IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 14/2018

In the matter between:

LETHABO MASOGA **First Appellant**

LEBOHANG MAELESO **Second Appellant**

and

PICK 'N PAY RETAILERS (PTY) LTD **First Respondent**

ASSIST BAKERY 115 CC **Second Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Third Respondent**

COMMISSIONER DJ NGWENYA N.O. **Fourth Respondent**

Heard: **15 May 2019**

Delivered: **12 September 2019**

Summary: Appeal against review and setting aside of arbitration award dismissed; s22B not to be used generally to determine who the employer is.

CORAM: Waglay JP, Jappie *et* Coppin JJA

JUDGMENT

COPPIN JA

[1] This is an appeal against the order of the Labour Court (Moshoana J) reviewing and setting aside an arbitration award of the fourth respondent ("the commissioner"), acting under the auspices of the third respondent ("the

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CCMA"), in favour of the appellants. Leave to appeal to this Court having been granted by the Labour Court.

[2] Ultimately, the main issue in this appeal is quite crisp, and it is whether the commissioner acted reasonably by applying section 200B of the Labour Relations Act[1] ("LRA") to find that the appellants were to be permanently employed by the first respondent ("PnP"), rather than by the second respondent ("AB"), in circumstances where the appellants never invoked, or expressed reliance on the section. The Labour Court held, *inter alia*, that it was not reasonable for the commissioner to have done so. As will be discussed, the answer to the question seems to me to lie in what exactly the dispute was that the appellants had referred to the CCMA and whether there was a proper evidential basis for applying the section.

<u>The background facts</u>

[3] PnP itself is a major retailer, operating a large number of hyper and supermarkets throughout South Africa. It sources most of its products from third party manufacturers or wholesalers, but in certain retail stores, it operates in-store bakeries to produce baked goods. In addition, it operates three manufacturing facilities separately from its retail stores and these facilities also produce goods specifically for PnP. One of these facilities is a bakery manufacturing plant. It initially operated from PnP's premises in Meadowbrook, but at the time of the review it operated from premises in Isando.

[4] From the outset the bakery plant was operated on an outsourced basis. Subsequently, a decision was made to operate the plant as part of an empowerment initiative where previously disadvantaged persons could be trained to operate self-standing bakeries capable of operating independently of PnP ("the empowerment scheme").

[5] As part of this empowerment scheme, PnP contracted with AB to produce certain baked products for PnP for five years. AB is a separate legal entity

[1] Act 66 of 1995.

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(close corporation) owned by its members and at the time of the review contracted about 30 persons, including the appellants, as employees.

[6] It is not disputed that the basis of the empowerment scheme was that a business that contracted with PnP under the scheme, such as AB, was required to operate as an independent business, providing specific products to PnP for a period of five years. During this period, PnP was to empower such a business with all the skills required to run a self–standing bakery and this included management and technical skills. In the course of the five years, the business had to save sufficient funds (capital) to enable it to function as self-standing bakery independent of PnP at the end of that period. There were a total of six entities, including AB, involved in the scheme with PnP.

[7] There were three agreements in place that regulated the empowerment scheme between PnP and AB. They were entered into on 1 August 2014 and more specifically are the following: a participation agreement (concluded between PnP, AB and its four members), a manufacturing and supply agreement (concluded between PnP and AB), and lastly, an association agreement (concluded between AB and its four members).

[8] AB was more specifically involved in the mixing of baking ingredients which would be supplied to the other five empowerment entities that did the actual baking of the products that would then be supplied to PnP. As contemplated in the scheme agreements referred to, PnP provided AB with access to its manufacturing facility in Isando, a workplace, a business infrastructure, intellectual property, equipment and utensils, ingredients, packaging and labels, training, mentorship and general assistance. PnP also invoiced AB for various services, and AB managed its own payroll.

[9] The appellants had been engaged by AB as bakery assistants, although they really worked as "pickers", whose function was to pick ingredients from stores and to deliver them to AB's workplace where AB's other employees would mix the ingredients. Their employment was in terms of written fixed term contracts of 12 months' duration entered into on 1 March 2015. The terms of their employment contracts were in all material respects the same and are signed

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by them. AB is described in those contracts as "the employer" and the contracts were to commence on 1 March 2015 and terminate on 1 March 2016.

Referral to the CCMA

[10] On 17 November 2015, apparently acting in person (i.e. without legal or union representation), the appellants referred a dispute to the CCMA in which they cited both, PnP and AB, as the "other party" whom they were in dispute with. In the referral form (which is signed by the first appellant, but in which the second appellant is described as the other applicant) they state, *inter alia*, the following: (a) that the "other party" is "an employer"; (b) that PnP is the owner/or the person in control of the premises where they work; (c) that a temporary employment service ("TES") is involved and that AB is that TES; (d) under the heading "nature of the dispute", they ticked the box indicating that it is a section 198A LRA (i.e., labour broker) dispute. (The form contained several other boxes, including one designated as "section 198C (part – time employment)", one as "section 198 LRA" and one as "section 198B (fixed term contract)", but those boxes were not ticked); (e) that the dispute was about the "interpretation/application of section 198A"; and (f) under the heading "result required", that "applicants to be deemed permanent by the client company".

[11] On 9 December 2015, the CCMA commissioner issued a certificate of outcome following conciliation. On the certificate, he indicates, *inter-alia*, that the dispute relates to "section 198B and D", i.e., of the LRA and that it may be referred to arbitration.

[12] On that same day, the appellants made a written request for arbitration. In their request under the heading "Dispute Details" they indicate that the dispute relates to sections 198B and D of the LRA, i.e. as per the certificate of outcome. Under the heading "What decision would you like the Commissioner to make" they state the following in manuscript: "We would like the commissioner to make [PnP] sign us permanently and make [PnP] pay us for operating reach truck an[d] forklift and same salary as [PnP] Permanent and

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Benefits Thanks”. In the form, they again describe the “other party” as PnP and AB.

[13] In a written notice dated 25 January 2016, the CCMA informed the appellants, PnP and AB, *inter alia*, that the arbitration was set down for 17 February 2016 and indicates that the primary issue was “198B – fixed-term contracts with employees earning below earnings threshold”.

[14] On 29 January 2016, AB, in writing, informed the appellants, respectively, that their contracts with AB were coming to an end on 29 February 2016, and that AB was offering them permanent employment. These letters also indicated to the respective appellants that their basic employment terms and conditions will remain unchanged and what their starting salary per month would be. In addition, the letters require the appellants to indicate their acceptance of the offer by signing and returning copies of the offer attached to the letter.

<u>The Arbitration</u>

[15] On 17 February 2016, the arbitration commenced before the commissioner. In his opening statement, the legal representative, for both PnP and AB, stated that AB accepted that the appellants were, in terms of section 198B(5) of the LRA, permanently employed by it. The legal representative, however, also indicated that PnP disputed that it was the employer of the appellants. He stated, *inter-alia*, that for the appellants “to make that contention it would need to be shown” that AB “is a labour broker or a temporary employment service”, which it was not.

[16] In his award dated 1 March 2016, the commissioner identifies the issue as being “the identity of the true employer” of the appellants and also identifies the issue to be decided being whether PnP was the employer of the appellants, and if so, whether the appellants were entitled to “parity within the meaning of section 198”.

[17] In his analysis of the evidence and the argument, the commissioner states concerning the agreements the following: “18. There was no dispute that the Agreement forms the basis for the relationship between [PnP] and [AB]. There

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was no dispute about the fact that in terms of the agreement [AB] enterprise was to supply baking ingredients to [PnP]. 19. The general tenor of the Agreement indicates that [PnP] is the dominant party in this relationship. In terms of the agreement, [PnP] is entitled to the disclosure of the financial statements of [AB]. [PnP] also has a right to monitor [AB] in the conduct of its business. [AB] is not permitted to conduct any other business whatsoever during the period of the Agreement. [AB] [is] also required to account in full to [PnP] for the financial position of its business and as such audited by [PnP's] auditors. These aforementioned provisions indicate that [AB] is not an independent entity but subservient to [PnP] and conducted its business at the bidding of the latter."

[18] Turning to the other, and oral, evidence, the commissioner found: "Furthermore [AB] carried on its business inside the premises rented by [PnP]. Undisputed evidence also established the fact that [PnP] supplied the equipment and tools that enabled [AB] to carry out its obligations in terms of the Agreement. There was uncontested evidence that the employees of [AB], including the applicants, performed their duties under the supervision and direction of [PnP] management. There was also the undisputed evidence that the applicants' leave forms were submitted and approved by [PnP] management."

[19] In light of the agreements and the evidence, the Commissioner concluded as follows: "21. All the aforementioned facts establish the close association of the business of the respective enterprises – [PnP] and [AB]. It further establish[es] the fact that the reality of the facts is that there is an employment relationship between [PnP] and the applicants despite the Agreement stipulating otherwise. One can thus deduce that the agreement was concluded to conceal the identity of the true employer thereby avoid[ing] the application of the Act. 22. Section 200B was enacted to counter this strategy…"

[20] The commissioner then went on to quote section 200B of the LRA and proceeded to find as follows: "23. It is patent that section 200B introduced and recognize[s] the concept of co-employers where the latter's business activity is, firstly, entwined to the extent that both are in the position to manage and

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control the performance of an employee. Secondly, where the arrangement and or activity has, inter-alia, the effect of defeating the purpose of the Act. In the present case, the interrelationship of the business arrangement via the Agreement has the effect of prejudicing the rights of the applicants to be treated on an equal footing with the employees of [PnP] while they are performing same and or similar work thereby defeating the purposing of the Act. Sec 200B thus finds application in this instance and [PnP] is thus determined to [be] a co-employer of the applicants. Accordingly, [PnP] and [AB] are jointly and severally liable to effect parity of treatment between the applicants and [PnP's] comparator permanent employees."

[21] The commissioner then went on to make the following award: "24. The respondents ([PnP] and [AB]) are joint or co-employe[rs] of the applicants (Messrs Lethabo Masoga and Lebohang Moeleso) within the meaning of section 200B. 25. Both respondents are thus jointly and severally liable to accord to the applicants the comparable treatment no less favourable than their counterparts who are the permanent employees of [PnP] while performing the same or similar work. The order [is] to be effected from 1 March 2015."

<u>The Review in the Labour Court</u>

[22] PnP and AB brought separate applications to review and set aside the award. These applications were subsequently consolidated by the Labour Court and were heard together as opposed reviews. Essentially, two grounds of review were relied upon by both, PnP and AB. The first ground was that the commissioner failed to identify the dispute, alternatively, that he did not understand it (i.e. that the misconceived the required enquiry), and the second ground being, essentially, that the commissioner failed to understand the evidence, that he had misconstrued it, or had unreasonably ignored aspects of it, resulting in an unreasonable, alternatively wrong, and reviewable conclusion.

[23] The Labour Court upheld these grounds of review. It held that the true dispute was about the interpretation and application of section 198B of the LRA,

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which deals with fixed-term contracts, and that one of the issues that arose related to section 198B(3) that requires the identification of “the employer” referred to in that subsection. It also held that the appellants had alleged a breach of section 198B(5) and had contended that they were permanent employees. Thus, it is only AB that could have contravened that subsection because it employed both appellants in terms of written fixed-term contracts for a period of 12 months. Since AB had conceded, in effect, that those contracts contravened section 198B(5), because it exceeded the three-month period and had accepted that the appellants were its permanent employees, the commissioner ought to have issued an award to the effect that AB is deemed to be their employer for an indefinite period. By so doing the commissioner would have interpreted and applied the section which was in dispute before him.

[24] The Labour Court found that in light of that, it was unclear why the commissioner still had to determine whether PnP was an employer, when it had already found that AB is the one that had contravened the law. It held that by embarking on that enquiry the commissioner dealt with “an extraneous question” and really arbitrated the wrong dispute, with the result that the award was a nullity. The Labour Court found that, in any event, the commissioner’s finding - that there was an employment relationship between PnP and the appellants was not only “without warning” or without having given PnP “an opportunity to lead evidence” on the criteria set by this Court for determining whether such a relationship exists- but amounted to a gross irregularity. According to the Labour Court, PnP did not “enjoy a fair trial of [the] issues”.

[25] Regarding the commissioner’s application of section 200B of the LRA – the Labour Court held, essentially, the following: that the section had “far-reaching” implications and that there were “serious reputational implications” for a big corporation which is found to have contravened the law; thus, the section required “strict purposive interpretation” and “ought to be invoked when all the requirements of it are met in full”. The Labour Court further found

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that a failure to do so "constitutes a serious and material error of law which on the correctness, or reasonableness test, vitiates the award".

[26] Having analysed and identified the elements of section 200B and the purpose of the LRA, the Labour Court found, in effect, that the commissioner had erred in finding, without proof, that the intention (or effect) of the empowerment scheme was to defeat the purposes of the LRA. The invocation by the commissioner of section 200B was "misguided" and an irregularity. The Labour Court further found that "it is crystal clear" that the commissioner in this matter interpreted the law incorrectly and that award was not correct. The Labour Court held that "an incorrect award is not awaited from a reasonable commissioner, nor does it fall within the bounds of reasonableness".

[27] The Labour Court found that it was pointless to refer the matter back to the CCMA – even though the commissioner had arbitrated a wrong dispute, because there was no longer a live dispute about the interpretation and application of section 198B as AB had regularised the matter before the arbitration, i.e. by accepting that the appellants where its permanent employees. Having found that the award was a nullity, the Labour Court, nevertheless, considered whether PnP was an employer of the appellants "for completeness sake and solely to avoid further litigation", and concluded that there was not a shred of evidence that PnP was a "client" of AB or that AB was a TES, as contemplated in section 198A(1) of the LRA. The Labour Court thus reviewed and set aside the award and replaced it with an order that PnP is not an employer of the appellants. It also ordered the parties to each bear their own costs.

The Appeal

[28] The appellants, essentially, contend that the Labour Court was wrong and that the commissioner was correct. According to the appellants, there were, basically, two issues in dispute before the commissioner: the first being whether AB contravened section 198B of the LRA and whether the appellants ought to be regarded as permanent employees; and the second being about whose permanent employees they were, and whether PnP should be

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regarded as the employer. According to their argument, the first issue was conceded by the legal representative of PnP and AB and it was left to the commissioner to determine the second issue. In respect of that issue, the commissioner was entitled to rely on section 200B to determine the dispute before him. According to this argument, the commissioner interpreted section 200B correctly and reasonably found that the section was applicable. The appellants further contend that the contractual arrangements between PnP and AB had the effect of defeating the purpose of the LRA, insofar as its "effect was to insulate the true bearer of power in the work relationship from any liability in respect of the appellants."

[29] Further with regard to the application of section 200B – the argument made on behalf of the appellants was that it was their case all along that the contractual form of the employment relationship had to be disregarded and that it was to be found that PnP was their employer. While the referral forms served as a useful guide in determining the nature of the dispute – they were not pleadings and could not dictate the parameters of a party's case as pleadings would. Similarly, the only significance the certificate of outcome had was to certify that a particular dispute was conciliated on a particular date and the notice of set down according to this argument "does little to chart the terrain of the legal contest."

[30] The appellants argue that the only way that it would be determined whether PnP was there employer was through the application of section 200B. According to them, the commissioner was obliged to apply the relevant law and there was no requirement that a party had to expressly invoke the section before it could be applied. It was submitted on their behalf that the Labour Court's reliance on this Court's decision in *Association of Mine Workers and Construction Union ("AMCU") and others v Buffalo Coal Dundee (Pty) Ltd and another*[2] ("*Buffalo Coal*") for the proposition that the party had to invoke the section, is based on a misleading of the section and of the decision. According to this argument, *Buffalo Coal* was distinguishable on the facts, in that there a party did in fact expressly rely on section 200B, whereas that was

[2] [2016] 9 BLLR 855 (LAC) ("*Buffalo Coal Dundee*") para 28.

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not the situation in the present matter. The legal representative of PnP and AB understood the second issue to have been whether PnP was avoiding its obligations under the Labour legislation by means of the empowerment scheme agreements, because he addressed the commissioner on that point.

[31] It was further submitted on behalf of the appellants that the commissioner's interpretation of section 200B was correct, and that he correctly found that the contractual arrangement between PnP and AB had the effect of defeating the purpose of the LRA "in that the appellants were entitled to be regarded as permanent employees of [PnP] and to be treated on an equal footing with its employees and because the Commissioner had found that there was an employment relationship between the appellants and [PnP]. The prevailing tests to establish whether there was such a relationship could not be regarded as adequate, because if that was the case then there would have been no need for the Legislature to introduce section 200B into the LRA. The appellant's counsel submitted that there was a "great deal of evidence" to sustain a finding that section 200B was triggered. In that regard, reference was made to what the appellants stated in the answering affidavit in the review, deposed to by the first appellant, even though this was not evidence at the arbitration.

[32] In addition to that "evidence", counsel for the appellants also referred to the following "observations", as fortification for the finding that they were employed by PnP, namely: that the appellants reported to one, Wayne, a manager of PnP and not to Miss Mzamo, who, on her own evidence, was not always in the area where the appellants worked; that the appellants' leave forms were dealt with by PnP employment and that those forms were on a PnP letterhead; that the appellants' contracts of employment stipulated that they would be cancelled if AB lost the contract with PnP; and lastly, that Mr Stroebel's evidence, on which AB relied, but which the commissioner did not rely on, was largely descriptive of the contractual arrangements, but did not make those arrangements less susceptible to being overridden by section 200B. The appellants submitted that in light of all those facts, the Labour Court ought to have dismissed the review applications.

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[33] Heads of argument had been filed on behalf of PnP and AB which, basically, were in support of the Labour Court's decision. However, when the matter was argued before this Court we were informed that AB had withdrawn from the appeal and was in the process of de-registering. The argument made on behalf of PnP was, fundamentally, the following: the dispute related to section 198A(3) (i.e. dealing with a temporary service, or TES) and/or section 198B (i.e. dealing with fixed-term contracts), read with section 198D (i.e. general provisions applicable to sections 198A to 198C of the LRA). Since there was no merit in the dispute (i.e. particularly after AB had accepted that the appellants were its permanent employees) the commissioner should simply have dismissed the matter. The commissioner was not entitled to rely on section 200B of the LRA, because there was no dispute before him concerning that section and there was no breach of the LRA by, either PnP, or AB, and the appellants had never invoked that section.

[34] In any event, so it was argued on behalf of PnP, the commissioner made a material error of law in his interpretation of section 200B – since, firstly, it could not apply in the absence of proof that AB had breached the LRA; and secondly, the commissioner's finding, that PnP is the actual employer or co-employer of the appellants falls outside the scope of section 200B; and thirdly, the appellants have no right to be treated the same as PnP's employees, as section 198A(5) was not applicable; and that could also not serve as a basis for finding that the intention or effect of the contractual relationship between PnP and AB was to defeat the purposes of the LRA. Furthermore, it was argued that the factual findings the commissioner made that led to him concluding that section 200B was triggered, were unreasonable; there was no evidentiary basis for finding that the empowerment scheme was a sham or a simulated agreement.

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Evaluation

[35] It follows axiomatically that there has to be a dispute for the CCMA to resolve as part of its dispute resolution function. This is apparent from various provisions of the LRA including sections 133 to 139 of the LRA. The nature or the dispute or the issue to be determined has to be ascertained.[3] This is not only necessary for jurisdictional purposes, because disputes, depending on their nature, may require different procedures for their resolution – but, so that appropriate enquiries are conducted for their resolution. Our courts have recognised that an employee/ complainant's description, or characterisation of a dispute may not be correct or accurate. Therefore, there is a duty on a CCMA commissioner or arbitrator, who is expected to be more familiar with the LRA and different kinds of disputes, to determine the true nature of the dispute that requires resolution – not only to establish whether the CCMA (or the bargaining council) has jurisdiction in the matter, but also to enable him or her to conduct the appropriate enquiry or enquiries. The nature of the dispute defines the parameters of his or her brief.

[36] In an arbitration, a commissioner is to deal with the substantial merits of the dispute and this is only feasible if the real nature of the dispute is ascertained. Although the commissioner or arbitrator in deciding what the true nature of the dispute is, is not bound by the description given to the dispute in the referral form, or by the legal representatives, he may not ignore those descriptions. It is also important to bear in mind that the labels attached to a dispute cannot change the true nature of the dispute. And it is established that in determining the true nature of the dispute the commissioner or arbitrator is required to take all facts into consideration.[4]

[37] In light of the facts of this case, another aspect of this process of establishing the true nature of the dispute, needs mentioning. An award should not be founded on matters (including the real nature of the dispute) that occur to the arbitrator after the hearing, but in respect of which the parties had no

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[3] See, *inter alia*, *Coin Security Group (Pty) Ltd v Adams and Others* [2000] 4 BLLR 371 (LAC) ("*Coin Security*") and the cases cited there.

[4] See *Coin Security* (above) para 15; *CUSA v Tao Ying Metal Industries* [2009] 1 BLLR 1 (CC) paras 65-66; *NUMSA obo Sinuko v Powertech Transformers* [2014] 2 BLLR 133 (LAC) para 17.

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opportunity to address him or her on.[5] The parties ought to know what the real dispute is so that they are not taken by surprise, or treated unfairly in that they are made to believe that the dispute is one thing while the arbitrator or commissioner goes on to find in his or her award that it is something else that was not anticipated, and in respect of which the parties were not given an opportunity to deal with. That would be grossly unfair and result in the setting aside of the award.[6]

[38] As mentioned when discussing the background facts, in their referral, the appellants characterised the dispute as one in terms of section 198A of the LRA. They indicate in the referral form that PnP is the owner or the person in control of the premises where they work and portray it as a "client" of AB, and that AB is a temporary employment service (TES). They did not mark any of the other boxes to indicate that it was any other kind of dispute, even though it was open for them to do so. However, the certificate of outcome makes no mention at all that it is a section 198A dispute. Instead, it states that the dispute relates to sections 198B and D of the LRA. In their request for arbitration the appellants indicate that the dispute relates to sections 198B and D, and the CCMA notice of set down confirms that it is a section 198B dispute.

[39] In his opening address, the legal representative of PnP and AB, having conceded on behalf of AB that the appellants were its permanent employees (as contemplated in section 198B(5)), went on to point out that PnP disputed that it was the employer of the appellants and submitted that the only basis on which the appellants could contend that PnP was the employer was if they could prove that AB was a labour broker, or a TES (i.e. as contemplated in section 198A) and that there was no such proof. A contrary viewpoint is not stated by the appellants, or the commissioner. It is thus clear that at the outset of the arbitration the parties and the commissioner shared the view that the

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[5] See; *Steeledale Cladding (Pty) Ltd v Parsons NO* 2001 (2) SA 663 (D) at 672F-673C ("*Steeledale Cladding*").

[6] Compare: *inter alia*, *Portnet (A division of Transnet Ltd) v Finnemore and Others* [1999] 2 BLLR 151 (LC) paras 14-16; *Reunert Industries (Pty) Ltd t/a Reutech Defence Industries v Naicker and Others* [1997] 12 BLLR 1632 (LC) 1637I-1638B; *AA Ball (Pty) Ltd v Kolisi and Another* [1998] 6 BLLR 560 (LC) 562 C-G; *Steeledale Cladding* (above) and *Tao Ying Metal Industries (Pty) Ltd v Pooe NO and Others* [2007] 7 BLLR 583 (SCA) para 6.

true nature of the dispute turned around sections 198B and D, and possibly also section 198A of the LRA.

[40] What is significant is that in all of this time, starting from the referral to the conclusion of the hearing, there was no mention at all of section 200B of the LRA, or evidence to the effect that the empowerment scheme was simulated or a sham, or that the appellants' employment contracts with AB were not genuine or *bona fide*. The first time section 200B is mentioned is in the commissioner's award. It appears from the award that the commissioner did not only, out of his own, invoke section 200B, but that his award is founded upon it.

[41] The commissioner seems to have found as a fact (albeit implicitly) that the scheme was simulated and a sham, even though this had never been an issue before him, and even though the parties had never been given an opportunity to address the applicability of section 200B and its ramifications. The application of that section is clearly something that occurred to the commissioner after the conclusion of the proceedings when he was preparing his award. The failure to give the parties an opportunity to address those matters, before making conclusive findings based on them, was grossly unfair and reviewable, as pointed out earlier.

[42] For the appellants to have succeeded under section 198A of the LRA, it would have had to be shown that AB was a TES and that PnP was its client. In terms of section 198(1), a TES means "any person who, for reward, procures for and provides to a client other persons – (a) who perform work for the client; and (b) who are remunerated by the temporary employment service". There was no such proof. Even though the appellants referred to AB in the referral form as a TES, they could not prove that as a fact. Thus, it is hardly surprising that they "jettisoned" their initial characterisation of the dispute and re-characterised it as a section 198B and D dispute.

[43] Section 198B of the LRA deals with fixed term contracts of employees earning below a threshold prescribed by the Minister. Section 198B(3) provides: "[a]n employer may employ an employee on a fixed term contract or successive

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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." Subsection (4) gives a list of possible justifications for employing an employee on a fixed term contract, but it is not a closed list. Subsection (5) provides that employment in terms of a fixed-term contract that has been concluded or renewed in contravention of subsection (3) "is deemed to be of indefinite duration." By virtue of the wording of the subsections, it seems that subsection (3) would have to be read with subsection (4) although I make no finding in that regard.

[44] Both appellants were employed by AB in terms of written fixed-term contracts. We do not know if AB could have justified employing them on such a basis, but what we do know is that AB offered the appellants permanent appointments. It is not known if they had reacted to those offers, but what is clear is that the appellants persisted with the dispute. And at the arbitration, it was confirmed on behalf of AB that the appellants were its permanent employees. That resolved the dispute between the appellants and AB, and in the absence of proof that AB was a TES and PnP its client, that should indeed have been the end of the matter.

[45] The appellants had been very vague about who their employer was. At the outset they did not outrightly claim that PnP was the employer – instead, they expressed a desire to be employed by PnP on a permanent basis. Their prospects of achieving that through section 198A were not good, and they could not have been assisted in that regard through sections 198B and D. However, the commissioner in his award used the provisions of section 200B as a test to find that PnP was their employer (together with AB).

[46] Section 200B(1), is relatively wide, and open-ended. It provides: "for the purposes of this Act and any other employment law, 'employer' includes one or more persons who carry on associated or related activity or business by or through an employer if the intent and effect of the doing so is or has been to directly or indirectly defeat the purposes of this Act or any other employment law." While that may seem to be a test, read with section 200B(2) it is clear

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that section 200B of the LRA does not postulate a general test for determining whether a particular person or entity is the true employer of a particular employee. Section 200B(2) provides: “[i]f more than one person is held to be the employer of an employee in terms of subsection (1), those persons are jointly and severally liable for any failure to comply with the obligations of an employer in terms of this Act or any other employment law”.

[47] The effect of section 200B, while crucial, is merely to fix or extend the liability that would ordinarily be that of the employer, as per the traditional tests, to another or others, who carry on as an associated or related activity or business by or through an employer. They are regarded as employers for the purposes of liability. But it is only if they are in an associated or related business with the employer which is intended to defeat, or has the effect of defeating, the purposes of the LRA or any other employment law, either directly or indirectly, that they would be treated as the employer. The purpose for this is clear from section 200B(2). They are regarded or treated as such for the purposes of liability – they are held jointly and severally liable for a failure to comply with the obligations of an employer in terms of the LRA or any other employment law. In other words, section 200B(1) defines “employer” for a very specific purpose and that purpose is found in section 200B(1) read with section 200B(2). The section cannot be utilised generally for making persons or entities the employer(s) of others.

[47] That section 200B was not intended as a general test is further borne out by the wording of that section. It, effectively, contains a deeming provision. While it contemplates that a single person may be the employer, it does not provide criteria for determining what makes that one person the employer, other than for the purposes of liability in a situation where that one person is party to a simulated arrangement or sham, the true intent, or effect of which is to defeat the purposes of the LRA, or any other employment law; and there is a failure by that person to comply with the obligations of an employer (i.e. in terms of those provisions). Any other person or entity which is complicit in this subterfuge is treated as an employer for the purposes of liability. She, he, or it is jointly and severally liable with anyone else held to be an employer, in

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terms of the section, and in respect of the employer's obligations under the LRA and /or those laws.

[49] The rationale for section 200B is set out in the memorandum of objects that accompanied the 2014 LRA Amendment Bill. The purpose of the section is said to be: "to prevent simulated arrangements or corporate structures that are intended to defeat the purposes of the LRA or any other employment law, and to provide for joint and several liability on the part of persons found to be employers under this section for any failures to comply with an employer's obligations under the LRA or any employment law. This is particularly important in the context of subcontracting and outsourcing arrangements if these arrangements are subterfuges to disguise the identity of the true owner."

[50] Because of its breath, section 200B could be used to scrutinise any conceivable relationship or arrangement for purposes of liability, provided that a case for such scrutiny has been made out, and it is done fairly. It is one of a suite of provisions whereby the Legislator seeks to stop complex contractual and other schemes used by true employers to avoid their obligations under the Labour legislation. It is conceivable that it may not be easy to determine who the true employer, or owner, is for the purposes of liability arising from a failure to comply with the obligations in terms of the LRA, or other employment laws. This may be due to the complexity of the stratagems, or devices used by those wanting to avoid their obligations.

[51] Section 200B, which is based on law and equity, is intended to assist in that regard. For example, it is likely that the difficulty this Court grabbled with in *Buffalo Signs Co. Ltd and others v De Castro and Another*[7]*,* regarding the liability of a holding company and its subsidiary to compensate employees of a subsidiary of the subsidiary, would have been easily resolved if section 200B was available at the time. The majority of this Court[8] overturned an order of the Industrial Court that held the holding company and its subsidiary jointly and severally liable, on the ground, *inter alia*, that even if the former

[7] (1999) 20 ILJ 1501 (LAC).

[8] Per Conradie JA (Ngcobo AJP concurring), especially paras 12- 14 and 20.

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was complicit in the latter's deceit to avoid its obligations under the LRA, that did not make the former the employer; because there was no such thing as a fictional employer and an employer was one that fitted the description of an employer in the Labour Relations Act of 1956[9]. In terms of section 200B, the holding company and its immediate subsidiary would be jointly and severally liable to compensate the employees.

[51] There was no suggestion, let alone credible averment in the dispute before the commissioner that PnP and AB engaged in subterfuge by utilising an empowerment scheme for deceitful purposes, or more particularly, that PnP was using the scheme and AB as a sham to avoid its legal obligations toward its employees[10], or that the scheme had that effect. The scheme has not been shown as one that was not a genuine empowerment initiative that provided real and meaningful opportunities for the development and empowerment of disadvantaged individuals[11]. In terms of the scheme, which was temporary, interaction between the employees of PnP and AB (and the other beneficiaries/participants in the scheme) was inevitable.

[52] The genuineness of the written employment contracts entered into between the appellants and AB were also never placed in issue. Miss Mzamo testified that the appellants reported to her on a daily basis, and Ms Bryant explained how the leave forms had been signed by mistake. They were ordinarily signed off by Miss Mzamo of AB, but she was not present on the day in question and the details had not been verified. There is no reason to doubt the veracity of that explanation. Mr Stroebel's evidence, which also dealt with the scheme, was apparently also not taken into account by the commissioner. Significantly, it was not put to any of these witnesses, or at all, that the scheme was had the effect, or was intended to be utilised by the employer to avoid its obligations under the LRA, or other labour laws.

[53] In seeking to justify his application of section 200B, the commissioner only considered singular provisions in the participation agreement and failed to

[9] Contrast: the minority judgment of Froneman DJP paras 21-30.
[10] Compare, *Buffalo Coal Dundee* (above) para 50.
[11] Compare: *Phaka and Others v Bracks and Others* (2015) 36 ILJ 1541 (LAC).

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take into account the other agreements of the scheme. The fact that AB carried on business in PnP's premises and that PnP supplied AB with equipment and tools was entirely consistent with the workings of a genuine empowerment scheme. Further, a "close association" between the nurtured business (AB) and PnP is clearly not sinister when viewed in the proper context, and as a necessary attribute of an empowerment scheme.

[54] Taking the facts, the law and fairness into account, a costs order is not appropriate.

[55] In the result, the following order is made:

1. The appeal is dismissed.

2. No order is made in respect of the costs of the appeal.

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P Coppin

Judge of the Labour Appeal Court

Waglay JP and Jappie JA concur in the judgment of Coppin JA.

APPEARANCES:

FOR THE APPELLANTS: Adv Craig Bosch

Instructed by Lawyers for Human Rights

FOR THE RESPONDENT: Anton Myburgh SC

Instructed by Bowman Gilfillan Attorneys

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