IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR2165/18

In the matter between:

UNILEVER SOUTH AFRICA (PTY) LTD **Applicant**

and

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

ELIZABETH LERUMO *N.O.* **Second Respondent**

AMALUNGELO WORKERS' UNION OBO MAYISELA, STEVEN JABULANI AND 29 OTHERS **Third Respondent**

Heard: **23 July 2020**

Delivered: **27 October 2020**

Summary: **CCMA arbitration proceedings - review of award of arbitrator as well as variation ruling - lack of jurisdiction relating to relief awarded by arbitrator under section 198D of the Labour Relations Act, No. 66 of 1995, as amended - test for review - lack of condonation application for failure to refer dispute timeously under section 198B(5) of Labour Relations Act - material error of law and jurisdiction - review considered as the basis of what is correct**

JUDGMENT

OLIVIER, AJ

Introduction

[1] At the end of March 2017 all of the third respondent's members as well as other employees employed as packers were retrenched and received severance packages.

[2] On 1 April 2017, the third respondent's members, and other packers employed by the applicant, were offered fixed term contracts of employment. The third respondent's members did not sign these contracts but continued to work at the applicant under the conditions as specified in the offers of employment, that being, that they would be employed on a fixed term basis with flexible working hours (i.e. they were called as and when they were required). The employees worked as packers on the "*Santa Clause Project*" and it was envisaged that the employees would not be required after June 2019, as this was the date on which the project would terminate. As per the offer of employment, the employees, as fixed term employees, would not be entitled to participate in the applicant's medical aid, pension, education or home loan schemes.

[3] Dissatisfied with this arrangement, the third respondent, on behalf of its members, referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) on 16 April 2018. On the CCMA referral form it was recorded that the date that the dispute arose was 12 April 2018 and that the nature of the dispute was a section 198B Labour Relations Act[1] (LRA) dispute.

[4] The facts were recorded as "employer's refusal or failure to consider employees permanent - section 198B of LRA". The result required was that the "employees to be considered permanent".

[1] No. 66 of 1995, as amended.

[5] On 6 September 2018, the second respondent Elizabeth Lerumo (the commissioner), issued an arbitration award (the main award), in which she found that the third respondent's members did not conclude a written contract with the applicant as a contract in terms of which an employee is employed to perform work on a fixed term basis must be in writing, and that contract must stipulate the reason for the limited duration contract. Therefore, the third respondent's members were not employed on a fixed term contract but rather for an indefinite duration.

[6] Following on from these findings, the second respondent made the following award:

6.1 the third respondent's members are deemed to be permanent employees of the applicant with effect from April 2017;

6.2 the applicant is to assist the third respondent's members to participate in the applicant's medical aid, pension, education and home loan schemes; and

6.3 the applicant is to pay the third respondent's members, with effect from April 2017, rates of remuneration which are not less favourable than those earned by permanent employees performing the same or similar work.

[7] Discontent with the main award the applicant filed a review application (main review application) on 19 October 2018 under this case number, JR 2165/18.

[8] On 21 May 2019 the third respondent applied to the CCMA, seeking the variation of the **main award in order to quantify the back-pay owed in terms of same.** On 12 September 2019 the commissioner issued a variation ruling in which she varied the main award by inserting paragraphs 44 and 45, which reads thus:

> "44. The Respondent is ordered to have a meeting with the Applicant's representatives by no later than 30 September 2019, in order to quantify the amounts as per paragraph 43 of the award. Further the respondent

is ordered to provide the applicant's representative a schedule of quantified sum of money by no later than 14 October 2019."

"45. The applicants are directed to approach the Labour Court by way of contempt proceedings should the respondent fail to comply with the paragraph 44."

[9] In response to the variation ruling, on 5 December 2019, the applicant instituted an application under case number JR2278/19 in terms of which the applicant sought a review of the variation ruling (variation review application). A further application was launched by the applicant under J3920/18 for the stay of the main award pending the outcome of the main review application. This application to stay was set down for hearing on 15 January 2020 on which date all three matters were consolidated.

[10] These three applications were set down for hearing on 23 July 2020. I will consider the main award review application first as the applicant has raised two jurisdictional points, which, if the applicant is successful, will de dispositive of all three applications.

Main Award Review

[11] The applicant's review application is founded on the following grounds of review:

11.1 the second respondent had an obligation to assist the applicant's representative at the arbitration by informing him of the necessity of adducing the April 2017 contract offered to the employees;

11.2 the second respondent did not have the jurisdiction to arbitrate the dispute as the dispute was referred in April 2018 while it arose in April 2017. Section 198D of the LRA prescribes that a section 198B dispute must be referred within six months of that dispute arising, and the third respondent did not file an application for condonation for the late filing of the dispute;

11.3 the employees were offered a written contract of employment but refused to sign the contract. Section 198B of the LRA does not require a written contract of employment, but only a written offer of employment, which there was. The employees continued to act in accordance with the written offer, despite not signing the contract, and therefore, the finding that the employees were permanent was reviewable; and

11.4 the second respondent had no jurisdiction to grant relief to Mr Jabulani Maseko, Mr Thokozani Mtshweni, Mr Thabo Seabi and Mr Albert Maloy because they were retrenched in July 2018.

[12] Although the applicant and the third respondent submitted comprehensive heads of argument on every ground of review, at the hearing of this matter both parties argued only the following jurisdictional points, being:

12.1 the second respondent did not have jurisdiction to hear the dispute as it was referred more than six months after the dispute arose and no application for condonation for the late filing of the dispute was filed; and

12.2 the second respondent did not have jurisdiction to award benefits (participation in the applicant's medical aid, pension, education and home loan schemes) as the third respondent's members, in their CCMA referral form, sought only to be declared permanent employees as envisaged in section 198B read with section 198D of the LRA.

Review test on jurisdictional points

[13] Before I consider these jurisdictional points I must confirm the test which I will use in determining the outcome.

[14] The Labour Appeal Court in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[2] stated:

[2] (2008) 29 ILJ 964 (LAC) at para 101.

> '.... Nothing said in Sidumo means that the CCMA's arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter on any of the other grounds specified in section 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise ....'

[15] This Court in *Eskom Holdings SOC Ltd v NUM obo Kyaya and Others*[3] stated:

> 'In simple terms, where the issue to be considered on review is about the jurisdiction of the CCMA, the Labour Court is entitled to, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court determines the issue de novo in order to decide whether the determination by the arbitrator on jurisdiction is right or wrong.'

[16] In *SA Rugby Players Association, and Others v SA Rugby (Pty) Ltd and Others*[4] the Labour Appeal Court explained:

> 'The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court...'

[17] Therefore, this Court is required to consider the issue of the CCMA's jurisdiction *de novo* and in so doing I am required to assess whether the second respondent was right or wrong in assuming jurisdiction.

Late referral to the CCMA

[18] The applicant argued that section 198D of the LRA prescribes that a dispute arising from section 198B of the LRA must be referred to the CCMA within six months of the dispute arising, failing which, an application for condonation of the late referral must be delivered.

[3] [2017] 8 BLLR 797 (LC) at para 32.
[4] (2008) 29 ILJ 2218 (LAC) at para 40.

[19] The relevant portions of section 198D of the LRA provide as follows:

> ‘(1) Any dispute arising from the interpretation or application of sections 198A, 198B and 198C may be referred to the Commission or a bargaining council with jurisdiction for conciliation and, if not resolved, to arbitration.
>
> …
>
> (3) A party to a dispute contemplated in subsection (1), other than a dispute about a dismissal in terms of section 198A(4), may refer the dispute, in writing, to the Commission or to the bargaining council, within six months after the act or omission concerned.
>
> …
>
> (6) The Commission or the bargaining council may at any time, permit a party that shows good cause to, refer a dispute after the relevant time limit set out in subsection (3) or (5).’

[20] The applicant argued that the dispute arose in April 2017 at the time when the new fixed term contract was offered and therefore the third respondent's referral to the CCMA should have been made no later than the end of September 2017.

[21] In response, the third respondent argued that the dispute is a continuing wrong (akin to an unfair labour practice) and therefore the referral is not late at all.

[22] Therefore, what must be determined is (i) when did the dispute arise (ii) whether this dispute concerns a continuing wrong (iii) whether an application for condonation was required of the third respondent and (iv) if an application for condonation was required, what is the effect of the third respondent's failure to apply for condonation for the late referral of the dispute.

Analysis

When did the dispute arise?

[23] It was common cause between the parties that the employees were offered new fixed term employment on variable hours, without benefits (that being

participation in applicant's medical aid, pension, education and home loan schemes) in April 2017.

[24] The applicant alleges that, for this reason, the dispute arose in April 2017. The third respondent accepts that the dispute arose in April 2017, however, alleges that the wrong continued monthly from that date.

[25] Consequently, it is common cause that the dispute arose in April 2017, however, the lifespan of the wrong is disputed and therefore I must determine whether the wrong was continuous.

Does this dispute concern a continuing wrong?

[26] In support of the assertion that the wrong was continuous, the third respondent made reference to *South African Broadcasting Corporation Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[5] wherein Waglay AJDP (as he then was), held as follows:

> 'The ruling of the Commissioner would therefore be open to be reviewed and set aside if the dispute constituting the unfair labour practice was said to occur in 1998 as alleged by the appellant. The problem however is that the argument presented by the appellant is premised upon the belief that the unfair labour practice/unfair discrimination consisted of a single act. There is however no basis to justify such belief. While an unfair labour practice/unfair discrimination may consist of a single act it may also be continuous, continuing or repetitive. For example where an employer selects an employee on the basis of race to be awarded a once off bonus this could possibly constitute a single act of unfair labour practice or unfair discrimination because like a dismissal the unfair labour practice commences and ends at a given time. But, where an employer decides to pay its employees who are similarly qualified with similar experience performing similar duties different wages based on race or any other arbitrary grounds then notwithstanding the fact that the employer implemented the differential on a particular date, the discrimination is continual and repetitive. The discrimination in the latter case has no end and is therefore ongoing and

[5] [2010] 3 BLLR 251 (LAC) at para 27.

> will only terminate when the employer stops implementing the different wages. Each time the employer pays one of its employees more than the other he is evincing continued discrimination. (Own emphasis).

[27] In response, the applicant made reference to *Eskom*[6] in which Snyman AJ sought to clarify that not all unfair labour practices which recur on a monthly basis, constitute a continuing wrong. The dispute in *Eskom* concerned an alleged unfair labour practice related to promotion. Snyman AJ explained that the alleged unfair conduct relating to promotion occurred on a specific date, and although it was recurring, in that the employee suffered the effects of the alleged unfairness on a monthly basis, it could not be said to be "*continuous*". Snyman AJ held:[7]

> 'This would render the 90 day time limit under Section 191(1)(b)(ii) completely valueless. The employee can then in effect do nothing about an employer's decision not to promote for a year and then decide to pursue it because it is purportedly 'continuous' this flies directly in the face of the primary consideration of the expeditious resolution of employment disputes. I accept that one must treat a failure to promote for example based on race differently, but that would be the cause of action is founded on discrimination, and not an unfair labour practice per se, with discrimination requiring a different level continuous protection.'

[28] What then is the effect of these judgments on this dispute? There can be no doubt that the initiation of the wrong occurred on a definitive date, in April 2017, when the employees were offered fixed term employment contracts on terms which is not in compliance with section 198B(3)(a) and (b) and were as such to be deemed to be employed on the basis of an indefinite contract as envisaged by section 198B(5). There can also be no doubt that the employees suffered the effects of the less favourable treatment on a continuous basis. But, does this automatically result in a continuous wrong in terms of which the employees are absolved from complying with the time limits prescribed in section 198D(3) of the LRA?

---

[6] Id fn 3
[7] Id fn 3 at para 59.

[29] The third respondent in their dispute referral form 7.11 clearly sought a declarator that their contracts were to be deemed to be of an indefinite nature as envisaged in section 198B(5) of the LRA. Such declarator was made by the second respondent and she made it clear that it was from April 2017 when the dispute arose. The third respondent did not refer an unfair labour practice dispute in terms of section 186(2) of the LRA. As such, the dispute arose from a single event that occurred in April 2017 and does not constitute a continuing wrong.

[30] Section 198D(3) of the LRA specifically prescribes a time limit for the referral of a dispute to the CCMA and this time limit is generous (especially compared to those time limits prescribed in section 191 of the LRA). It must also be remembered that section 198D of the LRA prescribes a dispute resolution procedure specifically for instances of less favourable treatment arising out of non-compliance with sections 198A, 198B and 198C of the LRA. The very nature of these disputes is that they recur on a monthly basis for example, less favourable monthly remuneration or benefits. Affected employees, who are suffering less favourable treatment, may then refer a dispute to the CCMA to rectify this treatment and obtain a declaratory order to this effect from the CCMA. There would simply be no purpose to the time limit prescribed in section 198D(3) of the LRA if all such disputes were considered as a continuing wrong.

Was an application for condonation required of the third respondent?

[31] It is clear that the employees were aware of the initiation of the wrong in April 2017, as it was for this precise reason that they refused to sign the offers of employment. The employees then elected not to pursue the matter for an entire year. This delay "*flies directly in the face of the primary consideration of the expeditious resolution of employment disputes*".

[32] This is not a matter of unfair discrimination, or an unfair labour practice in terms of section 186(2) of the LRA, in respect of which Snyman AJ indicated that

additional protections should be afforded, and since section 198D(3) of the LRA specifically contemplates a time limit for the referral of a dispute such as this, there can be no doubt that the third respondent was required to make an application for the condonation for the late referral of this dispute.

What is the effect of the third respondent's failure to apply for condonation for the late referral of the dispute?

[33] In *Member of the Executive Council, Department of Sport Recreation, Arts and Culture, Eastern Cape v General Public Service Sectoral Bargaining Council and Others*,[8] this Court said:

> 'The provisions of the Act are clear and there can be no doubt that this matter was referred late and that condonation was to be applied for.
> Without an application for condonation and without condonation being granted, the matter was not properly before the arbitrator and he had no jurisdiction to arbitrate the dispute.'

[34] In this case the same principles apply. It is clear that the third respondent had referred the dispute out of the time period prescribed in section 198D(3) of the LRA and therefore in terms of sections 198D(5) and (6) of the LRA the third respondent was required to apply for condonation for the late referral of the dispute. The third respondent did not do so. Without an application for condonation for the late referral of the dispute the matter was not properly before the second respondent and she had no jurisdiction to arbitrate the dispute.

[35] On this basis alone the main award review application must succeed, and therefore, the stay application would be subsequently dismissed and the variation ruling review application must also succeed. Having said that, and for the sake of completeness, I will also address the second jurisdictional point raised by the applicant.

[8] [2015] 12 BLLR 1224 (LC) at paras 41 and 42.

Award of benefits and back pay

[36] The second jurisdictional point raised by the applicant is that the Commissioner did not have jurisdiction to award equal treatment to the employees, retrospectively or prospectively as the third respondent's members, in their CCMA referral form, sought only to be declared permanent employees and did not seek equal treatment. They also did not refer any separate unfair labour practice dispute.

[37] In this regard, the applicant referred to the recent judgment of this Court in *Passenger Rail Agency of South Africa v Commission for Conciliation, Mediation and Arbitration and Others.*[9] The *PRASA* dispute concerned a review of an arbitration award in terms of which the commissioner awarded permanent employment to fixed term employees, membership of the employer's provident fund and back pay of provident fund contributions to 1 April 2015.

[38] PRASA, as the applicant in the review, argued that section 198B and 198D do not confer on a commissioner the power to award compensation or backdated relief and, therefore, the commissioner had no jurisdiction to award back pay of provident fund contributions to 1 April 2015. PRASA also argued that the commissioner erroneously awarded relief under section 198B of the LRA to employees who were declared permanent by PRASA and, since they were declared permanent employees, they were not entitled to rely on the rights afforded to fixed term employees under section 198B of the LRA. As a further point, PRASA argued that since the employees were not able to rely on the relief in section 198B of the LRA (because they were deemed permanent) the commissioner could not rectify the relief by treating the dispute as an unfair labour practice because an unfair labour practice had not been referred and therefore was not conciliated.

[39] In *PRASA* Conradie AJ held, in relation to the commissioner's ability to award substantive relief under section 198B and 198D of the LRA, that:

[9] [2020] 1 BLLR 49 (LC).

> 'Here, the complaint will be that a fixed-term employee is being treated less favourably than an employee employed on a permanent basis performing the same or similar work without there being a justifiable reason for the different treatment. Section 198D(2) sets out the circumstances in which different treatment may be justifiable, which includes considerations such as seniority, experience, length of service, merit, etc. Section 198D offers no other relief beyond this, and as stated above, in any event, is not concerned with the equal treatment or benefits of permanent employees.
>
> For the reasons stated above the arbitrator could not, on the strength of section 198B, grant substantive relief to the employees in terms of remuneration and benefits. In so doing he committed an error of law and/or exceeded his powers and the award must be reviewed and set aside on this basis.' [10]

[40] It is clear that this judgment relates specifically to employees who were declared permanent by the employer and therefore it was not competent for the commissioner to award relief in terms of section 198B or 198D of the LRA. Conradie AJ did not specifically deal with whether a commissioner has the jurisdiction under section 198D of the LRA to award back pay to a fixed term employee (i.e. one which is not deemed permanent). *PRASA* therefore, does not provide assistance to me in the case at hand relating to this topic.

[41] Having said that, I am provided with some assistance by the Labour Court decision in *Nama Koi Local Municipality v South African Local Government Bargaining Council and Others*,[11] wherein Snyman AJ stated:

> 'What is significant is that sections 198A, 198B and 198C come with their own dispute resolution process…
>
> 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

[10] Ibid at para 55 and 56.
[11] (2019) 40 ILJ 2092 (LC) at paras 33 – 35.

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. Using an example analogous to the current matter, a dispute concerning the application of section 198B(5) can be referred to the CCMA in the course of the existence of the fixed term contract and before the expiry of the term, for declaratory relief to the effect that the fixed term contract is in fact an indefinite contract as a result of the application of that provision. This would avoid the employer relying on the expiry of the fixed term to bring about termination of employment.

"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. My view in this regard is further informed by the fact that section 198D does not provide for the kind of relief as contemplated by sections 193 and 194, which only apply in the case of unfair dismissals and unfair labour practices. The relief that flows from section 198D can only be declaratory relief, which may well be moot if the employment relationship has ended by the time it falls to be decided.'

[42] I am in agreement with Snyman AJ in *Nama Khoi Local Municipality* that section 198D does not automatically entitle an applicant to compensatory relief in the event of a declaratory order in his favour that his contract of employment is deemed to be of an indefinite nature.

[43] In this matter, I could not find any reference to evidence on record relating to comparators who are permanently employed, or the salaries and benefits they received, compared with that of the third respondent's members. Once a declaratory has been obtained, the next step would have been for the third respondent to refer an unfair labour practice dispute regarding benefits or a dispute relating to unequal treatment and to lead proper evidence in support of the referral.

[44] The third respondent at all relevant times only applied for a declaratory order as envisaged in section 198B(5) of the LRA. The Second Respondent as such committed an error in law by including in her order and the variation ruling, relief relating to benefits and a comparison to employees who are permanently employed.

[45] As such, the main award should be set aside on this ground in addition to the first jurisdictional point.

[46] In the circumstances, the following order is made.

Order

1. The award issued by the second respondent under case number GAEK3595-18 is reviewed and set aside.
2. The stay application under case number J3920/20 is dismissed.
3. The Variation Ruling under case number GAEK3595-18 is reviewed and set aside.
4. There is no order as to costs.

_____

G. P. J. Olivier

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. F Boda SC

Instructed by: Norton Rose Fulbright South Africa Inc.

For the Third Respondent: Mr Sebola of Sebola Nchupetsang Sebola Inc.