Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 2834/16

J 2845/16

In the matter between:

AMCU **First applicant**

AMCU MEMBERS **Second and further applicants**

and

PIET WES CIVILS CC **Respondent (in J 2834/16)**

WATERKLOOF SKOONMAAKDIENSTE CC **Respondent (in J 2845/16)**

Heard: 14 December 2016

Delivered: 13 January 2017

Summary: Urgent application in terms of LRA s 189A(13) – application to reinstate employees pending proper consultation over dismissals for operational requirements. Respondents say that employees were not dismissed for operational requirements but fixed term contracts terminated by operation of law. LRA s 198B considered. Employees reinstated until employers comply with fair procedure.

JUDGMENT

STEENKAMP J

Introduction

[1] This is an urgent application in terms of s 189A(13) of the LRA.[1] The second and further applicants are members of the first applicant, the Association of Mineworkers and Construction Union (AMCU). They were employed by the respondents, Piet Wes Civils cc and Waterkloof Skoonmaakdienste cc respectively. They say they have been dismissed for operational requirements; that it was a large scale retrenchment contemplated by s 189A of the LRA; and that there was no consultation. They seek reinstatement pending a proper consultation process in terms of s 189A(13). The respondents say that the workers were not dismissed, for operational requirements or at all. They were employed on fixed term contracts; the contracts expired; and their contracts of employment terminated by operation of law.

Background facts

[2] AMCU initially brought two separate applications against Piet Wes and Waterkloof, the two respective employers. They have been consolidated. Where it is necessary to draw a distinction, I shall do so.

[3] Both respondents provide services to Exxaro coal mine as contractors. They entered into various contracts with Exxaro to perform certain tasks. Exxaro terminated the contracts on one month's notice. The respondents terminated the employees' contracts as a direct result of losing the Exxaro contracts.

[4] It is common cause that neither respondent entered into a consultation process with AMCU or the employees in terms of s 189 of the LRA. They say it was not necessary: the employees were all employed on fixed term contracts. Although no fixed termination dates were specified, the

[11] Labour Relations Act 66 of 1995.

contracts were contingent upon the respondents' contracts with Exxaro. The employment contracts would only endure for so long as the respondents received work from Exxaro.

[5] Exxaro terminated its contracts with the respondent in November 2016 on one month's notice. In turn, the employment contracts were terminated. By the time this application was heard, the employment contracts had already terminated (on the respondents' version) or the respondents had dismissed the employees (on the applicants' version). Either way, they are no longer employed.

[6] The applicants seek an order in terms of s 189A(13) of the LRA, forcing the respondents to consult. The respondents say that is simply not a factor: the workers were employed on limited duration contracts; the contracts expired; ss 189 and 189A are not applicable and no consultation is called for.

The legal principles

[7] In order to evaluate the applicants' claim properly, it must first be considered whether any consultation was called for in terms of s 189; or, as the respondents contend, whether the contracts of employment simply terminated by operation of law.

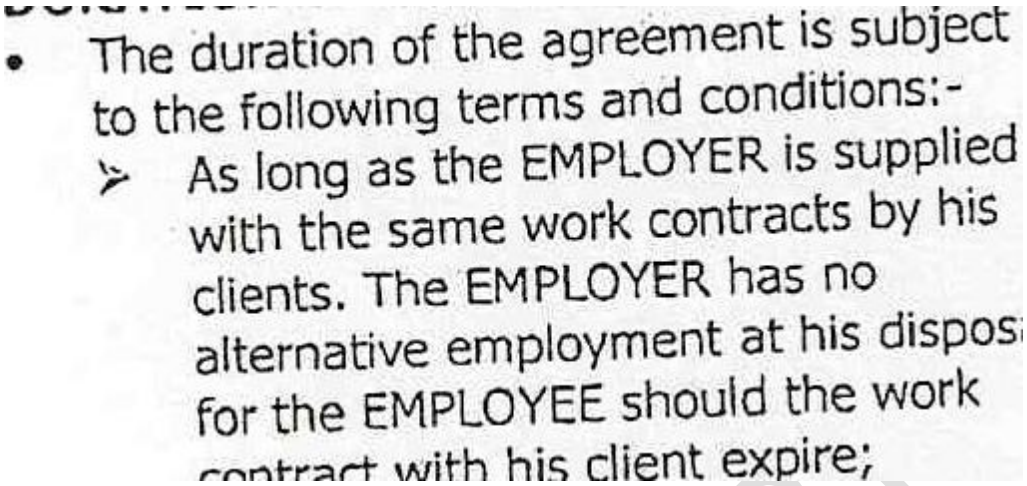
Application of s 189B of the LRA

[8] Piet Wes Civils had a contract with Exxaro that was only due to expire in 2021. But Exxaro terminated it on one month's notice. Waterkloof Skoonmaakdienste entered into different contracts for different tasks, but those have also been terminated on notice.

[9] The respondents say that, in their contracts of employment, the workers agreed that their contracts of employment would only endure so long as the respondents were contracted to Exxaro. In the case of Waterkloof, the employment contracts contained this clause:[2]

[2] The Piet Wes contracts contained a similar clause.

‘



- 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 dispos for the EMPLOYEE should the work contract with his client expire;

[10] Section 198B of the LRA came into operation on 1 January 2015.[3] It provides that an employer may employee an employee[4] on a fixed term contract or successive fixed term contracts for longer than three months only if –

(a) the nature of the work is of a limited or definite duration; or

(b) the employer can demonstrate any other justifiable reason for fixing the term of the contract.

[11] One of the listed justifiable reasons is when the person is employed to work exclusively on a specific project that has a limited or defined duration.[5] In such a case, if the person is employed for longer than 24 months, the employer must pay the employee on expiry of the contract one week’s remuneration for each completed year of service.[6]

[12] The respondents have tendered payment of this amount. AMCU rejected it; its stance is that the employers must embark on a consultation process in terms of s 189. It does not accept that the employment contracts are governed by s 198B(4)(d). Instead, it relies on s 198B(5):

> ‘Employment in terms of a fixed term contract concluded or renewed in contravention of subsection (3) is deemed to be of indefinite duration.’

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[3] Government Gazette 38317 of 19 December 2014.

[4] Who earns less than the threshold prescribed in s 6(3) of the Basic Conditions of Employment Act (currently R205 433, 30 per year).

[5] LRA s 198B(4)(d).

[6] s 198B(10)(a).

[13] The onus is on the employer to prove that there was a justifiable reason for fixing the term of the contract and that the term was agreed.[7]

[14] It is common cause that the clause quoted above is contained in the employment contracts. But, argued Mr *Cook*, it is not a genuine fixed term contract contemplated by subsection 4(d); therefore, it is in contravention of subsection 3 and therefore deemed to be of indefinite duration. The clause on which the respondents rely, he argued, is against public policy and *pro non scripto.*

[15] In neither employer's case was the nature of the work for which it employed the employees "of a limited or definite duration" as contemplated by s 198B(3)(a). Instead, it was linked to the employer being supplied with work by "his clients", i.e. Exxaro. Have the employers demonstrated that that was a "justifiable reason" for a fixed term contract as contemplated by s 198B(3)(b)? If the employers discharge that onus, the contracts will justifiably be seen as being for a fixed term and the employers' defence should succeed; but if not, the employment of the employees will be deemed to be of a fixed duration in terms of subsection 5 and the employers would have to consult over any contemplated dismissals for operational requirements.

[16] One of the "justifiable reasons" contemplated by subsection (4)(d) is an instance where the employees are employed to work exclusively on a specific project that has "a limited or defined duration". But that was not the case here. Exxaro simply terminated its contracts with the two employers on notice; there is no indication on the papers that a specific project had come to an end. The employers have not demonstrated a justifiable reason for fixed term contracts in that regard. An example of a real justifiable reason in terms of this subsection would have been, for example, where Exxaro had contracted the respondents to clean up a specific mine, or to do so within a specified time. This is not such an example.

[17] In a matter decided before the enactment of s 198B, *Fidelity Supercare Cleaning (Pty) Ltd v Busakwe NO*[8], the Court found in a review application

[7] s 198B(7).

that the commissioner's interpretation of a similar clause in an employment contract was not unreasonable and that the employee was entitled to severance pay. The employment contract provided for the situation where the employer loses the contract on which the employee was employed – much the same as the case here. The employer argued that, where there is a cancellation of a service contract, the employment contract automatically terminates on the date of termination of the applicant's service agreement with the client. The arbitrator found that the employee was not employed on a fixed term contract. In the context of that contract, he did not accept the employer's argument that the applicant's contract was for a fixed term, or that it would mean that once the employer's client cancels a contract or terminates it, the employees' contracts should or would automatically terminate "by operation of law". And Bhoola J found that the award was not unreasonable. I agree.

[18] More recently, shortly after s 198B came into operation, the Court came to a similar conclusion in a case involving the same company.[9] The Court, with reference to *Sindane v Prestige Cleaning Services*[10] and *Mahlamu v CCMA*[11], expressed the view (albeit *obiter*) that 'event' in s 198B(1)(a) does not include termination of a contract by a client of the employer. And with reference to s 198B, the Court continued:

> 'Given the expressions about the decisions by this court in *Mampeule*[12], *Nape*[13] and *Mahlamu*[14], *supra,* the view expressed in *Twoline Trading* above cannot be correct. A contractual provision that provides for the automatic termination of the employment contract at the behest of a third party or external circumstances beyond the rights conferred to the employee in our labour laws undermines an employee's rights to fair labour practices [and] is disallowed by labour market policies. It is contrary to

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[8] [2010] 3 BLLR 260 (LC).

[9] *SATAWU obo Dube & ors v Fidelity Supercare Cleaning Service Group Ltd* [2015] 8 BLLR 837 (LC); (2015) 36 *ILJ* 1923 (LC) para [51].

[10] [2009] 12 BLLR 1249 (LC).

[11] [2011] 4 BLLR 381 (LC).

[12] *SA Post Office v Mampeule* [2010] 10 BLLR 1052 (LAC).

[13] *Nape v INTCS Corporate Solutions (Pty) Ltd* (2010) 31 *ILJ* 2120 (LC).

[14] *Mahlamu v CCMA* [2011] 4 BLLR 381 (LC).

> public policy, unconstitutional and unenforceable (Grogan "The Broker's Dilemma" 2010 *Employment Law* 6). This view is clear from all the decisions referred to above, and it is apparent from these that labour-brokers may no longer hide behind the shield of commercial contracts to circumvent legislative protections against unfair dismissal. The freedom to contract cannot extend itself beyond the rights conferred in the constitution, as for instance, against slavery.'

[19] On the facts of the case before me, I hold a similar view. The contract was not intended to be for a fixed duration, or to terminate on the occurrence of a specified event or the completion of a specified task or project as contemplated by s 198B(1). And to place the construction of a 'specified event' on the cancellation of the Exxaro contract would, in my view, go beyond the intention of the legislature. The very purpose of the enactment of s 198B was to provide security of employment, except in circumstances where a fixed term contract is clearly justified, such as seasonal work or employment to carry out a specific task or to do so within a specified period. To make the workers' employment contingent upon the whims of a third party that can simply terminate the contract between it and the employer on notice, does not fit that purpose. The employers have not, in my view, discharged the onus of showing that there was a justifiable reason to employ the workers on a fixed term contract for more than three months, as contemplated by s 198B(3)(b). The employment contracts were either of an unlimited duration or must be deemed to be of an indefinite duration as contemplated by s 198B(5).

[20] Given that finding, the employment contracts did not terminate automatically when Exxaro terminated its contracts with the employers, Piet Wes and Waterkloof Skoonmaakdienste. The termination of the Exxaro contracts may well be a justifiable and fair reason for dismissing the employees for operational requirements; but that can only be ascertained after a proper consultation process in the form of a meaningful joint consensus-seeking process as contemplated by s 189 and s 189A.

Application of s 189A(13)

[21] Section 189A(13) has as its purpose to compel an employer in large scale retrenchments to follow a fair procedure if it has not done so.

[22] As the learned authors in *Labour Relations Law: A Comprehensive Guide*[15] point out, "the purpose of providing for application proceedings rather than ordinary referral is presumably to simplify and expedite the resolution of disputes about procedural unfairness." Hence this urgent application.

[23] The authors of *South African Labour Law*[16] explain:

> 'The procedural dimension of retrenchment has been hived off from the substantive dimension. The idea is that if a union or employee sees a failure in the consultative process, they should not stand on their rights but act at once, and approach the court for appropriate relief. The intent no doubt is to allow for early corrective action so that a process failure will not escalate into a substantive injustice.'

[24] The Constitutional Court recently gave a comprehensive judgment dealing with the provisions of s 189A. In *Steenkamp v Edcon Ltd*[17] Zondo J (for the majority) discussed s 189A(13) in circumstances such as these, where the employees had already been dismissed:

> '[161] If an employer has already dismissed employees without complying with a fair procedure, the consulting party may apply to the Labour Court in terms of subsection (13)(c) for an order reinstating the employees until the employer has complied with a fair procedure. The significance of the remedy of reinstatement in subsection (13)(c) is that it is made available even for a dismissal that is unfair only because of non-compliance with a fair procedure. That is significant because it is a departure from the normal provision that reinstatement may not be granted in a case where the only basis for the finding that the dismissal is unfair is the employer's failure to comply with a fair procedure. In such a case the

[15] Du Toit et al, *Labour Relations Law : A Comprehensive Guide* (6 ed 2016) at 497.

[16] Thompson & Benjamin, *South African Labour Law* (Service no 66, 2016) at AA1-517.

[17] (2016) 37 *ILJ* 564 (CC); 2016 (3) BCLR 311 (CC); [2016] 4 BLLR 335 (CC); 2016 (3) SA 251 (CC) paras 161-164.

norm is that the Labour Court or an arbitrator may award the employee only compensation.

[162] Subsection (13)(d) provides that a consulting party may apply to the Labour Court for an award of compensation "if an order in terms of paragraphs (a) to (c) is not appropriate". It seems to me that the phrase "if an order in terms of paragraphs (a) to (c) is not appropriate" constitutes a condition precedent that must exist before the Court may award compensation. The significance of this condition precedent is that its effect is that the Labour Court is required to regard the orders provided for in subsection (13)(a) to (c) as the preferred remedies in the sense that the Labour Court should only consider the remedy in subsection (13)(d) when it is not appropriate to make any of the orders in subsection (13)(a) to (c).

[163] This is a reversal of the legal position that obtains in the case of dismissals for the employer's operational requirements governed by only section 189 where dismissal is only procedurally unfair and not substantively unfair as well. In these cases the Labour Court is required not to order reinstatement at all. So, in making the remedy of reinstatement available for a procedurally unfair dismissal and also making it one of the preferred remedies in subsection (13), the Legislature has gone out of its way to give special protection for the rights of employees and to protect the integrity of the procedural requirements of dismissals governed by section 189A.

[164] The extensive remedies in subsection (13) provide at least partial compensation for the fact that in respect of disputes concerning the procedural fairness of dismissals the employees have been deprived of the right to adjudication that other employees have. In part the extensive remedies in subsection (13) for non-compliance with procedural fairness have been provided because of the importance of the pre-dismissal process.'

[25] In this case, it is common cause that there's been no consultation: the employers did not think it necessary. The primary remedy prescribed by the legislature and endorsed by the court is that of reinstatement until the employers have complied with a fair procedure.

[26] The employees who have been dismissed – clearly for operational requirements arising from the cancellation of the Exxaro contracts – must

be reinstated until the employers comply with a fair procedure. That holds true for all but 18 of the Piet Wes employees.

Piet Wes

[27] In the case of Piet Wes Civils, there is a dispute of fact on the papers regarding the fate of 18 of the 43 affected employees. The employer says their contracts of employment terminated at the end of August or beginning of September 2016; AMCU denies it, averring that Piet Wes recalled them and that they continued working until 11 November 2016, when they received notices of termination. The turnstile records purporting to show that they went back to work are not comprehensive. The dispute regarding these 18 employees[18] must be referred to oral evidence. Theirs is a dispute that falls within the circumstances mentioned by Du Toit et al in the context of applications in terms of s 189A(13):[19]

> 'An application, unlike a referral, contemplate argument on the papers without necessarily leading evidence. Where facts are in dispute, however, the matter may have to be postponed for the hearing of oral evidence and the result, including costs, may be much as before [LC Rule 7(7)].'

[28] With regard to the remaining Piet Wes employees, I rule that they were employed for an indefinite duration in terms of s 198B of the LRA and that their union, AMCU, must be consulted about their termination for operational requirements following on Exxaro's termination of its contract with Piet Wes.

Waterkloof Skoonmaakdienste

[29] The same considerations apply with regard to the 104 Waterkloof employees. The employer must consult with AMCU over the termination of their contracts. They must be reinstated pending that consultation process.

[18] Listed in annexure "SM 5" to the founding affidavit and Annexure "A" to Ms Steenkamp's redacted heads of argument.

[19] *Labour Relations Law : A Comprehensive Guide* 6 ed 2016) at 497. See also *NDPP v Zuma* 2009 (2) SA 277 para [26].

Conclusion

[30] I find that the employees were employed for an unlimited duration pursuant to the provisions of s 198B of the LRA. They were dismissed for operational requirements, being the loss of the Exxaro contracts. The employers have not consulted in terms of ss 189 and 189A of the LRA. They must be compelled to do so. The employees must be reinstated until the employers have complied with a fair procedure, as contemplated by s 189A(13)(c).

[31] The LRA contemplates a facilitated consultation process of 60 days after a written notice of contemplated dismissals for operational requirements in terms of s 189(3).[20] It seems to me to be in line with the purpose of the Act that, once the workers have been reinstated, the parties should be given a further 60 days to consult – preferably with the assistance of a facilitator -- after the date of this judgment. However, I make no order in this regard, other than to stipulate that the employers must follow a fair procedure.

Costs

[32] The upshot of this judgement is that the employees have not been dismissed. There is also an ongoing relationship between AMCU and the employers. I do not consider a costs award to be appropriate at this juncture in law or fairness.

Order

[33] I therefore make the following order:

33.1 The respondents in case numbers J 2834/16 and J 2845/16 respectively, Piet Wes Civils cc and Waterkloof Skoonmaakdienste cc, are ordered to reinstate the employees listed in each application, except as set out below.

33.2 The respondents are ordered to reinstate the employees as contemplated in s 189A(13) of the LRA until they have complied with a fair procedure.

[20] s 189A(7).

33.3 The dispute regarding the 18 Piet Wes employees listed in Annexure "SM 5" to the founding affidavit in case no J 2834/16 is referred to oral evidence.

33.4 The dispute with regard to the following four Piet Wes employees listed in Annexure "SM 6" to the founding affidavit in case no J 2834/16 has been withdrawn and this order does not apply to them:

33.4.1 Knowledge Boshielo;

33.4.2 Charles Gebina;

33.4.3 Phillip Mosema; and

33.4.4 Jonas Maluleka.

33.5 There is no order as to costs.

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Steenkamp J

APPEARANCES

APPLICANT:	A L Cook Instructed by Larry Dave attorneys.
RESPONDENTS:	E J Steenkamp Instructed by Cavanagh & Richards.