THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JR2439/17

In the matter between:

UASA – THE UNION obo MARIBE T.A.D
AND 13 OTHERS **Applicant**

and

COCA COLA FORTUNE PTY LTD **First Respondent**

SIPHO TALANE NO **Second Respondent**

COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION (CCMA) **Third Respondent**

Enrolled: 1 July 2021

Delivered: 31 August 2021 (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 on 31 August 2021)

JUDGMENT

TILLY, AJ

Introduction

[1] The applicants seek to review and set aside the Arbitration Award of the second respondent (Commissioner) issued under the auspices of the third respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA) under case number LP1800-17, dated 4 October 2017. In the award, the Commissioner found that the applicants were not dismissed and that their employment had came to an end through the effluxion of time in accordance with their limited duration contracts of employment.

Background Facts

Termination of fixed term contracts of employment

[2] The applicants, all of whom earned below the threshold prescribed in terms of section 6(3) of the Basic Conditions of Employment Act[1] (BCEA), were employed by the first respondent (Coca-Cola) on fixed term contracts of employment, which terminated on 31 January 2017.

Referral to the CCMA & the case at arbitration

[3] They subsequently referred an unfair dismissal dispute in accordance with section 186(1)(b) of the Labour Relations Act[2] (LRA) to the CCMA. At arbitration, the applicants *inter alia* contended that they were unfairly dismissed for reason that they held a reasonable expectation that Coca-Cola would retain them on an indefinite basis. They referred to the fixed term contracts of employment which were successively renewed on average four times at different stages between the years 2011 to 2016 and contended that this was

[1] No. 55 of 1997
[2] No. 66 of 1995, as amended.

in contravention of section 198B(3) of the LRA. As such, they held the expectation that their employment with Coca-Cola was of an indefinite duration, in accordance with section 198B(5) of the LRA and that Coca-Cola would retain them permanently, but instead unfairly dismissed them on the basis that the term in their contracts had come to an end by effluxion of time.

[4] Coca-Cola *inter alia* contended that their operational requirements required the use of flexible staff as and when the need arose. They utilised limited duration contracts of employment to address this need, which contracts were not in contravention of section 198B of the LRA as it was permitted by the Collective Agreement on Additional National Substantive Conditions of Employment (Collective Agreement), which was entered into between it and the majority Trade Union, Food and Allied Workers Union (FAWU) on 11 March 2015.

[5] They submitted that the Collective Agreement was applicable to the applicants, who were mostly employed as drivers and/or who were in positions in the company in grades 1-5. In this regard, they relied on the definition of a Bargaining Unit, as set out in the Recognition Agreement entered into between it and FAWU titled "*World Class Collective and Procedural Agreement for the Regulation of World Class Relationship and Performance*" (the Recognition Agreement) concluded on 21 August 2012, which *inter alia* defined Bargaining Unit to mean all positions within the company in grade 1-5 including all drivers.

[6] They submitted that the provisions of section 198B did not find application, as per section 198B(2)(c) of the LRA. Furthermore, that a reasonable expectation in terms of section 186(1)(b) of the LRA could not be established as the applicants had entered into limited duration contracts and were fully aware of the nature and terms thereof, including that it was for a limited duration. It was also their case that the limited duration contracts were in any event justified for operational requirements (seasonal reasons, volume increases, special projects and for leave coverage), as per section 198B of the LRA.

[7] The applicants, who were not members of FAWU, disputed that they were members of the Bargaining Unit and that the Collective Agreement was applicable to them.

The award

[8] In the award, the Commissioner found that the Collective Agreement was not binding on the applicants and accordingly section 198B remained applicable. He also found that the applicants were employed in terms of valid fixed term contracts as it complied with section 198B(3), (4), (5) and (6) of the LRA as the reason for limiting the contracts were for volume increases and vacancies. He was not persuaded that the applicants had proved that the non-renewal of their fixed term contracts amounted to a dismissal, as contemplated in section 186(1)(b) of the LRA, and concluded that they were not dismissed and that their employment came to end through the effluxion of time. He found that the CCMA lacked jurisdiction to determine the dispute referred.

The review application

[9] The applicants sought the review and setting aside of the award, primarily on the ground that the Commissioner had committed a material error of law by wrongly interpreting the provisions of section 198B of the LRA as against the evidence. In this regard, they submitted that had the Commissioner properly considered the facts before him, as against the applicable legal principles in section 198B of the LRA, he would have noticed that there was a limit within which fixed term contracts could be renewed, and he would have found that the applicants' successive renewal of their fixed term contracts by Coca-Cola fell beyond that limit. He would have found that the conclusion/renewal of the fixed term contracts of employment was in contravention of section 198B (3) of the LRA, and their employment should have been deemed to have been of an indefinite duration. Instead, he found that their contracts of employment had terminated due to the effluxion of time.

[10] Coca-Cola, on the other hand, agreed that the Commissioner committed an error of law, but for different reasons. They took issue with his findings that the applicants were excluded from the Collective Agreement; that they were not bound by it and that the provisions of section 198B were applicable to them. This notwithstanding, they submitted that the ultimate outcome in their favour (that the applicants could not establish the existence of a dismissal as per section 186 of the LRA) would not be affected and that the error of law did not justify the review of the award.

[11] They also disputed that the Commissioner would have concluded that the employment of the applicants were deemed to be of an indefinite duration as per section 198B(3) of the LRA, and submitted that the only reasonable/correct conclusion that the Commissioner could have reached on the facts before him was that the applicants' fixed term contracts of employment were permitted in terms of the Collective Agreement.

Evaluation

Traversing of section 186(1) and section 198B of the LRA

[12] The dispute before the Commissioner was whether the applicants were unfairly dismissed, as contemplated in section 186(1)(b)(ii) of the LRA. In this regard, the applicants contended that the non-renewal of their fixed term contracts was unfair for reason that they held an expectation that Coca-Cola would retain them on an indefinite basis, the latter informed by their contention that Coca-Cola had acted in contravention of section 198B(3) of the LRA, and as such their employment would be on an indefinite duration.

[13] The dispute at the CCMA thus traversed the provisions of both section 186(1)(b) and 198B of the LRA. The interaction between these two provisions is competent in the context of an employee referring an unfair dismissal dispute in accordance with either section 186(1)(a) or (b) of the LRA and as part of such dispute contends that the dispute was unfair for reason that there was an

expectation of employment for an indefinite duration, as per section 198B(5) of the LRA.

[14] This was confirmed in *Nama Khoi Local Municipality v South African Local Government Bargaining Council and Others*[3] where the Court stated as follows:

> "[36] It is then in the above context that the interaction between the unfair dismissal provisions of the LRA and section 198B must be considered. I am not suggesting that section 198B cannot be applied once an employee has been dismissed. What I am however saying is that it can only be applied as part and parcel of an employee's case in an unfair dismissal dispute as contemplated by either section 186(1)(a) or 186(1)(b) of the LRA.
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> [38] The judgment in Piet Wes Civils in my view aptly illustrates the point I wish to make. Section 198B can be applied as part and parcel of an unfair dismissal dispute. But it requires that an unfair dismissal dispute must be referred to the CCMA or bargaining council, or, as in the case of Piet Wes Civils, the Labour Court under section 189A(13). In short, it is an element of an unfair dismissal dispute, when deciding whether a dismissal exists, or whether a dismissal is fair."

Test on Review

[15] The issue before the Commissioner was whether the applicants were dismissed, which relates to the jurisdiction of the CCMA to adjudicate the dispute. The Commissioner found that the applicants were not dismissed and that the CCMA lacked the jurisdiction to determine the dispute. This means that the issue to be considered on review is whether or not the CCMA held the requisite jurisdiction to adjudicate the dispute, and this requires a determination by this Court, *de novo*, on whether or not the Commissioner was correct in

[3] (2019) 8 BLLR 830 (LC) at para [36] and [38].

coming to the conclusion that the CCMA lacked jurisdiction[4]. However, where a Commissioner commits a material error of law then that can result in both an incorrect and unreasonable award, which award can be attacked either on the basis of its correctness or unreasonableness[5].

Grounds for review

[16] The applicant's primary ground of review was that the Commissioner committed an error of law when he applied the provisions of section 198B of the LRA, as against the evidence led by them including the successive renewal of their fixed term contracts of employment, under circumstances where the Collective Agreement did not find application and there was no justifiable reason for fixing a term. In other words, they took issue with the Commissioner's findings that Coca-Cola did not act contrary to the provisions of section 198B of the LRA.

[17] Coca-Cola accepts that the Commissioner committed an error of law, albeit in his application of section 198B(2)(c) of the LRA, but nonetheless contends that the ultimate outcome would not be affected by such error.

The proper approach to the Commissioner's evaluation of the dispute

[18] As the case before the Commissioner traversed the provisions of both section 186(1)(b)(ii) and 198B of the LRA, the Commissioner was required to consider and/or make determinations of a number of aspects.

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[4] See: *Mnguti v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 311 (LC) at paragraph [14]; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 3 BLLR 197 (LAC) at paragraph [101]; *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others* (2008) 9 BLLR 845 (LAC) at paragraphs [39]-[40] and *Nama Khoi Local Municipality v South African Local Government Bargaining Council and Others* (2019) 8 BLLR 830 (LC) at paragraphs [14]-[18].

[5] See: *MacDonald's Transport Upington (Pty) Ltd v AMCU* [2017] 2 BLLR 105 (LAC) at para [30]; *National Union of Metalworkers of SA v Assign Services and Others* (2017) 10 BLLR 1008 (LAC) at paragraph [32] (which decision was upheld by the Constitutional Court in *Assign Services (Pty) Ltd v National Union of Metalworkers of SA and Others (Casual Workers Advice Office as amicus curiae)* (2018) 9 BLLR 837 (CC) and *Nama Khoi Local Municipality* (*supra*) at paragraph [19]-[20].

[19] First, whether the provisions of section 198B was applicable, which would have required a consideration of the Collective Agreement and the provisions of section 198B(2)(c) of the LRA.

[20] Second, if it was found that section 198B was applicable (meaning that the provisions of section 198B(2)(c) was not applicable, which provision provides for an exclusion from the application of section 198B under circumstances where the employment in terms of fixed term contracts of employment is permitted by *inter alia* a collective agreement) then consideration and a determination would be needed on whether there was a justifiable reason for entering into the fixed term contracts of employment. This would *inter alia* have required an evaluation of the fixed term contracts of employment; its terms; the successive renewal thereof; the nature of the work for which the applicants were employed for a limited duration and whether there a justifiable reason for fixing the term of the contract was set out therein. Such consideration would be needed against the provisions of section 198B(3), read with section 198B(4), (6) and (7) of the LRA.

[21] Third, and following from the second issue, if it was found that there was no justifiable reason, then a determination would have been required on whether the entering into of the fixed term contracts of employment was concluded/renewed in contravention of section 198B(3), and if so, then a finding needed to be made that the applicants employment with Coca-Cola was deemed to be of an indefinite duration, which consideration would be in accordance with the provisions of section 198B(5) of the LRA.

[22] Fourth, and again following from the determination from the third issue, consideration would be needed to be given to whether a dismissal was established, within the context of section 186(1)(b)(ii) of the LRA, which would have required an evaluation of whether there was a reasonable expectation by the employees that Coca-Cola would retain them in their employment on an indefinite basis, thus tying in with the consideration of the provisions of section 198B(5) of the LRA. If it was established that there was such expectation, then

the finding would have to have been that there was indeed a dismissal, as per section 186(1)(b)(ii) of the LRA.

Evaluation – whether the Collective Agreement was binding on the applicants and whether section 198B was applicable to the dispute?

[23] When regard is had to the award, the Commissioner considered the first issue, which was whether the provisions of section 198B was applicable to the dispute before him. This was because Coca-Cola's case was that the entering of the fixed term contracts of employment was permitted by the Collective Agreement and therefore the provisions of section 198B was not applicable, as per section 198B(2)(c) of the LRA, which provides as follows:

> "(2) This section does not apply to-
>
> (c) an employee employed in terms of a fixed-term contract which is permitted by any statute, sectoral determination or collective agreement."

[24] The Commissioner was therefore required to consider, as part of this issue, whether the Collective Agreement was binding on the applicants. Whilst the Commissioner rightly directed himself towards considering this aspect, he completely misdirected himself in his evaluation of same.

[25] In his evaluation, he accepted that FAWU and Coca-Cola had entered into the Collective Agreement that permitted Coca-Cola to use limited duration contracts. He considered that the applicants were not members of FAWU and were accordingly not bound by the Collective Agreement, unless it was extended to them in accordance with section 23(d)(i) or (ii) of the LRA. He indicated that he needed to determine whether the Collective Agreement was applicable to the applicants, as was Coca-Cola's case. Up to this point there was no misdirection by the Commissioner.

[26] The Commissioner however thereafter misdirected himself by evaluating the terms of the Recognition Agreement, rather than the terms of the Collective

Agreement, when considering whether the Collective Agreement was applicable to the applicants.

[27] He looked at clauses 3.2 and 3.4 of the Recognition Agreement (which he referred to as the 'Collective Agreement') which clauses indicated that FAWU and Coca-Cola had agreed to extend the (Recognition) agreement to bind all employees in the Bargaining Unit. He also looked at the definition of *"employees"* in the Recognition Agreement, and found that it referred to persons who were permanently employed in the Bargaining Unit. He evaluated that as the applicants were not permanently employed, they were not *"employees"* as contemplated in the Collective Agreement. He concluded that the Collective Agreement thus did not cover the applicants and accordingly the provisions of section 198B remain applicable.

[28] The misdirection was thus that the Commissioner in his evaluation considered the clauses as contained in the Recognition Agreement entered into some years prior between FAWU and Coca-Cola, rather than the Collective Agreement. This was not the correct reference document. He should have considered the terms of the Collective Agreement itself to determine whether it would bind the applicants in terms of section 23(1)(d) of the LRA. In so doing, he completely misdirected himself in his determination of whether the Collective Agreement was applicable to the applicants.

[29] This notwithstanding, the question is whether the Commissioner would have reached the same conclusion - that the Collective Agreement was not applicable to the applicants and the provisions of section 198B remained applicable - had he considered the terms of the Collective Agreement itself.

[30] When regard is had to the terms of the Collective Agreement itself, it is clear that it was entered into between Coca-Cola and FAWU, on behalf of its members in the Bargaining Unit. Furthermore, and more pertinently, the Collective Agreement is silent on whether it would bind employees who are not members of FAWU (including the applicants), nor does it identify such employees. It is trite that in order for a collective agreement to bind an employee

who is not a party thereto, all three conditions as set out in section 23(1)(d) of the LRA must be fulfilled[6]. Clearly not all the conditions were met.

[31] Therefore, had a proper evaluation been done, the Commissioner would have come to the same conclusion which he had reached when he misdirected himself, which is that the Collective Agreement was not applicable to the applicants and the provisions of section 198B remained applicable.

[32] It must be stated that this conclusion is also reached notwithstanding Coca-Cola's complaint that the Commissioner committed a material error of law when he found that the Collective Agreement was not binding on the applicants based on the definition of employees. In this regard, they submitted that the Commissioner should have considered the definition of a bargaining unit as contained in the Recognition Agreement. They therefore also relied on a definition as contained in the Recognition Agreement, rather than the Collective Agreement, which is a misdirection.

Evaluation – Was there a justifiable reason for entering into the fixed term contracts of employment and/or whether it was concluded/renewed in contravention of section 198B(3)?

[33] Having made a finding that the provisions of section 198B remained applicable, the Commissioner correctly considered the second issue for determination, which is whether there was a justifiable reason for entering into the fixed term contracts of employment.

[34] As indicated, this would ideally have required an evaluation of the fixed term contracts of employment; its terms; the successive renewal thereof; the nature of the work for which the applicants were employed for a limited duration and whether there a justifiable reason for fixing the term of the contract was set out

[6] See: *Concor Projects (Pty) Ltd t/a Concor Opencast Mining v Commission for Conciliation, Mediation and Arbitration and others* [2014] 6 BLLR 534 (LAC) at para [25] – [26] and *Glencore Operations South Africa (Pty) Ltd and others v National Union of Metalworkers of South Africa* [2018] 10 BLLR 1022 (LC) at para [14] – [15].

therein, which consideration needed to be given against the provisions of section 198B(3), read with section 198B(4), (6) and (7) of the LRA.

[35] The Commissioner failed dismally short in such evaluation. He did not delve into the detail that was required. He simply concluded that the applicants were employed in terms of valid fixed term contracts, as the contracts complied with section 198B(3), (4), (5) and (6) of the LRA for reason that the fixed term contracts were limited due to volume increase and vacancy.

[36] The applicant's primary ground of review is that had the Commissioner properly considered the facts before him, as against the applicable legal principles in section 198B of the LRA, he would have found that the successive renewal/conclusion of the fixed term contracts by Coca-Cola was in contravention of section 198B(3) of the LRA, and their employment should have been deemed to have been of an indefinite duration.

[37] Whilst the Commissioner should have given due consideration to the evidence and properly evaluated same, his conclusion however cannot be faulted. The evidence supports the finding that there was a justifiable reason for entering into the fixed term contracts of employment, which were for temporary increases in the volume of work, which occurred seasonally and for reason that it was to replace other employees that were temporarily absent from work. These reasons are included in section 198B(4) as examples where a fixed term contract of employment can be justified.

[38] The contracts itself recorded the term of the contract, as fixed, and *inter alia* set out the reasons for fixing the term. This included that it was to "*address the Employers fluctuating operating requirements".* It also contained the agreement that the "*Employee agree(d) to render a service to the Employer for a limited duration of which duration will (would) be directly linked to a specific project/assignment/task which is described as follows: volume increase"*. In other instances the specific project/assignment/task which is described as "*Temp Replacement.*"

[39] The evidence by Coca Cola's witness, Mr G Rossouw, also confirmed same. He *inter alia* testified that limited duration contracts were used for operational requirements, which included for seasonal reasons, volume increases, special projects and for leave coverage.

[40] The Commissioner's conclusion that there was thus a justifiable reason for entering into the fixed term contracts of employment in accordance with 198B(3), (4), and (6) of the LRA and that there was no contravention by Coca-Cola of the provisions of section 198B(5) of the LRA is therefore a correct conclusion, and cannot be faulted. The ground of review is thus without merit.

Evaluation - whether a dismissal was established within the context of section 186(1)(b)(ii) of the LRA?

[41] Having made such finding, the Commissioner lastly considered whether a dismissal was established, within the context of section 186(1)(b)(ii) of the LRA. In this regard, he stated that he was not persuaded that the applicants had proved that the non-renewal of the fixed term contracts amounted to a dismissal. He accordingly found that the applicants were not dismissed and that their employment came to an end through the effluxion of time.

[42] The said evaluation and conclusion flowed from the Commissioner's finding that that there was no contravention of section 198B, which meant that the applicants had failed in establishing that they held a reasonable expectation that Coca-Cola would retain them in their employment on an indefinite basis. Under such circumstances, the finding that the applicants were not dismissed, and that their employment came to an end through the effluxion of time was correct. The CCMA accordingly lacked the jurisdiction to adjudicate the matter. For these reasons, the review application stands to be dismissed.

Costs

[43] This Court has a wide discretion in terms of section 162(1) of the LRA when it comes to the issue of costs. In my view, this is not a matter where a cost order should be made.

[44] In the circumstances, the following order is made:

Order

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

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S. Tilly

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr A Phewa (Union Official) UASA

For the Respondent: Advocate O.H Smith
Instructed by: TN & Associates