
Of interest to other judges

# THE LABOUR COURT OF SOUTH AFRICA,

# HELD AT CAPE TOWN

**Case No: C 234/2020**

In the matter between:

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| **STELLENBOSCH MUNICIPALITY** | **First Applicant** |
| and | |
| **THE SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL (SALGBC)** | **First Respondent** |
| **ILSE DE VLIEGER-SEYNHAEVE (*N.O.*)** | **Second Respondent** |
| **IMATU OBO DEIDRÉ JEFTAS** | **Third Respondent** |

**Date of Set Down:** 16 November 2022

**Date of Judgment:** This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 22 November 2022.

**Summary: (**Review – Unfair dismissal – Alleged dismissal in terms of s 186(1)(b)(ii) of the LRA not to be collapsed with the principles governing a dispute under s198B – Arbitrator determining existence of employee's expectations of continued employment not on her expectations but on the basis of an analysis under s 198B – Employee's expectations were of a renewal of a fixed term contract, not permanent employment)

**JUDGMENT**

LAGRANGE J

Introduction

[1] This is a review application to set aside an award in which the arbitrator found that the third respondent, Ms D Jefthas ('Jefthas') had a reasonable expectation to be retained on a permanent basis in line with section 186(1)(b)(ii) of the LRA. Accordingly, the termination of her service at the end of a fixed term contract amounted to a dismissal and her dismissal was substantively and procedurally unfair. The arbitrator "reinstated" her in the position of a library assistant employed by the applicant ('the municipality') on a permanent basis from 1 December 2018.

[2] The review application was launched some eight months' late and the applicant applied for condonation.

The condonation application

[3] The primary explanation for the very lengthy delay was the municipality's slow process of approving tenders for legal service providers which coincided with the time period when the review application should have been launched. Between March and June 2020, which is when the applicant launched a contempt application there is no real explanation what was happening. When the contempt application was launched, the municipality then approved a deviation from tendering procedures to appoint attorneys to deal with that application and the overdue review proceedings.

[4] Institutions and organisations must adapt the conduct of their litigation to ensure they act timeously in accordance with the same time frames which

apply to all litigants. They usually are better resourced than individual litigants and cannot expect the progress of litigation to advance at the doleful pace set by their own bureaucratic inertia. It is trite that review applications are supposed to be conducted expeditiously and the Labour Court has developed an array of measures to try and ensure that this happens. As a case like this illustrates, those measures do not always suffice. Essentially there is only one explanation for the delay, namely an apparent inability to institute proceedings until the entire tendering process had been completed.

[5] It is noteworthy that it was only when contempt proceedings were launched, that the municipality considered that it had reason to deviate from standard tender procedures. The need for acting in accordance with statutory time frames for launching the review should have been sufficient reason to warrant considering a deviation to enable it to launching the application timeously.

[6] Another reason why the supposed need to appoint legal representatives is a poor justification for the delay is that professional legal expertise is not a pre-requisite for taking the first step of initiating review proceedings. Countless review applications in this court are launched by lay persons in this court, some of whom struggle to draft the founding affidavit in support of the notice of motion, owing to the challenges of language or their literacy levels. However, applicants in review proceedings enjoy an advantage not available in ordinary applications, namely that the shortcomings in founding papers can be rectified when filing an amended notice of motion and supplementary affidavit once a record has been obtained. There is no reason why an institution like a municipality could not at least draft and file founding papers itself, and obtain professional legal assistance to refine the application when the time comes to file supplementary pleadings.

[7] While not suggesting that the municipality was deliberately dragging its feet, the justification is a poor one, and the delay in finalising legal service tenders is not an acceptable explanation for such a long delay. Were it not for the merits of the application, I would be inclined to dismiss the condonation application. The merits are dealt with below.

The Award

[8] At the start of the arbitration proceedings a preliminary objection was raised by the municipality because the employee also sought a determination of a dispute under section 198B of the Labour Relations Act, 66 of 1995[1].

[1] For the purposes of the judgment the relevant provisions of this section are:

"**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.

Relying on the authority in *Nama Khoi* accepted that such a dispute could be "part and parcel" of a dismissal dispute under section 186(1)(b), but correctly accepted that a dispute about Jefthas's permanent employment status was not before her to determine, which could only have been done if it had been referred and if she had been in employment at the time, not after her termination.

[9] The employee, Ms D Jefthas ('Jefthas') worked as a library assistant on two successive two-year contracts the first of which began in mid- 2014. On each occasion she had applied and was interviewed for the fixed term appointment. The last two year contract ended on 31 July 2018. The post was re-advertised for a further fixed term appointment but the appointment process was delayed and Jefthas was continued performing the same work, but on fixed term contracts of short duration to tide the municipality over until the new appointment was made. As on the previous occasions, Jefthas had applied for re-appointment in the position for another two- year period but was unsuccessful. This time she was not successful and someone was appointed on the same basis to perform the same work.

[10] Jefthas did not know that the post was linked to a specific conditional grant but did know that it was of limited duration because the money was provided by the provincial government. By way of background it appears that library functions are a provincial government competence, whereas before they were municipal services. However, the province seemingly has found it easier to deliver the service through municipal structures.

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(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.

…"

[11] Jefthas had argued that in terms of section 198B contracts could not be simply rolled over. The employer argued that the expectation of renewing the contract was purely the employee's own subjective expectation whereas it was clear from the terms of the contract that it was for a fixed term on each occasion and she was also warned before the contract expired what her situation would be. It contended there was no basis for assuming her position would become permanent. Moreover, the very fact that the contract was linked to a specific project was sufficient justification for not making it a permanent appointment.

[12] The arbitrator considered that the contract was headed 'Conditional Grant Contract' and that it stated *inter alia*: "As has been pointed out to you, your employment with the municipality will not continue after the date mentioned above. You have been specifically informed that you should have no expectation of your contract been extended or in any way reviewed after this date".

[13] The contract further mentioned that it was a temporary one linked to a specific project with external funding. After the second two-year contract ended, it is common cause Jefthas was at home for two months. Thereafter, she worked on another fixed term contract which ran from …September 2018 until either 31 October 2018 or the date the post was filled, whichever came first.

[14] Jefthas claimed that her expectation of permanency was not based on anything said or done by the municipality but on her own interpretation of section 198B, which applied to her because she earned below the earnings threshold. Sub-section 198B(5) states that any fixed term contract longer than three months is deemed to be of indefinite duration. The arbitrator then proceeded to consider the application of s198B to the dispute.

[15] The arbitrator found that the funding for the post was provided by the province under an expenditure item titled 'Community Library Services Grant' and the grant memorandum which the municipality submitted at the arbitration provided for a grant only for the 2017/18 financial year. She concluded that since the employee was employed on a two-year contract that indicated that the employer was confident on continued funding beyond

the one-year period mentioned in the grant agreement. Secondly, the duration of Jefthas's employment could not be characterised as a 'limited period', which the arbitrator probably intended to be an indirect reference to s 198B(4)(h). Thirdly, there was no evidence that the funding had not come through and that the real reason for her not being reappointed was that someone else had been. Accordingly, the arbitrator reasoned that a defence based on s 198B(3) could not succeed. She concluded that the Jefthas's employment was deemed to be indefinite and that she had proven the expectation that she would be retained indefinitely. Therefore, the termination of her service amounted to a dismissal.

[16] Since there was no hearing and no reason for her termination was advanced by the employer, Jefthas's dismissal was substantively and procedurally unfair.

Grounds of review

[17] In summary, the municipality's grounds of review, are:

17.1 The arbitrator committed an error of law in finding that section 198B(4)(h) did not apply.

17.2 Secondly, she committed an error of law by determining that an expectation existed under section 186 based simply on the legal conclusion that section 198B(5) applies, whereas the employee had to discharge the onus of proving the existence of a reasonable expectation.

17.3 The arbitrator wrongly concluded that the post was not funded for a limited period simply based on the employee's confidence that it would continue and the appointment of another person in the same position.

17.4 The fact that the contract had been previously renewed was not sufficient to prove that she had a reasonable expectation of renewed employment.

17.5 The appointment of another individual had nothing to do with whether Jefthas should be considered a permanent employee.

[18] The enquiry the arbitrator was seized with was firstly to determine if Jefthas had been dismissed and, if so, whether the dismissal was fair. It is trite that the existence of a dismissal is a jurisdictional question and a review of an arbitrator's finding on the question is not determined using the standard of reasonableness but simply whether the ruling was correct.

[19] This court has accepted on two occasions that where a dismissal dispute under s 186(1)(b)(ii) is linked to an employee's status as an indefinite employee under s 198B of the LRA, it is proper to take account of s198B[2].

[20] The critical findings of the arbitrator were that neither of the circumstances in s 198B(3) applied, so she concluded that Jefthas should be deemed to have been in indefinite employment under s 198B(5). Further, Jefthas had an expectation of permanent employment based on her own interpretation of s198B. In the *UASA* case, the court adopted a schema for analysing the interplay between s 198b and an alleged dismissal under s 186(1)(b). In that case, when the employees fixed term contracts terminated they argued that this amounted to an unfair dismissal in terms of s 186(1)(b)(ii) on the basis that they should have been retained on an indefinite basis. The schema adopted by the court was that an arbitrator should first determine if employees were deemed to be indefinitely employed under the provisions of s 198B and, if so, then decide if a dismissal had taken place in the sense that the employees had a reasonable expectation that they would be retained in employment on an indefinite basis. If that expectation was established, then it followed they had been dismissed under s 186(1)(b)(ii).

[21] There is some merit in the approach adopted in *UASA*, but in my view it can lead to difficulties if the determination of the existence of a dismissal case is collapsed with an enquiry under 198B. Disputes under the latter section are to determine an employee's status whilst in employment. Determining or hypothesising about an employee's status under that section is not a pre-requisite for determining the existence of a dismissal under s 186(1)(b)(ii). The problems of collapsing the two enquiries are evident in this case.

[2] See UASA — *The Union on behalf of Maribe & others v Coca Cola Fortune (Pty) Ltd & others* (2021) 42 *ILJ* 2702 (LC) at paras [12]-14], and the reference to *Nama Khoi Local Municipality v SA Local Government Bargaining Council & others* (2019) 40 *ILJ* 2092 (LC) thereat.

[22] In this matter, the arbitrator's approach was that she accepted the stated version of Jefthas at the start of the arbitration that she had an expectation of permanent employment based solely on her understanding of s 198B. The arbitrator then effectively proceeded as if she was actually seized with making a determination of Jefthas's employment status under s 198B, rather than simply having regard to it in relation to determining if Jefthas had formed a reasonable expectation of permanent employment. This is clear from her conclusion in paragraph [15] of her award. after deciding that Jefthas's employment since 2014 could not be regarded as a limited period and that there appeared to be no problems with the continued funding of the post as evidenced by the employment of somebody else in the same position , the arbitrator continued :

> "The project is not for a limited period and therefore the reliance on s198B must fail. As a consequence, section 198B (5) applies and I have to conclude that the applicant's employment is deemed to be of indefinite duration. It was therefore reasonable of the applicant to expect that she would be appointed on an indefinite basis. Seeing that the applicant proved the expectation to be retained in an indefinite position, I have to conclude that the respondent has dismissed the applicant."

[23] In effect, the arbitrator's 'finding' under s198B that Jefthas was in fact deemed to be indefinitely employed was the basis on which she determined that Jefthas had a reasonable expectation of indefinite employment at the time her employment ended under s186(1)(b)(ii). Consequently, she was dismissed in terms of that provision. The finding that Jefthas had an expectation of indefinite employment is finding is difficult to reconcile with her own testimony on her expectation. Even though at the outset of the arbitration it was stated that Jefthas relied on an expectation of indefinite employment owing to repeated renewals of her contract, her evidence was rather to the effect that she expected that her contract would again be renewed for a fixed term as it had been done twice before in the past. When the last contract came to an end, she had applied again for re-employment on the next fixed term appointment. Although the post continued to exist and could not be characterised as a project, her understanding was that when each contract ended, it was necessary to re-apply and be interviewed again.

Although she was unaware of the grant memorandum, she knew the post was externally funded and not by the municipality. Based on her work history and that there had never been any complaints about her work, she believed she had a good chance of being re-appointed to the post. The arbitrator did not take account of Jefthas's actual testimony on her expectation but decided what her expectation was based on what she believed would have been the correct determination of her status under s198B.

[24] In the circumstances, I am satisfied that the arbitrator misdirected her enquiry under s 186(1)(b)(ii) by conducting an enquiry under s 198B, which led her to make a finding based on considerations other than Jefthas's expectations. On an objective assessment of Jefthas's actual expectations she could not have concluded she expected permanent employment, and the award must be substituted. Because the dispute before the arbitrator was not a s198B dispute, it is not necessary to determine if her finding in that regard was correct or not.

[25] It is very unfortunate that the case was pursued under s 186(1)(b)(ii) and not under s 186(1)(b)(i), at least in the alternative. The court is not at liberty to simply extend the scope of the dispute to include a claim to a further fixed term contract, as that was not the case the arbitrator the arbitrator was called upon to decide.

<u>Order</u>

[1] The late filing of the review application is condoned.

[2] The arbitration award issued by the Second Respondent under case number WCP011015 on 27 August 2019 is reviewed and set aside.

[3] The findings and relief awarded in the arbitration award are substituted with a finding that the Third Respondent failed to prove that she was dismissed in terms of s 186(1)(b)(ii) of the Labour Relations Act, 66 of 1995 and the Second Respondent lacked jurisdiction to determine her claim of unfair dismissal.

[4] No order is made as to costs.

**Lagrange J**
**Judge of the Labour Court of South Africa**

**Representatives**

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| For the Applicant | M Aggenbach, instructed by Rufus Dercksen Attorneys |
| For the Third Respondent | P Fouché of IMATU |