IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 29/2020

In the matter between:

EKHURULENI METROPOLITAN MUNICIPALITY	**Appellant**
and	
LAWRENCE MANDOSELA AND 194 OTHERS	**First Respondent**
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**Second Respondent**
TIMOTHY BOYCE *N. O*	**Third Respondent**

Heard: 25 May 2021

Delivered:(In view of the measures implemented as a result of the Covid-19 outbreak, this judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be 02 July 2021

Coram: Waglay JP, Savage AJA and Molefe AJA

JUDGMENT

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MOLEFE AJA

[1] The appellant appeals against the judgment of Patel AJ, in particular paragraphs 31 and 32 thereof, handed down on 13 February 2020. The court *a quo* substituted the arbitrator's award of three months' compensation and ordered the appellant to pay compensation equal to 12 months' remuneration to each of the first respondents. The crux of the appeal is based on the standard of reviewing a compensatory award. The appellant accepted that the second respondent's decision was reasonable in so far as he found that the first respondents were permanently employed by the appellant during the first period of employment, but that the court *a quo* misdirected itself in substituting the second respondent's award of three months' compensation with 12 months' compensation.

[2] The first respondents noted a cross-appeal against the judgment and order of the court *a quo* in so far as it pertains to the finding that it failed to find that the first respondents were deemed employees of the appellant between December 2015 to August 2016.

[3] Both the appeal and cross-appeal centre around the involvement of the first respondents in the appellant's job creation programme called Lungile Mtshali Community Development Plan Project (the project).

<u>The factual background</u>

[4] The first respondents were employed by the appellant over two employment periods. The first period of employment was governed by two fixed-term contracts. On 14 February 2014, the first respondents signed the first fixed-term contract for a period of 12 (twelve) months, commencing on 3 March 2014 and terminated on 30 March 2015. Upon termination of the first contract, it was extended to 30 June 2015. The second fixed-term contract was signed between the appellant and the first respondents from 30 March 2015 to 30 June 2015. Both contracts were terminated by the effluxion of time.

[5] The second period of employment commenced on 15 December 2015 and was governed by a fixed contract which expired on 31 August 2016. There was a

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lapse of approximately five and a half months between the conclusion of the first employment period and the fixed-term contract entered into in the second employment period ('the third contract'). The third contract differed from the two previous fixed-term contracts in that it was concluded between the first respondents, a private company called Hlaniki Investment Holding (Pty)Ltd ('Hlaniki') and a government entity named the Gauteng Enterprise Propeller ('GEP'). The appellant was not a party to the third contract.

[6] Hlaniki was engaged by the appellant to *inter alia* manage the services to the GEP.[1] The GEP was engaged by the appellant to co-ordinate a job creation programme in which the first respondents were supposed to participate. The project was initiated by the appellant as a short term measure to alleviate poverty and unemployment through a job creation scheme. The purpose of the project was to target unskilled labourers, and the programme entailed 60% theoretical training and 40% practical training. The first respondents were in all three fixed-term contracts earning R2000.00 per month and worked 8 (eight) hours a day. Under the first two contracts, the first respondents' salaries were paid by the appellant and by the GEP under the third contract.

[7] On 1 April 2015, the first respondents referred a first dispute to the second respondent, the South African Local Government Bargaining Council ('SALGBC'). The dispute was conciliated and referred for arbitration ('the first arbitration'). This dispute dealt with whether the first respondents were permanently employed by the appellant pursuant to section 198 A of the Labour Relation Act ('LRA')[2]

[8] On 8 June 2015, and whilst employed in terms of the second fixed-term contract, the first respondents received letters of termination of employment at the expiry of the contract on 30 June 2015. The first respondents tendered their services to the appellant on 30 June 2015 but were turned away because their fixed-term contracts had terminated by effluxion of time.

[1] Gauteng Enterprise Propeller as a separate entity established in terms of section 2 of the Gauteng Enterprise Propeller Act no 5 of 2005 of the Gauteng Legislature.
[2] Labour Relations Act 66 of 1995, as amended.

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[9] On 7 September 2016, the first respondents referred a second dispute to the SALGBC and classified the nature of the dispute as a dismissal ('the second arbitration'). On 22 February 2018 and upon an application by the first respondents, the arbitrator ('the third respondent') issued a ruling consolidating the two disputes.

The arbitration award.

[10] The issues to be determined in respect of the first arbitration were whether the first respondents were dismissed by the appellant on 30 June 2015, and if they were dismissed, whether there was a fair reason for their dismissal and whether the dismissals were preceded by a fair procedure.

[11] The issue to be determined in respect of the second arbitration was whether the first respondents were deemed to be permanently employed by the appellant when their fixed-term employment contracts with Hlaniki expired on 31 August 2016.

The first arbitration award.

[12] At the arbitration hearing, it was contended on behalf of the first respondents that they were dismissed by the appellant when they were prevented to work when their second contract ended on 30 June 2015. The dismissals aforementioned were predicated squarely on the submission that at the time of the alleged dismissal, the employment contracts were deemed to be of indefinite duration as contemplated by section 198 B (5) of the LRA.[3]

[13] The first respondent's' second fixed-term employment contract with the appellant exceeded three months (i.e. 2 March 2015 to 30 March 2015), and in order to determine whether their contract could be "deemed to be of indefinite duration," the arbitrator was to determine whether the nature of the work for which the employees were employed was of a limited or definite duration or the

[3] Section 198 B (5) of the LRA reads: "Employment in terms of a fixed-term contract concluded or renewed in contravention of subsection (3) is deemed to be of indefinite duration."
Subsection (3) of section 198B of the LRA will be contravened if an employee's fixed term employment contract is for a period of longer than 3 months and:

- The nature of work is not "of a limited or define duration" (vide section 198B(3)(a) of the LRA
- The employer cannot "demonstrate any other justifiable reason for fixing the term of the contact

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employer can demonstrate other justifiable reason for fixing the term of the contract.

[14] The unequivocal evidence of the witnesses who testified on behalf of the first respondents was to the effect that during both contracts the work the first respondents did for the appellant entailed cleaning streets, storm water drains, municipal parks, municipal stadiums, old age homes, etc. The arbitrator found that the nature of the work was ongoing and it is axiomatic that it is not of a limited or definite duration.[4]

[15] Section 198B (3) of the LRA will not be contravened if the employer can demonstrate any other justifiable reason for fixing the term of the contract. The fact of the matter is that in terms of the second contract, the appellant engaged the service of the first respondents to perform work of an ongoing nature, and it was the appellant which was obliged to remunerate them. The arbitrator found that in the circumstances, section 198B(4)*(g)* of the LRA has no application to the second contract and that the fixed duration of the second contract was not justified.

[16] The arbitrator found that the first respondents had accordingly discharged the onus on them to prove that they were dismissed when the second contract ended and the appellant failed to adduce any evidence to prove that there was a fair reason for the first respondents' dismissals, or that the said dismissals were preceded by a fair procedure.

[17] On 7 June 2018, the arbitrator issued an arbitration award in terms of which he found that on 30 June 2015, the first respondents' dismissals were both substantively and procedurally unfair and awarded a compensation equal to three months' remuneration to each of the first respondents.

<u>The second arbitration</u>.

[18] The first respondents, relying on section 198A and 198B of the LRA contended that, in essence, since they are deemed to be permanently employed by the

[4] Section 198(3)(a) of the LRA.

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appellant, they were in fact dismissed when the appellant refused to allow them to render services when the third contract ended.

[19] The arbitrator found the above-mentioned contention to be inherently difficult in that the deeming clause embodied in section 198A(3)*(b)* of the LRA can only apply when there is a tripartite relationship between employees, a temporary employment services ('TES'), and a client. The internship contract which was concluded between on the one hand, Hlaniki and GEP, and on the other hand the first respondents did not create a tripartite relationship as stated above. There was in short no TES and no client, and the employment relationship *apropos* the third contract was one between the first respondents, Hlaniki and GEP.

[20] The arbitrator found that the first respondents, having failed to establish that they were permanently employed by the appellants, therefore failed to discharge the onus on them to prove the existence of the alleged dismissal.

The Court *a quo*.

[21] On 27 August 2018, the first respondents issued a review application to review and set aside the arbitrator's award of three months' compensation for their unfair dismissal and finding that no employment service relationship existed between the appellant and the first respondents. The appellant opposed the application.

[22] Sitting in the court *a quo*, Patel AJ agreed with the arbitrator when he concluded that the reinstatement was not reasonably practicable because there was never any intention by the appellants to employ the first respondents permanently. He, however, found that the first respondents' length of service, the manner in which their contracts were terminated, and the reasons for their termination are the reasons to replace the arbitrator's three months' compensation with a just and equitable 12 months' remuneration to each of the first respondents.

[23] Regarding the question of the employment service under the third contract, Patel AJ found that for Hlaniki to be regarded as a TES, there must exist a client, and that the first respondents have provided insufficient legal reasons

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why he should ignore the express written terms of the Service Level Agreement, the commercial relationship which existed between Hlaniki and GEP, and the fact that, there was no contractual or commercial relationship between the appellant and Hlaniki, and dismissed the review against this award

The Appeal.

[24] It is submitted on behalf of the appellant that it is trite that when awarding compensation, the commissioner exercises a discretion which should not be too readily or easily interfered with by the Labour Court.[5] The appellant contends that the court *a quo* had no power to interfere with the quantum compensation awarded by the arbitrator, and in this regard relies on *Kukard v GKD Delkor (Pty) Ltd*[6] wherein the court held that:

> '…the court's power to interfere with quantum of compensation awarded by an arbitrator under s 194(1) of the LRA is circumscribed and can only be interfered with on the narrow grounds that the arbitrator exercised his or her discretion capriciously or upon the wrong principle, or with bias, or without reason or that she adopted a wrong approach. In the absence of one of these grounds, this court has no power to interfere with the quantum of compensation awarded by the commissioner…It is, therefore, for Delkor to persuade this court that the quantum of compensation awardee by the commissioner may be impugned on one of the narrow grounds referred to above'

[25] It is the appellant's case that the court *a quo* did not advance any special circumstances justifying the 12 months' remuneration award, nor did it furnish reasons as to the factors that led to such compensation. Counsel for the appellant contends that a consideration of compensation in this matter should be limited to the last fixed-term contract concluded between the appellant and the first respondents, which was a subject of the arbitration, and was for a period of four months, commencing on 3 March 2015 and terminated on 30 June 2015. It is further argued that the first fixed-term contract was concluded prior to the amendment of the LRA. Therefore, such contract was not impacted by the amendments or the deeming provisions of section 198B of the LRA.

[5] *Kemp t/a Centralmed v Rawlins* (2009) 30 ILJ 2677 (LAC).
[6] ((2015) 36 ILJ 640 (LAC) at para 35

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[26] In his judgment, Patel AJ correctly agreed with the arbitrator's conclusion that reinstatement is not reasonably practicable because there was never an intention by the appellant to employ the first respondents permanently.

[27] It is trite that the determination of the quantum of compensation is limited to what is 'just and equitable'. What this court should consider in making a determination of an award is the contract entered into for the four months' period from March 2015 to June 2015. The amendment of the LRA is therefore applicable insofar as this contact is concerned.

[28] It is also trite that when awarding compensation, the commissioner exercises a discretion which should not be easily interfered with by the Labour Court on review. Compensation must be just and equitable and a number of factors must be taken into account when quantifying the compensation (solatium).[7]

[29] On the facts set out in this matter, when granting an award of 12 months' compensation, the court *a quo* did not advance any special circumstances justifying such a startling award given the provisions and the nature of the first respondents' employment. The court *a quo* did not indicate whether the arbitrator's exercise of his discretion was capricious, based on wrong principles, biased or whether the arbitrator misconducted himself.[8] The court *a quo* therefore erred in interfering with the three months' compensation award without factual or legal basis for such an interference. There was no logic to grant 12 months' compensation, and in exercising his discretion the arbitrator did not act capriciously, upon the wrong principle, with bias, without reason, nor did he adopt a wrong approach. As a result, there is no reason to interfere with the decision to award three months' compensation to the first respondents and the Labour Court erred in finding differently.

<u>The first respondents' cross-appeal</u>

[30] The cross-appeal is against the court *a quo*'s judgment and order pertaining to the second period of employment, and the court *a quo*'s failure to find that the first respondents were deemed permanent workers of the appellant. The issue

[7] *Tshishonga v Minister of Justice & Constitutional Development & another* (2009) 30 ILJ 1799 (LAC).
[8] *Kemp t/a Centralmed supra*.

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arising from the second period of employment was whether the first respondents were unfairly dismissed when their contracts ended on 16 August 2016 because they were in fact employed in terms of section 198A(3)*(b)(*i) and (ii) despite having signed the contracts with Hlaniki. The arbitrator found that Hlaniki was not a temporary employment service (TES), and accordingly found against the first respondents.

[31] Hlaniki and GEP contracted with the appellant to project manage and effect job programmes. In contrast to the first period of employment, the first respondents signed their contracts of employment with Hlaniki and GEP, and not the appellant. The first respondents spent the majority of that time doing the same cleaning work, they had done during the previous employment period. The contracts terminated by effluxion of time.

[32] The primary issue that arises is whether Hlaniki was a temporary employment service (TES). The first respondents accepted that Hlaniki was to act as a project manager but argue that the realities of the relationship between themselves and Hlaniki were wholly at odds with the contractual role accorded to Hlaniki. On this basis, the first respondents argue that Hlaniki was in reality a TES. It is also argued that because the job creation programme was so non-functional as to be abortive, it did not constitute a justifiable reason for fixing the terms of their contracts.

[33] In dealing with the question whether Hlaniki was a TES, the arbitrator found as follows;

> The deeming clause embodied insection198A (3) (….) of the LRA can obviously only apply when there is a tripartite relationship between the workers, a temporary employment services provider, a client. The internship contract which was concluded between, on the one hand Hlaniki and the Gauteng Enterprise Propeller, and on the other hand the applicants, did not create a tripartite relationship. The applicants were employed by Hlaniki and the GEP, not by the Municipality''.

[35] The court *a quo* concluded similarly, placing equal emphasis on the contracts;

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> [38] The services level agreement concluded between the third respondent and the fourth respondent, following a tender process, appointed the fourth respondent as the project management company to manage the Lungile Mtshali Poverty Alleviation Project on behalf of the third respondent for the period 11 December 2015 until 11 December 2018. A reading of this agreement shows that the fourth respondent is not operating as a temporary employment service, but as a project manager. The fourth respondent's core business as agreed upon by the applicants is not the provision of labour. If this is not the fourth respondent's core business, it cannot be regarded as a Temporary Employment Service Provider''.

[36] Counsel for the first respondents argued before this court that the approach adopted by both the arbitrator and the court *a quo* was wrong in law, having failed to assess the realities of the relationships at play. Counsel contends that the true relationships between Hlaniki, GEP, the appellant and the first respondents were obscured by a complicated web of at least five different contracts concluded between different parties at different points over the course of two years, and the true nature of the relationships was further impacted by the "degeneration of job creation programme into a shamble".

[37] it is common cause that Hlaniki was contractually appointed to "manage and provide technical assistance and effectively run the project". The primary objective of the programme that Hlaniki was managing was to "upskill and train the beneficiaries so that, they can be employable or even become entrepreneurs". GEP provided financial and non-financial support to the SMMES and co-operative emerging from the project that was supposed to be project managed by Hlaniki.[9]

[38] The second period subsisted for eight months and the training received was superficial. It is argued on behalf of the first respondents that at the end of the eight months, the first respondents emerged with no useful business knowledge, let alone an ability to start a business. The court *a quo* was asked to determine that Hlaniki was a TES, despite contractual agreements indicating that it was not.

[9] MOA between GEP and the Municipality; Record Volume 3, page 293.

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[39] Counsel for the first respondents relied on *David Victor and 200 others v Chep South Africa Ltd and Others*[10] as a ringing endorsement of the court's use of purposive approach in assessing the true nature of the contract between the alleged TES and the alleged client. The court cautioned against permitting "restrictive interpretations" of section 198A of the LRA. Counsel argues that the approach adopted in *Chep* was correct and that courts are enjoined to look past contractual agreements when evaluating TES relationships.

[40] In my view, *Chep* is distinguishable from this case. The distinguishing element lies in the relationship between the dictate of the contracts and the reality of the employment relationship. In this case, the job creation programme did not achieve its objectives. The first respondents' submission is that having regard to the fact that they did not benefit from the programme, and the protective purpose of section 198A, this court should disregard the contracts in favour of evaluating the substance of this relationship.

[41] There is no merit in the argument that the substance of the relationships reveal that Hlaniki was active as a TES, and that when the purported fixed-term contract terminated by effluxion of time on 31 August 2016, the workers were permanent workers of the appellant.

[42] The deeming clause embodied in section 198A(3)*(b)* of the LRA can obviously apply when there is a tripartite relationship between employees, TES and a client, which was not the case in the third contract. The internship contract which was concluded between Hlaniki, GEP and the first respondents did not create tripartite relationship as stated above. There was no TES and no client, and the employment relationship concerning the third contract was between the first respondents as employees, and Hlaniki and GEP as employers, and not the appellant.

[43] The first respondents accepted that the intention of the internship contract was to provide training and entrepreneurial assistance to the first respondents and the appellant was not signatory to the contract. Hlaniki however, did not perform its role as a contract manager despite having been paid a substantial amount

[10] 2020 JA 55/2019 (LAC) (*Chep*).

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of the tax payers' monies. The first respondents were then left to do cleaning work for the appellant.

[44] Hlaniki should have managed the project, organised the training and overseen its success but dismally failed to do so. It is unfortunate that the first respondents should have been upskilled and either employable or part of co-operatives or SMMES, which is not the case. This does not however qualify Hlaniki as a TES, an entity that procures or provide workers to a client for a reward. There was no disguised employment relationship in this case, and the cross-appeal must fail.

[45] The appellant is not asking for any costs order against the first respondent, and in the circumstances, no costs order will be made.

[45] In the result the following order is made:

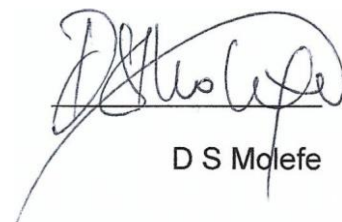
1. The appeal is upheld.

2. The cross-appeal is dismissed.

3. The order of the court *a quo* is set aside and replaced with the following order:

   "The review application to set aside the arbitration award is dismissed".

4. There is no costs order in respect of the appeal and the cross-appeal.



D S Molefe

Acting Judge of the
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Waglay JP and Savage AJA concur.

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APPEARANCES:

FOR THE APPELLANT:	Koketso Pooe
	Instructed by Majang Inc Attorneys
FOR THE FIRST RESPONDENT:	Jessica Lawrence
	Instructed by Lawyers for Human Rights

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