



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA110/2018

In the matter between:

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

and

COMMISSION STAFF ASSOCIATION

M.P. SHAI N.O.

Heard: 20 August 2019

Delivered: 16 October 2019

CORAM: DAVIS and COPPIN JJA and MURPHY AJA



Appellant

First Respondent

Second Respondent

JUDGMENT

COPPIN JA

[1] Does section 198B (3), (4) and (5) of the Labour Relations Act¹ (“the LRA”), which came into operation on 1 January 2015, apply to fixed-term employment contracts concluded/renewed before that date (“historical contracts”)?

¹ Act 66 of 1995.

- [2] Essentially section 198B, which was introduced into the LRA through the Labour Relations Amendment Act² (“the Amendment Act”), applies to workers falling under a prescribed earnings threshold. Subsection (3) provides that an employer may not “employ” an employee on a fixed-term basis in excess of three months, except in certain prescribed circumstances. Subsections (3) and (4) list those circumstances. Whereas the former subsection mentions the broad grounds of justification, the latter section lists specific examples of justifications. Of particular significance to this matter, subsection (5) provides that a fixed-term contract concluded or renewed in contravention of subsection (3) is deemed to be of an indefinite duration.
- [3] This is an appeal against the judgment of the Labour Court (Patel AJ) in terms of which it reviewed and set aside an arbitration award of the second respondent (“the commissioner”) in which he found, *inter-alia*, that those subsections did not apply to historical fixed term contracts. In terms of its order, the Labour Court referred the matter back to the Commission for Conciliation Mediation and Arbitration (“the CCMA”), which is also the appellant in this matter, to determine whether the members of the first respondent (“the CSA”), were entitled to any further relief under subsections 198B (5) and (8) of the LRA. Leave to appeal to this Court was granted by the Labour Court.

The background facts

- [4] Section 198B, which I reproduce here in full for purposes of discussion, provides 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 Act 6 of 2014.

(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

(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".

[5] At the time section 198B came into operation on 1 January 2015, Mr Tamboer and his colleagues, now represented herein by the CSA, had already been employed by the CCMA as interpreters on a part-time or fixed-term basis in excess of three months. They construed the aforesaid subsections as applying to historical contracts and held the view that, by virtue of those provisions, read with section 200 A of the LRA, they had become full-time (or

permanent) employees of the CCMA. The latter contested those assertions and maintained that they were independent contractors.

- [6] On 30 June 2015, Mr Tamboer and of his colleagues referred the dispute to the CCMA. They wanted to be declared permanent/full time employees of the CCMA. The CSA also referred a similar dispute on behalf of its members seeking a similar outcome. These referrals were consolidated to be conciliated together on 20 August 2015.
- [7] At the hearing, the CCMA raised certain points at the outset, one of which was that the CCMA lacked jurisdiction to entertain those disputes, because (according to the CCMA) the interpreters were independent contractors. On 25 September 2015, the officer presiding dismissed all the points raised by the CCMA and held that the CCMA does have jurisdiction to deal with the disputes which arose from the interpretation of section 198B of the LRA.
- [8] The disputes were referred to arbitration at the request of the CSA, now acting on behalf of the affected employees. The commissioner was to determine the following issues: (a) – whether the amendment to the LRA that came into operation on 1 January 2015 applied retrospectively, i.e. to the historical contracts; (b) whether there was an obligation on employers and employees to regularise their historical contracts so as to comply with section 198B(3) and (4), and (c) whether any of the employees (i.e. the applicants) could claim backpay relying on those historical contracts.
- [9] Having discussed and referred to the principle of retrospectivity and the case law on the topic the commissioner, in essence, held that he could find no indication in the entire section 198B that subsections (3), (4) and (5) applied retrospectively – as they appeared “to apply to future events”. Instead, it appeared that section 198B (8)(a) and (b), which ought to be read together, applied retrospectively, because, *inter-alia*, they do not require the contract to have been concluded in violation of the amendment – and there could not have been a violation of the amendment before its commencement.
- [10] In conclusion, the commissioner ruled as follows: “63. I find that section 198B (3), (4) and (5) do not have retrospective application and do not apply to

contracts entered into before the coming into effect of the new amendments. 64. I further find that there is no obligation on the employers and employees to regularise the contracts entered into prior to the coming into effect of the amendments in compliance with section 198B (3), (4) and (5). 65. I further find that the applicants are not entitled to back pay arising out of contracts entered into prior to the coming into effect of the new amendments. 66. Matter to be rescheduled to deal with the outstanding issues...”

- [11] The CSA brought an application in the Labour Court to review and set aside the commissioner's award. The application was opposed by the CCMA.

The Labour Court

- [12] The Labour Court reviewed and set aside the Commissioner's ruling and remitted the matter back to the CCMA for determination by a different commissioner of the question whether the employees were entitled to relief in terms of section 198B(5) and/or section 198B(8).
- [13] The Labour Court, essentially, applied an unreported judgement of that court in the matter of *CCMA v National Union of Metalworkers of South Africa (NUMSA) and Others*³ (“NUMSA”), having found that matter similar to the present. There, the Labour Court dismissed an application to review and set aside an award which found that employees on historical fixed-term contracts were deemed to be employed on an indefinite basis and ordered the CCMA to pay the employees backpay. There, the Labour Court also held that section 198B(8)(a) applied to historical contracts from 1 April 2015.
- [14] The Labour Court further reasoned as follows: in order to determine whether subsections (3) and (5) applied to the interpreters, one had to take into account, firstly, the wording of those provisions, secondly, that the retrospective application of any law, in the absence of any unambiguous provision, therefore “is a pronouncement to be made based on the principles of fairness” and, thirdly, that an interpretation that section 198B applies retrospectively “renders the most equitable results” in line with the LRA and

³ Case no JR1624/16 (delivered on 23 June 2017).

the Constitutional right to fair labour practices. The Labour Court thus concluded that subsection 198B(5) applied retrospectively and that the commissioner's conclusion to the contrary constituted "a material error in law", which "a reasonable [c]ommissioner would not have come to".

The Appeal

- [15] It appears common cause that a commissioner's award can be reviewed if it is found that he or she committed a material error of law, either because the interpretation was unreasonable, or was wrong, and affected the outcome. In any event, this is consistent with what this Court has held.⁴
- [16] It was submitted on behalf of the CCMA that the Labour Court was wrong in its reasoning and conclusion. The argument, in brief, is that, correctly interpreted, subsections 198B(3), (4) and (5) do not apply retrospectively, i.e. to historical contracts, but only to those concluded or renewed after 1 January 2015. The commissioner, according to this argument, was, therefore, correct considering the language of those subsections and their context within section 198A and 198B of the LRA, the purpose of those provisions and the background to their enactment.
- [17] In amplification, it was submitted, in essence, that various features of the language of those subsections indicate that they only apply to contracts concluded after their commencement. Reference was made in particular to the use of the word "employ" in subsection 198B(3) – (It was argued that the term denoted active conduct) – and the phrase "the conclusion of the fixed term contract will be justified if..." in subsection 198B(4), which refers to subsection 198B(3) – and the phrase "... concluded or renewed in contravention of subsection (3)" in subsection (5). It was argued in that regard that the conclusion or renewal of the contract could only have been a contravention of subsection (3) if that subsection was in existence and

⁴ See, *inter alia*, *Macdonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union (AMCU) and Others* [2017] 2 BLLR 105 (LAC) para 30; *National Union of Metalworkers of South Africa v Assign Services and Others* [2017] 38 ILJ 1978 (LAC) para 32; *SBV Services (Pty) Ltd v National Bargaining Council for the Road Freight & Logistics Industry and Others* (2018) 39 ILJ 1290 (LAC) para 26.

operational at the time of the conclusion of the employment contract, or its renewal.

[18] Turning to its statutory context, it was submitted on behalf of the CCMA that the requirement in subsection 198B(6)(b) that an offer to an employee on a fixed-term contract (which has to be in writing) must state the reasons contemplated in subsections (3)(a) or (b), was new and did not exist before the introduction of that subsection. And that, significantly, section 198B(6)(b) did not require the revisiting, or amendment, of historical contracts to render them compliant with section 198B(6)(b). The subsection, therefore, applies prospectively – and can only meaningfully apply to fixed term contracts concluded after 1 January 2015. This, according to the argument on behalf of the CCMA, supports the interpretation that subsections 198B(3), (4) and (5) do not apply to historical contracts.

[19] It was also argued on behalf of the CCMA that express retrospective provisions in subsections 198B(8)(a) and (b) and subsection 198B(10)(b), and the absence of similar express retrospective provisions in subsections 198B(3), (4) and (5) further indicates that the latter subsections do not apply retrospectively, i.e. to historical contracts. This conclusion, according to the argument on behalf of the CCMA, is fortified by the fact that section 198A(9), which was also introduced into the LRA by the Amendment Act, and which pertains to employees employed through temporary employment services (“TES”), contains an express provision that the section applies to services procured for, or provided by, a TES before the commencement of the Amendment Act, whereas section 198B had no corresponding provision.

[20] Concerning the section’s purpose and background, it was submitted on behalf of the CCMA that the abuse of fixed-term contracts and the need to protect employees that were subjected to them motivated the introduction of section 198B. These mischiefs, or concerns, according to this argument, were addressed in the following manner: the conclusion and renewal of all fixed-term contracts (including historical fixed-term contracts renewed after the commencement of that section) which are not justified as contemplated in subsections (3) and (4) are proscribed under subsection 198B(3); the

deeming provision in subsection (5) – which will also apply to historical fixed term contracts renewed after the commencement of section 198B; and the provisions of subsections (8) and (10), which provides employees on all fixed term contracts with protection. Viewed in this light, according to this argument, the present matter is really about “a very narrow category of fixed-term contracts, namely historical fixed term contracts that endured beyond the introduction of the amendments and which have not been subject to renewal.” These contracts, it is submitted, are bound to be phased out over time and will fall away as their expiry dates are reached. The protections thus afforded by subsections (3), (4) and (5) will not be undermined if the CCMA’s interpretation of section 198B is upheld.

- [21] Lastly, it was submitted on behalf of the CCMA that its interpretation is consistent with the presumption against retrospectivity, which is premised on the unwillingness of courts to interfere with vested rights. Counsel referred in this regard to *Curtis v Johannesburg Municipality*⁵ (“Curtis”), *National Iranian Tanker Co v MV Pericles GC*⁶, and *S v Mhlungu and Others*⁷ (“Mlungu”). The argument proceeded from the premise that the presumption propounded in those authorities had to be applied. Counsel for the CCMA was critical of the fact that the Labour Court did not apply the presumption and, instead, considered the investigation into retrospectivity as entailing “a pronouncement to be made on the basis of the principles of fairness.”
- [22] On the other hand, it was argued on behalf of the CSA that section 198B was enacted to regulate all fixed term contracts, including historical fixed term contracts that were effective at the time of the commencement of section 198B, and had as its purpose the protection of all employees employed in terms of such contracts. Secondly, it was submitted that subsection 198B(2) stipulates what section 198B does not apply to and that it is significant that the section does not mention historical fixed term contracts. The implication being that the section does indeed apply to those contracts.

⁵ 1906 TS 308.

⁶ 1995 (1) SA 475 (A) at 483H-484B.

⁷ 1995 (3) SA 867 (CC) para 65.

- [23] According to this argument it was clear from a “plain reading” of section 198B that the section applied to all existing contracts of employment as provided for in subsection 198B(8)(b); further, that section 39(2) of the Constitution of the Republic of South Africa, 1996 (Constitution) and section 3 of the LRA mandate an interpretation which better gives effect to fundamental rights. Thus, an interpretation which affords protection to vulnerable employees better promotes section 23 (the right to fair labour practices) and section 9 (the right to equality) of the Constitution.
- [24] The CSA contends that even if all its arguments were invalid, section 198B, nevertheless, applies retrospectively. The test for determining whether the section applies retrospectively is fairness, and fairness dictates that the section was enacted to provide protection to the most vulnerable employees. The interpretation proffered by the CCMA, according to the CSA, would lead to an unfair and unjust result and should not be accepted, because: (a) it is not premised on a reliance of section 23 of the Constitution, or the principles contained in section 3 of the LRA; and (b) it results in the unequal treatment of those employed on fixed-term contracts, depending on when they concluded those contracts, and this was “offensive” to the intention behind section 198B and sections 9 and 23 of the Constitution.
- [25] According to the CSA, its interpretation is supported, firstly, by the Constitutional Court’s decision *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa and Others*⁸ (“*Assign Services*”), (which dealt with section 198A of the LRA, which is also introduced by the Amendment Act, and where, according to this argument, the Constitutional Court commenced its interpretation by identifying the purpose of section 198A as giving “security to marginalised workers”); secondly, by this Court’s decision in *Piet West Civils CC and Another v Association of Mineworkers and Construction Union (AMCU) and Others*⁹ (“*Piet West*”) (where it held, *inter alia*, that the purpose of section 198B was to provide security of employment, except in circumstances where a fixed-term on a limited duration contract was clearly justified); and, thirdly, by the memorandum accompanying the

⁸ [2018] 9 BLLR 837 (2018) 39 ILJ 1911; 2018 (5) SA 323 (CC).

⁹ [2018] 12 BLLR 1164; (2019) 40 ILJ 130 (LAC) para 28.

amendment (i.e. the Amendment Bill) which described the purpose of the amendments as introducing “key additional protections for more vulnerable workers.”

- [26] CSA submits, finally, that the difficulty with the interpretation of the CCMA was that it allows the mischief, that section 198B was intended to prevent, to continue with impunity. In respect of the issue of retrospectivity, it was submitted that the correct test is to be derived from the majority judgment in *Mhlungu*.¹⁰ Thus, even if there is an express indication against retrospectivity in the provisions under consideration, those will be trumped in favour of retrospectivity if fairness requires it. Therefore, the presumption against retrospectivity had “scant application” when you were dealing with a possible invasion of rights and an exclusion of benefits. Accordingly, so it was argued, the approach adopted by the Labour Court was reflected in the approach of the majority judgment in *Mhlungu*.

Evaluation

- [27] There are explicit indications in the language and context of subsections (3), (4) and (5) that they do not apply retrospectively, i.e. to historical contracts. It is indeed so that the language of those subsections is in the present tense. A prominent word in subsection (3) is the verb “employ”. It means “to engage”, “to recruit”, “to take on” or “to take into employment”¹¹. Read in its context it literally refers to the conclusion (or renewal) of the employment contract. That it is so, is confirmed by the wording of subsections (4) and (5). The former uses the phrase “...conclusion of a fixed term contract...”, and the latter subsection uses the phrase “...a fixed term contract concluded or renewed...”.
- [28] In terms of subsection (5) “[a] fixed term contract concluded or renewed in contravention of subsection (3) is deemed to be of indefinite duration.” A fixed-term contract concluded before the commencement of subsections (3), (4) and (5), i.e. before 1 January 2015, cannot (ordinarily) be in contravention of subsection (3) because the subsection was not in existence or operative at

¹⁰ See above.

¹¹ See: New Oxford Thesaurus of English (Oxford University Press, 2000) 303.

the time of the conclusion of that contract. Further, the requirement in subsection (6) that a fixed-term contract (or its renewal or extension) must be in writing and state the reasons contemplated in subsection (3)(a) or (b) could also not reasonably be expected to be complied with before the enactment or operation of subsections (3) (a) or (b) and (6).

[29] Other indicators that subsections (3), (4) and (5) apply only to contracts concluded, renewed or extended after 1 January 2015, is the structure of section 198B. There is no express provision in those subsections, similar to that found in, for example, subsections (8) and (10), and making them applicable to historical contracts.

[30] Subsection (8)(a) provides: "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." This provision's application to historical contracts is expressly provided for in subsection (8)(b), which provides: "Paragraph (a) applies three months after the commencement of the Labour Relations Amendment Act, 2014...". This provision is clearly not only aimed at contracts concluded after 1 January 2015 but at all fixed-term contracts, including the historical ones. The mischief subsection (8)(a) is aimed at concerns the differential treatment meted out to persons employed on a fixed-term basis in comparison to permanent employees doing the same or similar work, thus giving rise to the need for a provision such as subsection (8)(a). The argument of CSA that this section only applies to permissible fixed-term contracts loses sight of the fact that there would otherwise be no provision placing a specific obligation on employers in such contracts to treat the employees that are subjected to such contracts, even if deemed permanent, the same as its ordinary permanent employees doing the same or similar work.

[31] In subsection (10), a clear distinction is drawn between contracts concluded before the commencement of the Amendment Act (i.e. before 1 January 2015) and those concluded or renewed after that date. Subsection (10)(a) applies to the latter, while subsection 10(b) applies to the former. Subsection

10(a) provides: “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’.

[32] On the other hand, subsection (10)(b) provides: “An employee employed in terms of a fixed-term contract, as contemplated in paragraph (a), *before 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”. (Emphasis added). It is also significant that in terms of subsection 10(b) the employer in the historical contract is only obliged to pay the employee under the contract the remuneration contemplated in paragraph (a) for the period worked after the commencement of the Amendment Act, i.e. after 1 January 2015 – and not for the period worked before that date.

[33] The wording of subsection (9) also indicates that it is applicable to all fixed-term contracts, including historical ones that persisted beyond the commencement date of the Amendment Act. It provides: “As from the commencement of the Labour Relations Amendment Act, 2014, an employer must provide an employee employed in terms of the fixed term contract and an employee employed on a permanent basis with equal access to opportunities to apply for vacancies”.

[34] What is therefore clear from the structure of section 198B is that certain of its provisions apply retrospectively, i.e. to all fixed term contracts, including historical contracts, while other of its provisions evidently do not. The principal difficulty with the CSA’s main argument is that it does not acknowledge this apparent diversity within the structure of section 198B.

[35] In light of those clear indications, there is no need to invoke the presumption against retrospectivity, which, like other presumptions of statutory interpretation, serves merely as a guide or aid in establishing the position in

case of ambiguity¹². In terms of the presumption, statutes regulate future conduct, and unless there is a clear indication that it applies retrospectively, the provision under consideration is construed as applying only to matters, or facts, that came into existence after its commencement¹³. Unless the provision deals purely with procedural matters where there are no vested rights, it would *prima facie* be applicable to matters pending and to future matters, unless there are clear indications to the contrary¹⁴.

[36] Subsections 198B (3) and (4) are evidently not procedural provisions. The conclusion of the employment contract, *per se*, is not a procedural matter, and the justifications contemplated in subsections (3) and (4), as well as the deeming provision in subsection (5), at best, relate to the issue of onus and the burden of proof, which are all substantive matters. The true test, however, that has been accepted by South African courts¹⁵, is not to enquire whether a provision is procedural or substantive, but to determine if it would impair or affect existing rights and obligations¹⁶. If the provision does, a court is more likely to presume that it did not operate retrospectively, unless there is a clear indication to the contrary. The rationale behind the presumption against retrospectivity is the fear of injustice to those whom the provision will affect¹⁷. Therefore, a provision is taken not to have been intended to interfere with vested rights or to impair existing contracts. Nevertheless, if this principle, or presumption, is invoked in aid of the construction of subsections (3), (4) and (5), the conclusion can only be that they do not apply retrospectively, i.e. to historical contracts, and there are no clear indications to the contrary.

[37] The CSA's reliance on *Assign Services* is misplaced. The facts in that case are clearly distinguishable from the present. There the Constitutional Court dealt with the interpretation of s198A(3)(b) of the LRA. It did not deal with s

¹² See *inter alia*: *Abbot v Commissioner for Inland Revenue* 1963 (4) SA 552 (C) at 556E-F.

¹³ See, *inter alia*: *Adampol (Pty) Ltd v Administrator, Transvaal* 1989 (3) SA 800 (A) at 805F-808D; EA Kellaway *Principles of Legal Interpretation* (Lexis Nexis;1995) 319-320.

¹⁴ See, *inter alia*, *Curtis v Johannesburg Municipality* (above) at 312: and *Pericles* (above) at 483H-484B.

¹⁵ See: EA Kellaway (above) at 327, 329; and, *inter alia*, *Euromarine International of Mauren v The Ship "Berg"* 1984 (4) SA 647 (N) 661C-662A; (confirmed on appeal) 1986 (2) SA 700 (A) at 710E-711C.

¹⁶ See: EA Kellaway (above) and *inter alia*, *Adampol* (above).

¹⁷ See: *R v Margolis* 1936 OPD 143 at 144.

198B, or with the issue of retrospectivity. A dictum in *Piet West*, which might have given the impression that this court had already decided on the general retrospectivity of section 198B, or specifically of section 198B (3), (4) and (5), requires comment. The following is stated there: "In *Enforce Security Group v Fikile and others (Enforce)*, this court had regard to fixed term employment contracts which had been entered into prior to section 198B having been brought into operation on one January 2015. In the current matter section 198B finds application."¹⁸

[38] Firstly, in stating there that this Court had regard to contracts concluded before the commencement of section 198B does not mean that this court held that the section (including subsections (3), (4) and (5) apply retrospectively, i.e. to historical contracts. In any event, it is clear from the judgment in *Enforce*¹⁹ that this court never applied section 198B in that matter. In fact, in *Enforce* this Court eschewed dealing with the issue of the indefinite or permanent employment of the employees there, because the employees had abandoned it and did not pursue it in the Labour Court²⁰. So there is no precedent set in that regard by this Court in *Enforce* that bound it in *Piet West*. Secondly, it is not clear at all why, in those circumstances, this Court would have held in *Piet West* that section 198B was applicable to the fixed term contracts dealt with there. It might well be because they were concluded after the commencement of section 198B (i.e. after 1 January 2015). The date(s) of the conclusion of those contacts is not apparent from the judgment in *Piet West*. Thirdly, in *Piet West* the issue of the retrospective application of subsections (3), (4) and (5) was not raised specifically by the parties; hence the absence of reasoning, and the mere assumption by the court of the position on the point. Lastly, and in any event, if the conclusion in *Piet West* was that those subsections applied to historical contracts (which I do not find), then it was, with respect, unreasoned and clearly wrong.

[39] Similarly, the CSA's reliance on the majority judgment in *Mhlungu* appears to be based on a misconception of what was held in that matter. The facts there

¹⁸ See *Piet West* (above) para 22.

¹⁹ See *Enforce Security Group v Fikile and Others* (2017)38 ILJ 1041 (LAC): [2017] 8 BLLR 745 (LAC) (*Enforce*).

²⁰ See *Enforce* (above) para 14.

are also clearly distinguishable from the present. The majority of the Constitutional Court did not purport to lay down a general principle of interpretation as postulated by the CSA. But even if it did, at best it supported a construction that was “most beneficial to the widest amplitude”, i.e. a broad, and more generous construction, where that was possible²¹. This is generally what a purposive approach to the interpretation of a right in the Bill of Rights calls for. But it is also acknowledged that this may not always be possible, because the context may indicate that in order to give effect to the purpose of a particular provision a narrower or specific meaning should be given to it²².

[40] Adopting a purposive approach to the interpretation of section 198B of the LRA, certainly does not mean that one must ignore the specific language, structure and content of that provision. It is also necessary to bear in mind the following: Section 198B does not outlaw fixed-term contracts, or seek to replace them entirely with contracts of indefinite duration. Instead it acknowledges the need for such contracts and seeks to regulate them and to protect vulnerable employees that are often exploited through the means of such contracts, in a manner that is fair.

[41] It appears manifestly unfair to find fixed-term contracts concluded before the promulgation or commencement of subsections (3), (4) and (5) to be in contravention of subsection (3), and to proceed without respite, or repose, to impose the onerous obligation of permanent employment on an employer because of such contravention. And, while not as serious, this may be comparable to inflicting punishment on individuals for contraventions of a particular rule or crime created by a law that was not in force at the time of the alleged contravention. If we were dealing with a criminal law provision, the construction advocated by the CSA would be in conflict with the principle that there can be no crime and no punishment without law (*nullem crimen, nulla poena sine lege*), which is an important aspect of the principle of legality that is an integral part of our Constitution²³. One of the attributes of the principle of legality or the rule of law is said to be “non-retroactivity”, i.e. “laws must

²¹ See: *S v Mhlungu* (above) para 9.

²² See: *Soobramoney v Minister of Health (KwaZulu-Natal)* 1998 (1) SA 765 (CC) para 17.

²³ See Jonathan Burchell and John Milton *Principles of Criminal Law* (Juta: 1991) pp 54-62.

govern behaviour that takes place after their creation rather than past events".²⁴

[42] In construing section 198B of the LRA we ought to promote the spirit, purport and objects of the Bill of Rights as contemplated in section 39(2) of the Constitution; and are to give effect to the primary objects of the LRA (as amended), in compliance with the Constitution, and in compliance with the public international obligations of the Republic, as we are required to do by section 3 of the LRA. The purpose of the LRA is certainly not to bring about injustice and unfairness. On the contrary, it seeks to promote fairness and all the other constitutional values in the workplace and the employment relationship.

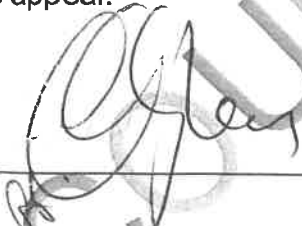
[43] A construction that subsections (3), (4) and (5) do not apply to historical contracts i.e. retrospectively, does not offend the intention behind section 198B or any provision of the Constitution. Considered in the proper context the construction is reasonable and fair. This section appropriately addresses the abuses (or "mischiefs") that were wrought through fixed term contracts. Employees would effectively be denied permanent full-time employment unjustifiably through the successive renewal, or extension, of such contracts; and not be treated the same as permanent employees of the employer; they would also not be given the same access, as those employees, to opportunities to apply for vacancies; and there was no obligation to pay such employees any amount similar to a severance at the end of the contract's term. Each of those aspects is now addressed by section 198B in specific subsections, in a manner that is fair.

[44] The commissioner's conclusion that subsections (3), (4) and (5) do not apply to historical contracts, but prospectively, was therefore reasonable and correct. There is no reason to interfere with the award. The Labour Court's conclusion to the contrary, is wrong. Therefore, the appeal ought to succeed. However, taking into account all the circumstances, including the law in fairness, it is not appropriate to make a costs order in this matter.

²⁴ Francois du Bois et al *Wille's Principles of South African Law* (Juta; 9ed) p18, (referring to Lon L Fuller *Morality of the Law* (1968) Chapter 2 and David Dyzenhaus (1994) 7 *Ratio Juris* 80 at 92).

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

1. The appeal is upheld.
2. The order of the Labour Court is set aside and replaced with the following order: "The application is dismissed".
3. No order is made in respect of the costs of the appeal.



P Coppin

Judge of the Labour Appeal Court

Davis JA and Murphy AJA concur in the judgment of Coppin JA.

APPEARANCES:

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