



**THE LABOUR COURT OF SOUTH AFRICA
JOHANNESBURG**

Not reportable

Case No. JR 1624/16

In the matter between:

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION
NALEDI BISIWE N.O.
NATIONAL UNION OF METAL WORKERS
OF SOUTH AFRICA
S NZAMA AND FOUR OTHERS**

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Heard: 23 May 2017

Delivered: 23 June 2017

JUDGMENT

SALOOJEE, AJ

Introduction

- [1] This is an application to review and set aside the second respondent's (Commissioner) award, which found that the fixed term employment contracts of the fourth to eighth respondents became contracts for an indefinite duration in terms of Section 198B of the Labour Relations Act¹ (LRA) by operation of law.
- [2] The Commissioner also ordered, in the award, the applicant to pay the fourth to eighth respondents for the period 1 October 2015 to 30 June 2016 and for the applicant to receive these respondents as permanent employees.

Background

- [3] The applicant employed the fourth to eighth respondents as interpreters on fixed term contracts for two-year periods.
- [4] These respondents consist of three groups as the contracts commenced at different periods:
- 4.1 The first group consists of two employees who were employed from 1 May 2013 to 30 April 2015. The second group consists of two employees who were employed from 1 June 2014 to 31 May 2016.
- 4.3 The third group consists of one employee who was employed from 1 September 2014 to 31 August 2016.
- [5] Prior to the expiration of the fixed term contracts, the applicant commenced with a process to recruit permanent interpreters. The applicant extended the fixed term contracts for the first group to 31 October 2015 in order to include these respondents in the recruitment process.

¹ Act. 66 of 1995

- [6] On completion of the recruitment process, the fourth to eighth respondents were not offered permanent employment. Instead, these respondents were offered part-time positions with the applicant.

The grounds of review

- [7] The grounds of review are based on an interpretation of Section 198B² of the LRA.

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- (1) For the purpose of this section, a “fixed term contract” means a contract of employment that terminates on—
 - (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) This section does not apply to—
 - (a) employees earning in excess of the threshold prescribed by the Minister in terms of section 6 (3) of the Basic Conditions of Employment Act;
 - (b) an employer that employs less than 10 employees, or that employs less than 50 employees and whose business has been in operation for less than two years, unless—
 - (i) the employer conducts more than one business; or
 - (ii) the business was formed by the division or dissolution for any reason of an existing business; and
 - (c) an employee employed in terms of a fixed term contract which is permitted by any statute, sectoral determination or collective agreement.
 - (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.

- [8] The first ground of review is that a fixed term contract concluded before 1 January 2015 and continued beyond 1 April 2015 does not fall within the scope of Section 198B of the LRA.
- [9] The second ground of review is that the phrase “*not be treated less favourably*” contained in Section 198B(8)(a) cannot be equated to permanent employment.

Analysis

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- (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).
 - (7) If it is relevant in any proceedings, an employer must prove that there was a justifiable reason for fixing the term of the contract as contemplated in subsection (3) and that the term was agreed.
 - (8)
 - (a) An employee employed in terms of a fixed term contract for longer than three months must not be treated less favourably than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment.
 - (b) Paragraph (a) applies, three months after the commencement of the Labour Relations Amendment Act, 2014, to fixed term contracts of employment entered into before the commencement of the Labour Relations Amendment Act, 2014.
 - (9) As from the commencement of the Labour Relations Amendment Act, 2014, an employer must provide an employee employed in terms of a fixed term contract and an employee employed on a permanent basis with equal access to opportunities to apply for vacancies.
 - (10)
 - (a) An employer who employs an employee in terms of a fixed term contract for a reason contemplated in subsection (4) (d) for a period exceeding 24 months must, subject to the terms of any applicable collective agreement, pay the employee on expiry of the contract one week's remuneration for each completed year of the contract calculated in accordance with section 35 of the Basic Conditions of Employment Act.
 - (b) An employee employed in terms of a fixed-term contract, as contemplated in paragraph (a), before the commencement of the Labour Relations Amendment Act, 2014, is entitled to the remuneration contemplated in paragraph (a) in respect of any period worked after the commencement of the said Act.
 - (11) An employee is not entitled to payment in terms of subsection (10) if, prior to the expiry of the fixed term contract, the employer offers the employee employment or procures employment for the employee with a different employer, which commences at the expiry of the contract and on the same or similar terms.

- [10] Section 3 of the LRA³ requires that the LRA should be interpreted on a construction that complies with the Constitution and public international law that gives effect to the primary objects of the LRA.
- [11] In *Natal Joint Municipal Fund v Endumeni Municipality*⁴ the Supreme Court of Appeals states:

“...The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, 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; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the

³ **“Interpretation of this Act**
Any person applying this Act must interpret its provisions—
(a) to give effect to its primary objects;
(b) in compliance with the Constitution; and
(c) in compliance with the public international law obligations of the Republic.”

⁴ 2012 (4) SA 593 (SCA) at para 18-19

purpose of the provision and the background to the preparation and production of the document.

All this is consistent with the 'emerging trend in statutory construction'. It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in *Jaga v Dönges NO and Another*; *Bhana v Dönges NO and Another*, namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow, without the need to cite authorities from an earlier era that are not necessarily consistent and frequently reflect an approach to interpretation that is no longer appropriate. The path that Schreiner JA pointed to is now received wisdom elsewhere. Thus Sir Anthony Mason CJ said:

'Problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context. The modern approach to interpretation insists that context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise.'

More recently, Lord Clarke SCJ said 'the exercise of construction is essentially one unitary exercise'."

[12] In *Steenkamp and others v Edcon Limited*⁵, the Constitutional Court adopted the purposive approach to interpret the LRA on the following reasoning:

"This matter requires us to interpret various provisions of the LRA. That being the case, it is necessary that we have regard to the correct approach to the interpretation of this legislation. The starting point is section 39(2) of the Constitution. In so far as it is relevant, it reads:

⁵ 2016 (4) BCLR 335 (CC) at para. 100 to 101

“When interpreting any legislation . . . every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

We must also take into account the provisions of section 3 of the LRA. Section 3 reads:

“Any person applying *this Act* must interpret its provisions—

- (a) to give effect to its primary objects;
- (b) in compliance with the Constitution; and
- (c) in compliance with the public international law obligations of the *Republic*.”

The primary objects of the LRA appear in section 1 which sets out its purpose. The purpose is –

“to advance economic development, social justice, labour peace and the democratisation of the *workplace* by fulfilling the primary objects of *this Act*.”

Thereafter the primary objects of the LRA are spelt out. They are:

- “(a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution;
- (b) to give effect to obligations incurred by the *Republic* as a member state of the International Labour Organisation;
- (c) to provide a framework within which *employees* and their *trade unions*, employers and *employers’ organisations* can –
 - (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
 - (ii) formulate industrial policy; and
- (d) to promote –
 - (i) orderly collective bargaining;
 - (ii) collective bargaining at sectoral level;
 - (iii) *employee* participation in decision-making in the *workplace*; and
 - (iv) the effective resolution of labour *disputes*.”

It is trite by now that, in interpreting provisions of the LRA, the correct approach is purposive interpretation.”

[13] In *Commission for Conciliation, Mediation and Arbitration v MBS Transport CC and others*⁶, the Labour Appeal Court stated:

“It is trite that, when interpreting any document, regard must be had to the language used as well as the context under which the document saw the light of the day. This holds true for any document including contracts and legislative texts. There is no need for any ambiguity before the context is considered”

The first ground of review

[14] In *Bartman v Dempers*⁸, the Appellate Division confirmed the rule of construction that:

“There is a well-known rule of construction that no statute is to be construed so as to have a retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws) unless the Legislature clearly intended the Statute to have that effect. See *Peterson v Cuthbert and Co. Ltd.*, 1945 AD 420 at p. 430.”

[15] The Appellate Division in *Minister of the Interior v Confidence Property Trust (Pty) Ltd and others*⁹ stated:

⁶ [2016] 10 BLLR 999 (LAC) at para. 15

⁷ *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) at para [29] [also reported at [2015] 4 All SA 417 (SCA) – Ed]; *KPMG Chartered Accountants SA v Security Ltd and another* 2009 (4) SA 399 (SCA) at para [39] [reported as *KPMG Chartered Accountants v Securefin Ltd and another* [2009] 2 All SA 523 (SCA) – Ed]; 2012 (4) SA 593 (SCA) at para [18] [sic]

⁸ 1952 (2) SA 577 (A) at 580 B-C

⁹ 1956 (2) SA 365 (A) at 372H – 373 A

"I am strongly inclined to the view that in interpreting those sections the general rule must be applied viz: a statute regulates future conduct and must be construed, unless there is a clear indication to the contrary, as operating only on cases or facts which came into existence after the Statute came into operation. *Nova constitutio futuris formam imponere debet non praeteritis*. See *Principal Immigration Officer v Purshotam*, 1928 AD 435 at p. 443; *Principal Immigration Officer v Bhula*, 1931 AD 323 at pp. 333 - 335; *Ex parte The Minister of Justice*, 1938 AD 370 at pp. 377 - 378; *Peterson v Cuthbert and Company Ltd.*, 1945 AD 420 at pp. 431 - 432; Craies on *Statute Law*, (6th ed. pp. 330 *et seq.*); Maxwell on *Statutes*, (8th ed. pp. 189 *et seq.*). In *Bartman v Dempers*, 1952 (2) SA 577 (AD)"

[16] The Appellate Division in *Bellairs v Hodnett and another*¹⁰ stated:

"There is a general presumption against a statute being construed as having retroactive effect and even where a statutory provision is expressly stated to be retrospective in its operation it is an accepted rule that, in the absence of contrary intention appearing from the statute, it is not treated as affecting completed transactions and matters which are the subject of pending litigation. (*Bell v Voorsitter van die Rasklassifikasieraad en Andere*, 1968 (2) SA 678 (AD); *Pinkey v Race Classification Board and Another*, 1968 (4) SA 628 (AD); Steyn, *Uitleg van Wette*, 4th ed., pp. 86 - 92)."

[17] Kellaway in the *Principles of Legal Interpretation of Statutes, Contracts and Wills*¹¹ states:

"In the interpretation of any statute or subordinate legislation (such as a validity notice), there must be a clear indication that it has retrospective effect, otherwise it applies only from the date on which it comes into effect or from the date of promulgation or, as the case may be, from the date of the notice."

¹⁰ 1978 (1) SA 1109 (A) at 1148 F-G

¹¹ at page 321, 1995 Edition

- [18] Section 198B of the LRA commenced on 1 January 2015.
- [19] Section 198B(8) consists of two parts; Section 198B(8)(a) which applies to employees employed in terms of a fixed term contract for longer than three months and Section 198B(8)(b), a transitional provision.
- [20] The transitional provision ¹² suspends the operation of Section 198B(8)(a) for a period of three months for fixed term employment contracts that were concluded before the commencement of the amendment. Secondly, a clear indication by the legislature that Section 198B(8)(a) applies to fixed term contracts of employment entered into before the commencement of the LRA, 2014.
- [21] Thus, Section 198B(8)(a) of the LRA was suspended from 1 January 2015 until 31 March for fixed term employment contracts concluded before 1 January 2015.
- [22] It stands to reason that the fixed term contracts referred to in Section 198B(8)(b) should endure for longer than three months in order to avoid an absurdity¹³.

¹² Section 198B(8)(b)

¹³ *S v Acting Regional Magistrate, Boksburg 2012 (1) BCLR 5 (CC)* at par 22:

“In light of these objects stated within the four corners of the Act itself, it is impossible to interpret the provisions to render any sexual incapable of prosecution. In *New Clicks*, this Court approved the rule laid down in *Venter v R*, that a court may depart from the clear language of a statute where it:

“...would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account.”

- [23] Consequently, Section 198B(8)(a) applies from 1 April 2015 to fixed term employment contracts concluded before 1 January 2015.
- [24] The fourth to eighth respondents concluded fixed term employment contracts with the applicant before 1 January 2015 and the contracts were to terminate after 31 March 2015. Thus, these contracts fall within the time periods of Section 198B(8)(b) and Section 198B(8)(a) applies to these respondents.

The second ground of review

- [25] The second ground of review is that the phrase “*not be treated less favourably*” contained in Section 198B(8)(a) cannot be equated to permanent employment.
- [26] The Commissioner incorrectly relied on Section 198B(3) of the LRA to regard the contracts of the fourth to eighth respondents to be for an *indefinite duration*¹⁴ as these contracts would have terminated after 31 March 2015.
- [27] The first respondent’s Counsel submitted that the Commissioner erred in this regard but reached a reasonable conclusion nonetheless.
- [28] I agree with the first respondent’s Counsel that the Commissioner misplaced Section 198B(5) dealing with the deeming of a contract of indefinite duration for Section 198B(3).
- [29] Further, the Commissioner did not rely on Section 198B(8)(a) that contains the phrase “*not be treated less favourably*” in order to arrive at the conclusion in the award.

¹⁴ Para. 48 and 49 of the award

[30] The basis of the Commissioner's reasoning does not equate to the Commissioner failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously. Therefore, the Commissioner's misplaced reliance is neither latently nor manifestly unlawful and does not amount to a reviewable irregularity.¹⁵ The award is a decision that another reasonable decision-maker could reach.¹⁶

[31] In light of this conclusion, there is no need to consider a definition for the phrase in question.

Costs

[32] The approach to costs in *National Union of Mine Workers v East Rand Gold and Uranium Company Ltd*¹⁷ that costs follow the result is a factor to be taken into account but not determinative in awarding costs.

[33] In *Biowatch Trust v Registrar Genetic Resources and Others*¹⁸ the Constitutional Court took into account exceptions to the general rule to costs which would encourage parties to assert rights. The Constitutional Court took into account the impact of the judgment on other institutions, enriching the general body of jurisprudence, adding to the texture of living in a constitutional democracy and that the State should be shielded of costs from manifestly inappropriate or frivolous actions.

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

¹⁵ *Head of the Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC) at para. 30-31

¹⁶ *Sidumo and another v Rustenburg Platinum Mines Ltd and others* [2007] 12 BLLR 1097 (CC) at para. 110

¹⁷ [1991] ZASCA 168; 1992 (1) SA 700 (A)

This approach has been endorsed by this Court in several decisions see for example *Callguard Security Services (Pty) Limited v TGWU and Others* [1997] 4 BLLR 392 (LC) at 399-402; *South African Airways Technical (SOC) Ltd v South African Transport and Allied Workers Union and Another* [2014] 5 BLLR 491 (LC) at para 22.

¹⁸ 2009 (10) BCLR 1014 (CC) at para. 23

Order

1. The application is dismissed.
2. Each party is to pay its own costs.

Y F Saloojee

Acting Judge of the Labour Court

Appearances:

For the Applicant: P Maserumule of Maserumule Attorneys

For the respondent: C Watt-Pringle SC

Instructed by : Brett Purdon Attorneys

LABOUR COURT