IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA37/2017

In the matter between:

PIET WES CIVILS CC	**First Appellant**
WATERKLOOF SKOONMAAKDIENSTE CC	**Second Appellant**

and

ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION (AMCU)	**First Respondent**
MEMBERS OF AMCU	**Second to Further Respondents**

Heard: **28 March 2018**

Delivered: **10 March 2018**

Summary: Urgent application in terms of s 189A(13) of the LRA granted by the Labour Court. Respondent employees reinstated pending proper consultation by appellant on their dismissals for operational requirements. On appeal, appellants contended that employees not dismissed for operational requirements but employed on limited duration employment contracts. Having regard to s198B, contracts found unlimited in duration. Order of Labour Court upheld. Appeal dismissed with costs.

Coram: Phatshoane ADJP, Musi JA and Savage AJA

JUDGMENT

SAVAGE AJA:

Introduction

[1] This appeal, with the leave of the Court *a quo*, is against the judgment and order of the Labour Court (Steenkamp J) in which the appellants, Piet Wes Civils CC (Piet Wes) and Waterkloof Skoonmaakdienste CC (Waterkloof), were ordered in terms of s 189A(13) to reinstate the respondent employees until a fair procedure had been complied with as contemplated by s 189 of the Labour Relations Act, 66 of 1995 (LRA). The dispute involving eighteen respondents, all employees of Piet Wes, was referred for the hearing of oral evidence.

[2] The first respondent, the Association of Mineworkers and Construction Union (AMCU), on behalf of the respondent employees, sought urgent relief in the Labour Court on 2 December 2016, in two applications brought in terms of s 189A(13), against the two appellant close corporations, Piet Wes and Waterkloof, respectively. The applications were subsequently consolidated for hearing before the Labour Court. The respondents sought that the appellants be directed in terms of s 189A(13)(c) to reinstate the employees pending compliance by the appellants with s189A; and that the appellants be interdicted from retrenching the employees until a fair procedure has been complied with. In the alternative, payment of twelve months' compensation in terms of s189A(13)(d) was sought.

Background

Piet Wes

[3] Piet Wes entered into four agreements with Exxaro Coal (Pty) Ltd, trading as Grootegeluk Mine (Exxaro), on 10 November 2003, 2 September 2013, 17

June 2014 and 30 September 2014 for the provision of certain services to Exxaro, including the management and distribution of magnetite, the movement of coal, an internal delivery service and the cleaning of plants. In order to provide these services, Piet Wes employed a number of employees, including the second to further respondents.

[4] In dispute between the parties is whether the contracts of employment entered into by Piet Wes with the respondents were to subsist for a limited duration, or for a fixed term, or whether the contracts were of an unlimited duration. Only certain employees signed the written contract. The remaining employees were employed by way of verbal agreement, the terms of which, according to Piet Wes, were the same as those of the written employment contract.

[5] The written employment contract contained the following clause:

> '…2. DURATION OF AGREEMENT:
>
> The duration of the agreement is subject to the following terms and conditions:-
>
> - As long as the EMPLOYER is supplied with work contracts by his clients. The EMPLOYER has no alternative employment at his disposal for the EMPLOYEE should the work contract with his client expire;
>
> - NO EMPLOYEE OF PIET WES MAY CROSS OVER TO ANOTHER CONTRACTOR WITHIN EXXARO OR BE INVITED FOR AN INTERVIEW UNLESS OUTSIDE THE SCOPE OF WORK. SHOULD AN EMPLOYEE OF PIET WES BE FOUND GUILTY THEREOF, A PLACEMENT FEE WILL BE CHARGED;
>
> - In the event of the employee resigning from Piet Wes Civils or are dismissed for valid reasons within 24 months from first date of employment, the cost of medical competency certificate will be deducted from the employee's last remuneration;
>
> - …In the event that the EMPLOYER'S operational needs change…'.

[6] During August 2016, Exxaro gave one month's notice of cancellation of one agreement to Piet Wes. Piet Wes gave one month's notice of the termination of the contracts to 43 of its employees. In dispute between the parties was whether the contracts of employment of 18 of these employees were terminated at the end of August 2016 or the beginning of September 2016, as was contended by Piet Wes, or on 11 November 2016 with the remainder of the 43 employees. While AMCU stated that employees dismissed in August 2016 were recalled to work, this was denied by Piet Wes.

[7] Following notice of termination of their employment contracts, an unfair dismissal dispute was lodged by the respondents with the Commission for Conciliation Mediation and Arbitration (CCMA), the determination of which remained pending at the time that the urgent application was heard by the Labour Court. On 6 December 2016, a tender of payment of one week's salary to each employee who had been employed for a period in excess of 24 months as contemplated by s198B(10)(a) was made by Piet Wes.

[8] The respondents took the view that the termination of the respondents' contracts of employment was in breach of s198B in that the contracts were entered into for an unlimited duration; and that their dismissals for reason of operational requirements had not complied with a fair procedure. This led the respondents to approach the Labour Court for urgent relief in terms of s189A(13).

Waterkloof

[9] Waterkloof entered into an agreement with Exxaro for cleaning services, as a result of which it employed 104 respondent employees. As was the case with Piet Wes, not all employees signed a written contract of employment, with some employees employed in terms of an oral agreement. For those who did sign a contract, its duration was recorded as follows:

> '…2. DURATION OF AGREEMENT:
>
> The duration of the agreement is subject to the following terms and conditions:-

- As long as the EMPLOYER is supplied with the same work contracts by his clients. The EMPLOYER has no alternative employment at his disposal for the EMPLOYEE should the work contract with his client expire;

- NO EMPLOYEE OF WATERKLOOF MAY CROSS OVER TO ANOTHER CONTRACTOR WITHIN EXXARO OR BE INVITED FOR AN INTERVIEW UNLESS OUTSIDE THE SCOPE OF WORK. SHOULD AN EMPLOYEE OF WATERKLOOF SERVICES BE FOUND GUILTY THEREOF, A PLACEMENT FEE WILL BE CHARGED;

- In the event of the employee resigning from Waterkloof Dienste or are dismissed for valid reasons within 24 months from first date of employment, the cost of medical competency certificate will be deducted from the employee's last remuneration;

- In the event that the EMPLOYER'S operational needs change'.

[10] On 11 November 2016, Exxaro notified Waterkloof in writing of the termination of the employment contract on one month's notice. Waterkloof employees were on strike at the time and, at a meeting, non-striking employees were informed of the termination of their employment contracts. On 28 November 2016, AMCU's attorneys were informed that the employment contracts of 104 employees had been terminated and that no s189A process would be embarked upon given that the employees "*were all employed on limited duration contracts which were linked to the supply of work*" by the clients of Waterkloof. Payment of one week's salary for each completed year of service was tendered to those employees who had been employed for more than 24 months.

[11] Aggrieved with the dismissals, the respondents sought urgent relief in the Labour Court, contending that the contracts of employment did not accord with s198B, that they were indefinite in duration and that the provisions of s189A had not been complied with.

Relevant statutory provisions

[12] Section 189A applies to dismissals based on operational requirements by employers with more than 50 employees. S189A(13) provides that:

> 'If an employer does not comply with a fair procedure, a consulting party may approach the Labour Court by way of an application for an order—
>
> (a) compelling the employer to comply with a fair procedure;
>
> (b) interdicting or restraining the employer from dismissing an employee prior to complying with a fair procedure;
>
> (c) directing the employer to reinstate an employee until it has complied with a fair procedure;
>
> (d) make an award of compensation, if an order in terms of paragraphs (*a*) to (*c*) is not appropriate.'

[13] Section 198B[1] applies to fixed-term contracts in which employees earn below a prescribed earnings threshold.[2] It applies neither to employees earning above the threshold, nor to employers who employ less than 10 employees (or less than 50 employees subject to certain conditions).[3] Section 198B(1) states that for purposes of s198B –

> '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).'

[14] In terms of s198B(3):

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[1] Inserted into the LRA by s 38 of Labour Relations Amendment Act 6 of 2014. The provision became operative on 1 January 2015 in terms of GG 38317 (19 December 2014).

[2] Currently R205 433 per annum as prescribed by the Minister in terms of section 6 (3) of the Basic Conditions of Employment Act 105 of 1997 (as amended).

[3] Subject to s198B(2), when the 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'.

[15] Section 198B(4) provides that:

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

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

[16] In terms of s 198B(5), a fixed term contract which has been "*concluded or renewed in contravention of subsection (3) is deemed to be of indefinite duration*". S198B (6) requires that "(a)*n 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)*".

[17] Section 198B(7) provides that "(i)*f 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*".

[18] In terms of s 198B(10)(a) –

'(*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.'

[19] Section 198B(11) provides that an employee is not entitled to payment in terms of ss 198B(10) if the employer offered or procured employment for the employee with a different employer, which commences on expiry of the contract and is on the same of similar terms.

Submissions on appeal

[20] It was submitted for the appellants on appeal that the employment contracts entered into with the employees were for a limited duration linked to the completion of the tasks for which the appellants had been contracted by Exxaro to undertake and were therefore subject to, and determined by, the subsistence of agreements with Exxaro. The employment contracts, it was argued, were neither unlawful or invalid and it was a clear term that they would end on the termination of the agreement with Exxaro. This was so even though they were clumsily drafted. Since proof was provided to the respondents that Exxaro terminated the contracts entered into between it and the appellants, and the employment contracts were not constructed so as to circumvent the provisions of the LRA, it was argued that the Labour Court had erred in concluding that the contracts with the respondents were not intended to endure for a limited duration or terminate on completion of a specified event, task or project, as contemplated in s 198B(1). A legitimate reason existed to fix the term of the contracts as contemplated in s 198B(3)(b), and the appellants were not the proximate cause for the legitimate termination of the contracts. It followed therefore that the respondents were not dismissed and that they were therefore not entitled to reinstatement or to the relief envisaged in s189A(13). The appellants accordingly seek that the appeal be upheld with costs and that the order of the Labour Court be set aside and replaced with an order dismissing the consolidated applications in terms of s189A(13).

[21] The respondents opposed the appeal on the basis that the employment contracts were not valid and enforceable limited duration contracts but indefinite duration contracts in terms of s198B(5). The appellants were therefore not entitled to terminate such contracts in terms of an automatic termination clause, when such a clause was intended to circumvent the fair dismissal obligations imposed on the appellants by the LRA and Constitution of the Republic of South Africa, 1996. Since no justifiable reason was shown to exist for fixing the term of the contracts, it was submitted that the Labour Court properly ordered the reinstatement of the employees. Consequently, it was submitted that the appeal should be dismissed with costs.

Discussion

[22] In *Enforce Security Group v Fikile and Others (Enforce),* [4] this Court had regard to fixed term employment contracts which had been entered into prior to s 198B having been brought into operation on 1 January 2015. In the current matter, s 198B finds application.

[23] An offer to employ an employee on a fixed term contract, or to renew or extent that contract must, in terms of s198B(6) be in writing; with a fixed term contract, in terms of s198B(1), required to state expressly that it is to terminate on the occurrence of a specified event, on the completion of a specified task or project or a fixed date, subject to s198B(3). The requirement that a written offer of employment is made to an employee is for compelling reason in that it seeks to prevent any later dispute arising as to the terms, scope or duration of the fixed term or limited duration contract entered into. 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 s198B(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 s198B had been complied

[4] (2017) 38 ILJ 1041 (LAC); [2017] 8 BLLR 745 (LAC) (25 January 2017).

with. Consequently, those employees were not employed on the basis of a limited duration contract but rather for an unlimited duration.

[24] Turning to the employees with whom the appellants state that a written employment contract was entered into, the duration of that contract was made subject to the "supply of work contracts" by Piet Wes' clients, and the supply of the "same work contracts" by Waterkloof's clients.

[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 is clearly, from its terms, an unlimited duration employment contract entered into between the parties.

[27] 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 s189A(13), which, as

was stated by the Constitutional Court, in *Steenkamp v Edcon Ltd,*[5] grants "*special protection for the rights of employees…to protect the integrity of the procedural requirements of dismissals governed by section 189A*".[6]

[28] The Labour Court correctly stated that, after Exxaro terminated its contracts with the appellants, there may exist "*justifiable and fair reason for dismissing the employees for operational requirements*" but that that issue would only be capable of being ascertained through a proper consultation process as contemplated in s 189 and s 189A. I agree. It follows for these reasons, that the Labour Correct was correct in granting the relief sought by the respondents in terms of s189A(13) and in reinstating the respondent employees to enable the appellants to follow a fair pre-dismissal procedure in accordance with s189A.

[29] Given the dispute of fact which arose on the papers as to whether the contracts of employment of 18 of 43 affected Piet Wes employees had been terminated at the end of August 2016 or the beginning of September 2016, as was contended by the appellants, or on 11 November 2016, as is contended by the respondents, the Labour Court properly referred that dispute to the hearing of oral evidence.

[30] It follows for these reasons that there is no merit in the appeal, which cannot succeed. Having regard to considerations of law and fairness, there is no reason as to why the costs of this appeal should not follow the result. Costs were not granted in the Labour Court and there is no reason to interfere with that order.

Order

[31] For these reasons, the following order is made:

1. The appeal is dismissed with costs.

[5] (2016) 37 *ILJ* 564 (CC); 2016 (3) BCLR 311 (CC); [2016] 4 BLLR 335 (CC); 2016 (3) SA 251 (CC) paras 161-164.
[6] At para 163.

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Savage AJA

Phatshoane ADJP and Musi JA agree.

APPEARANCES:

FOR THE APPELLANTS: E J Steenkamp

Instructed by Cavanagh & Richards Attorneys

FOR THE RESPONDENTS: A L Cook

Instructed by Larry Dave Attorneys