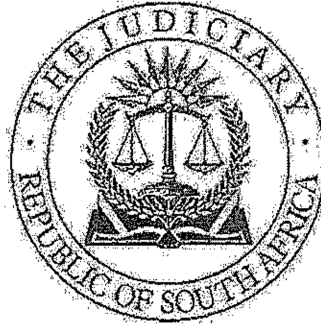

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: C 391/17

In the matter between:

NAMA KHOI LOCAL MUNICIPALITY	**Applicant**
and	
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**First Respondent**
LEKUKA MORE N.O. (AS ARBITRATOR)	**Second Respondent**
INDEPENDENT MUNICIPAL AND ALLIED TRADE UNION	**Third Respondent**
RAYMOND AUGUST	**Fourth Respondent**

Heard: **6 September 2018**

Delivered: **20 March 2019**

Summary: Bargaining council arbitration proceedings – Review of award of arbitrator – principles considered – test for review – s 145 of LRA 1995 – material error of law and jurisdiction – reasonable outcome test does not apply – review considered on the basis of what is correct or incorrect

Section 198D – dispute process separate from unfair dismissal dispute process – not competent to consider a dispute as contemplated by section 198B referred under section 198D where employee already dismissed

Section 198B and 198D – already dismissed employee – cannot order reinstatement under such provisions – reinstatement only competent under section 193 in unfair dismissal dispute – no unfair dismissal dispute before arbitrator

Dismissal dispute – dismissal as contemplated by section 186(1)(a) or (b) – dispute must be specifically referred to bargaining council for conciliation and arbitration – is not part of dispute referred under section 198D – section 198B can be considered as part of unfair dismissal dispute, but unfair dismissal cannot be considered under section 198D referral

Review of award – award of arbitrator constituting material error of law and misdirection – award reviewable and set aside – substituted with determination dismissing referral

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This is a matter that has some novelty attached to it, arising from the January 2015 amendments to the Labour Relations Act ('LRA').[1] In particular, it concerns the competency of an arbitrator to consider a dispute, and then afford consequential relief, under section 198B of the LRA, where such dispute is pursued under section 198D of the LRA. The matter has come before me by way of an application by the applicant to review and set aside an arbitration award of the second respondent dealing with these provisions, made in his capacity as an arbitrator of the South African Local Government Bargaining Council (the first respondent). This application has been brought in terms of section 145, as read with section 158(1)(g), of the LRA.

[1] Act 66 of 1995 (as amended). The amendments were effected by way of Act 6 of 2014.

LABOUR COURT

[2] In this matter, the third respondent, which I will refer to in this judgment as IMATU, pursued a dispute as contemplated by section 198B of the LRA to the first respondent, on behalf of one its members, being the fourth respondent. This dispute was pursued in terms of the dispute resolution provisions prescribed in section 198D of the LRA. The second respondent was called upon to decide whether the fourth respondent should be appointed on an indefinite employment contract. According to IMATU, the fourth respondent's job functions were permanent, and the application of the provisions of section 198B(5) meant that his employment was indefinite, necessitating the relief sought.

[3] In an award dated 28 July 2017, the second respondent decided that the fourth respondent was indeed appointed on an indefinite contract of employment since the inception of his second fixed term contract (he was appointed on two consecutive fixed term contracts), by virtue of the application of section 198B(5). The second respondent then determined that the fourth respondent be reinstated with full retrospective effect to 1 April 2017, being the date of the expiry of his second fixed term contract. It is this determination by the second respondent that forms the subject matter of the review application brought by the applicant.

[4] The arbitration award was served on the applicant on 28 June 2017. The applicant's review application was filed on 7 July 2017, which is well within the 6 (six) weeks' time limit contemplated by section 145 (1) of the LRA. The applicant's review application is thus properly before me for determination, which I shall now attend to by first setting out the relevant background facts.

<u>The relevant background</u>

[5] The relevant background facts in this case are straight forward and uncontested.

[6] The fourth respondent was employed by the applicant as a communal officer on a fixed term contract of employment, commencing 1 October 2016 and terminating 31 December 2016. However, a further and separate fixed term contract of employment was then concluded with the fourth respondent for the same position, commencing 1 January 2017 and terminating 31 March 2017.

LABOUR COURT

In essence, the fourth respondent was employed on two consecutive fixed term contracts of 3 (three) months each.

[7] The fourth respondent's second fixed term contract terminated, as said, on 31 March 2017. On 4 April 2017, he was presented with a notice dated 31 March 2017, indicating that his fixed term contract had terminated and his employment had come to an end.

[8] However, on 27 March 2017 already, IMATU referred a dispute to the first respondent, on behalf of the fourth respondent, as contemplated by section 198B of the LRA. This referral was made in terms of the dispute resolution process prescribed by section 198D of the LRA. According to IMATU, it had nothing to do with the termination of the fixed term contract.

[9] In this dispute referral, it is said that the dispute arose on 14 March 2017, and the dispute was described as:

> 'The employer failed and/or neglected to appoint Mr R August on an indefinite contract although function of the post are of a permanent nature, alternatively to confirm that he is appointed on an indefinite contract.'

The primary relief sought was indicated to be that the applicant be ordered to appoint the fourth respondent on an indefinite contract.

[10] The dispute was unsuccessfully conciliated on 24 April 2017, and a certificate of failure to settle was issued on that date, also confirming that the dispute concerned section 198B of the LRA.

[11] The dispute was referred to arbitration on 25 April 2017, reflecting the exact same issues in dispute for determination, and requiring the same primary relief. The dispute then came before the second respondent for arbitration on 21 June 2017.

[12] In his arbitration award the second respondent quoted virtually the entire section 198B. He held that the applicant had failed to explain why the fourth respondent was employed on two fixed term contracts of employment. He also considered that the fixed term contracts themselves did not contain reasons

LABOUR COURT

why fixed term contract were being utilized in employing the fourth respondent. As such, and according to the second respondent, the fixed term contracts did not meet the requirements of section 198B, resulting in the fourth respondent being employed on an indefinite basis. The second respondent also held that the renewal of the fixed term contract, in concluding the second fixed term contract, was in contravention of section 198B, and for this reason as well, the applicant was indefinitely employed.

[13] Having found that the fourth respondent was indefinitely employed, and then being confronted with the situation that the fourth respondent's employment had already terminated on 31 March 2017, the second respondent then directed that the fourth respondent be reinstated with effect from 1 April 2017. It is this award that gave rise to the current review application.

The test for review

[14] In this instance, the case of the applicant always was, in effect, that the fourth respondent was never dismissed and his fixed term contract of employment had expired. The applicant also contended that there was no unfair dismissal dispute before the first and second respondents, which could have resulted in the kind of determination made in this instance. Therefore, the very jurisdiction of the first and second respondents to entertain this matter was at stake. In *Mnguti v Commission for Conciliation, Mediation and Arbitration and Others*[2] the Court held as follows:

> 'The issue whether or not a dismissal exists concerns the jurisdiction of the CCMA. If there is no dismissal, then the CCMA has no jurisdiction to entertain an unfair dismissal claim. Where a commissioner thus finds that no dismissal exists, that commissioner in essence determines that the CCMA does not have jurisdiction and the matter is then dismissed on that basis.'

[15] In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[3] the Court considered the review test

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[2] (2015) 36 ILJ 3111 (LC) at para 14.
[3] (2008) 29 ILJ 964 (LAC) at para 101.

LABOUR COURT

postulated by *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[4] and said:

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

[16] The aforesaid means that where the issue to be considered on review is about the jurisdiction of the CCMA or bargaining council, it is not about a reasonable outcome. What happens is that the Labour Court is entitled to, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court determines the issue *de novo* in order to decide whether the determination by the arbitrator is right or wrong.[5]

[17] In *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others*,[6] the articulated the enquiry as follows:

> 'The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then, the CCMA had no jurisdiction to entertain the dispute in terms of s 191 of the Act.
>
> The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court...'

[18] This 'right or wrong' review approach has been consistently applied in a number of judgments, in instances where the issue for determination on

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[4] (2007) 28 ILJ 2405 (CC).
[5] See *Trio Glass t/a The Glass Group v Molapo NO and Others* (2013) 34 *ILJ* 2662 (LC) at para 22
[6] (2008) 29 *ILJ* 2218 (LAC) at paras 39 – 40.

LABOUR COURT

review concerned the jurisdiction of the CCMA where the commissioner had to decide whether a dismissal exists.[7]

[19] But in addition to the aforesaid, there is another issue at stake in this case. That issue is whether the second respondent, in deciding this matter, committed a material error of law. In *National Union of Metalworkers of SA v Assign Services and Others*[8] the Court said:

> 'An incorrect interpretation of the law by a commissioner is, logically, a material error of law which will result in both an incorrect and unreasonable award. Such an award can either be attacked on the basis of its correctness or for being unreasonable.'

[20] Accordingly, and in this instance, I shall proceed to decide this matter *de novo* on the basis of determining whether the second respondent was right or wrong, and not whether the outcome the second respondent arrived at was reasonable. I will commence this exercise by first setting out the relevant grounds of review as raised by the applicant.

<u>The grounds of review</u>

[21] The applicant's case and grounds for review must be made out in the founding affidavit, and supplementary affidavit.[9] As was said in *Northam Platinum Ltd v Fganyago NO and Others*[10]:

[7] See: *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape and Others* (2013) 34 ILJ 1427 (LAC) at para 24; *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others* (2012) 33 *ILJ* 363 (LC) at para 23; *Hickman v Tsatsimpe NO and Others* (2012) 33 *ILJ* 1179 (LC) at para 10; *Protect a Partner (Pty) Ltd v Machaba-Abiodun and Others* (2013) 34 *ILJ* 392 (LC) at paras 5–6; *Gubevu Security Group (Pty) Ltd v Ruggiero NO and Others* (2012) 33 *ILJ* 1171 (LC) at para 14; *Workforce Group (Pty) Ltd v CCMA and Others* (2012) 33 *ILJ* 738 (LC) at para 2; *Stars Away International Airlines (Pty) Ltd t/a Stars Away Aviation v Thee NO and Others* (2013) 34 *ILJ* 1272 (LC) at para 21; *Mnguti (supra)* at para 20.

[8] (2017) 38 ILJ 1978 (LAC) at para 32. The judgment of the LAC 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) 39 ILJ 1911 (CC). See also with regard to this principle the judgments in *Democratic Nursing Organisation of SA on behalf of Du Toit and Another v Western Cape Department of Health and Others* (2016) 37 *ILJ* 1819 (LAC) at paras 21-22; *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union and Others* (2016) 37 *ILJ* 2593 (LAC) at para 30.

[9] See: *Brodie v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 608 (LC) at para 33; *Songqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union* (2011) 32 ILJ 730 (LC) at para 9; *De Beer v Minister of Safety and Security and Another* (2011) 32 ILJ 2506 (LC) at para 27.

[10] (2010) 31 ILJ 713 (LC) at para 27.

LABOUR COURT

'.... The basic principle is that a litigant is required to set out all the material facts on which he or she relies in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit'.

[22] Because this review application entails a *de novo* consideration as to whether the decision of the second respondent is right or wrong, the actual reasoning of the second respondent as contained in his award is of lesser importance. The review grounds would thus not be aimed at showing that his reasoning is unreasonable, but would rather be aimed at setting out a basis as to why the applicant contends the finding of the second respondent is incorrect.

[23] The applicant raised a number of complaints about the sustainability of the award of the second respondent. I will summarize these into the following succinct points:

23.1 A dispute in terms of section 198B was referred to the first respondent by way of section 198D. Section 198D can only relate to the interpretation and application of section 198B, and does not include the power to appoint. By actually appointing the fourth respondent on an indefinite contract, the second respondent exceeded his powers.

23.2 IMATU was never seeking reinstatement of the fourth respondent. What was being sought was appointment on an indefinite basis. By awarding retrospective reinstatement, the second respondent awarded relief he was never called upon to award. The applicant further contends in this regard that the second respondent in any event did not have the power to award reinstatement in the actual dispute placed before him.

23.3 The second respondent applied remedies associated with an unfair dismissal dispute, but no unfair dismissal dispute was placed before him. According to the applicant, he acted *ultra vires* for this reason as well.

23.4 The applicant contended that on the evidence, an award of reinstatement would not be competent, by virtue of the application of section 193(2)(c) of the LRA.

LABOUR COURT

23.5 The second respondent had ignored pertinent evidence, including evidence by the fourth respondent himself, which justified why the contracts in this case were fixed term contracts, as would be required by section 198B.

Analysis

[24] On the undisputed facts, the applicant and the fourth respondent concluded two written fixed term contracts of employment. I will confine my references to the second contract, as its essential terms are the same as the first. It records, in clause 2.2, that it is concluded for a fixed term and that it expires on 31 March 2017. It is further recorded in clause 2.3 that the fourth respondent has no expectation of continued employment beyond the fixed term. In clause 11.1.1 it is recorded that the contract automatically expires upon expiry of the fixed term.

[25] Next, and again on the undisputed facts, the fourth respondent was presented with a written notice on 4 April 2017, which notice is dated 31 March 2017, stating the following:

> 'Met verwysing na klousules 2.2 en 11 van u dienskontrak die volgende.
>
> Hiermee om u in kennis te stel dat u dieskontrak op 31 Maart 2017 beeindig en nie hernu gaan word nie. ...'

[26] Thus, and without doubt, the employment of the fourth respondent with the applicant terminated on 31 March 2017 due to the expiry of his fixed term contract of employment.

[27] It is by now trite that the expiry of a fixed term contract of employment does not constitute a dismissal but a termination of employment by operation of law, and which cannot be seen to be contrary to the provisions and scheme of the LRA. In *Enforce Security Group v Fikile and Others*[11] the Court said:

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[11] (2017) 38 ILJ 1041 (LAC) at para 18. See also *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 *ILJ* 2407 (SCA) at paras 17-18; *Sindane v Prestige Cleaning Services* (2010) 31 *ILJ* 733 (LC) at para 16; *Nongcantsi v Mnquma Local Municipality and Others* (2017) 38 ILJ 595 (LAC) at para 36.

LABOUR COURT

'It is clear from the wording of s 186(1) above that there are specifically defined instances that bring about the termination of employment I which would be regarded as dismissal. This means therefore that an employment contract can be terminated in a number of ways which do not constitute a dismissal as defined in s 186(1) of the LRA. One such instance would be a fixed-term employment contract entered into for a specific period or upon the happening of a particular event. An event that comes to mind would include a conclusion of a project or the cancellation or expiry of a contract between an employer and a third party. Once the event agreed to between an employer and its employee takes place or materialises, there would ordinarily be no dismissal. It has been the position in common law that the expiry of a fixed-term contract of employment does not constitute termination of the contract by any of the parties. It constituted an automatic termination of the contract by operation of law and not a dismissal ...'

[28] But even the above state of affairs does not leave an employee without a possible remedy. The employee can still launch a challenge where it comes to such termination of employment, in one of two possible ways.

[29] First, and if an employer seeks to rely upon the expiry of a fixed term contract of employment as a basis to bring about the termination of employment of an employee, and it turns out that such reliance was misplaced, for example because no such fixed term was agreed to, or the fixed term contract is invalid, or the fixed term had expired and the employee just continued working, then the misplaced reliance on a fixed term contract of employment expiring would constitute an act of dismissal by the employer as contemplated by section 186(1)(a) of the LRA.[12] An employee seeking to challenge this state of affairs must then pursue an unfair dismissal claim to the CCMA or bargaining council, in the ordinary course, alleging a dismissal as contemplated by section 186(1)(a).

[30] Second, and even if there is a legitimate and valid fixed term contract that expired, an employee can still challenge this expiry on the basis that it constitutes a dismissal. But in such a case, the employee would be compelled

[12] The section reads: 'Dismissal' means that- *(a)* an employer has terminated employment with or without notice ...'. For examples of this see *Clencor (Pty) Ltd v Mngezana NO and Others* (2018) 39 ILJ 1029 (LAC); *Central Technical Services (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others* (2017) 38 ILJ 1651 (LC).

LABOUR COURT

to refer an unfair dismissal dispute to the CCMA or bargaining council as contemplated by section 186(1)(b) of the LRA,[13] and provided the requirements of this section are satisfied, can still prove a dismissal.[14] As held in *University of Pretoria v Commission for Conciliation, Mediation and Arbitration and Others*[15]:

> 'The words employed in s 186 envisage that two requirements must be met in order for an employer's action to constitute a dismissal:
>
> (1) a reasonable expectation on the part of the employee that a fixed-term contract on the same or similar terms will be renewed; and
>
> (2) a failure by the employer to renew the contract on the same terms or a failure to renew it at all.'

[31] So, in sum, once the employment of the employee terminates based on a fixed term contract of employment expiring, in circumstances where it can be contended that it would be wrong or unfair, it must be challenged by way of a dismissal dispute referred to the CCMA or bargaining council, either under section 186(1)(a) or 186(1)(b) of the LRA, as the two grounds of dismissal are mutually exclusive. Only then can an employee obtain relief under sections 193 and 194 of the LRA. These dismissal disputes would have to be pursued under section 191 of the LRA, and the dispute resolution process as set out in that section must be complied with.[16]

[32] Next, section 198B must be considered. It applies to all kinds of fixed term contracts, whether date or event driven, and also only applies to employees

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[13] The section reads: ''Dismissal' means that ... (b) an employee employed in terms of a fixed-term contract of employment reasonably expected the employer- (i) to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or (ii) to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed-term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee ...'

[14] For these requirements see *De Milander* (*supra*) at para 26 where the Court said: 'The test whether or not an employee has discharged the onus is objective, namely, whether a reasonable employee would, in the circumstances prevailing at the time, have expected the employer to renew his or her fixed-term contract on the same or similar conditions'. The Court added the following at para 29: '... it is first necessary to determine whether she in fact expected her contract to be renewed, which is the subjective element. Secondly, if she did have such an expectation, whether taking into account all the facts, that expectation was reasonable, which is the objective element. Whether or not her expectation was reasonable will depend on whether it was actually and genuinely entertained ...'

[15] (2012) 33 ILJ 183 (LAC) at para 18.

[16] In terms of section 191(1)(a) and (b), the dispute must be referred to the CCMA or bargaining council within 30 days, and such referral must be served on the employer (section 191(3). The CCMA or bargaining council must attempt to resolve the dispute by way of conciliation (section 191(4)), and if this fails, the dispute is then referred to arbitration in terms of section 191(5)(a).

LABOUR COURT

that earn less than the threshold prescribed by way of section 6(3) of the Basic Conditions of Employment Act ("BCEA').[17] The provisions of section 198B relevant to deciding this matter are the following:

> '(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.[18]
>
> (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)'

[33] What is significant is that sections 198A, 198B and 198C come with their own dispute resolution process. This is found in Section 198D, which provides:

> '(1) Any dispute arising from the interpretation or application of sections 198A, 198B and 198C may be referred to the Commission or a bargaining council with jurisdiction for conciliation and, if not resolved, to arbitration. ...
>
> (3) A party to a dispute contemplated in subsection (1), other than a dispute about a dismissal in terms of section 198A (4), may refer the dispute, in writing, to the Commission or to the bargaining council, within six months after the act or omission concerned.
>
> (4) The party that refers a dispute must satisfy the Commission or the bargaining council that a copy of the referral has been served on every party to the dispute.

[17] Act 75 of 1997 (as amended). The current threshold is R205 433.30, as published in GN 531 in GG 37795 of 1 July 2014.

[18] Section 198B(4) sets out individual instances of justifiable reasons.

LABOUR COURT

> (5) If the dispute remains unresolved after conciliation, a party to the dispute may refer it to the Commission or to the bargaining council for arbitration within 90 days.'

[34] In my view, it is clear why sections 198A, 198B and 198C have their own dispute resolution process. The reason for this is that section 198D makes it possible for employees to pursue disputes about whether any of these provisions apply to their employment whilst the employment relationship is ongoing, with the view to obtaining declaratory relief, particularly where it comes to section 198B, as to the status of that employment relationship. Using an example analogous to the current matter, a dispute concerning the application of section 198B(5) can be referred to the CCMA in the course of the existence of the fixed term contract and before the expiry of the term, for declaratory relief to the effect that the fixed term contract is in fact an indefinite contract as a result of the application of that provision. This would avoid the employer relying on the expiry of the fixed term to bring about termination of employment.

[35] I consider section 198D to be a process designed to be proactive. It places an entitlement in the hands of an employee party to remedy a state of affairs as contemplated by sections 198A, 198B and 198C during the currency of the employment relationship. Section 198D as a dispute resolution process is not intended to be applied once the employment relationship has terminated. For that, employee parties already have the required protection in the unfair dismissal provisions of the LRA. My view in this regard is further informed by the fact that section 198D does not provide for the kind of relief as contemplated by sections 193 and 194, which only apply in the case of unfair dismissals and unfair labour practices. The relief that flows from section 198D can only be declaratory relief, which may well be moot if the employment relationship has ended by the time it falls to be decided.

[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

LABOUR COURT

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.

[37] A pertinent example can be found in *Piet Wes Civils CC and Another v Association of Mineworkers and Construction Union and Others*[19], where employees were given notices of termination of their fixed term employment contracts in the course of a mass retrenchment, and those employees then referred an unfair dismissal dispute to the CCMA. In this context, the employees took the view that the termination of their contracts of employment was in breach of section 198B in that the contracts were actually entered into for an unlimited duration. Because the employees contended they were dismissed, and had pursued an unfair dismissal dispute based on operational requirements, the employees also brought an application for urgent relief in terms of section 189A(13)[20]. In deciding this dismissal dispute, the Court then applied section 198B as follows:[21]

> '... On the appellants' own version, no written employment contract was entered into with a number of employees employed by both Piet Wes and Waterkloof, with the basis of employment apparently having been agreed verbally with those employees. No evidence was put up that employees were provided with a written offer of employment, as required by s 198B (6). It follows that the appellants failed to show, in respect of those employees with whom no written contract had been concluded, that the provisions of s 198B had been complied with. Consequently, those employees were not employed on the basis of a limited duration contract but rather for an unlimited duration.'

Based on this finding, the Court then concluded:[22]

> 'Since all of the employment contracts entered into were of an indefinite duration, as contemplated by s 198B (5), such contracts could not be terminated on notice by the appellants without adherence to the fair dismissal procedures set out in the LRA. The respondents were consequently entitled to approach the Labour Court to seek relief as provided in s 189 A(13) ...'

LABOUR COURT

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[19] (2019) 40 ILJ 130 (LAC).
[20] See para 8 of the judgment.
[21] Id at para 23.
[22] Id at para 27.

[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.

[39] I shall further illustrate the point by another example. An employer employs an employee on a 12 month fixed term contract of employment, in contravention of section 198B(3) of the LRA. The effect of this would be, by virtue of section 198B(5), that once the contract extends beyond three months, the employee is considered in law to be employed indefinitely. The employer however still relies on the 12 month fixed term, and brings about the end of the employment relationship upon the expiry of that term. In that case, the employee would then be in a position to pursue an unfair dismissal claim to the CCMA as contemplated by section 186(1)(a) of the LRA, contending that the employer's reliance on the fixed term was misplaced, because by way of operation of law it had become indefinite. In such a case, the employer would be found to have dismissed the employee when seeking to rely on the fixed term, which, if found to be unfair, could carry with it the relief of fully retrospective reinstatement. The point is however that an unfair dismissal dispute must be pursued.

[40] In fact, and to utilize a referral under section 198D to determine what in essence is an unfair dismissal dispute, is to bypass the prescribed dispute resolution process in this regard. The case *in casu* is a prime example. In an unfair dismissal dispute where section 186(1)(b) forms the basis of the dismissal, the employee party would have to prove the requirements of such section in order to establish the existence of a dismissal, and if this is done, it may give rise to the relief of reinstatement (if that dismissal is substantively unfair).

[41] Section 198B may be part of that unfair dismissal enquiry. But seeking to apply section 198B in a dispute referred under section 198D means that the employee does not have to prove dismissal, and, as happened *in casu*, reinstatement if awarded without complying with any of the unfair dismissal

LABOUR COURT

provisions of the LRA. This kind of situation should not be permitted. This was recognized in *National Union of Metalworkers of South Africa (NUMSA) obo Members v Transnet Soc Limited and Others*[23], as is apparent from the following *dictum*:

> 'The appellant, in effect, conceded to its inability to make out a case in the application that any of its members, on whose behalf it was bringing the application, had a legitimate expectation that their contracts would be renewed by Transnet, and that the non-renewal was accordingly dismissals as contemplated in s186(1)(b) of the LRA. This would have required the appellant to, at least, put up facts and circumstances in respect of each affected employee, which would cause a reasonable person, in the position of the particular employee, to expect a renewal of the contract.
>
> The appellant avers that the application is an alternative to the other processes that it has adopted, namely, resorting to arbitrations to prove that their individual members had reasonable expectations of renewal. … Mr James states in that regard: "…should this Court uphold the applicant's contentions relevant to the applicability of Section 189B to the current situation, this will effectively dispose of all cases and there will be no need to deal with the alternative contentions relevant to a reasonable expectation of permanency." The reference to s189B appears to be an error, and reference was most likely being made to s198B of the LRA, but that does not detract from the point that the appellant sought to use the application as an alternative, or short-cut strategy, but failed to make out a case for the relief sought.
>
> In summary, the appellant' application was rightly dismissed by the Labour Court. Notwithstanding the perceived merit in the, effectively, singular ground that the appellant chose to pursue on appeal, it had failed to make out a case in the application for the relief it sought. At the core of this failure was its failure to prove that any of its members, on whose behalf it was bringing the application, had been dismissed by Transnet. … '

[42] Considering the above, this is then where the dispute referred by IMATU to the first respondent heads straight into quicksand. IMATU did not refer an unfair dismissal dispute to the first respondent. It referred a dispute relating to the

[23] [2018] 5 BLLR 488 (LAC) at paras 30 – 32.

LABOUR COURT

application of section 198B, which referral was made in terms of the provisions of section 198D. It never sought to make out a case that a dismissal exists. As such, it could only obtain declaratory relief under section 198D, to the effect that section 198B(5) applied and that the fourth respondent was not employed on a fixed term contract of employment, but was an indefinitely employed employee. The difficulty then is that this relief is only competent if the employment relationship still exists, as it can hardly be said that someone that had already been dismissed is indefinitely employed. And further, reinstatement cannot be awarded if there is no dismissal proven in the first place.

[43] By the time the dispute came before the second respondent, the employment of the fourth respondent had long since terminated. Whether one views it as a dismissal by the applicant as employer, or an automatic termination by operation of law does not matter. Even if IMATU is correct in saying that as at 31 March 2017 the fourth respondent was employed on an indefinite contract of employment, then that contract was brought to an end by the applicant by way of the notice handed to the fourth respondent on 4 April 2017, and this would constitute an act of dismissal.[24] However, because there was no unfair dismissal dispute before the second respondent, he could not decide if that dismissal was fair or unfair, and award relief accordingly. All the second respondent could do, by virtue of what was before him, is to declare that the fourth respondent was employed indefinitely. But with the employment of the fourth respondent already having been terminated, this was not possible. Even if such a declaration could be made, it would be of no practical effect and is simply moot.[25]

LABOUR COURT

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[24] In *Ouwehand v Hout Bay Fishing Industries* (2004) 25 *ILJ* 731 (LC) at para 14 the Court said a dismissal exists where: '... some initiative undertaken by the employer ... which has the consequence of terminating the contract, whether or not the employer has given notice of an intention to do so ...'. See also *Heath v A & N Paneelkloppers* (2015) 36 ILJ 1301 (LC) at para 31 and 33; *Chemical Energy Paper Printing Wood and Allied Workers Union v Astrapak Manufacturing Holdings (Pty) Ltd t/a East Rand Plastics* (2012) 33 *ILJ* 2386 (LC) at para 13; *National Union of Metalworkers of SA and Others v SA Five Engineering (Pty) Ltd and Others* (2007) 28 *ILJ* 1290 (LC) at para 41; *Ismail v B & B t/a Harvey World Travel Northcliff* (2014) 35 *ILJ* 696 (LC) at para 2

[25] See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para 21 footnote 18; *Ninian & Lester (Pty) Ltd v Crouse NO and Others* (2009) 30 ILJ 2889 (LAC) at para 30; *City of Cape Town v SA Municipal Workers Union on behalf of Abrahams and Others* (2012) 33 ILJ 1393 (LAC) at para 11; *Multichoice Africa (Pty) Ltd v Broadcasting Electronic Media & Allied Workers Union and Others* (2012) 33 ILJ 177 (LAC) at para 16; *National Employers' Association of SA v Metal and Engineering Industries Bargaining Council and Others* (2015) 36 ILJ 2032 (LAC) at para 9.

[44] The situation is akin to that which came before the Labour Court in *Independent Municipal and Allied Trade Union on behalf of Joubert v Modimolle Local Municipality and Another*[26]. In that case, the employee party had pursued an unfair labour practice dispute to the bargaining council relating to promotion. But by the time the matter came before the arbitrator at the bargaining council, the employment of the employee had already terminated based on the expiry of her fixed term contract of employment.[27] The arbitrator found in favour of the employee, and considering her employment had already terminated, determined that '*I award in favour of the applicant and order the respondent to appoint the former retrospectively in an admin clerk position*'.[28] The comparison to the matter *in casu* is immediately apparent. In deciding a contempt application seeking to enforce this award, the Court said:[29]

> 'An unfair labour practice dispute, and then the obtaining of relief as a result of pursuing same, contemplates a continued existence of an employment relationship between the parties. In short, unfair labour practices are only available to employees. Where the employment relationship comes to an end prior to the relief afforded under the unfair labour practice dispute being implemented, then that relief may well be rendered incompetent. As a simple example, where an arbitration award directs that an employer promotes an employee, but the employee then resigns before this promotion is effected, that is simply no need or purpose to still promote the employee. Therefore, and once the employment relationship has terminated, an employer cannot be expected to thereafter take positive action in the form of promoting the employee, reversing a demotion, subjecting the employee to training, reversing a final written warning and the like, being the kind of relief flowing from unfair labour practice arbitration awards. In short, circumstances have overtaken the relief, rendering compliance incompetent.'

[45] The Labour Court in *Joubert supra* also specifically dealt with the relief afforded by the arbitrator, and held:[30]

> 'The applicants are in effect contending that compliance with the award entails the reinstatement of the individual applicant into the position of administrative

LABOUR COURT

[26] (2017) 38 ILJ 1137 (LC).
[27] See paras 5 – 9 of the judgment.
[28] Para 10 of the judgment.
[29] Id at para 22.
[30] Id at para 32.

clerk. But, and as I have illustrated above, this does not follow. It is not competent to demand the reinstatement of the individual applicant so that she can be promoted. That is simply not contemplated as constituting action required from the first respondent in order to comply with the award. Accordingly, and by not reinstating the individual applicant, the first respondent has not acted in contravention of the award, and consequently the court order of Gush J. The unfortunate reality for the individual applicant is that circumstances overtook her unfair labour practice dispute, these circumstances being her termination of employment on 15 November 2005. If this has the effect of negating her award and relief in respect of her unfair labour dispute, then that is unfortunately so.'

[46] The judgement of the Labour Court in *Joubert* came before the Labour Appeal Court in *Independent Municipal and Allied Trade Union obo Joubert v Modimolle Local Municipality*[31], where the Court in upholding the judgment of the Labour Court added the following:

> 'The facts show that at the time that the Arbitrator's award was issued on the 15 March 2006, Ms Joubert was no longer an employee of the respondents. Since no unfair dismissal dispute had been referred to the Bargaining Council for adjudication, the expiry of her fixed-term contract went unchallenged. The Arbitrator in the promotion dispute was not empowered to determine an unfair dismissal dispute and could consequently not order the reinstatement of Ms Joubert into a position with the respondents'

[47] The exact same consequence that followed in the judgments of *Joubert* must follow *in casu*. By the time the section 198B dispute brought by IMATU on behalf of the fourth respondent came before the second respondent for arbitration, the fourth respondent's fixed term contract as it stood had ended and his employment had terminated. Relief under section 198D in a dispute involving section 198B would only be available to existing employees. It would not be available to IMATU and the fourth respondent in this case, because the fourth respondent was not an existing employee.

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[31] [2018] 11 BLLR 1106 (LAC) at para 7.

LABOUR COURT

[48] In addition, it is in my view clear that the approach of the second respondent in awarding reinstatement retrospective to 1 April 2017 is a complete misdirection. Reinstatement flows from section 193(1) and (2) of the LRA, which only apply to a dismissal dispute where the dismissal has been found to be unfair.[32] Reinstatement is in fact the primary remedy that follows a dismissal that is found to be substantively unfair.[33] Therefore, in order to award reinstatement, the second respondent must have an unfair dismissal dispute before him, pursuant to which he must have first decided that the fourth respondent was dismissed, and then decided that such dismissal was substantively unfair. But, as said, no unfair dismissal dispute was before him, and he made none of the determinations referred to above. It was thus simply impossible for him to have awarded reinstatement.

[49] Insofar as it may be contended that the dispute referral of 27 March 2017 by IMATU contemplated a dismissal dispute, that contention cannot hold water. On the facts, that is just not the case. The referral documents speak for themselves as to the nature of the dispute. The opening address in the arbitration by the IMATU representative makes it clear that the dispute does not concern one of an unfair dismissal. Nowhere in the arbitration is dismissal challenged as an issue for determination. And even in this review application, the answering affidavit deposed to by the fourth respondent records that the referral was not made as a result of the termination notice he received on 4 April 2017.

[50] In any event, and to accept that a referral as contemplated by section 198D may by its nature include a dismissal dispute is to ignore the two distinct and separate dispute resolution processes under sections 191 and then 198D of the LRA. It is similar to the situation where an employee is given a final written

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[32] Section 193(1) reads: 'If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may- (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal ...'. Section 193(2) in turn provides that 'The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless ...', and four individual exceptions are then listed in sections 193(2)(a) to (d).

[33] See *Equity Aviation Services Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 2507 (CC) at para 44; *SA Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 97 (CC) at para 38; *Mediterranean Textile Mills (Pty) Ltd v SA Clothing and Textile Workers Union and Others* (2012) 33 ILJ 160 (LAC) at para 28; *Independent Municipal and Allied Trade Union on behalf of Strydom v Witzenberg Municipality and Others* 2012) 33 ILJ 1081 (LAC) at para 30; *Elliot International (Pty) Ltd v Veloo and Another* (2015) 36 ILJ 422 (LAC) at para 53; *Xstrata SA (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers on behalf of Masha and Others* (2016) 37 ILJ 2313 (LAC) at paras 6 and 8..

LABOUR COURT

warning which is not challenged by way of an unfair labour practice dispute, and when the employee is then later dismissed based on such warning, the employee seeks to challenge the warning as part of the unfair dismissal dispute. It has been held that in order for the final written warning to be open to challenge, it had to have been specifically referred as an unfair labour practice.[34] Another example is the case of an automatic unfair dismissal dispute under section 187(1)(f) of the LRA, and a discrimination dispute under section 6 (as read with section 10) of the EEA[35] based on the same facts.[36]

[51] In order to legitimately place an unfair dismissal dispute before the CCMA or bargaining council, that dispute must be properly referred in itself, complying with all the requirements of section 191. None of this happened *in casu*, insofar as it concerns any dismissal dispute. In *National Union of Metalworkers of SA v Intervalve (Pty) Ltd and Others*[37] the Court said:

> 'In determining the objectives of s 191, none of its provisions can be ignored. They must all be taken into account. That includes the requirement in s 191(3) that the employee must satisfy the council that a copy of the referral has been served 'on the employer'. The general purpose of s 191 provides the background against which the specific purpose of s 191(3) must be understood. The subsection ensures that the employer party to a dismissal or unfair labour practice dispute is informed of the referral. The obvious objective is to enable the employer to participate in the conciliation proceedings, and, if they fail, to gird itself for the conflict that may follow.'

The Court concluded:[38]

> '... The focal question narrows to the purpose of the service requirement in s 191(3). The objective cannot be just to let the employer know that a dispute, related to the dispute that affects it, is being conciliated. It must be to put each

[34] See *Paper Printing Wood & Allied Workers Union and Another v Sappi Fine Papers (Pty) Ltd* (1993) 2 LCD 318 (IC) at paras 6 – 7; *Agbro (Pty) Ltd v Tempi* 1993) 2 LCD 24 (LAC) at para 5; *Subroyen v Telkom (SA) Ltd* (2001) 22 ILJ 2509 (CCMA) at 2521C-D; *Mining Power Transfer t/a Driveline Technologies v Marcus NO and Others* [2008] JOL 21764 (LC) at paras 37 – 38.
[35] Employment Equity Act 55 of 1998 (as amended).
[36] See *SA Airways (Pty) Ltd v Jansen van Vuuren and Another* (2014) 35 ILJ 2774 (LAC); *Evans v Japanese School of Johannesburg* (2006) 27 ILJ 2607 (LC); *Bedderson v Sparrow Schools Education Trust* (2010) 31 ILJ 1325 (LC); *Wallace v Du Toit* (2006) 27 ILJ 1754 (LC); *Hibbert v ARB Electrical Wholesalers (Pty) Ltd* (2013) 34 ILJ 1190 (LC)
[37] (2015) 36 ILJ 363 (CC) at para 47.
[38] Id at para 52.

LABOUR COURT

employer party individually on notice that it may be liable to legal consequences if the dispute involving it is not effectively conciliated. Those consequences may be severe. They may include enterprise-threatening implications: trial proceedings, reinstatement orders, backpay and costs orders. So the notice must be directly targeted.'

Based on the aforesaid, the second respondent would in any event not have had jurisdiction to entertain an unfair dismissal dispute.[39]

[52] The point is that it would have been the easiest thing in the world for IMATU to have referred an unfair dismissal dispute to the first respondent immediately after the fourth respondent was issued with the notice of termination of employment on 4 April 2017.[40] That referral required specific reference to the fact that it was an unfair dismissal dispute, and had to be served on the applicant. But IMATU chose not to do this. In my view, and in order to successfully rely on section 198B(5) after termination of employment of the fourth respondent, IMATU needed to pursue an unfair dismissal dispute.

[53] In summary therefore, the second respondent committed a material error of law when he proceeded to determine whether the fourth respondent was employed indefinitely by virtue of the application of section 198B(5), when it was patently obvious that the employment of the fourth respondent had already been terminated, and there was no unfair dismissal dispute before him. Insofar as he may have decided the matter based on the existence of a dismissal, he had no jurisdiction to do so. In addition, and by awarding reinstatement, the second respondent completely exceeded his powers, and gave relief that he was not competent to give, considering the nature of the dispute that was before him. Stripped down to its basics, what the second respondent actually did was to try and decide an unfair dismissal dispute that was never before him.

[54] I will accept for the purposes of this judgment that the second respondent had the necessary jurisdiction to decide a dispute under section 198B of the LRA, which was actually referred to him in terms of section 198D of the LRA by

[39] See *Mphahlele v Ephraim Mogale Municipality* (2018) 39 ILJ 879 (LC) at para 8.
[40] See *Intervalve* (*supra*) at para 38.

LABOUR COURT

respondent). The second respondent should have dismissed the referral. Accordingly, the award of the second respondent must be substituted with an award to the effect that the dispute referral of IMATU on behalf of the fourth respondent be dismissed.

Costs

[58] This then only leaves the issue of costs. In terms of Section 162 of the LRA, I have a wide discretion where it comes to the issue of costs. Even though the applicant was successful, this was certainly an arguable and novel case brought to this Court by both the parties. I do not think any of the parties acted unreasonably in seeking to pursue this matter to finality. It is an issue that called for final determination by this Court. I also consider the *dictum* of the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*[43] where it comes to costs awards in employment disputes before this Court, and in this case there certainly exists no reason to depart from this. Therefore, and although the applicant was successful, I consider it to be in the interest of fairness that no costs order be made.

[59] In the premises, I make the following order:

Order

1. The applicant's review application is granted.

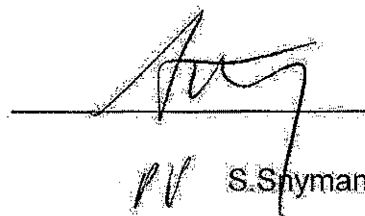
2. The arbitration award of the second respondent, arbitrator Lekuka More, dated 28 June 2017 and issued under case number NCD031717, is reviewed and set aside.

3. The arbitration award is substituted with a determination that the third and fourth respondent's referral to the first respondent is dismissed.

4. There is no order as to costs.

[43] (2018) 39 ILJ 523 (CC) at para 25.

LABOUR COURT



S.Snyman

Acting Judge of the Labour Court of South Africa

LABOUR COURT

Appearances:

For the Applicant: Mr N Cloete of Neveille Cloete Attorneys Inc

For the Third and

Fourth Respondents: Mr S Windvogel – IMATU Official