

SOUTH AFRICA / JUDGMENT

Bidvest Prestige Services (Pty) Ltd v Lebea NO and Others (JR1328/16) [2020] ZALCJHB 211; (2021) 42 ILJ 377 (LC) (26 September 2020)

[2020] ZALCJHB 211

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhlamajane

CASE / FILE NUMBER

JR1328/16

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IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 1328/16

In the matter between:

BIDVEST PRESTIGE
SERVICES (PTY) LTD
Applicant
and
COMMISSIONER MOHALE
LEBEA N.O
First Respondent
COMMISSION FOR
CONCILIATION, MEDIATION
AND
ARBITRATION
Second
Respondent
AMCU obo RM
NKOSI & 46 OTHERS
Third Respondent

Enrolled:

14 May 2020
Decided
on the papers

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and release to SAFLII. The date and time for hand-down is deemed to be on 26 September 2020 at 16:00

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

- [1] The applicant (Bidvest), seeks an order reviewing and setting aside the arbitration award (award) dated 28 June 2016 issued by the first respondent (the Commissioner). In the award, the Commissioner found that the termination of the Employees' fixed term contracts constituted a dismissal based on Bidvest's operational requirements, and were thus entitled to severance packages. Eight of the Employees who were party to the proceedings did not pursue their claim, and the award was made in favour of 39 Employees who are members of AMCU.

Background:

- [2] Arising from the declaration of the National State of Disaster, and at the invitation of the Court, the parties agreed that the matter be disposed of on the papers. Furthermore, the parties were invited to file written supplementary heads of argument, and only Bidvest took up the invitation.

- [3] The following facts are not in dispute;

3.1 The individual Employees were all employed by Bidvest at varying times between 2009 and 2016 in terms of 'Fixed Term Eventuality Contract of Employment' as cleaning staff. They were engaged to render their services specifically at one of Bidvest's client, Tubatse Chrome, in Steelpoort.

3.2 The standard contract at its clause 5 specifically provided that it (contract) is for a definite period which terminates automatically upon;

"5.1 The Employer's client terminating the contract or part of the contract pertaining to the Employee which exists between the Employer and the client, and that,

5.2 The employee specifically acknowledges that he/she fully understands the Employer's contract with the client and the Employee's engagement at the site may be terminated and/or revised by the Client from time to time and for any cause whatsoever, or may terminate through the passing of time, and that in consequences thereof, the nature of the Employee's employment

and its duration is totally dependent upon the Employer's contract with the Client, and that the Employee's contract of employment will terminate at any time as and when an event referred to in 5.1 above occurs. In such event this Contract will automatically terminate. Such termination will not be a termination for operational reasons"

3.3 Tubatse Chrome gave notice of its intention to terminate the service contract with Bidvest with effect from 30 April 2016. Bidvest accordingly forewarned the Employees of the termination of their contracts of employment and indeed on 30 April 2016, the termination took effect.

3.4 Aggrieved, the Employees as assisted by AMCU referred a dispute to the second respondent (CCMA), contending that the termination of their services was as a result of Bidvest's operational requirements, and that they were thus entitled to severance packages.

3.5 The matter came before the Commissioner for arbitration. The parties' representatives had agreed at those proceedings that the background material to the dispute was common cause, and that the matter was to be determined solely on the basis of documentation and submissions made by the representatives.

The submissions before the Commissioner and the arbitration award:

- [4] In their submissions, the Employees acknowledged that the termination of their contracts of employment flowed from the termination of the service contract between Bidvest and Tubatse Chrome. It was however contended that the terminations were effectively related to Bidvest's operational reasons, and that the provisions of section 41(1) of the Basic Conditions of Employment Act (BCEA)[1] were applicable.
- [5] They had further submitted that the mere automatic termination clauses could not override the provisions of section 189 of the Labour

Relations Act (LRA),[2] and that these clauses were inconsistent with the provisions of the LRA, since they restricted their entitlement to retrenchment benefits. They further submitted that the mere fact that Bidvest had met twice with their Union to consult over the terminations, this was indicative of an acknowledgement that the provisions of section 189 of the LRA needed to be followed.

- [6] Bidvest relied on *Sindane v Prestige Cleaning Services*[3] and contended that the judgment was indistinguishable from the facts of this case, as it dealt precisely with the same contract of employment, the same employer and the similar set of circumstances. In that judgment, this Court had held that there was no dismissal in circumstances where an employee was engaged in terms of a contract that provided for its termination on the happening of a future event. Bidvest submitted that the termination of the contract with Tubatse Chrome was the specified future event giving rise the termination of the fixed term contracts, and that there could therefore be no dismissal for the purposes of operational requirements, or entitlement to severance packages.

- [7] Bidvest further submitted that it conducted its business in the contract cleaning sector, which was regulated by Sectoral Determination 1. Thus the law accordingly recognised that the nature of employment in the sector was linked to contracts with clients. In this regard, reliance was placed on section 198B of the LRA[4], which specifically provided for and endorsed the validity of contracts linking employment to such contracts.
- [8] Bidvest submitted that taking into account the provisions of section 198B of the LRA; the nature of the employment contracts as linked to the Tubatse Chrome service agreement; its duration; the purpose for which the contracts were entered into; and the decision in Sindane, the termination of the employment contracts could not have amounted to a dismissal, but were consequent upon the occurrence of the specified event envisaged at the outset of those contracts.
- [9] In concluding that the Employees were dismissed based on Bidvest's operational requirements, and that they were entitled to severance packages, the Commissioner held that;

9.1 Both the LRA and the BCEA were intended to provide employees with certain basic protections emanating from their employment. The LRA provided employees with the right not to be unfairly dismissed, whilst in the case of a dismissal for operational requirements, the LRA read together with section 41 of the BCEA provided employees with a right to severance package.

9.2 With reference to Mahlamu v CCMA and Others[5], parties to an employment contract could not contract out of the protections granted to employees against unfair dismissal by including automatic termination clauses in an a contract.

9.3 Bidvest's submissions that the facts of this case were distinguishable from Mahlamu ought to be rejected, since the contracts in both cases contained automatic termination clauses as linked to the contract between the employer and the client.

9.4 The decision in Sindane v Prestige Cleaning Services[6] as relied upon by Bidvest could not be followed as its essence was to deprive employees of the protection afforded to them by the LRA and the BCEA. Thus, the fixed term contract and its automatic termination clause in this case prohibited the employees from exercising their rights in terms of the LRA, which was inconsistent with section 5 of the LRA.

9.5 A second consideration was that the provisions of section 198B(10) of the LRA in any event granted employees who were employed for more than two years on a fixed term contract, a right to be paid severance pay, and thus the Employees in this case who had worked for more than two years on fixed term contracts, were entitled to such severance payments.

Grounds of review:

- [10] Bidvest contends that the arbitration award is reviewable on the grounds that;

10.1 The Commissioner committed several irregularities in that contrary to the findings made, the Employees were not dismissed in view of the nature of the contracts of employment they had entered into, and further since such terminations were not because of any conduct on its part.

10.2 The Commissioner was incorrect in finding that the contracts were contrary to the rights of Employees not to be unfairly dismissed or the provisions of section 5 of the LRA, as the contracts were linked to a specific project that had a limited or defined duration.

10.3 The Commissioner's finding on the provisions of section 5 of the LRA amounted to a material error of law, in that first, the definition of a 'dismissal' in section 186 of the LRA and in section 198B specifically recognised and endorsed fixed term contracts where the nature of the work was of a limited or definite duration; and second, where the employer could demonstrate any other justifiable reason for fixing the term of the contract; and third, since section 198B(4) justified a conclusion of fixed term contracts if an employee was employed to work exclusively on a specific project that has a limited or defined duration. In this regard, a finding that the Employees were dismissed was equally wrong and the CCMA thus lacked jurisdiction to arbitrate the matter.

[11] The Employees disputed that the award was reviewable on the grounds that;

11.1 The facts of Mahlamu and Sindane were indistinguishable as in all instances, the fixed term contracts provided for automatic termination upon termination or reduction of the employer's contract with the client, and further that in both instances, the eventuality came into being. Furthermore, in both instances, the employer had concluded a fixed term contract eventuality agreement with employees which provided for automatic termination.

11.2 The Commissioner's conclusions could not be faulted as he had considered conflicting decisions of this Court and aligned himself with one of them in determining that there was a dismissal.

11.3 Bidvest's reliance on the provisions of section 198B of the LRA that they recognised and endorsed fixed term contracts where the nature of the work was of limited or definite duration or where the employee worked on a specific project was academic in the light of the Labour Appeal Court's (LAC) decision in *Piet Wes Civils CC & Another v AMCU and others*[7] (*Piet Wes Civils*).

11.4 The Commissioner's finding in relation to section 198B of the LRA was in any event of no consequence since he had already found that the termination of the employment contracts constituted a dismissal, entitling the Employees to a severance package.

The legal framework and evaluation:

[12] To the extent that there was a dispute as to whether or not the termination of the contracts of employment by virtue of the automatic

termination constituted a dismissal as defined in section 186(1) of the Labour Relations Act[8], the test on review as correctly pointed out on behalf of the parties is that of correctness, and not reasonableness. This test was reiterated by the LAC in *Enforce Security Group v Fikile and Others* (*Enforce Security*)[9].

Automatic termination clauses:

[13] The dilemma faced by the Commissioner at the time that this dispute was determined is understandable in the light of what may have been perceived as a dichotomy between the approaches in *Sindane* and *Mahlamu* in regards to the import of automatic termination clauses. The dispute came before the Commissioner prior to the decisions of the LAC in *Ensure Security, Piet Wes Civils, Commission for Conciliation, Mediation and Arbitration v Commission Staff Association and Another*(*CCMA v CSA*)[10] and *Khum MK Investments and Bie Joint Venture (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (*Khum*)[11], which have to a large extent, provided some clarity on the lawfulness and validity of automatic termination clauses, and interpretation and the implications of section 198B of the LRA.

[14] Flowing from the interpretation of the wording of section 186(1) of the LRA and the effect of fixed term contracts in *Enforce Security* and other authorities referred to therein[12], the following principles can be gleaned;

14.1 In an endorsement of the decision in *Sindane*, the LAC agreed 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 (e.g., 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 materializes, there would ordinarily be no dismissal[13].

14.2 The common law position that the expiry of the fixed term-contract of employment does not constitute a termination of the contract by any of the parties, and that it constituted an automatic termination of the contract by operation of law, which did not constitute a dismissal, remains intact. This is so in that there is no express or implied intention by the legislature in enacting section 186(1) of the LRA to amend or change the common law position[14].

14.3 The definition of a dismissal flowing from the words “an employer has terminated a contract of employment with or without notice”, requires that there must be an act by the employer that terminates the contract[15].

14.4 In instances where the employees' contracts of employment were fixed-term and linked to a third party contract which defined a set of events such as the completion of a specified task or project, the continued existence of the contracts of employment is depended on the continued existence of the project or task. Thus the termination of the tasks or project (i.e. third party contract), would be a legitimate event that would by agreement, give rise to automatic termination of the employment

contracts.

14.5 In instances where the third party terminated the contract (proximate cause of the termination of the employment contracts), and thus the project or tasks, there would be no direct or indirect act by the employer to cancel the contracts or the subsequent termination of the contracts of employment, unless there is evidence to suggest that cancellation by the third party was a device to rid the employer of the employees, or evidence to suggest that it was a clandestine move by the employer to dismiss the employees[16].

14.6 The mere fact that the provisions of section 189 of the LRA are an option or that there were other available options instead of relying on the automatic termination clause cannot be used to negate the clear terms agreed to by the parties in the fixed-term contract. Thus, the considerations of the fairness or otherwise of a dismissal cannot be used to determine whether an employee has been dismissed[17].

14.7 In regards to lawfulness of the automatic termination clauses, section 5(4) decrees that a provision in any contract, whether entered into before or after the commencement of the LRA, that directly or indirectly contradicts or limits any provision of sections 4, or 5, is invalid, unless the contractual provision is permitted by this LRA.[18]

14.8 The automatic termination clauses are not always invalid and that in making this determination the court must consider whether the clause was intended to circumvent the fair dismissal obligations imposed on an employer by the LRA and the Constitution of the Republic. The relevant considerations, would include the precise wording of the automatic termination clause and the context of the entire agreement; the relationship between the fixed-term event and the purpose of the contract with the client; whether it is left to the client to choose and pick who is to render the services under the service agreement; whether the clause is used to unfairly target a particular employee by either the client or the employer; and whether the event is based on proper economic and commercial considerations. Each case must be decided on its circumstances[19].

[15] Applying the above principles to the facts of this case, and further to the extent that it was submitted on behalf of Bidvest that the facts of this case were on all fours with those in Sindane (which the Commissioner had refused to follow), and further to the extent that the LAC in Ensure Security had equally stated that the facts before it were not dissimilar to those in Sindane[20], the following conclusions ought to be made;

15.1 Clause 2 of the fixed term contract signed by the Employees in this case provides that an employee would be employed in the position of cleaner and based at the contract (Tubatse Chrome). Clause 2 ought to be read together with clause 11, where it also stated that the nature of the Employer's business is contractual with a third party, the Client, and that each Employee's employment by the Employer is directly linked to the duration and conditions of the contract where he/she is located.

15.2 On a proper reading of clauses 2 and 11 of the contracts of employment, it can be accepted that to the extent that the Employees were based at Tubatse Chrome as a result of contractual arrangements between Bidvest and the former, there was as a result of the termination of the client's contract, indeed a termination of the contract of employment upon the happening of a particular event, which constituted an automatic termination of the contract by operation of law, and not a dismissal as the Commissioner had found.

15.3 The Employees' reliance on Piet Wes Civils[21] for the proposition that contract duration linked to the supply of work contracts by clients cannot be construed to equate to the occurrence of a "specified event", "the completion of a specified task or project" or "a fixed date", as contemplated by s198B(1) is however misplaced. In Khum, it was confirmed that as it was held in Enforce Security, where the express provisions of that contract unambiguously provided that the employee's employment with the employer and its duration was "totally dependent on the duration of the Company's contract with the Client/s, the Employee's contract of employment shall automatically terminate, and that it was not correct that the substance of the reason for termination over its form may be decisive, as the issue remained whether the contract permitted for its automatic termination on specified grounds[22].

15.4 Thus, from a reading of clauses 2 and 11 of the fixed term contracts in this case, it ought to be accepted that those contracts were to run until the service contract with Tubatse Chrome was terminated. Furthermore, the termination of the contracts of employment was in line with its express clause 5 which further states that the contracts were for a definite period which terminates automatically upon the client service contract as it pertained to the Employees.

15.5 Thus, the termination of the service contract by Tubatse Chrome was the proximate cause[23] of the termination of the employment contracts, and I did not understand the Employees' case before the Commissioner to have been that there was any act or conduct on the part of Bidvest leading to termination of the contracts, or that Tubatse Chrome terminated the contract with Bidvest for nefarious reasons, or that Bidvest terminated the employment contracts for improper motives. As it was already indicated, the Employees had before the Commissioner, conceded that the termination of the employment contracts arose from the termination of the service contract.

15.6 Furthermore, the circumstances of this case do not suggest that the automatic termination clauses were intended to circumvent the fair dismissal obligations imposed on Bidvest by the LRA contrary to the Commissioner's findings. The precise wording of the automatic termination clause and the context of the entire agreement clearly suggested, as the Employees had conceded before the Commissioner, that the continued employment depended on the existence of the Tubatse Chrome service contract.

15.7 The Commissioner had further found that the automatic termination clauses prevented the Employees from exercising their rights under the LRA contrary to the provisions of section 5 of the LRA, in that the Employees were left with no option for challenging their dismissal. This finding is however not correct in the light of the Commissioner's reliance on the provisions of section 198B of the LRA in concluding that the Employees were entitled to severance payments.

15.8 Under section 198B(1), a 'fixed term contract' means a contract of employment that terminates on the occurrence of a specified event; or the completion of a specified task or project; or a fixed date, other than an employee's normal or agreed retirement age, subject to subsection (3).

15.9 In this case, it has already been concluded that the fixed term contracts terminated upon an occurrence of an event, i.e. the termination of the Tubatse Service contract. In these circumstances, the contracts in question were permissible under the LRA when taking into account the provisions of section 5(4), which as stated in Ensure Security, decrees that a provision in any contract, whether entered into before or after the commencement of the LRA, that directly or indirectly

contradicts or limits any provision of section 4, or section 5 of the LRA, is invalid, unless the contractual provision is permitted by this LRA.

15.10 It follows in the light of the above conclusions that the findings of the Commissioner that there was a dismissal flowing from the automatic termination were incorrect. Equally, the Commissioner committed a material error of law in concluding that the automatic termination clauses were impermissible under the provisions of section 5 of the LRA, as sections 198B (1) and 5(4) permit such clauses.

[16] To the extent that it was found that there was no dismissal flowing from the operation of the automatic termination clauses, ordinarily, the CCMA would have lacked jurisdiction over the matter. However, even if there was no dismissal, there is nothing that prevented the CCMA from assuming jurisdiction over the matter to the extent that the provisions of section 189B of the LRA found application to the facts of the dispute. It would not have made practical sense nor could it have been in the interests of expeditious resolution of disputes for the CCMA to have declined jurisdiction, and for the Employees to have been required to re-refer the dispute in circumstances where the real nature of the dispute was whether the Employees were entitled to payments under section 198B(10) or not.

The provisions of section 198B of the LRA:

[17] The next issue to be determined is whether provisions of section 198B of the LRA found application in this case. The principal purpose of the provisions of section 198B of the LRA was set out in *Piet Wes Civils*[24]. In *Commission for Conciliation, Mediation and Arbitration v Commission Staff Association and Another*(CCMA v CSA)[25] it was held that;

“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.”[26]

[18] Relying on CCMA v CSA, Bidvest had contended that these provisions did not apply to the contracts of employment concluded prior to 1 January 2015,

and that in the present matter, the contracts were concluded prior to that date. This contention is however misplaced in that the LAC had specifically stated that what was clear from the structure of section 198B was that certain of its provisions apply retrospectively, i.e. to all fixed term contracts, including historical contracts, while other of its provisions did not[27]. Section 198B(10) therefore draws a distinction between contracts concluded before 1 January 2015, and those concluded or renewed after that date as can be gleaned from its 198B(10) (a) and (b).

[19] It was submitted on behalf of the Employees that the debates surrounding the applicability of section 198B were laid to rest in *Piet Wes Civils CC*[28], and that in any event any finding by the Commissioner in relation to section 198B of the LRA was of no consequence in the light of the finding that the termination of the contracts constituted a dismissal. The difficulty however with these submissions is that in the light of the conclusions reached above in this judgment, the termination of the fixed term contracts cannot constitute a dismissal.

[20] The Commissioner had however granted ‘severance’ payment on an additional ground, being the provisions of section 198B(10). Incidentally, section 198B(10) does not make any reference to ‘severance’ payment. It merely refers to ‘remuneration’, and there might be a reasoning behind this distinction. The issue however whether the Employees were still entitled to such remuneration severance despite it being found that there was no dismissal consequent upon automatic termination clauses.

[21] In *Enforce Security*, it was held that the mere fact that the automatic termination clauses further provide that ‘such terminations would not constitute a retrenchment but a completion of the contract’ did not render a termination of the contract of employment upon termination of the contract with the client to be something else, and that they merely served to amplify the consequences of the agreed terms. In this regard, the LAC held that the affected employees were free to challenge the termination if it fell within the exclusions in section 5(4) of the LRA, and further that they were at liberty to challenge the termination of their employment in terms of section 186(1)(b) of the LRA.[29] . Thus read in context,

clause 5.2 of the fixed term contracts in this case, which stated that the termination will not be a termination for operational reasons, do not take away the Employees' rights to pursue any dispute arising from the terminations.

[22] Equally so, to the extent that the employees sought severance packages within the context of section 189 of the LRA, it is open to them to pursue any relief in that regard in accordance with those provisions read together with section 191 of the LRA. Similarly, any reliance on an entitlement to severance packages under section 41 of the BCEA would imply that it has to be first established that the terminations were as a result of the employer's operational requirements.

[23] There appears to be confusion surrounding the effect of the provisions of section 198B(10) of the LRA as against the purpose of section 41 of the BCEA. In my view, the entitlement to any remuneration under section 198B(10) of the LRA is self-standing and a completely separate and unrelated issue to an entitlement of a severance pay under section 41(2) of the BCEA or any relief arising from the provisions of section 189 of the LRA.

[24] Even though employees who qualify under section 198B(10) of the LRA would be entitled to 'remuneration', akin to a severance

payment contemplated in section 41(2) of the BCEA, it is my view that the two payments are not one and the same thing. Payment of a severance package under the latter provisions are predicated on the provisions of section 41(1) of the BCEA which defines 'operational requirements', and it is clear from the provisions of section 41(2) of the BCEA that any severance payment is due as a consequence of a 'dismissal'

for reasons based on the employer's operational requirements (or where the contract is terminated in terms of the provisions of section 38 of the Insolvency Act[30]).

[25] A payment of remuneration under section 198B(10) of the LRA on the other hand, is specific to employees under fixed term contracts contemplated under subsection (4)(d) for a period exceeding 24 months. It would not have made sense to treat remuneration under section 198B(10) of the LRA the same as severance pay in section 41(2) of the BCEA, when automatic termination clauses are recognised as valid and lawful under section 198B(1) of the LRA, and not constituting a dismissal for the purposes of section 186 of the LRA. A dismissal under section 186 is defined to include a termination of a contract of employment for reasons based on operational requirements. To reiterate, where an automatic termination clause is found not to have led to a dismissal, there cannot be any entitlement of a severance payment under the provisions of section 189 of the LRA read with section 41(2) of the BCEA, unless those provisions are relied upon in a separate cause of action.

[26] Effectively, remuneration made under section 198B(10) of the LRA is in my view, part and parcel of the grant scheme and purpose of those provisions, which seeks to protect vulnerable employees from abuse and exploitation by unscrupulous employers when automatic termination clauses take effect. Such remuneration is meant to inter alia,

recognise the service of those employees as a form of gratuity, to cushion the blow of a loss of a job consequent upon an occurrence of an event contemplated in section 189B(1) of the LRA, and are also a form of social security mechanism intended to aid workers whose services were terminated due to no fault of their own, albeit that termination was always anticipated.

- [27] The remuneration is effectively due and payable by operation of the provisions of section 198B(10) (provided the conditions are met) and is not subject to negotiations, unless there is a collective agreement regulating such matters at the workplace. It is further independent and distinct from severance payments payable under the provisions of section 189 of the LRA read with section 41(2) of the BCEA, or any other payments that may be made due under the provisions of sections 193 (1)(c) and 194 of the LRA.
- [28] In this case therefore, where it was found that there was no dismissal flowing from the automatic termination clauses, and to the extent that all of the Employees' contracts commenced before 1 January 2015 as can be gleaned from Annexure 'A3'[31] and the Commissioner's award, it can be accepted that the provisions of section 198B(10)(b) would find application. Even then, and as stated in *CCMA v CSA*, the employer in such historical contract is only obliged to pay the employees under the contract, the remuneration contemplated in paragraph (a) for the period worked after 1 January 2015, and not for the period worked before that date[32]. Furthermore, any payment can only be due to employees who were employed in terms of a fixed term contract for a reason contemplated in subsection (4)(d) for a period exceeding 24 months. Subsection (4)(d) provides that the conclusion of a fixed term contract will be justified if the employee is employed to work exclusively on a specific project that has a limited or defined duration.
- [29] The facts of this case have established that the Employees had serviced the Tubatse Chrome contract for longer than 24 months and that they earned below the prescribed earnings threshold contemplated in section 198B(2)(a) of the LRA. Furthermore, the prohibitions for entitlement to payment under section 198B(11) of the LRA do not apply in that the Employees were at no stage offered alternative employment nor did Bidvest procure employment for them with a different employer, which had commence at the expiry of the contract and on the same or similar terms.
- [30] In the award, although the Commissioner also relied on the provisions of section 198B(10) in awarding severance payment, it would appear that no consideration was had to the provisions of section 198B(10)(b) in that from the table of payments to be made[33], it is apparent that any calculation in that regard took into account the entire period of service until termination, rather than from 1 January 2015 when those provisions took effect.

[31] It follows further therefore that even though the Commissioner correctly found that payments were due to the Employees under section 198B(10) of the LRA, ultimately, the quantum arrived at in respect of those payments was incorrect as a result of a misreading of section 198B(10) (a) and (b), and thus ought to be set aside.

[32] I have had regard to the requirements of law and fairness in regards to an award of costs. The issues raised in this application were indeed of importance in the light of the uncertainties that continue to prevail in regards to the impact and consequences flowing from automatic termination clauses since 1 January 2015 with the amendments to the LRA, and despite several LAC decisions on the matter. There is therefore clearly no basis for any award of costs to be made.

[33] Accordingly, the following order is made;

Order:

1. The arbitration award issued by the First Respondent is reviewed and set aside to the extent that it was found that the Third Respondent (Employees) were dismissed by the Applicant, and further to the extent that it was found the dismissals were for operational requirements under the provisions of section 189 of the Labour Relations Act.
2. Orders 6.1 and 6.2 of the arbitration award are substituted with an order that the terminations of the Employees' fixed term contract did not constitute a dismissal.
3. The matter is remitted to the Second Respondent for consideration by the First Respondent, of the amounts of payments due to the Employees under the provisions of section 189B(10) of the Labour Relations Act. Such amounts should be corrected and calculated from 1 January 2015 until 30 April 2016 being the date of the termination of the Employees' fixed term contracts of employment.
4. There is no order as to costs.

Edwin Tlhotlhamajje

Judge of the Labour Court of South Africa

Representation:

For the Applicant: Moodie & Robertson Attorneys.

Heads of argument drafted by Adv G.A Fourie

For the Third Respondent: Larry Dave Incorporated Attorneys.

Heads of argument drafted by Robyn Acar

[1] Act 75 of 1997, as amended

[2] Act 66 of 1995, as amended

[3] [2009] 12 BLLR 1249 (LC)

[4] 198B. Fixed term contracts with employees earning below earnings threshold (1) For the purpose of this section, a 'fixed term contract' means a contract of employment that terminates on- (a) the occurrence of a specified event; (b) the completion of a specified task or project; or (c) a fixed date, other than an employee's normal or agreed retirement age, subject to subsection (3). (2) This section does not apply to- (a) employees earning in excess of the threshold prescribed by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act; (b) an employer that employs less than 10 employees, or that employs less than 50 employees and whose business has been in operation for less than two years, unless- (i) the employer conducts more than one business; or (ii) the business was formed by the division or dissolution for any reason of an existing business; and (c) an employee employed in terms of a fixed term contract which is permitted by any statute, sectoral determination or collective agreement. (3) An employer may employ an employee on a fixed term contract or successive fixed term contracts for longer than three months of employment only if- (a) the nature of the work for which the employee is employed is of a limited or definite duration; or (b) the employer can demonstrate any other justifiable reason for fixing the term of the contract. (4) Without limiting the generality of subsection (3), the conclusion of a fixed term contract will be justified if the employee- (a) is replacing another employee who is temporarily absent from work; (b) is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months; (c) is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession; (d) is employed to work exclusively on a specific project that has a limited or defined duration; (e) is a non-citizen who has been granted a work permit for a defined period; (f) is employed to perform seasonal work; (g) is employed for the purpose of an official public works scheme or similar public job creation scheme; (h) is employed in a position which is funded by an external source for a limited period; or (i) has reached the normal or agreed retirement age applicable in the employer's business. (5) Employment in terms of a fixed term contract concluded or renewed in contravention of subsection (3) is deemed to be of indefinite duration. (6) An offer to employ an employee on a fixed term contract or to renew or extend a fixed term contract, must—

(a) be in writing; and

(b) state the reasons contemplated in subsection (3)(a) or (b). (7) If it is relevant in any proceedings, an employer must prove that there was a justifiable reason for fixing the term of the contract as contemplated in subsection (3) and that the term was agreed. (8) (a) An employee employed in terms of a fixed term contract for longer

than three months must not be treated less favourably than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment. (b) Paragraph (a) applies, three months after the commencement of the Labour Relations Amendment Act, 2014, to fixed term contracts of employment entered into before the commencement of the Labour Relations Amendment Act, 2014. (9) As from the commencement of the Labour Relations Amendment Act, 2014, an employer must provide an employee employed in terms of a fixed term contract and an employee employed on a permanent basis with equal access to opportunities to apply for vacancies. (10) (a) An employer who employs an employee in terms of a fixed term contract for a reason contemplated in subsection (4)(d) for a period exceeding 24 months must, subject to the terms of any applicable

collective agreement, pay the employee on expiry of the contract one week's remuneration for each completed year of the contract

calculated in accordance with section 35 of the Basic Conditions of Employment Act. (b) An employee employed in terms of a fixed-term contract, as contemplated in paragraph (a), before the commencement of the Labour Relations Amendment Act, 2014, is entitled to the remuneration contemplated in paragraph (a) in respect of any period worked after the commencement of the said Act. (11) An employee is not entitled to payment in terms of subsection (10) if, prior to the expiry of the fixed term contract, the employer offers the employee employment or procures employment for the employee with a different employer, which commences at the expiry of the contract and on the same or similar terms.

[4] 198B. Fixed term contracts with employees earning below earnings threshold

(1) For the purpose of this section, a 'fixed term contract' means a contract of employment that terminates on-

- (a) the occurrence of a specified event;
- (b) the completion of a specified task or project; or
- (c) a fixed date, other than an employee's normal or agreed retirement age, subject to subsection (3).

(2) This section does not apply to-

- (a) employees earning in excess of the threshold prescribed by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act;
- (b) an employer that employs less than 10 employees, or that employs less than 50 employees and whose business has been in operation for less than two years, unless-
 - (i) the employer conducts more than one business; or
 - (ii) the business was formed by the division or dissolution for any reason of an existing business; and

- (c) an employee employed in terms of a fixed term contract which is permitted by any statute, sectoral determination or collective agreement.
- (3) An employer may employ an employee on a fixed term contract or successive fixed term contracts for longer than three months of employment only if-
 - (a) the nature of the work for which the employee is employed is of a limited or definite duration; or
 - (b) the employer can demonstrate any other justifiable reason for fixing the term of the contract.
- (4) Without limiting the generality of subsection (3), the conclusion of a fixed term contract will be justified if the employee-
 - (a) is replacing another employee who is temporarily absent from work;
 - (b) is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months;
 - (c) is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession;
 - (d) is employed to work exclusively on a specific project that has a limited or defined duration;
 - (e) is a non-citizen who has been granted a work permit for a defined period;
 - (f) is employed to perform seasonal work;
 - (g) is employed for the purpose of an official public works scheme or similar public job creation scheme;
 - (h) is employed in a position which is funded by an external source for a limited period; or
 - (i) has reached the normal or agreed retirement age applicable in the employer's business.
- (5) Employment in terms of a fixed term contract concluded or renewed in contravention of subsection (3) is deemed to be of indefinite duration.
- (6) An offer to employ an employee on a fixed term contract or to renew or extend a fixed term contract, must—
 - (a) be in writing; and
 - (b) state the reasons contemplated in subsection (3)(a) or (b).
- (7) If it is relevant in any proceedings, an employer must prove that there was a justifiable reason for fixing the term of the contract as contemplated in subsection (3) and that the term was agreed.
- (8)

- (a) An employee employed in terms of a fixed term contract for longer than three months must not be treated less favourably than an employee employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment.
- (b) Paragraph (a) applies, three months after the commencement of the Labour Relations Amendment Act, 2014, to fixed term contracts of employment entered into before the commencement of the Labour Relations Amendment Act, 2014.
- (9) As from the commencement of the Labour Relations Amendment Act, 2014, an employer must provide an employee employed in terms of a fixed term contract and an employee employed on a permanent basis with equal access to opportunities to apply for vacancies.

(10)

- (a) An employer who employs an employee in terms of a fixed term contract for a reason contemplated in subsection (4)(d) for a period exceeding 24 months must, subject to the terms of any applicable

collective agreement, pay the employee on expiry of the contract one week's remuneration for each completed year of the contract

calculated in accordance with section 35 of the Basic Conditions of Employment Act.

- (b) An employee employed in terms of a fixed-term contract, as contemplated in paragraph (a), before the commencement of the Labour Relations Amendment Act, 2014, is entitled to the remuneration contemplated in paragraph (a) in respect of any period worked after the commencement of the said Act.
- (11) An employee is not entitled to payment in terms of subsection (10) if, prior to the expiry of the fixed term contract, the employer offers the employee employment or procures employment for the employee with a different employer, which commences at the expiry of the contract and on the same or similar terms.

[5] [2011] 4 BLLR 381 (LC)

[6] [2009] 12 BLLR 1249 (LC)

[7] Piet Wes Civils CC and Another v Association of Mineworkers and Construction Union (AMCU) and Others (JA37/2017)

[2018] ZALAC 18; [2018] 12 BLLR 1164 (LAC); (2019) 40 ILJ 130 (LAC), where it was held; “[25] A contract duration linked to the supply of work contracts by clients cannot be construed to equate to the occurrence of a “specified event”, “the completion of a specified task or project” or “a fixed date”, as contemplated by s198B(1). This is so in that a “specified event”, “the completion of a specified task or project” or a “fixed date” does not constitute a possibility that future contracts may not be supplied in future by an employer’s clients.

This remains a possibility and nothing more than that. It is by no means a specified event which in future will arise, nor is it related to the completion of a task or project or a fixed date, but is an operational risk which may occur, one under which the business operates.

[26] The purpose of s 198B is to provide security of employment, except in circumstances where a fixed term or limited duration contract is clearly justified. The Labour Court was correct in finding that to place a construction of the words “specified event” on the cancellation of the Exxaro contract went beyond the intention of the legislature. From a plain reading of the contract that was concluded between the appellants and certain of the employees, no limited duration or fixed term can be read into what was clearly, from its terms, an unlimited duration employment contract entered into between the parties.”

- [7] Piet Wes Civils CC and Another v Association of Mineworkers and Construction Union (AMCU) and Others (JA37/2017)

[2018] ZALAC 18; [2018] 12 BLLR 1164 (LAC); (2019) 40 ILJ 130 (LAC), where it was held;

“[25] A contract duration linked to the supply of work contracts by clients cannot be construed to equate to the occurrence of a “specified event”, “the completion of a specified task or project” or “a fixed date”, as contemplated by s198B(1). This is so in that a “specified event”, “the completion of a specified task or project” or a “fixed date” does not constitute a possibility that future contracts may not be supplied in future by an employer’s clients. This remains a possibility and nothing more than that. It is by no means a specified event which in future will arise, nor is it related to the completion of a task or project or a fixed date, but is an operational risk which may occur, one under which the business operates.

- [26] The purpose of s 198B is to provide security of employment, except in circumstances where a fixed term or limited duration contract is clearly justified. The Labour Court was correct in finding that to place a construction of the words “specified event” on the cancellation of the Exxaro contract went beyond the intention of the legislature. From a plain reading of the contract that was concluded between the appellants and certain of the employees, no limited duration or fixed term can be read into what was clearly, from its terms, an unlimited duration employment contract entered into between the parties.”

- [8] Meaning of dismissal and unfair labour practice (1) "Dismissal" means that- (a) an employer has terminated a contract of employment with or without notice; (b) an employee reasonably expected the employer 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; (c) an employer refused to allow an employee to resume work after she- (i) took maternity leave in terms of any law, collective agreement or her contract of employment; or (ii) was absent from work for up to four weeks before the expected date, and up to eight weeks after the actual date, of the birth of her child; (d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or (e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee. (f) an employee terminated a contract of employment with or

without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.

[8] Meaning of dismissal and unfair labour practice

(1) "Dismissal" means that-

- (a) an employer has terminated a contract of employment with or without notice;
- (b) an employee reasonably expected the employer 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;
- (c) an employer refused to allow an employee to resume work after she-
 - (i) took maternity leave in terms of any law, collective agreement or her contract of employment; or
 - (ii) was absent from work for up to four weeks before the expected date, and up to eight weeks after the actual date, of the birth of her child;
- (d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or
- (e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.
- (f) an employee terminated a contract of employment with or without notice because the new employer, after a transfer in terms of section 197 or section 197A, provided the employee with conditions or circumstances at work that are substantially less favourable to the employee than those provided by the old employer.

[9] (DA24/15)

[2017] ZALAC 9; (2017) 38 ILJ 1041 (LAC); [2017] 8 BLLR 745 (LAC), where it was held; “[16] The question whether there has been a dismissal goes to the jurisdiction of the CCMA and the Labour Court to entertain the parties’ dispute. A finding that there was no dismissal means that the CCMA and subsequently the Labour Court did not have jurisdiction to entertain the dispute. Such a finding as a matter of fact, has to be a correct finding. It cannot be a finding that falls within a band of reasonable findings since there can only be one correct finding. To the extent that the court a quo found that the award stands to be reviewed and set aside as a decision which no reasonable decision maker could have reached it misdirected itself because it applied a wrong test to review the award of the commissioner.”

[9] (DA24/15)

[2017] ZALAC 9; (2017) 38 ILJ 1041 (LAC); [2017] 8 BLLR 745 (LAC), where it was held;

“[16] The question whether there has been a dismissal goes to the jurisdiction of the CCMA and the Labour Court to entertain the parties’ dispute. A finding that there was no dismissal means that the CCMA and subsequently the Labour Court did not have jurisdiction to entertain the dispute. Such a finding as a matter of fact, has to be a correct finding. It cannot be a finding that falls within a band of reasonable findings since there can only be one correct finding. To the extent that the court a quo found that the award stands to be reviewed and set aside as a decision which no reasonable decision maker could have reached it misdirected itself because it applied a wrong test to review the award of the commissioner.”

[10] JA110/2018)

[2019] ZALAC 69; [2020] 1 BLLR 9 (LAC); (2020) 41 ILJ 145 (LAC)

[11] (JA52/2018)

[2020] ZALAC 1; [2020] 4 BLLR 362 (LAC); (2020) 41 ILJ 1129 (LAC)

[12] South African Post Office v Mampeule [2010] BLLR 1052 (LAC); South African Post Office v Mampeule [2009] 8 BLLR 792 (LC); Mahlamu v CCMA & others (2011) 4 BLLR 381 (LC); Sindane v Prestige Cleaning Services (2010) 31 ILJ 733 (LC)

[13] At para 18. See also at paras 34 – 34 where it was held; “Sindane v Prestige Cleaning Services [supra]

[34] The facts in this case are closer to the facts in the matter under consideration. The court considered whether the applicant, formerly employed as a cleaner by the respondent in terms of a “fixed-term eventuality contract of employment had been dismissed within the meaning of section 186(1) (a) of the LRA. The employee’s contract of employment had been terminated as a result of the client downsizing its contract with the employer brokers, by cancelling a contract in terms of which an extra cleaner had been provided to them. The contract stipulated that, upon termination of the broker’s contract with the client to whom the employee rendered services, the employee’s employment contract with the employer broker would

automatically terminate. [35] The Respondent employer argued that there was no dismissal as his contract of employment was terminated when the cleaning contract with the client Menlyn Piazza was reduced. In reaching its decision, the Labour Court considered the finding of the Labour Court in SA Post Office which considered the automatic termination of an employment contract as a result of an act of a third party. The court then distinguished the finding of the court in SA Post Office to that of the case at hand. It found that in SA Post Office, the termination was based on the employer’s decision to remove the employee from the Board of directors following allegations of misconduct. In such instances, the court held, because the employee was suspended for alleged misconduct and the termination was misconduct related, fairness dictates and in light of the audi alteram partem rule that he ought to have been given an opportunity to dispute the fairness of his termination. The Labour Court was satisfied that the applicant had not

been dismissed as the termination of his employment contract was triggered by the termination of the employer's contract with its client. The court relied on the wording of section 186 of the LRA which defines dismissal as the termination of the contract of employment "by the employer". In finding that the contract terminated as a result of a specified event as opposed to an overt act on the part of the employer, the Labour Court was satisfied that the termination did not fall within the ambit of section 186. This conclusion by the Labour Court can, in my view, not be faulted."

[13] At para 18. See also at paras 34 – 34 where it was held;

"Sindane v Prestige Cleaning Services [supra]

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[14] At para 20

- [15] At para 21. See also Khum MK Investments and Bie Joint Venture (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (JA52/2018)
- [2020] ZALAC 1; [2020] 4 BLLR 362 (LAC); (2020) 41 ILJ 1129 (LAC) at para 12
- [16] At para 23
- [17] At para 24
- [18] At para 25
- [19] At para 41
- [20] At para 34
- [21] See fn 7 above
- [22] See Khum at fn 4
- [23] See SATAWU obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd 2015 36 ILJ 1923 (LC) at para 30, where it was held; "...[t]o the extent that this termination is triggered by the "occurrence of an event" and is not based on an employer's own decision, there is no dismissal and the employee is not entitled to a hearing..." And at para 33 where it was held; "...[t]his proximate cause theory, as I understand, holds that the act that directly or indirectly actuates termination, is the one determining whether or not there was a dismissal. An act by a third party, as for instance a decision by the Vice Principal of Wits, terminating a service level contract with the labour broker, cannot be a proximate cause, and therefore cannot result in a dismissal of the employee of the labour broker."
- [23] See SATAWU obo Dube v Fidelity Supercare Cleaning Services Group (Pty) Ltd 2015 36 ILJ 1923 (LC) at para 30, where it was held;
- "...[t]o the extent that this termination is triggered by the "occurrence of an event" and is not based on an employer's own decision, there is no dismissal and the employee is not entitled to a hearing..."*
- And at para 33 where it was held;
- "...[t]his proximate cause theory, as I understand, holds that the act that directly or indirectly actuates termination, is the one determining whether or not there was a dismissal. An act by a third party, as for instance a decision by the Vice Principal of Wits, terminating a service level contract with the labour broker, cannot be a proximate cause, and therefore cannot result in a dismissal of the employee of the labour broker."*
- [24] At para 26. See also useful summary of the rationale behind the provisions of section 198B of the LRA in Geldenhuys J "The Effect of Changing Public Policy on the Automatic Termination of Fixed- Term Employment Contracts in South Africa" PER / PELJ 2017(20) - DOI at pages 40 - 41
- [25] JA110/2018)

[2019] ZALAC 69; [2020] 1 BLLR 9 (LAC); (2020) 41 ILJ 145 (LAC)

[26] At para 40

[27] At para 34

[28] *supra*

[29] At para 42

[30] Act 24 of 1936

[31] Index to Review Application: Volume 2

[32] At para 32

[33] Pages 23 – 25 of the Updated Index to Review Application: Vol 1

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