IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: C251/17

In the matter between:

NATIONAL UNION OF PUBLIC SERVICE AND ALLIED WORKERS (NUPSAW) **Applicant**

And

EZRA JOEL MFINGWANA **First Respondent**

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Second Respondent**

COMMISSIONER D.J.K WILSON N.O. **Third Respondent**

Date heard: 6 November 2019

Delivered: 20 February 2020

Summary: Review of an arbitration award; reliance by employee on section 198B of the LRA; whether fixed term contract had been novated, and if so, whether novation rebutted deeming provision in section 198B(5).

JUDGMENT

RABKIN-NAICKER, J

[1] The applicant union applies for condonation for the late filing of this review application. The delay was some two weeks and the application was not opposed. I grant condonation and deal with the opposed review on its merits.

[2] The Award by the third respondent (the Commissioner) reads as follows:

"46. The Applicant, Mr Ezra Joel Mfingwana, is deemed to have been a permanent employee of the Respondent the National Union of Public Servant and Allied Workers (NUPSAW) from 1 January 2016.

47. The termination of the Applicant's fixed term contract on 30 November 2016 amounts to a dismissal of the Applicant by the Respondent, which was both substantively and procedurally unfair.

48. The Respondent is ordered to reinstate the Applicant on the same terms and conditions on which he was previously employed immediately prior to 30 November 2016, with the proviso that the Applicant's employment shall be deemed to be of indefinite duration. The reinstatement shall operate retrospectively to 1 December 2016. The Applicant shall be required to report for duty at the Western Cape provincial office of the Respondent on 8 May 2017.

49. The respondent shall pay to the Applicant the sum of R38 594-45 in back-pay for the period from 1 December 2016 to 7 May 2017. The sum must be paid to the Applicant by no later than 31 May 2017, failing which it will bear interest from the date of this award to the date of payment at the rate of interest applicable in terms of the Prescribed Interest Act."

[3] The first respondent was employed by the Union as of the 1 October 2015 as an organizer earning a salary of R8 878-10 (including a R1500 travelling allowance), on a six month fixed-term contract. When this contract expired on 31 March 2016 it was not renewed, but the Applicant continued to work for the Union. In July 2016 the contract was extended through an addendum to the original contract, 'from 1 June to 31 November (sic) 2016'. On 5 November 2016, the Applicant was advised that his contract would not be renewed when it expired on 30 November.

[4] In his award the Commissioner recorded the following submissions made by the first respondent:

"6. The applicant argued that since he worked for two months beyond the original expiry date of his contract, the subsequent termination of the contract constituted a dismissal. He argued that he had a reasonable expectation of permanent appointment. The position of provincial Organiser was not a temporary one and the work continued to exist. There was no valid reason for him to have been employed on a fixed-term contract, and he should be regarded as having been employed on an indefinite basis after he had served three months (in terms of section 198(B) of the Labour Relations Act ("the LRA"). He also alleged that the Respondent had acted inconsistently in that two other employees on fixed-term contracts were offered permanent employment from 1 December 2016."

[5] Section 198B of the LRA reads as follows:

"198B Fixed-term contracts with employees earning below earnings threshold

(1) For the purpose of this section, a 'fixed-term contract' means a contract of employment that terminates on-
    (a) the occurrence of a specified event;
    (b) the completion of a specified task or project; or
    (c) a fixed date, other than an employee's normal or agreed retirement age, subject to subsection (3).
(2) This section does not apply to-
    (a) employees earning in excess of the threshold prescribed by the Minister in terms of section 6 (3) of the Basic Conditions of Employment Act;
    (b) an employer that employs less than 10 employees, or that employs less than 50 employees and whose business has been in operation for less than two years, unless-
        (i) the employer conducts more than one business; or
        (ii) the business was formed by the division or dissolution for any reason of an existing business; and

(c) an employee employed in terms of a fixed-term contract which is permitted by any statute, sectoral determination or collective agreement.

(3) An employer may employ an employee on a fixed-term contract or successive 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.

(4) Without limiting the generality of subsection (3), the conclusion of a fixed-term contract will be justified if the employee-

(a) is replacing another employee who is temporarily absent from work;

(b) is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months;

(c) is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession;

(d) is employed to work exclusively on a specific project that has a limited or defined duration;

(e) is a non-citizen who has been granted a work permit for a defined period;

(f) is employed to perform seasonal work;

(g) is employed for the purpose of an official public works scheme or similar public job creation scheme;

(h) is employed in a position which is funded by an external source for a limited period; or

(i) has reached the normal or agreed retirement age applicable in the employer's business.

(5) Employment in terms of a fixed-term contract concluded or renewed in contravention of subsection (3) is deemed to be of indefinite duration.

(6) An offer to employ an employee on a fixed-term contract or to renew or extend a fixed-term contract, must-

(a) be in writing; and

(b) state the reasons contemplated in subsection (3) (a) or (b).

(7) If it is relevant in any proceedings, an employer must prove that there was a justifiable reason for fixing the term of the contract as contemplated in subsection (3) and that the term was agreed.

(8) (a) An employee employed in terms of a fixed-term contract for longer than three months must not be treated less favourably than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment.

(b) Paragraph (a) applies, three months after the commencement of the Labour Relations Amendment Act, 2014, to fixed-term contracts of employment entered into before the commencement of the Labour Relations Amendment Act, 2014.

(9) As from the commencement of the Labour Relations Amendment Act, 2014, an employer must provide an employee employed in terms of a fixed-term contract and an employee employed on a permanent basis with equal access to opportunities to apply for vacancies.

(10) (a) An employer who employs an employee in terms of a fixed-term contract for a reason contemplated in subsection (4) (d) for a period exceeding 24 months must, subject to the terms of any applicable collective agreement, pay the employee on expiry of the contract one week's remuneration for each completed year of the contract calculated in accordance with section 35 of the Basic Conditions of Employment Act.

(b) An employee employed in terms of a fixed-term contract, as contemplated in paragraph (a), before the commencement of the Labour Relations Amendment Act, 2014, is entitled to the remuneration contemplated in paragraph (a) in respect of any period worked after the commencement of the said Act.

(11) An employee is not entitled to payment in terms of subsection (10) if, prior to the expiry of the fixed-term contract, the employer offers the employee employment or procures employment for the employee with a different employer, which commences at the expiry of the contract and on the same or similar terms."

[6] In its founding papers, the applicant union submitted that the facts and circumstances of the case before the Commissioner did not support the conclusion that the employment relationship be deemed to be of an indefinite duration with effect from January 1 2016. This it averred was because:

> "6.19 The first respondent, subsequent to expiry of the initial fixed-term contracts and, specifically, after two months since the said expiry, voluntarily entered into an Addendum with the Applicant in terms of which the initial fixed term contract of employment was extended to the end of November 2016.
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> With respect, the Commissioner overlooked this significant fact. It is respectfully submitted that the conclusion of the Addendum in July 2016 rebuts the deeming provisions of section 198B(5) of the LRA."

[7] In **Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd t/a Crown River Safari** [1]the SCA considered the interpretation of a deeming provision and stated, having surveyed a wide range of authorities, that:

> "[34] From what is set out above, it follows that a deeming provision must always be construed contextually and in relation to the legislative purpose."

[8] In **Piet Wes Civils CC & another v Association of Mineworkers & Construction Union & others** [2], the Labour Appeal Court said the following:

> "[26] The purpose of s 198B is to provide security of employment, except in circumstances where a fixed-term or limited duration contract is clearly justified."

[9] In this matter, the Commissioner referred to the provisions of section 198B in his Award, given that the section was relied on, inter alia, by the first respondent at

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[1] 2018 (4) SA 206 (SCA)
[2] 2019) 40 ILJ 130 (LAC)

arbitration. In his analysis of the evidence and argument before him, the Commissioner wrote the following:

> "37. It is clear that the nature of the work performed by the Applicant was not of a limited or definite duration, and the Respondent did not contend otherwise. Section 198B(4) sets out some (non-exhaustive) "justifiable reasons" for employment on a fixed-term contract, none of which would appear to be applicable in this case. The Respondent did not put forward any other possible "justifiable reason" for the use of a fixed-term contract. It appears that the Respondent is using fixed-term contracts as a form of probationary mechanism, which is entirely contrary to the spirit and intent of section 198B. If an employer wished to assess an employee's performance, it should employ him or her on a permanent contract subject to a reasonable probationary period. This period may be extended if necessary. If the employee does not meet expectations, the contract can be terminated during the probationary period with a minimum of formalities.
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> 38. It is not open to an employer to employ an employee for over a year, and then simply decide not to renew the contract or make the employee permanent based on an unanswered allegation of poor performance. The Respondent, as a trade union, should be aware of this and in particular be aware of the impact of the amendments to the LRA which gave rise to the introduction of section 198(B)."
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> 39. I find that in terms of section 195B(5), the Applicant's employment was deemed to be of indefinite duration with effect from 1 January 2016, after he had served three months on a fixed term contract for which there was no justifiable reason. Therefore the termination of the fixed-term contract constitutes a dismissal."

[10] Much is made by the applicant in the papers before me about the characterization of the dispute by the first respondent, i.e. that it was referred as an 'expectation of renewal of a fixed term contract' dispute. Although section 188(1)(b)

is referred to in the subpoena notices sent out before the arbitration, and the certificate of outcome after conciliation, the actual referral notices filled in by the first respondent to both conciliation and arbitration state that the reason for the dismissal being unfair is “Contract renewed more than twice; union work continuing indefinitely”. The result required is stated by the first respondent to be: “Permanent employment retrospective as of expire of first contract.”

[11] The submissions by the applicant that the enquiry at arbitration should have been limited to the ‘reasonable expectation of renewal’ tests is without merit. The first respondent articulated the 198B reliance and various alternatives to this reliance, in submission at arbitration.

[12] A further line of argument in the applicant’s supplementary affidavit was that if the applicant relied on the section 198B ground that he was permanently employed by 1 January 2016, he should have referred a dispute by 31 January 2016. Given that the first respondent was still employed and working for the union at this date, this submission has no merit.

[13] The applicant also argued in its founding affidavit that the Addendum concluded between the parties ‘novated’ any claim the first respondent may have had to permanent employment arising from the conclusion of the initial fixed-term contract in November 2015.

[14] Can it be said as contended by the applicant that the ‘novation’ of the contract rebutted the deeming provision in section 198B(5)? The first respondent continued to be employed by the Union at the end of his fixed term contract on March 21, for a further period. The addendum was signed during July 2016 but only back dated to 1 June 2016, two months after the original fixed term contract had lapsed.

[15] In determining whether novation has occurred, the intention to novate is never presumed.[3] There is a presumption against novation because novation involves a waiver of existing rights. In order to establish whether novation has occurred, a court

[3] National Health Laboratory Service v Lloyd-Jansen Van Vuuren 2015 (5) SA 426 (SCA) at 15

is entitled to have regard to the conduct of the parties, including any evidence relating to their intention.[4] In this matter the evidence of first respondent at arbitration was that he signed the addendum under protest.

[16] In any event, the first contract had come to an end in March 2016. A novation is only valid and enforceable if the contract it novates is also legally valid.[5] In addition, the notion that the parties rebutted the provision in section 198B(5) through novation flies in the face of the wording of that provision itself which envisages the renewal of a contract in which the exceptions listed in subsection (3) do not apply: i.e. that

> "(5) Employment in terms of a fixed-term contract concluded or renewed in contravention of subsection (3) is deemed to be of indefinite duration."

[17] The Commissioner was correct in finding that a dismissal had occurred in all of the particular facts and circumstances of this case. In addition, given there was no disciplinary or consultative process regarding the alleged failure of the first respondent to perform his recruiting targets, the dismissal was procedurally unfair.

[18] In as far as the substantive fairness of the dismissal was concerned, although the union attempted to argue a case of poor work performance at arbitration, the letter addressed to the first respondent from the General Secretary on the 15 November reads as follows:

> "1. We refer to your contract of temporary employment which ends on 30 November 2016.
> 2. We advise that the contract will not be renewed and take this opportunity to thank you for your service to the Union.
> 3. On your last day of service before close of business you should hand over the Union vehicle, keys and accessories to the Provincial Office Manager in terms of the Motor Vehicle policy clause 6. You should also handover any other union property in your possession.
> 4. We wish you all the best in your future endeavors."

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[4] Ibid
[5] Tauber v Von Abo 1984 (4) SA 482 (E)

[19] The issue of poor work performance is not relied on by the applicant in this application.

[20] In view of all of the above, I find that the Commissioner was correct in finding that the first respondent was dismissed and his decision that such dismissal was both procedurally and substantively unfair is not susceptible to review.

[21] In all the circumstances, I make the following order:

Order

The review application is dismissed

H. Rabkin-Naicker
Judge of the Labour Court

Appearances:

Applicant:	B.M. Mkhize instructed by Ndumiso Voyi Attorneys
First Respondent:	In person