THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR668/16/ JR649/16

In the matter between:

ASSIST BAKERY 115 CC **Applicant**

and

DUMISANE JOHANNES NGWENYA N.O **First Respondent**

CCMA **Second Respondent**

LETHABO MASOGA **Third Respondent**

LEBOGANG MOELESO **Fourth Respondent**

PICK N PAY RETAILERS (PTY) LTD **Fifth Respondent**

Heard: **18 October 2017**

Delivered: **27 October 2017**

Summary: An opposed review application. Where a commissioner identifies the true dispute but arbitrate a wrong dispute, such amounts to not having arbitrated the dispute and an irregularity that vitiates the award. A commissioner who incorrectly interprets the law can be attacked on correctness or reasonableness. The provisions of section 200B of the

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Labour Relations Act[1] considered. The provisions ought to be invoked by a party and all its elements to be proven by the party invoking it. The provisions of section 200B has far reaching implications for corporate South Africa. The commissioner by *mero motu* invoking the provisions of section 200B acted wrongly. Held (1): The award was reviewed and set aside. Held (2): Replaced with an order that Pick N Pay is not the employer. Held (3): Each party to pay its own costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] Before me are two review applications. The first review is launched by Assist Bakery 115 CC and the other by Pick N Pay Retailers (Pty) Ltd. Both reviews attack one award issued by Commissioner Dumisane Johannes Ngwenya. On 22 February 2017, this court ordered that the two reviews be consolidated and heard together. Accordingly on 18 October 2017 I heard argument on the consolidated matters. I hasten to mention that in the Pick N Pay review, Lebohang Maeleso did not file an answering affidavit. Otherwise both reviews as now consolidated are opposed and I shall for the purposes of this judgment treat them as such.

[2] This matter raises important questions which impacts on the so-called empowerment deals.[2] Commissioner Ngwenya made an award to the effect that the respondents (Pick N Pay and Assist Bakery) are joint or co-employees (*sic*) meaning co-employers of the applicants (Messers

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[1] Act 66 of 1995 as Amended.

[2] Black Economic Empowerment (BEE) is a racially selective programme launched by the South African government to redress the inequalities of the Apartheid by giving certain previously disadvantaged groups of South African citizens' economic privileges' previously not available to them under the white rule. There is legislation and Codes gazetted to ensure empowerment. Therefore BEE plays a pivotal role in ensuring transformation of the South African Society. Wherever it happens it should not be undermined given its worth to the transformed South Africa.

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Lethabo Masoga and Lebohang Moeleso) within the meaning of section 200B. Both respondent(s) are thus jointly and severally liable to accord to the applicants the comparable treatment no less favourable than their counterparts who are the permanent employees of Pick N Pay who are performing the same or similar work. The order to be effected from 1 March 2015.

[3] Both Pick N Pay and Assist Bakery were aggrieved by the award and launched separate review applications, later consolidated.

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Background facts

[4] On or about 1 August 2014, Assist Bakery 115 CC and Pick N Pay entered into three separate agreements, namely the Association Agreement, Manufacturing and Supply Agreement and Participation Agreement. All the three agreements were termed Empowerment Scheme Agreements. Parties to the Association Agreements are Assist Bakery 115 CC on the one hand and Mhlanga, Maluka, Mzamo and Mthethwa on the other. Parties to the Manufacturing and Supply Agreement are Pick N Pay Retailers (Pty) Ltd on the one hand and Assist Bakery 115 CC on the other. Participation Agreement was a tripartite agreement. Parties thereto were Pick N Pay Retailers (Pty), Assist Bakery 115 CC and the Participants (Mzamo, Mhlanga, Maluka and Mthethwa)

[5] All the agreements were for a limited duration of five years. Pursuant to empowerment scheme, both Moeleso and Masoga (collectively the employees) were employed from 1 March 2015 on 12 months fixed term contracts of employment. The agreements were to expire on 1 March 2016. They were employed as bakery assistants (pickers).

[6] On 19 November 2015, the employees referred a dispute to the CCMA. They categorized the dispute as being one of section 198A (Labour

Broker), they cited Pick N Pay as a party that controls access to the premises where they work and Assist Bakery 115 CC as a Temporary Employment Services (TES). They required as the results, to be deemed permanent by the client (Pick N Pay).

[7] On 9 December 2015, the dispute so referred was certified to be unresolved. It appears so that Commissioner Ngwenya attempted conciliation, whereafter he categorized the dispute as one in terms of section 198B and D and directed the dispute to arbitration.[3] On the same day the employees completed a request for arbitration. What was in dispute according to the request form was a dispute related to section 198B and D. As outcome they sought the following: "*We would like the commissioner to make Pick N Pay us permanently (sic) and make Pick N Pay pay us for operating Reach Truck and Fork Lift and same salary as Pick N Pay permanent and benefits*"[4]

[8] On 17 February 2016, the arbitration sat. Given the poor state of the arbitration transcript, it is difficult to establish what the Commissioner identified as the true nature of the dispute. However in his award he stated that the issue to be decided was whether Pick N Pay is the employer of the Applicant (employees) and if so, whether the applicants (employees) are entitled to pay parity within the meaning of section 198.

[9] After hearing evidence and arguments, on 1 March 2016, the commissioner published his award. The applicants before me were aggrieved and approached this court.

Grounds of Review

[10] As mentioned before there were two applications, which were consolidated for the purpose of hearing. The Assist Bakery 115 CC were only two. The first being that the commissioner failed to identify the dispute he was required to arbitrate and did not understand the dispute he was required to arbitrate. Put differently the commissioner

[3] See page 122 Bundle Assist matter.

[4] Page 121 Assist Bundle

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misconceived the nature of the enquiry he was to conduct. The second being that the commissioner misconstrued evidence and ignored evidence which led to a conclusion that could not have been reached by another reasonable decision maker. In the alternative the commissioner's conclusions are simply wrong in law and fact and are reviewable. Similarly, Pick N Pay raised two grounds which are similar to those of Assist Bakery 115 CC.

Evaluation

[11] Determining what the true nature of the dispute is, is important for two reasons. Firstly to establish whether the decision maker is empowered to entertain the dispute for the parties. Secondly to ensure that you resolve the correct dispute for the parties. All of these is the duty of a commissioner. The referring party at all times would know what dispute he or she is presenting. That being the case, referral documents serve as important source documents to establish what the dispute is. On the referral forms, appears the following:

> NATURE OF THE DISPUTE. What is the dispute about? S198A LRA (Labour Broker). SUMMARISE THE FACTS OF THE DISPUTE: Interpretation/Application of S198A. RESULT REQUIRED: Applicants to be deemed permanent by the client company.

[12] When requesting for arbitration, the employees identified the issues in dispute to be related to S198B and D. it is apparent that after attempting conciliation the commissioner characterized the dispute as on in section 198B and D. Nonetheless, the following was apparent:

> WHAT DECISION WOULD YOU LIKE THE COMMISSIONER TO MAKE: We would like the commissioner to make Pick N Pay sign us permanently and make Pick N Pay pay us for operating reach truck and Forklift and same salary as Pick N Pay permanent and benefits. (My own underlining)

[13] On the basis of the above, it is clear that the employees were yearning to be signed as permanent employees of Pick N Pay. Once they are so

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signed they have to be paid the same salary and benefits as other Pick N Pay permanent staff. Suffice to mention at this point in time, they seek no relief against Assist Bakery 115 CC. It is common cause that the employees were employed on fixed term contracts which were to expire on 1 March 2016. This request to the commissioner they made in December of 2015. When the commissioner introduced section 198B and D for the parties it must have been clear to him as a conciliating commissioner at the time true dispute is not about temporary employment services. He was not far off the mark when he identified the dispute to be one for employees who were on a fixed term contract for a period of more than three months and wanting to be deemed to be permanent employees in terms of the deeming provisions. Again he was not far off the mark when he identified that the dispute is about the interpretation and application of section 198D and such disputes are to be referred to the CCMA.

[14] Section 198B (3) provides that 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 a definite duration; or (b) the employer can demonstrate any other justifiable reason for fixing the term of the contract. Section 198B (5) provides that employment in terms of a fixed term contract concluded or renewed in contravention of subsection 3 is deemed to be of indefinite duration.

[15] Section 198D (1) provides that any dispute arising from the interpretation of sections 198A, 198B and 198C may be referred to the Commission or Bargaining Council with jurisdiction for conciliation and, if not resolved to arbitration.

[16] Therefore, in the light of the above, the true nature of the dispute is one about interpretation and application of section 198B. It is apparent that on or about 29 January 2016, the employees were made offers to be

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permanent by their employer Assist Bakery 115 CC.[5] The employees held a view that their employer was Pick N Pay and not Assist Bakery 115 CC anymore. It was common cause throughout the arbitration proceedings that the fixed term contract which would have exceeded the three months period contemplated in section 198B (3) was with Assist Bakery 115 CC.

[17] What follows is the question whether the commissioner arbitrated a dispute about interpretation and application of section 198B. In order to establish that regard must be heard to his award. In there he stated that the issue to be decided by him is whether Pick N Pay is the employer and if so whether the applicants are entitled to parity within the meaning of section 198. Judging by the award made by the commissioner it does seem to me that the commissioner had in mind section 198 (5) when reference was made to within the meaning of section 198.

[18] Section 198 (5) provides that an employee deemed to be an employee in terms of subsection 3 (b) must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment. Subsection 3 (b), provides that For the purposes of the Labour Relations Act, an employee not performing such temporary service for the client is deemed to be the employee of that client and the client is deemed to be the employer and subject to the provisions of section 198B, employed on an indefinite basis by the client.

[19] In terms of section 198(1), temporary service means work for a client by an employee (a) for a period not exceeding three months; (b) as a substitute for an employee of the client who is temporarily absent; or (c) in a category of work and for a period of time which is determined to be a temporary service by a collective agreement concluded in a bargaining

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[5] Pages 131 and 132 of the Assist File. It does seem that the employees did not accept the offer to be made permanent by Assist Bakery 115 CC but wanted permanency with Pick N Pay. Paras 27 and 28 Founding Affidavit by Mzamo and paragraph 48 of Lethabo Masoga Answering Affidavit. Read with paras 27 and 28 of the Assist Affidavit and

council, a sectorial determination or a notice published by the Minister in accordance with the provisions of subsections (6) to (8).

[20] For section 198A (5) to kick in the employees before the Commissioner ought to have been deemed to be such in terms of subsection 3 (b). The question is when they performed services to the client as alleged were they performing temporary services or not? If they were then their employer is Assist Bakery 115 CC and if they were not they are deemed to be the employees of Pick N pay and if they performed those services for longer than three months then they are deemed to be for an indefinite period if the exceptions in subsection 3 (a) and (b) of section 198B does not arise.

[21] To my mind subsection 3(b) of section 198A is to cater for situations where a person was placed by a temporary employment service, but after three months he or she continues to perform services for the client. The new dispensation brought about by the amendments is that temporary service must not be for more than three months. If a client retains a temporary employee for more than three months he or she runs the risk of being deemed an employer and for an indefinite period if section 198B (3) is contravened. The LAC in *Numsa v Assign Services and others*[6] had the following to say:

> [36] What s189A(1) [*I think reference is made to 198A (1)]* does is to place emphasis on the nature of the services as defined and not on the person rendering the service or the recipient of the services *per se* to determine who the employer of the placed worker is. What it therefore means is that a placed worker…is not rendering a temporary service for the purposes of s 198(A) and therefore not an employee of a TES. Put it differently, a service by a placed worker which does not fall within the category defined above and which is in excess of a three month period is not a "temporary service" for the purposes of s198A (1) of the LRA.

[6] Case no: JA 96/15 delivered on 10 July 2017. Apparently on appeal at the Constitutional Court.

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> [37] In order to ascertain who the employer of the placed worker in that position for the purposes of the LRA is, one is enjoined to resort to the provision s198A (3) (b). Such a worker is therefore deemed to be the employee of the client and the client is deemed to be the employer of the worker. Furthermore, a worker in this situation is subject to the provisions of s198B, employed by the client of the TES on an indefinite basis. [My additions and emphasis]

[22] Returning to the question whether the commissioner determined the dispute about interpretation and application of section 198B, which was the true dispute before him. One of the issues involving interpretation of the section is who is the employer referred to in section 198B (3). In relation to this matter if the evidence showed that the employees before me were no longer performing temporary services for the client, taking into account that if the at some stage they performed temporary employment services as defined in section 198 (1)[7] . This connection is seen by reference to a client in the deeming provisions.

[23] Therefore another aspect to be established by evidence should be whether Pick N Pay was ever a client of Assist Bakery 115 CC within the contemplation of section 198 (1)-providing the services of the employees before me to Pick N Pay for reward. It ought to be remembered that the employees before me were effectively alleging contravention of section 198B (5). They simply allege that they have been on a fixed term employment contract in contravention of section 198B (3).

[24] It is common cause that the only employer who could possibly have contravened the provisions of section 198B (5) is Assist Bakery 115 CC. I say so because only Assist Bakery 115 CC employed the employees before me on a fixed term contract.

[25] It seems to me that regard being had to the award the commissioner identified the true nature of the dispute but chose to deal with an

[7] In this section temporary employment services means any person who, for reward, procures for or provides to a client other persons.

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extraneous question. Earlier I stated that one of the issues to be dealt with within the interpretation of section 198B is who is the employer referred to in section 198B (3). It must logically follow that the employer should be one that employs an employee on a fixed term contract. This question is different from whether there was an employer and employee relationship. In his award he said:

> [17] The respondent [I assume reference is made to Assist Bakery 115 CC] stipulated to the fact that the applicants' fixed term contract was concluded in contravention of section 198B [assuming section 198B (5)] and thus invalid thereby rendering same as an indefinite contract from inception. The issue left to be determined was whether Pick N Pay was the employer of the applicants. [My additions and emphasis]

[26] It is unclear to me why he had to determine whether Pick N Pay was an employer, when he has already found that Assist Bakery 115 CC is the one that contravened the law. If truly he was interpreting and applying section 198B, he ought to have issued an award to the effect that Assist Bakery 115 CC is deemed to be an employer for an indefinite period. By so doing he would have interpreted and applied the section which was the dispute before him.

[27] The fray he was to enter was to determine whether an employer and employee relationship between the employees before me and Pick N Pay existed. In a true employer and client situation, he had to seek the answer from section 198(A) (3) (b)[8]. To show that he was not dealing with the employer and client situation, he sought to determine the issue of who the employer was with reference to the Agreements. In doing so he does not suggest that the employees before me were "placed workers". The test to determine whether an employer and employee relationship exists was somewhat perfected by the LAC in *State*

[8] Paragraph 37 of *Assign Services supra*.

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Information Technology Agency (Pty) Ltd v CCMA and others.[9] The court per Davis JA held thus:

> [12] For this reason, when a court determines the question of an employment relationship, it must work with three primary criteria:
>
> 1 an employer's right to supervision and control;
>
> 2 whether the employee forms an integral part of the organization with the employer; and
>
> 3 the extent to which the employee was economically dependent upon the employer.[10]

[28] However what the commissioner did was to examine the commercial contracts dealing with the empowerment scheme. Having done that he came to the following conclusion in relation to the question he left for himself:

> [21] All the above mentioned facts establish the close association of the business of the respective enterprises, Pick N Pay and Assist Bakery. It further establish the fact that the reality of the facts is that there is an employment relationship between Pick N Pay and the applicants despite the agreement stipulating otherwise. [My emphasis]

[29] Having made that conclusion without following the LAC decision[11], he then jumped to section 200B. It is instructive to note that he does not apply the deeming provisions. He used the facts. By that time he had determined an issue that does not fall within the dispute and most importantly without warning and or giving Pick N Pay an opportunity to lead evidence on the criteria set by the LAC. This amounts to gross irregularity. The applicants in particular Pick N Pay did not enjoy a fair trial of issues.

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[9] (2008) 29 ILJ 2234 (LAC) par 12

[10] Page 2238 par 12 I

[11] Ibid 6

[30] At no stage during the arbitration did any of the parties request the commissioner to determine any issue arising out of section 200B. The employees never alleged that Pick N Pay is a co-employer. All what they wanted was for the commissioner to ask Pick N Pay to sign them as permanent employees and to be afforded salary and benefits of Pick N Pay permanent employees.

[31] In the light of the above stated I am of a view that the commissioner managed to identify the dispute but side stepped it and somewhat went on a frolic of his own. Instead of dealing with the dispute of interpretation and application of section 198B, he determined employer and employee relationship an issue that was not before him.

[32] I shall now deal with section 200B (1). As an opening gambit, it is my view that the section has far reaching implications to corporate South Africa. Much as it serves to promote social justice, it also may have the effect of damaging the reputation of corporations. Imagine a big corporation being found to have colluded to contravene the law. Such has serious reputational implications. It is for the above reason that I hold a view that the section requires strict purposive interpretation and ought to be invoke when all the requirements of it are met in full. Failing to do so constitutes a serious and material error of law which on the correctness or reasonable test vitiates an award.

[33] The following are the elements of the sub-section, which require full presence before invocation:

33.1 First and foremost the section deals with liability for legal obligations.

33.2 It is meant for the purposes of the LRA.

33.3 It seeks to define an employer as opposed to creating an employer and employee relationship.

33.4 There must be carrying on of an associated or related activity or business.

33.5 It must be through an employer.

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33.6 That carrying on of an associated or related activity must be intended to defeat the purpose of this Act or any other employment law.

33.7 Or the carrying on of an associated or related activity has the effect of defeating the purpose.

33.8 Such carrying on of the associated or related activity can either be direct or indirect.

[34] To my mind if any of the above elements lack, the section cannot be validly invoked. The purpose of the Labour Relations Act is to be found in section 1.[12] Defeat within the context of the section should mean either to defy and or frustrate the purpose of the Act. Therefore, it is not a requirement for a specific section to be defied or frustrated. It is enough to show that the purpose of the Act is being defied nor frustrated.

[35] Subsection (2) of the section deals with the consequences that will follow should subsection (1) be found to have obtained. The consequences are joint and several liability for any failure to comply with the obligations of an employer in terms of the Act or any other employment law. It is important to observe that the section seeks to introduce the concept of joint wrongdoers. It seems to me that an employer must have failed to comply with a legal obligation arising from the LRA or employment law. Once that is shown, the person(s) with whom the employer carries on association or related activity with the sole intention or effect to defy or frustrate the purpose of the Act or other employment law will be liable. On the failure to comply, it does seem that the legislature is introducing strict liability on the part of the person.

[36] On the facts of this case, subsection (2) means that Assist Bakery 115 CC as the primary employer should have failed to comply with obligations arising from the LRA or any other employment law. Failure to comply in itself is a matter of fact. In other words, there must be evidence

[12] The purpose is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objectives of the Act, being: (a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa 1996, (b) to give effect to the obligations incurred by the Republic as a member of the ILO.

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that, in this instance, Assist Bakery 115 CC has failed to comply with section 198B (5). The commissioner records in his award that "*The respondent stipulated to the fact that the applicants' fixed contract was concluded in contravention of section 198B..*"

[37] I am not sure what this "*stipulation*" mean. Does it mean an admission or what? There we go, the court of review is left guessing. Nonetheless the transcript although poor reflects the following:

> **RESPONDENTS REPRESENTATIVE**: The second respondent concedes that through the workings of uh section 198B of the Labour Relations Act the uh both applicants became its permanent employees uhm three months after the commencement of the amended section being uhm uh April 2015 they would have been construed as permanent employees of the second respondent.
>
> **RESPONDENTS REPRESENTATIVE**: Without getting to (sic) technical in terms of section 198B of the Labour Relations Act uhm the applicants are now permanent.
>
> **RESPONDENTS REPRESENTATIVE**: Even though they signed a fixed term contract of employment was longer than three months which is in contravention of section 198B so the second respondent concedes that they are permanent from April 2015.

[38] In the light of the above, it seems to me that stipulation means an admission of contravention from April 2015. It seem clear that as at the time of arbitration, Assist Bakery 115 CC had regularized the situation. Put it differently, they were compliant. The commissioner does not mention this fact in his award. This simply means that at the time of ordering joint and several liability he was dealing with a "has been" as opposed to current non-compliance. Assuming that the situation was still obtaining at the time, the appropriate award to make is that Pick N Pay has also contravened section 198B (5) of the Act. Instead of doing that he resorted to section 198A (5) which deals with temporary service, which was not the case before him.

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[39] In order to observe the purpose of section 200B one must have regard to the Memorandum on the objects of the Labour Relations Amendment Bill 2014.[13] The LAC in *AMCU v Buffalo Coal Dundee (Pty) Ltd and others*[14] had the following to say about section 200B:

> [28] The party who wants to invoke section 200B must not only show that the persons are carrying on or conducting an associated or related business but also that the intent or effect of doing so is or was to directly or indirectly defeat the purpose of the Act or any employment law…They failed to prove that there was an intention to directly or indirectly defeat the purpose of the Act or any other employment law neither did they prove that the effect of the business arrangement was to indirectly directly undermine the purpose of the Act or any other employment law.

[40] It is clear from the dictum of this judgment that the section ought to be invoked by a party. In this matter the employees before me did not invoke the section. Also the employees ought to have proven[15] through evidence that the intention of the empowerment scheme was to defeat the purpose of the law and or that the effect of the scheme was to undermine the law. Generally, empowerment schemes are within the BEE legislation.[16]

[41] It is very clear that invocation of section 200B was misguided. To conclude that the scheme or Agreement as the commissioner choose to call it has the effect of prejudicing rights of the applicants to be treated on equal footing with the employees of Pick N Pay while they are performing the same and or similar work defeats the purpose of the Act without an

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[13] It states that insertion of section 200B of Act 66 of 1995: A new section is inserted to prevent simulated arrangement or corporate structures that are intended to defeat the purpose of the LRA or any other employment law, and to provide for joint and several liability on the part of persons found to be employers under this section for any failures to comply with the employer's obligations under the LRA or any employment law. This is particularly important in the context of subcontracting and outsourcing arrangements if these arrangements are subterfuges to disguise the true employer.

[14] Case no: JA42/2015 delivered on 11 May 2016.

[15] See Metcash Trading Africa (Pty) Ltd v Goddard (DA 14/2010) [2011] ZALAC 36 (14December 2011)

[16] They cannot be seen as simulated arrangements or subterfuge.

iota of evidence is in itself an irregularity. The purpose of the Act is not about individual prejudices but it is about social justice.

[42] The test for review does not require repetition at every turn. It is trite that only decisions that a reasonable commissioner cannot make are reviewable. In terms of the well-known authority of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[17] , an irregularity prevents a fair trial of issues.

[43] In *Assign Service* the LAC had the following to say:

> [32] An incorrect interpretation of the law by a commissioner is, logically, a material error of law which will result in both an incorrect and unreasonable award. Such an award can either be attacked on the basis of its correctness or for being unreasonable.[18]

[44] It is crystal clear that the commissioner in this matter interpreted the law incorrectly and his award is not correct. An incorrect award is not awaited from a reasonable commissioner nor does it fall within the bounds of reasonableness.

What now?

[45] I am inclined to review and set aside the commissioner's award. The question I have to consider is whether I should remit or not. The applicants are correct when they say the commissioner did not understand the dispute he was required to arbitrate. Put differently he arbitrated a wrong dispute. Ordinarily in such circumstances, the court ought to remit as it cannot usurp the powers of the commissioner.

[46] However this matter presents unique circumstances. It is common cause that at some stage Assist Bakery 115 CC contravened section 198B (5), but that situation was regularized before arbitration. Such to me entails that there is no longer a live dispute about interpretation and application

[17] [2007] BLLR 1097 (CC)

[18] Footnote omitted.

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of section 198B, which was the dispute the commissioner was empowered to arbitrate. Accordingly, it will be pointless to remit since there is no longer a dispute. It will not serve the interest of justice to remit. To my mind although the commissioner had jurisdiction to arbitrate, he arbitrated a wrong dispute, therefore his award is actually a nullity. For the reasons set out above I am not to remit.

Is Pick N Pay an employer of the employees?

[47] For completeness sake and solely to avoid further litigation, I feel constraint as a court of review to determine this question once and for all. It does seem that the applicants applying the three months "ban" of fixed term contracts, they sought to be made permanent. Indeed in the absence of a justification their definite employment is prohibited. But where they got it wrong in my view is to believe that Pick N Pay was deemed their employer. Yes, if Pick N Pay was perhaps the client of Assist Bakery 115 CC within the contemplation of section 198A (1) the provisions of section 198A (5) could come to their favour.

[48] However there is no shred of evidence that Pick N Pay was a client of Assist Bakery 115 CC, nor is there evidence that Assist Bakery 115 CC was a TES. Accordingly it is my considered view that Pick N Pay is not the employer of the employees before me.

[49] In summary, the commissioner did commit a reviewable irregularity and accordingly his award is reviewable in law.

[50] Regarding costs, I am of a view that an appropriate order is for each party to bear its own costs.

[51] In the results I make the following order:

Order

1. The arbitration award issued by Dumisane Johannes Ngwenya under case number GAEK9539-15 issued on 1 March 2016 is hereby reviewed and set aside.

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2. It is replaced with an order that Pick N Pay Retailers (Pty) Ltd is not the employer of Lethabo Masoga and Lebohang Moeleso.

3. Each Party to pay its own costs.

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GN Moshoana

Judge of the Labour Court of South Africa

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Appearances

For the Applicant:	Mr N Preston (Assist Bakery 115 CC matter) and G Damant (Pick N Pay matter)
Instructed by:	Cliffe Dekker Hofmeyr Inc, Sandton and Bowman Gilfillan Inc, Sandton respectively.
For the Respondents:	Mr C Bosch
Instructed by:	Lawyers for Human Rights, Braamfontein.