IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR536/16

In the matter between:

TLOKWE LOCAL MUNICIPALITY **Applicant**

and

INDEPENDEANT MUNICIPAL AND ALLIED TRADE UNION (IMATU) OBO P LEREFOLO **First Respondent**

SOUTH AFRICAN LOCAL BARGAINING COUNCIL **Second Respondent**

COMMISSIONER MARLEZE BLIGNAUT (SWANEPOEL) N.O. **Third Respondent**

Heard:13 July 2018

Delivered: 30 May 2019

JUDGMENT

MOSEBO, AJ

Introduction

[1] This is an application brought in terms of section 145(1)(a) of the Labour Relations Act[1] (the LRA). In this application, the applicant (the municipality) seeks an order to review and set aside the arbitration award issued by the third respondent (the arbitrator) on 25 February 2016 under case number NWD081506. The application is opposed by the third respondent, IMATU, on behalf of its member, Mr P Lerefolo (the employee).

Background

[2] On or about 22 July 2014, the finance department of the applicant advertised a vacancy for a senior clerk debt collection. The employee applied for the position even though he did not have 3 years working experience that was set out in the advertisement as one of the minimum requirements of the post. It appears that at some stage the municipality placed a moratorium as a result of which no permanent appointments could be made in the advertised posts. As a result, there were no interviews that were conducted in respect of the relevant posts including the post of senior clerk debt collection.

[3] However, the finance department requested the municipal manager's approval that, in the interim, somebody be appointed in the post of senior clerk debt collection on a fixed term contract to assist with the workload until such time when the moratorium would have been uplifted and a suitable candidate would have been appointed. The municipal manager approved the request and as a result the employee was employed by the municipality on a fixed term contract. It was also not in dispute that when he was employed, the employee was informed by the Revenue Manager, Ms Theresa van Wyk (Ms

[1] 66 of 1995, as amended.

Van Wyk) that he was being appointed on a temporary basis until the municipality could appoint a suitable candidate in that post.

[4] It is also not in dispute that the employee was handpicked from a data base of the candidates who had applied for the post of senior clerk debt collection. According to the Human Resources Manager, Ms Nontobeko Klass (Ms Klass), the employee was handpicked not because he met all the requirements of the post, but simply because he happened to be the first candidate on the data base who appeared on the face of it that he could perform the required job. It was not disputed that the municipality normally used this selection method when any department had a requirement to temporarily fill a vacancy on an urgent basis and it was also testified that this selection method gave an opportunity to the selected candidates to gain experience and enhance their possible future employment opportunities.

[5] On or about 17 December 2013, the municipality and the employee concluded a fixed term contract (the contract) for the period 18 December 2013 to 17 March 2014. Paragraph 1 of the contract provided that the employee's fixed term contract as a clerk Gr 1 2013-12-18 to 2014-03-17 was confirmed. Paragraph 2 provided that the employee's appointment was in the Department: Finance Section: Revenue – debt collection. Paragraph 4 refers to the attached contract of employment but only the following documents were attached 1. A copy of a code of good conduct for municipal staff employees 2. A copy of the employee's job description 3. A copy of the structure of the revenue management.

[6] The first addendum extended the fixed term contract to 17 June 2014. Thereafter, the said contract was extended to 17 September 2014; 17 November 2014; 18 December 2014; 17 January 2015; 17 February 2015; 17 April 2015; 17 May 2015 and finally to 17 June 2015. Despite the fact that all the addendums refer to clause 2.1, it is apparent that there is no clause 2.1 in the contract. However, it was common cause between the parties that those addendums duly extended the contract concluded on 17 December 2013.

[7] On or about 03 March 2015, the municipal manager uplifted the moratorium and issued an email to Ms Klass instructing her to proceed with the recruitment of all the advertised posts which had been placed on hold. On or about 21 April 2015, a shortlisting panel made a recommendation of the shortlisted candidates but the employee was excluded from the shortlisting. The interviews of the shortlisted candidates were scheduled for 12 May 2015 and Ms H M Erasmus was recommended for appointment. It only came to the employee's attention on or about 14 May 2015, that the shortlisting and the interviews had already been conducted and that he was excluded from the shortlist on the basis that he did not have 3 years working experience and that the shortlisted candidates had the required 3 years working experience.

[8] On or about 14 May 2014, the employee wrote a complaint to the municipal manager about his exclusion on the basis of lack of 3 year experience in circumstances where he was the only person working in that office with his supervisor from 17 December 2013 and he had performed his duties satisfactorily. There was no response to this complaint and this was followed up with about three emails some of which were also addressed to the Human Resources Department. It is common cause that the only reason the employee was excluded from the shortlist was the fact that he did not have the 3 year working experience which was set out in the advertisement as one of the minimum requirements of the post.

[9] On 27 July 2015, the employee was issued with a letter terminating his fixed term contract with effect from 31 July 2015. On or about 12 August 2015, the first respondent (the union), referred the dispute to the second respondent (the bargaining council) for conciliation on behalf of the employee. The union identified the nature of the dispute as interpretation and/application of section 198B of the LRA in that the municipality had failed and/or neglected to comply with the section. The bargaining council was unable to resolve the dispute and the matter was referred to arbitration.

Arbitration Award

[10] In her award, the arbitrator concluded that the employee, was in accordance with the provisions of section 198B, deemed to be employed on an indefinite basis by the municipality at the time of the termination of his employment contract on 31 July 2015. The municipality was ordered to pay the employee compensation in the sum of R98 104.00 (Ninety eight thousand one hundred and four rand, calculated as R12 263 x 8) for having unfairly terminated his employment contract. The said amount was to be paid on or before 31 March 2016. It is common cause that at the commencement of the arbitration, the employee abandoned his claim for reinstatement and sought compensation only.

[11] The municipality seeks to review this award on various grounds. In its first ground of review, the municipality states that the arbitrator misconstrued the nature of the dispute that served before her in that she confused and/or incorrectly took into account the provisions of s 186(1)(b)(ii) relating to legitimate expectation instead of only the provisions of s 198B of the LRA under which the dispute was referred. In this regard, the municipality referred to various paragraphs in the arbitration award but in particular to paragraph 30 where the arbitrator has stated that on 01 January 2015, new legislation was promulgated which amended both s 186(1)(b) and s 198B of the LRA.

[12] In my view, the commissioner simply set out the legal position of both s 186(1) (b) and s 198B. She stated that based on s 186(1) (b) an employee employed on a fixed term contract can now claim that he reasonably expected an employer to either (i) renew the fixed term contract or to (ii) retain the employee on an indefinite basis. If he does not renew or retain the employee, then, an employee can claim that he was unfairly dismissed. However, an employee's expectation in that regard would still be subject to an enquiry to establish what expectation existed or not. In paragraph 31 of her award, the arbitrator continued and stated the following:

> "Section 198B further places a limitation on what would constitute a valid fixed term contract and under what circumstances a fixed term contract would be justified. The legislature also stipulated that if a fixed term contract was concluded or renewed in contravention of subsection (3) (the justification clause) then the contract would be deemed to be of indefinite duration (sec198B (5)). It further requires that the offer to employ or to renew on a fixed term basis must be in writing and state the reason for fixing the period (sec 198B (6)). It also places an onus on the respondent to prove that there is in fact a justifiable reason for having fixed the term of the contract and that the term was agreed (sec 198B(7))."[2]

[13] Thereafter, the arbitrator continued and stated that in determining the dispute referred to the Council she would consider the employee's case against the provisions of s 198B of the LRA. In my view, the commissioner merely set out the background and the import of both s 186(1)(b) and s 198B and thereafter she made it clear that she would consider the employee's case against the provisions of s 198B and not s 186(1)(b) of the LRA. It is apparent from the aforegoing that the arbitrator was not confused about the task she was about to undertake and, indeed, she did not determine the dispute based on a legitimate expectation, but did so based on s 198B of the LRA. This ground of review has no merit and falls to be dismissed.

[14] The municipality's second ground of review is based on the fact that the arbitrator stated that in considering the version presented by the municipality, she had taken notice of the fact that there is nothing in writing that confirmed the intention of the municipality to appoint the employee only until such time when it found a suitable candidate. The commissioner further stated that the municipality was quite opportunistic to raise this as their defence.

[15] The municipality's case is that the employee conceded under cross-examination that he was informed by his manager that the position was on a

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[2] Record of the hearing p27

fixed term contract and that he might be released from his duties when a permanent employment is made. It was submitted that the appointment of a permanent employee in the employee's position constituted an occurrence of a specific event contemplated in s 198B(1)(a) of the LRA and it was further submitted that it was immaterial that this was not reduced to writing because the facts are not disputed but are common cause.

[16] *In Piet Wes Civilis CC & another v Association of Mineworkers & Construction Union & others*[3] the Labour Appeal Court (LAC) considered the application of s 198B in a case where some of the employees had signed a written contract of employment and others had been employed in terms of an oral agreement. After considering that s 198B came into operation on 01 January 2015, the court stated the following:

> "An offer to employ an employee on a fixed term contract, or to renew or extend that contract must, in terms of s 198B (6) be in writing; with a fixed term contract, in terms of s 198B (1), required to state expressly that it is to terminate on the occurrence of a specified event, on the completion of a specified task or project or a fixed date, subject to s 198B (3). The requirement that a written offer of employment is made to an employee is for the compelling reason in that it seeks to prevent any later dispute arising as to terms, scope or duration of the fixed term or limited duration contract entered into. On the appellants' own version, no written employment contract was entered into with a number of employees employed by both Piet Wes and Waterkloof, with the basis of employment apparently having been agreed verbally with those employees. No evidence was put up that employees were provided with a written offer of employment, as required by s 198B (6). It follows that the appellants failed to show, in respect of those employees with whom no written contract had been concluded, that the provisions of s 198B had been complied with. . . "[4]

[3] (2019) 40 ILJ 130 (LAC).
[4] Para 23

[17] In respect of the employees with whom the appellant had a written employment contract and where the duration of contract was made subject to the supply of work contracts by the clients, the LAC held that a contract duration linked to the supply of work contracts by clients cannot be construed to equate to the occurrence of a specified event, the completion of a specified task or project or a fixed date, as contemplated by s 198B (1).

[18] It is apparent from the above authority that the specified event contemplated by s 198B (1) is in terms of s 198B (6) required to be expressly stated in the written fixed term contract or extension, subject to s 198B (3). The LAC found against the appellants on the basis that the contracts offered to the employees were not in writing and therefore did not comply with the provisions of s198B (6). This 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).

[19] S 198B (3) provides that 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 limited or definite duration; or (b) the employer can demonstrate any justifiable reason for fixing the term of the contract. This means that the offer of employment must not only be in writing but it must also expressly state the reasons contemplated in subsection (3) (a) or (b).

[20] It is significant to note that in the instant case, the offer of employment was made to the employee on 17 December 2013 well before s 198B was brought into operation. The relevant extensions are those that were made after 01 January 2015 up to 31 July 2016 when the employee's contract of employment was terminated. Nonetheless, I consider it significant in the instant case to note that neither the offer of employment dated 17 December 2013 nor several extensions that followed it, in particular those that were

made after 01 January 2015 expressly state any reason contemplated in subsection (3) (a) or (b).

[21] Therefore, it follows that even though the offer of employment made to the employee including the extensions made to his contract were in writing, the fixed term contract in this matter was renewed in contravention of subsection (3) in that the provisions of s 198B(6)(b) were not complied with. In terms of section 198B (5), a fixed term contract renewed in contravention of s 198B (3) is deemed to be of indefinite duration.

[22] It is understandable that the offer of employment would not state the reasons contemplated in subsection (3)(a) or (b) because it predated the said subsection. The same applies to the extensions that were made before 01 January 2015. The extensions made after 01 January 2015 should have been made with the provisions of s 198B in mind. However, the wording of the said extensions is exactly the same as the wording of the extensions made prior to 01 January 2015. This is an indication that the possible consequences of the introduction of s 198B in the LRA, with effect from on 01 January 2015, was not taken into consideration by the municipality concerning this contract. This much was confirmed by Ms Van Wyk at the arbitration when she testified that the panel did not take any consideration to the amendments in terms of the labour law.[5]

[23] Therefore, the arbitrator's conclusions that in considering the version presented by the municipality, she had taken notice of the fact that there was nothing in writing that confirmed the intention of the municipality was to appoint the employee until such a time when it found a suitable candidate, cannot be faulted. So too, the arbitrator's conclusion that the municipality was quite opportunistic to raise that as their defence. In my view, the arbitrator's finding in this regard is correct in that the extensions to the fixed term

[5] Record of the proceedings p194 ll 1-10

contract, in particular, those that were made after the introduction of s 198B do not expressly state that the fixed term contract will terminate once a suitable candidate has been appointed. Therefore, this ground of review falls to be dismissed as well.

[24] The municipality's third ground of review is that the employee conceded in cross-examination that he agreed with his manager that one day the position would be filled and when it is filled the fixed term contract would come to an end even though the manager did not specify as to when. The municipality's case is that the arbitrator ignored this evidence when she stated in her award that the municipality had to 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 to.

[25] In her award, the arbitrator, indicated that s 198B (3) allows appointment on a fixed term period only if the work is of limited or defined duration or if the employer can demonstrate any other justifiable reason. The arbitrator concluded that the municipality was not able to prove on a balance of probabilities that it had a justifiable reason for fixing the term of the applicant's employment contract, in that on the municipality's own version the work was not of a limited nature, but, in essence, the municipality wanted to appoint somebody who met the minimum requirements of 3 years working experience. The commissioner found this justification illogical in that the employee had occupied that position for 19 months without meeting the minimum requirements of 3 years working experience and during that period, it made no difference to the municipality and to the service delivery. I find this reasoning unassailable and therefore correct.

[26] The municipality's further submission that there was an agreement made with the employee in terms of s 198B (3) that the employee's contract would terminate once the municipality had found a suitable candidate does not take this matter further in that the said agreement did not comply with the provisions of s 198B(6)(b) and in any event, the arbitrator correctly found that

there was no justifiable reason for fixing the employee's employment contract. This ground of review falls to be dismissed as well.

[27] The municipality's fifth ground of review should also suffer the same fate simply on the basis that the municipality's alleged justification for fixing the employee's employment contract was not expressly stated in the contract or in the extensions to the contract in accordance with the provisions of s 198B(6)(b) of the LRA. Therefore, this ground falls to be dismissed as well.

[28] The municipality's sixth ground of review has no merit in that the factors that the arbitrator took into account are clearly set out in the award. There is no indication in the arbitration award that in determining the appropriate amount of compensation, the arbitrator took into account any of the factors relied upon by the municipality in this ground of review. Therefore, this ground of review also falls to be dismissed.

[29] In my view, considerations of law and fairness dictate that no order should be made as to costs.

[30] In the premises, I make the following order:

Order

1. The application for review is dismissed.
2. There is no order as to costs.

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Mosebo AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr H Wissing of Henk Wissing Attorneys

For the first respondent: Mr/Ms _____ Union Official