

NOTES / AANTEKENINGE

THE DEVIL IN THE DEEMED: NOVEL TAKES ON SECTIONS 198B AND D¹

1 Introduction

Section 198 of the Labour Relations Act is designed to protect vulnerable employees of labour brokers and those on fixed-term contracts. Some recent judgments may make obtaining that protection more complicated.

2 *Nama Khoi Local Municipality v SALGBC*

2.1 *Background*

The dispute in *Nama Khoi Local Municipality v South African Local Government Bargaining Council* [2019] 8 BLLR 830 (LC) arose in the following circumstances. Mr August was employed as a communal officer by the Nama Khoi municipality on two successive fixed-term contracts, the first from 1 October to 31 December 2016, the second from 1 January to 31 March 2017. This made a total of six months; three months longer than employers are now allowed to employ workers earning below R205,433.30 a year unless the nature of the work is “of a limited or definite duration” or the employer can establish some “justifiable reason for fixing the term of the contract” (s 198B(3) of the Labour Relations Act 66 of 1995, as amended on 1 January 2015). If the contract is for longer than three months or is extended beyond that period, without the employer demonstrating a justifiable reason for this, employment is deemed to be of indefinite duration (s 198B(5)).

August was informed on 31 March 2017 (the day his extended contract was set to expire) that it would not be renewed and that his service to the municipality would end. Three days earlier (on 27 March 2017), August’s union, IMATU, had referred a dispute to the CCMA in terms of section 198D, seeking the following relief:

“The employer failed and/or neglected to appoint Mr R August on an indefinite contract although function of the post are of a permanent nature [*sic*], alternatively to confirm that he is appointed on an indefinite contract.”

¹ This contribution first appeared in *Employment Law* (2020) vol 36(1).

The conciliating commissioner classified the dispute as one falling under section 198B, and the matter was referred for arbitration in the same terms. After the dispute was arbitrated on 21 June 2017, another commissioner noted that the municipality had not explained why it had chosen to employ August on a second fixed-term contract. The commissioner also noted that neither of the contracts explained why it was necessary to employ August on fixed-term contracts at all, as required by section 198B(6)(b). The arbitrator accordingly ruled that August had been deemed employed indefinitely. Importantly, the commissioner took a step further: Having noted that Mr August's second contract had ended on 31 March 2017, he reinstated August retrospectively to that date. This was the aspect of the award that was challenged on review.

Apart from claiming that the commissioner had ignored evidence concerning the justifiable reasons why it claimed to have employed August on fixed-term contracts, the municipality raised a number of innovative points: First, that, since the dispute had been referred under section 198D, the commissioner lacked power to do anything more than interpret and apply that provision; secondly, that section 198D does not confer on arbitrators power to appoint employees; thirdly, that IMATU (the referring party) had not sought reinstatement; finally, that reinstatement would have been impracticable within the meaning of that word in section 193(2)(c).

2.2 *Judgment*

Snyman AJ began by referring to the conventional dispute resolution provisions of the LRA which relate to dismissals. If August was deemed a permanent employee by virtue of section 198B(5), the termination of his contract could be covered by one of two provisions of the definition of "dismissal" in section 186(1)(a). If the municipality was wrong in contending that August was employed on a fixed-term contract, he would have been dismissed in the sense contemplated in section 186(1)(a) – his employment had been terminated without notice. Or, if August was indeed employed on a fixed-term contract, he might have been dismissed in the sense contemplated by section 186(1)(b) – he could claim that he reasonably expected to have been employed on an indefinite basis on the same or similar terms. Either way, August would normally have had to refer a dispute for conciliation under section 191(5)(a) of the LRA and, if successful, could claim relief under sections 193 and 194.

Significantly, IMATU had not referred the dispute under section 191(5). It had relied on section 198D, the dispute resolution provision specifically tailored for alleged breaches of sections 198A, B or C, which requires arbitrators to interpret and apply those provisions to resolve the dispute. Save for spelling out its own time limits (six months from the act or omission complained of and 90 days after the dispute has been certified unresolved), the procedural steps prescribed by section 198D are much the same as those set out in section 191(1)(a) – first conciliation and then, if unresolved, arbitration.

Unlike section 193, section 198D does not expressly spell out the relief arbitrators may grant after interpreting and applying sections 198A, B or C.

The question before the *Nama Khoi* court was what arbitrators may do if they find that any of the substantive provisions of sections 198A, B or C apply – i.e. if an employee is deemed an employee of a labour broker's client (s 198A(3)(b)), if an employee on a fixed-term contract is deemed permanently employed (s 198B(5)) or if a part-time employee is entitled to be treated no less favourably than full-time employees (s 198C(3)(a)).

While the employment relationship still exists, the answer seems obvious. All the arbitrator need do is to declare that the employee is “deemed” to be a fulltime employee of the client or permanently employed or entitled to be treated similarly to fulltime employees, and the legal consequences will follow. Any specific order will be unnecessary because the consequences of the deeming provisions are spelt out in the Act itself. The same applies to arbitrators charged with interpreting and applying collective agreements: No power to grant specific remedies is expressly afforded by section 24(5) because the arbitrator need only declare as much and the employer is legally bound to comply with the agreement as interpreted by the arbitrator.

However, after the employment relationship has ended the position appears to be different. Employees can hardly claim to be deemed employees of a labour broker's client or to be permanently employed because they were on fixed-term contracts for longer than three months or to be entitled to be treated the same as permanent employees of an employer once the employment relationship has ended. As far as section 198B is concerned, Snyman J had no doubt. He wrote:

“In my view, it is clear why sections 198A, 198B and 198C have their own dispute resolution process. The reason for this is that section 198D makes it possible for employees to pursue disputes about whether any of these provisions apply to their employment *whilst the employment relationship is ongoing*, with the view to obtaining declaratory relief, particularly where it comes to section 198B, as to the status of that employment relationship.” (Emphasis supplied.)

In other words, if employment was *subsequently* terminated, the employer could not then rely on a claim that the fixed-term contract had expired because the contract will in law *already have become* permanent. The termination would then amount to a dismissal and the employer would then have to find some other reason to justify it.

2.3 *The section 198D procedure*

What, then, is the purpose of the section 198D procedure? Snyman AJ did not doubt that score either. He wrote:

“I consider section 198D to be a process designed to be proactive. It places an entitlement in the hands of an employee party to remedy a state of affairs as contemplated by sections 198A, 198B and 198C *during the currency of the employment relationship*. Section 198D as a dispute resolution process is not intended to be applied once the employment relationship has terminated. For that, employee parties already have the required protection in the unfair dismissal provisions of the LRA.” (Emphasis supplied.)

The judge regarded this view as fortified by the absence from section 198D of the kind of relief expressly provided for unfair dismissals and unfair labour

practices by sections 193 and 194 reinstatement, re-employment, or compensation. In Snyman AJ's view, the only competent relief that may be granted under section 198D is declaratory. But even that would be moot if the employment relationship has ended by the time the referral comes before an arbitrator: An award declaring that the employee had become deemed permanent would serve no purpose.

On this approach, Mr August's case seems to have been hit by mootness, not by the fact that the dispute had been referred after employment had ended. As indicated above, he referred his dispute three days *before* the ending of his second contract, that is, while the employment relationship still subsisted. It may be arguable that he had left his referral too late. But a delay of this nature cannot deprive the CCMA of jurisdiction to entertain the dispute. The facts contained in the judgment do not indicate that August was told any earlier that his employment was to end on 31 March 2017. The timing of the referral would not therefore have precluded the arbitrator from declaring that August had been "deemed" a permanent employee of the municipality from one day after the end of his first three-month contract and that the subsequent termination constituted a dismissal, as opposed to the automatic expiry of a fixed-term contract. But even that would not have helped August given the approach adopted by the court. By the time the matter came before the arbitrator several months had passed since the employment relationship ended. On the court's approach, an order declaring that on 31 March 2017 August had become a deemed employee could not revive the employment relationship.

The court also placed another hurdle before August. This was that he could and should have referred an unfair dismissal dispute to the CCMA under section 191 if he wished to be reinstated. The judge relied on two authorities and an example to justify this proposition. The first authority was *Piet Wes Civils v Association of Mineworkers and Construction Union* [2018] 12 BLLR 1164 (LAC). This matter involved section 198B only obliquely. The workers, in this case, were told that their fixed-term contracts had expired because the employer's service contract with a mine had come to an end. The workers claimed that they had been deemed permanently employed and on that basis approached the Labour Court under section 189A(13) for an order reinstating them until their union had been consulted. They were granted that order by the Labour Court. After finding that the employer had failed to prove that the workers had not become deemed employees because they had not been given written contracts, as required by section 198B(6), the LAC found that the workers were entitled to approach the Labour Court under section 189A(13). They were reinstated so that consultations could commence.

To Snyman AJ, *Piet Wes* was relevant because it showed how section 198B could be applied "as part and parcel of an unfair dismissal dispute"; it becomes "an element of a dismissal dispute, when deciding whether a dismissal exists, or whether a dismissal is fair". This arguably stretches the point. *Piet Wes* did indeed involve an unfair dismissal dispute referred in terms of section 189A(13). The issue was whether the employees had become permanent by virtue of section 198B. The court found that they had and that they had accordingly been dismissed unfairly because the employers had staked their entire case on the claim that the employees'

limited duration contracts had expired. *Piet Wes* did not say that employees wishing to rely on section 198B *must* refer disputes under one of the “standard” dispute resolution procedures if their fixed-term contracts are terminated once they have been deemed permanent because they had.

The second judgment on which Snyman AJ relied was *National Union of Metalworkers of SA obo Members v Transnet SOC Ltd* [2018] 5 BLLR 488 (LAC), which also involved an application under section 189A(13). The Labour Court found that NUMSA had failed to prove that its members were dismissed because they had not satisfied the court that they had either a reasonable expectation that their contracts would be renewed or that they had become deemed permanent employees by operation of section 198B. The LAC agreed, noting that section 189A(13) applies only when dismissals are contemplated or effected. All Transnet had done was to allow permissible fixed-term contracts to expire.

The example provided by Snyman AJ concerned the hypothetical situation of an employee employed on a 12-month fixed-term contract in contravention of section 198B where the employer releases the employee at the end of the contract. In this case,

“[T]he employee would then be in a position to pursue an unfair dismissal claim to the CCMA as contemplated by section 186(1)(a) of the LRA, contending that the employer’s reliance on the fixed term was misplaced, because *by way of operation of law* it had become indefinite. In such a case, the employer would be found to have dismissed the employee when seeking to rely on the fixed term, which, if found to be unfair, could carry with it the relief of fully retrospective reinstatement. The point is, however, that an unfair dismissal dispute must be pursued.” (Emphasis supplied).

2.4 A proactive section?

If, as this passage suggests, the employee becomes permanently employed by operation of law, what is the point of obtaining a declaratory order to this effect under section 198D before the contract expires? Snyman AJ’s answer was that, like section 189A(13), section 198D initiates a process that is meant to be “proactive”– it “places an entitlement in the hands of an employee party to remedy a state of affairs as contemplated by sections 198A, 198B and 198C during the currency of the employment relationship”. In the case of section 198B, this can only be to enforce the employer’s obligation under subsection (8)(a) – to treat the employee no less favourably than permanent employees performing the same or similar work. That relief cannot be granted unless and until the employee is found to have been unfairly dismissed and is reinstated.

In this sense, the purpose of section 198D is similar to that of section 189A(13). That provision is designed to ensure that pre-retrenchment consultations are properly conducted. This does not mean that employees may not invoke section 189A(13) after they have been dismissed. However, the courts accept that that provision may not be invoked long after the retrenchment has been effected, even though the Act provides that employees may be reinstated if the employer has failed to comply with a fair procedure. Late applications under section 189A(13) are usually dealt with on the basis that the delay cannot be condoned (see *Steenkamp v Edcon*

Ltd [2019] 12 BLLR 1189 (CC) and the judgments cited there), which did not seem to affect the approach of the court in *Piet Wes*.

As alluded to above, Snyman AJ saw the bar raised by section 198D as more than a matter for condonation. For him, it was a matter of process. On this approach, while employees could not invoke section 198D after they had been dismissed, they may do so only as “part and parcel” of a dismissal dispute, as was done in *Piet Wes* and *Transnet*. In other words, the employee may still raise section 198B (and presumably s 198A), but only to defeat the employer’s claim that a fixed-term contract has expired (or, presumably, that the employee was rendering “temporary service”). After employment has ended, these issues can only be raised in the context of an unfair dismissal claim. If the employer succeeds in proving that the deeming provision in section 198B (and presumably in s 198A(3)) did not apply during the employment relationship, the employee will fail to prove that he or she had been dismissed, and the matter will end there.

The *Nama Khoi* court saw two further reasons why section 198D cannot be invoked after termination of employment. The first was that if an employee claims, as Mr August did, that she wishes to be reinstated, she must prove that she had been dismissed in one of the senses the LRA defines as a dismissal. Employees can be reinstated only if they have been unfairly dismissed. August had not claimed that he had been dismissed. He had merely sought confirmation that he had been appointed on an indefinite contract. Without an averment that the referring employee has been dismissed, the matter can’t be treated as such.

The second reason why Snyman AJ regarded section 198D as the incorrect route for August to have followed was that, if indeed he claimed to have been dismissed, the matter had not been referred for conciliation as a dismissal dispute, as all dismissal disputes must be (see *National Union of Metalworkers of SA v Intervolve (Pty) Ltd* [2015] 3 BLLR 305 (CC)). August and his union had in effect used section 198D as means of bypassing the procedural requirements of the LRA. However, as IMATU pointed out, August was still in employment when the dispute was referred, if only for a few days before the contract lapsed. For Snyman AJ, the commissioner could have declared August to be a permanent employee but, by the time such a declaration was made, August’s status as an employee was moot.

Snyman AJ found the situation in which the arbitrator found himself akin to that in which an arbitrator would be if asked to decide an unfair labour practice dispute after employment had terminated, as occurred in *Independent Municipal and Allied Trade union obo Joubert v Modimolle Local Municipality* (2017) 38 ILJ 1137 (LC). In that case, both the Labour Court and the Labour Appeal Court (see [2018] 11 BLLR 1106 (LAC)) found that an order reinstating Mr Joubert to the disputed post was a complete misdirection because there was no unfair dismissal dispute before the arbitrator. By the same token, this arbitrator lacked power to order reinstatement.

Snyman AJ pointed out that the only remedies statutory arbitrators may grant are set out in section 193 of the LRA. The remedies of reinstatement, re-employment or compensation are limited to unfair dismissals and unfair labour practices. Section 198D provides for no such remedies –

reinstatement, re-employment, or compensation – may be granted, only if the employee has been unfairly dismissed or subjected to an unfair labour practice. The arbitrator, in this case, had made no such finding. The judgment ends with this synopsis:

“In summary therefore, the [arbitrator] committed a material error of law when he proceeded to determine whether [August] was employed indefinitely by virtue of the application of section 198B(5), when it was patently obvious that the [his] employment ... had already been terminated, and there was no unfair dismissal dispute before him [the arbitrator]. Insofar as he may have decided the matter based on the existence of a dismissal, he had no jurisdiction to do so. In addition, and by awarding reinstatement, the [arbitrator] completely exceeded his powers, and gave relief that he was not competent to give, considering the nature of the dispute that was before him. Stripped down to its basics, what the [arbitrator] actually did was to try and decide an unfair dismissal dispute that was never before him.”

2.5 Analysis

In the wake of *Nama Khoi*, then, the situation created by referral under section 198D is this: Employees on fixed-term contracts who claim to have become deemed permanently employed may seek an arbitration award confirming this to be the case. Such referrals may be accompanied by a further claim directing the employer to accord them more or less the same terms and conditions of its employees who perform the same work. The arbitrator may then issue a declaratory order and a direction to that effect, but only if at the time the employee is still in the employer's service. If the employment relationship has ended by the time the matter is set down for arbitration, the most the arbitrator can make is an empty declaration that the employee was once a permanent employee. The dispute can be kept alive only if the employee claims an unfair dismissal, and refers a dispute as such (obviously within the time frames set by the LRA for unfair dismissal disputes or condonation must be sought). This was the approach followed by the arbitrator and ultimately the employee in *Mhlanga / King Recruitment Services* [2019] 12 BALR 1273 (MEIBC).

While this remains the law, one can only sympathise with employees, like Mr August (and all classified as “vulnerable”), who find themselves without jobs because they have delayed referring a dismissal dispute until just before their employment formally ends. Only a higher court can overrule *Nama Khoi*, unless another Labour Court judge finds it “plainly wrong”.

In the meantime, the judgment evokes some questions. First, why does section 198D(3) give a generous period of six months to refer disputes relating to sections 198A, B or C (as opposed for 30 days for unfair dismissal disputes)? It seems inconceivable that the legislature should grant that period of grace for referring disputes under section 198D if, as in cases like that of August, his period of service was only six months, and in many other cases is perhaps less. The requirement set by *Nama Khoi* effectively reduces the statutory period in which such cases may be referred.

Secondly, it may well be that the court took too technical a stance by drawing an impermeable line between unfair dismissal disputes and referrals under sections 198A and B. The avowed purpose of those provisions is to protect vulnerable employees by converting temporary service of

employment on fixed-term contracts into fulltime employment. Section 198A(4) provides that the termination by a Temporary Employment Services provider of employees' services with a client for the purpose of evading the deeming provision is a dismissal. A challenge to such a dismissal may presumably be launched under section 198D within 30 days because section 198D(3) says that disputes referred under subsection (1) must be referred within six months, *except if the dispute is about a dismissal contemplated in 198A(4)*. No such exception is made in section 198B.

Thirdly, if as the court said an employee who meets the statutory criteria becomes a permanent employee by operation of law, why can't an arbitrator's pronouncement on the legal position operate with retrospective effect? If that issue can be dealt with in a dismissal dispute, it seems hard to understand why it should not be dealt with under section 198D. Disputes under that provision must also be referred for conciliation and arbitration. During conciliation employees in the position of Mr August, if confronted with the proposition that they should have referred a dismissal dispute, would presumably say: "But I was dismissed and I want to be reinstated." Having identified the true nature of the dispute, the conciliating commissioner should then, on the strength of *September v CMI Business Enterprise CC* [2018] 5 BLLR 431 (CC), have indicated that the dispute in truth concerned a dismissal and the matter could have been referred for arbitration as such. As the highest court found the LAC had been in *CMI, Nama Khoi* could also well be criticised for being too formalistic.

3 Masoga v Pick 'n Pay

3.1 Background

Masoga v Pick 'n Pay Retailers (Pty) Ltd [2019] 12 BLLR 1311 (LAC) was another judgment in which a commissioner was held to have misinterpreted section 198B. As part of an empowerment initiative, PnP decided to use several bakeries which supplied products to its stores on an outsourced basis to train previously disadvantaged persons to operate bakeries on their own. The project was intended to be completed in five years. The function of one of the outsourced firms (AB) was to supply mixed ingredients to the other bakeries. AB operated from PnP's premises. AB employed Mr Masoga and his colleagues as bakery assistants on 12-month fixed-term contracts. They claimed that AB was a temporary employment service and that they should be deemed employees of PnP. However, the dispute was set down for arbitration as a dispute concerning "198B – fixed-term contracts with employees earning below threshold". Four days after the dispute was referred, AB informed the employees that their fixed-term contracts were to end and offered them permanent contracts. So, in this case, the workers were still in employment when the matter came before the arbitrator.

PnP simply denied that AB was a TES. The commissioner identified the issue in dispute as "the identity of the true employer, whether PnP was the employer and whether the employees were entitled to parity within the meaning of section 198" (without identifying the section to which he referred). The commissioner found that AB was subservient to PnP and that the employees worked under PnP's supervision and control and that, with

reference to section 200B, PnP was a “co-employer” and was therefore jointly liable to effect parity of treatment between the employees and PnP’s permanent employees. On review, the Labour Court held that the arbitrator should simply have found, with reference to section 198B, that AB was obliged to employ the employees permanently, which it had done, and that any further inquiry into the role of PnP was irrelevant. The award was set aside.

3.2 *Judgment of the Labour Appeal Court*

The LAC noted that commissioners are required to identify the true nature of disputes before them not only for purposes of determining jurisdiction but also to ensure that the correct inquiry is conducted. Although commissioners are not necessarily bound by the description of the dispute in the referral form, they may not entirely ignore that description because it remains a factor to be considered. Once the nature of the dispute has been identified, an award should not be founded on matters not dealt with by the parties, which the commissioner had done by invoking section 200B (which extends liability for breaches of employment laws to third parties if the purpose of an arrangement between the third party and the employer is aimed at defeating the purpose of the law).

The AB employees had characterised their dispute as one falling under section 198A. However, the certificate of outcome reflected that the dispute concerned section 198B and D. This was repeated in the referral for arbitration and the notice of set down. Neither the employees nor the arbitrator had contested the companies’ opening statement that the employee had to prove that AB was a TES. Prior to the award, there had been no reference to section 200B or any claim that the arrangement between PnP and AB was a sham. Section 200B was raised for the first time in the award, which was founded on it. The companies had never been given an opportunity to address the commissioner on the relevance of section 200B or on the further finding that the relationship between PnP and AB was a sham designed to evade it. This was grossly unfair. Since there was no proof that AB was a sham, it was unsurprising that the employees had jettisoned their reliance on section 198A and re-characterised it as a dispute concerning section 198B.

The court then turned to section 198B. Although AB had not attempted to justify employing the employees on fixed-term contracts for longer than three months, it was common cause that AB had ultimately employed them permanently. This had resolved the dispute between the employees and AB and without proof that AB was a TES, that should have been the end of the matter. Even so, the employees had persisted with the dispute. The employees could not claim to be deemed employees of PnP by virtue of section 198A(3)(b) because AB was not a TES. They could not invoke section 198B(5) because they had already made permanent employees of AB. There was accordingly no dispute for the arbitrator to determine. If the employees wished to obtain anything from AB, they would have to refer an unfair labour practice dispute claiming that they are being treated less favourably than AB’s fulltime employees performing the work of bakery assistants, if there are any (see below).

The commissioner had also wrongly invoked section 200B. This provides that “employer” includes one or more persons who carry on related businesses to evade the provisions of any employment law. This provision merely extends liability that would ordinarily be that of the employer to others who carry on a related business through the employer. Section 200B does not identify the employer; it merely extends liability. That section cannot be used to make entities the employers of others; its purpose is to prevent employers using complex arrangements to evade employment laws. There was no evidence to suggest that PnP had devised the empowerment scheme for this purpose. In finding the contrary, the commissioner had focused only on certain clauses in the contracts between PnP and AB, while ignoring the overall purpose of the arrangement. The appeal was dismissed.

4 PRASA v CCMA

4.1 Background

Passenger Rail Agency of South Africa v CCMA [2020] 1 BLLR 49 (LC) was another recent case involving section 198B – also referred to by employees who were still in service when they claimed to have been deemed permanently employed by virtue of 198B(5). When section 198B came into force, PRASA had many employees on fixed-term contracts. Two unions referred disputes to the CCMA claiming that their members on fixed-term contracts were deemed permanent employees. That referral was settled on the basis that a study would be undertaken within three months to verify the numbers of fixed-term contract workers to be absorbed in terms of criteria to be agreed. The agreement was made an order of the Labour Court, but a subsequent application to declare PRASA in contempt of court was dismissed. The ultimate outcome of the study remains unknown.

While this was going on, 166 PRASA workers lost patience and referred two disputes to the CCMA, which were consolidated, claiming the relief that had been abandoned by the unions. By this time, PRASA had conceded that the employees were permanent. The commissioner not only agreed that these employees had been deemed permanently employed by PRASA, but ordered the company to compensate them for the benefits received by fulltime employees, with retrospective effect – which came to a whopping R35 million. The arbitrator’s analysis and conclusion centred on section 198B:

“Whereas the applicants were integrated into the business, they are not treated equally to their indefinitely employed colleagues and are still referred to as contract workers. Thus, up to these proceedings there had been no acknowledgement by [PRASA] that the applicants had become indefinitely employed. They are still treated differently compared to their colleagues doing the same work, particularly in that they are not members of the provident fund and are never considered to be paid bonuses...Once an employee is deemed to have become indefinitely employed they are from that date onwards entitled to be treated on par with their colleagues. Failure to do this would constitute an unfair labour practice or could even amount to discrimination ...”

PRASA took the award on review, raising a number of grounds, including that the dispute had already been settled; that the arbitrator did not have the

jurisdiction to deal with the dispute afresh in circumstances where the settlement agreement had been made an order of the Labour Court (because the appropriate remedy available to these employees would also have been a contempt application to the Labour Court); and that a dispute about the interpretation of section 198B of the LRA should have been referred for conciliation to the CCMA within six months after 1 April 2015 (when PRASA failed to employ the workers permanently), failing which condonation should have been sought.

4.2 Judgment

Conradie AJ disposed of the matter by accepting PRASA's first ground – that the dispute had been settled and that the matter was accordingly *res judicata* and the commissioner accordingly lacked jurisdiction. This was because the parties were bound by the settlement agreement, which was a collective agreement as defined in the LRA and included clauses detailing benefits to which the employees would enjoy after absorption as permanent employees. These employees were not entitled to ignore the agreement struck by their unions and “pursue their own relief outside of the collectively bargained process”. The parties were entitled to agree to a gradual or phased implementation of benefits, or even to lesser benefits.

According to the court, the arbitrator lacked jurisdiction to entertain the dispute on this basis as well – the employees had effectively referred a dispute concerning the interpretation and/or application of the settlement agreement, which was precisely what the commissioner had considered. But, according to the court, “[t]he matter was not referred to him as an interpretation and application dispute and he had no jurisdiction to deal with it as such. The parties should have been told to resolve their interpretation and application dispute with reference to the dispute resolution provisions in the settlement agreement”.

In respect of section 198B, the judge noted that that provision has no application to employees employed on a permanent basis. It is concerned only with fixed-term contracts of employees earning below the threshold. As such, once PRASA had conceded that the employees were employed on a permanent basis, section 198B could no longer apply. If the employees felt that they were being treated less favourably than other employees, they could simply refer an unfair labour practice dispute. Section 198D, according to the court, would typically apply in disputes relating to whether or not an employee is employed on an indefinite basis, and when fixed-term contract employees rely on section 198B(8) to claim more favourable treatment. According to Conradie AJ, echoing *Nama Khoi* but not referring to it, “[s]ection 198D offers no other relief beyond this, and...is not concerned with the equal treatment or benefits of permanent employees”. The arbitrator had thus committed an error of law or exceeded his powers by granting substantive relief to the employees.

What of the argument that the dispute related to an alleged unfair labour practice? Relying on *September v CMI Business Enterprise CC* (*supra*), the court found that the dispute was never dealt with as an unfair labour practice (either at conciliation or at arbitration). The commissioner had therefore

committed a further gross irregularity by treating it as such. In any case, the arbitrator had not considered the kind of issues that arise in disputes related to the exercise of an employer's discretion. As Conradie AJ put it: "The point is that in this matter the arbitrator did not approach the matter as an unfair labour practice and it therefore cannot be correct that the relief which he granted was competent under the unfair labour practice provisions of the LRA."

4.3 Analysis

An aspect of the judgment which is open to debate is this:

"[O]nce it is conceded by an employer or determined by an arbitrator that employees are employed on a permanent basis, *section 198B has no application to such employees*. If these employees believe that they are being treated less favourably than their counterparts in respect of benefits, for example, they can then simply refer an unfair labour practice dispute. This is the same route which any other permanent employee would have to follow." (Emphasis supplied.)

Although generally true, there may be (limited) cases where this observation requires some qualification. For example, there seems no reason why employees who have obtained orders in terms of section 198D declaring that they are indefinitely employed (as per the approach of the court in *Nama Khoi*), but whose original fixed-term contracts have expired without renewal or permanency being conceded by the employer should not be able to rely on section 198B(7) when launching an unfair dismissal claim. This section provides that "If it is relevant in any proceedings, an employer must prove that there is a justifiable reason for fixing the term of the contract as contemplated in subsection (3) and that the term was agreed."

The approach in *PRASA* seems to differ from that in *Nama Khoi* in this regard. For Snyman AJ, referrals in terms of section 198D may be accompanied by a further claim directing the employer to comply with section 198B(8), so that employees alleging deemed permanency are not treated less favourably in the absence of a justifiable reason. For Conradie AJ, section 198B(8) has no application whatsoever once employment has been deemed to be of indefinite duration in terms of section 198B(5). Such employees should utilise the LRA's unfair labour practice provisions, presumably that relating to "unfair conduct in relation to the provision of benefits" (section 186(2)(a)). Again, the severing of the "standard" dispute resolution provisions provided by the LRA from those in section 198D seems to go against the purpose of the provisions designed to protect "vulnerable" workers employed by labour brokers and those retained indefinitely on fixed-term contracts without good reason.

5 ***CCMA v Commission Staff Association***

5.1 *Background*

A further reason why the application by the PRASA employees might have failed was fortuitously provided by *Commission for Conciliation, Mediation*

and Arbitration v Commission Staff Association [2020] 1 BLLR 9 (LAC), handed down after the *PRASA* judgment, in which the very body charged with monitoring the application of section 198B ironically found itself in the respondent's box. The questions in the *CCMA* case was whether the amendments to the LRA that came into operation on 1 January 2015 apply retrospectively to fixed-term contracts concluded before that date and whether employers are obliged to amend these "historical contracts" to comply with the amendments and pay affected employees the additional salary and benefits to which they would have been entitled as permanent employees?

CCMA interpreters who had been engaged on a part-time or fixed-term basis for more than three months before the LRA amendments argued that they had become permanent employees and referred that claim for arbitration, claiming "back pay" to the date on which they should have been deemed permanent. The *CCMA* argued, unsuccessfully, that the interpreters were independent contractors and the matter was referred to arbitration under section 198D. The arbitrator found that sections 198B(3), (4) and (5) did not operate retrospectively and therefore did not apply to contracts concluded before the new amendments came into effect. This meant that employers were not obliged to regularise the contracts concluded before 1 January 2015 and that the interpreters were not entitled to any back pay.

5.2 *Judgment and appeal*

On review in *CCMA v National Union of Metalworkers of South Africa (NUMSA)* (case number JR1624/16 dated 23 June 2017, as yet unreported), the Labour Court set aside the commissioner's decision on the basis that it constituted a material error of law and was unreasonable, and remitted the matter for determination by a different arbitrator. The court reasoned that to apply section 198B retrospectively would yield "the most equitable results", at least to employers. This was supported by the presumption against retrospectivity and the courts' unwillingness to disrupt vested rights, as well as the wording of section 198B itself. Commission Staff Association's (*CSA*) argument that these considerations were overridden by fairness to the employees and the ultimate purpose of section 198B – the protection of vulnerable employees employed on fixed-term contracts – was rejected by the court.

The LAC agreed that some subsections of section 198B apply retrospectively to fixed-term contracts concluded by employees earning under the threshold prior to 1 January 2015, but did not say which. What mattered was that the language of subsections (3) and (4) (which set the circumstances in which employee may be employed on fixed-term contracts for longer than three months) as well as subsection (5) (the deeming provision). Linguistic indications which pointed to non-retrospectivity included the use of the present tense, the word "employ", the phrases "conclusion of a fixed-term contract" and "a fixed-term contract concluded or renewed". The court could also not see how section 198B(6), which requires that a fixed-term contract must be in writing, could be applied retrospectively. The express statements in subsections (8)(b) and (10)(b) that subsections 8(a) (the equal treatment provision) and (10)(a) (the severance pay

provision) do not apply retrospectively also indicated that subsections (3), (4) and (5) don't apply to contracts concluded after 1 January 2015. So, too, does the wording of subsection (9) (the equal access to opportunities provision). While in the face of these indications in the Act itself it was unnecessary to apply the presumption against retrospectivity, it would have led the court to the same conclusion.

CSA's reliance on *Enforce Security Group v Fikile* (2017) 38 ILJ 1041 (LAC) (a case that did not relate to an application of section 198B), and its suggestion that the LAC had determined the issue in *Piet Wes*, was misplaced (even though the contracts in that case had been concluded before 1 January 2015, which the *Piet Wes* court had ignored). In this case, the court held that if the *Piet Wes* court had indeed found that the subsections in question applied to "historical" contracts, the judgment would have been "plainly wrong". Section 198B does not outlaw fixed-term contracts, or seek to replace them entirely with contracts of indefinite duration: "Instead it acknowledges the need for such contracts and seeks to regulate them and to protect vulnerable employees that are often exploited through the means of such contracts, in a manner that is fair." The commissioner's finding that subsections (3), (4) and (5) do not apply to historical contracts was therefore correct and the appeal succeeded. The LAC wrote in conclusion:

"A construction that subsections (3), (4) and (5) do not apply to historical contracts, ie retrospectively, does not offend the intention behind section 198B or any provision of the Constitution. Considered in the context the construction is reasonable and fair. This section appropriately addresses the abuses (or 'mischiefs') that were wrought through fixed-term contracts. Employees would effectively be denied permanent full-time employment unjustifiably through the successive renewal, or extension, of such contracts; and not be treated the same as permanent employees of the employer; they would also not be given the same access, as those employees, to opportunities to apply for vacancies; and there was no obligation to pay such employees any amount similar to a severance at the end of the contract's term. Each of those aspects is now addressed by section 198B in specific subsections, in a manner that is fair."

5.3 *Analysis and conclusion*

The practical impact of this judgment will probably be limited. It is concerned with contracts concluded before section 198B became effective. As five years have passed since then, few if any such contracts (especially those with workers earning below the threshold) can still be in existence. However, *Nama Khoi*, *Pick 'n Pay*, *PRASA* and *CCMA* suggest that vulnerable workers who wish to claim the benefits afforded by section 198A, B and C may not always have an easy ride.

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