that it was entitled to rely on s189A(13) of the LRA, which can only find application at the instance of a consulting party in circumstances where mass dismissals of employees for operational reasons (retrenchments) were contemplated by the employer, and the employer failed to comply with a fair procedure. The section provides that in those circumstances the consulting party may approach the Labour Court by way of an application for an order (a) compelling the employer to comply with a fair procedure; (b) interdicting and restraining the employer from

dismissing an employee prior to complying with a fair procedure; (c) directing the employer to reinstate an employee until it has complied with a fair procedure; (d) make an award of compensation, if an order in terms of paragraphs (a) to (c) is not appropriate.

[34] The first respondent did not ask for costs, in the event it was successful, but preferred to leave the costs issue in the Court's discretion. Taking all relevant factors into account, a costs order is not appropriate.

[35] In the result, the appeal is dismissed.

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P Coppin

Judge of Appeal

Sutherland JA and Savage AJA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANT:

Mr Minnaar Niehaus

of Minnaar Niehaus Attorneys

FOR THE FIRST RESPONDENT:

Mr P Pretorius SC, with Mr R Itzkin

Instructed by Maserumule Attorneys