IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case no: C1037/18

In the matter between:

PASSENGER RAIL AGENCY OF SOUTH AFRICA **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

DU PLESSIS *N.O* **Second Respondent**

MDLULI AND 164 OTHERS **Third to 164TH Respondent**

Date heard: 17 October 2019

Delivered: 14 November 2019

Summary – Interpretation and application dispute - Commissioner cannot assume jurisdiction to arbitrate an interpretation and application dispute relating to a settlement agreement outside of section 24 of the LRA.

Section 198B – Indefinite employees not entitled to rely on section 198B in seeking to secure benefits or equal treatment with fellow employees. Commissioner committed an error of law and/or gross irregularity by applying the remedies available under the unfair labour practice provisions to a section 198B dispute.

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JUDGMENT

CONRADIE, AJ

Introduction

[1] In this matter, the applicant (PRASA) seeks an order reviewing and setting aside the arbitration award made by the second respondent (the arbitrator) in terms of which he found that the third to 164th respondents (the employees) are deemed to be employed on an indefinite basis from 1 April 2015; that PRASA must pay them an amount of R35 455 140.00 and that it ensures that the employees complete the required forms to become members of it's provident fund.

[2] PRASA launched its review application late by about two months. It has applied for condonation for the late filing of the review. I am of the view that condonation should be granted, given in particular, the explanation for the delay and the prospects of success. The matter also raises important questions of law and as such it is in the interest of justice that it be heard. In addition, while the employees opposed the condonation application in their answering papers they did not persist with their opposition when the matter was heard.

Background

[3] The employees were all employed on fixed-term contracts with PRASA.

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[4] When section 198B of the Labour Relations Act 66 of 1995 came into effect, on 1 January 2015, the employees remained in the employ of PRASA, but were not required to sign new fixed-term contracts of employment.[1]

[5] The South African Transport and Allied Workers Union (SATAWU) and the United National Transport Union (UNTU) referred a number of disputes to the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA).

[6] There is a dispute between PRASA and the employees as to whether all these disputes were referred in 2016. However, nothing turns on this. What is important is that one of the disputes concerned the fixed-term contract employees.

[7] The unions' disputes were consolidated by the CCMA and the period for conciliation was extended in order to allow PRASA and the trade unions an opportunity to engage during the week of 4 to 8 April 2016 with a view to reaching a negotiated settlement.

[8] The parties held a special meeting under the auspices of the PRASA Bargaining Forum and on 7 April 2016 concluded a settlement agreement which covered the various disputes that the unions had referred to the CCMA.

[9] Clause 3.8 of the settlement agreement specifically dealt with the *Appointment of Fixed Term Contract Workers*".

9.1. Clause 4.1 of the agreement provides that "This agreement is in full and final settlement of all disputes and all perceived disputes between the parties, whether arising in contract, delict or statute."

9.2. Clause 4.2 provides that the parties confirmed that they have no further claims against each other.

9.3. Clause 5.1 deals with dispute resolution and provides that "Any dispute about the interpretation or application of this agreement must be

[1] The last fixed-term contract expired on 31 March 2015.

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resolved by way in terms of the provisions of PRASA Bargaining Forum Constitution" [sic].

[10] The details of how the fixed-term contract and other disputes were to be resolved was set out in an addendum to the agreement. Item 8 of the addendum provides as follows:

> "FTCW's APPOINTMENT":
> "A study will be commissioned to look at:
> - Verification of numbers of current FTCW's to be absorbed in terms of a criteria to be agreed between the parties.
> - Full compliance with the provisions of the Recruitment and Selection Policy.
> - Death benefit to be extended to include FCTWs".

[11] The first two items were to be resolved within three months (end of June 2016) and the death benefit to be extended within seven days.

[12] At some stage UNTU brought an application in the Labour Court[2] to make the settlement agreement an order of court in terms of section 158(1)(c) of the Labour Relations Act[3] (LRA). The order was granted on 8 August 2017. Following on this order, the unions, on 16 February 2018, brought a contempt application in terms of which it wanted an order that PRASA was in contempt of the court order granted on 8 August 2017.[4] The court declined to entertain the application. According to Steenkamp J, with reference to the dispute resolution clause in the settlement agreement, the PRASA Bargaining Forum Constitution itself *"provides for the way in which to resolve disputes, and …..the choice to follow a particular dispute resolution process is a choice which, as long as it is voluntarily made, should be respected by the courts, as confirmed by the Constitutional Court in Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another 2009 (4) SA 529 (CC)* at 219."

[2] The date is unknown as the judgment was not part of the record.
[3] No. 66 of 1995, as amended.
[4] An order which made the settlement agreement an order of court.

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[13] On 8 February 2018, a group of employees (Mdluli and 14 Others) referred a dispute, without the assistance of their trade unions, to the CCMA.

[14] On 22 February 2018, a group of employees (Mhlakela and 152 Others) also referred a dispute, without the assistance of their trade unions, to the CCMA.

[15] These two disputes were subsequently consolidated. The disputes were dealt with at the CCMA on the basis of a stated case. As such, instead of leading evidence the parties agreed that what was recorded in the stated case constituted the evidence before the CCMA. The relief sought by the employees was described in the stated case as follows:

> "(a) Declaring them to be deemed permanent employees.
> (b) Declaring that they are entitled to payment in an amount equal the benefits (sic), i.e. provident fund contributions and bonus payments, for at least the period 1 January 2015 to date".

[16] At the commencement of the arbitration, PRASA raised a point *in limine* that the dispute had been settled in terms of the settlement agreement of 7 April 2016. The arbitrator, however, dismissed the point *in limine* on the grounds that the settlement agreement did not cover the issue of benefits and that the case had been referred to the CCMA as an unfair labour practice dispute.

The Award

[17] The following paragraphs relating to the arbitrator's analysis of the evidence and argument are important for this matter:

17.1. "This case is more about the application of section 198B of the LRA than the interpretation thereof. Whereas the applicants were integrated into the business, they are not treated equally to their indefinitely employed colleagues and are still referred to as contract workers. Thus, up to these proceedings there had been no acknowledgement by the respondent that the applicants had become indefinitely employed.

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They are still treated differently compared to their colleagues doing the same work, particularly in that they are not members of the provident fund and are never considered to be paid bonusses. The latter being reserved for the indefinitely employed people". [5]

17.2. "Section 198B(5) provides that a fixed-term contract "converts" after three months into an indefinite contract (unless any of the justifications are present), and the employee becomes for all intents and purposes permanent. Terminating a fixed-term contract to avoid the operation of this provision constitutes a dismissal. When an employee had been dismissed the remedies are provided for in the LRA. Apart from the term "application" there is no remedy prescribed in section 198B read with section 198D of the LRA. Taking a purposeful approach to the interpretation of the section it would be absurd to simply declare an employee to be indefinitely employed and leave it there. The employee will then have to institute new proceedings. This goes contrary to the principle that employment issues are to be dealt with as quickly as possible with the least legal formalities. Whereas I have sympathy for the poor finances of the respondent, I agree with Mr Du Preez that employees cannot be made to suffer because of mismanagement. Examples of this are in the public domain via newspaper reports and have not been denied by the respondent".[6]

17.3. "The documents Ms Nicholas presented do not constitute proof on a balance of probabilities of the Respondent's financial woes. I cannot accept the factual correctness thereof because the documents come from a slide-show, no source documents were presented, and the author(s) were not called as witnesses. One is surprised that the respondent had not taken any steps to negotiate this issue with the applicants and their representatives, particularly about the pension fund and bonus issues. If there had been such serious financial constraints it would simply make sense for the Respondent to come to

[5] Paragraph 16 of the Arbitration Award.
[6] Paragraph 17 of the Arbitration Award.

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an agreement with the Applicants. I have no discretion and I do not agree with Ms Nicholas' submission. Once an employee is deemed to have become indefinitely employed they are from that date onwards entitled to be treated on par with their colleagues. Failure to do this would constitute an unfair labour practice or could even amount to discrimination. Therefore, guidance in what the remedy is, is to be found in the remedies available in unfair labour practice cases and discrimination cases. Section 198B(8)(a) also provides guidance related to "equal" treatment so to speak".[7]

17.4. "It was common cause that from 1 April 2015 the applicants had become indefinitely employed or "permanent". That is the date from which they are entitled not to be treated less favourably than their counterparts who had been "permanent" at that date. That is therefore also the date the Applicants had become entitled to be members of the Respondent's provident fund and to receive bonus payments. I agree that they do not have the benefit of the cushion of a provident fund, should anything happen to an applicant's employment. It is up to each applicant what they do with the funds representing past provident fund contributions. They are also entitled to bonuses the did not receive previously [sic]. This is to be both with retrospective and future effect. Thus, the applicant will from now on have to join the provident fund and they will be entitled to bonus payments, when these are made. The respondent has not shown a justifiable reason for the difference in treatment".[8]

17.5. "The costs to make such a retrospective order is huge in this case and bearing in mind that there might well be cash constraints, the Respondent will be ordered to pay the compensation in three equal instalments to each Applicant and to immediately take the necessary steps to ensure that each applicant completes the necessary documentation to become members of the Respondent's provident

[7] Paragraph 18 of the Arbitration Award.
[8] Paragraph 19 of the Arbitration Award.

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fund. At the time when bonus payments are made, each applicant must also be paid the bonus if bonusses are paid".[9]

17.6. "I used the spreadsheets presented to me to make the calculations and determine the total compensation. As I understand from the submissions the spreadsheet shows the difference for each year since each applicant became indefinitely employed and these amounts need to be added for each applicant to see the total due to such applicant. According to the Respondent's calculations this total difference amounts to R35 455 140,00 and on the spreadsheet, it is broken down into the different years, showing for each year the difference in the remuneration of the particular applicant compared to the counterpart".[10]

17.7. "The employment of the 166 applicants (as per the attached list) is in terms of Section 198B(5) of the Labour Relation Act 66 of 1995 as amended deemed to be of indefinite duration since 1 April 2015".

17.8. "Each Applicant is entitled to become a member of the Respondent's provident fund and the Respondent must immediately take the necessary steps to ensure that by 30 August 2018 each Applicant has completed the necessary forms to become a member of the provident fund and to ensure that these documents are properly processed".

17.9. "Each Applicant must henceforth also be paid a bonus when the Respondent pays bonusses".

17.10. "The Respondent, Passenger Road Agency of South Africa Soc t/a Metrorail Western Cape, is ordered to pay to each applicant, (details reflected on the spreadsheet) the amounts indicated on the attached spreadsheet in the column "amounts due to each applicant". The total for each applicant is to be divided by three and three equal payments are to be made to each applicant; the first by 31 July 2018, the second

[9] Paragraph 20 of the Arbitration Award.
[10] Paragraph 21 of the Arbitration Award.

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by 31 August 2018 and the third by 30 September 2018. Should any instalment not be paid by the date ordered, the full outstanding balance shall become due and payable without any notice having to be given to the Respondent".

17.11. "The total to be paid to all the applicants amounts to R35 455 140.00".

Grounds of Review

[18] In total PRASA has raised six grounds of review which are summarised below.

First ground of review – jurisdiction

[19] The Commissioner's decision to dismiss the point *in limine* that the settlement agreement precluded the employees from further pursuing the matter before the CCMA is wrong in law and constitutes an irregularity in the conduct of the proceedings and exceeded the arbitrator's powers.

[20] According to PRASA, the dispute about the status of the fixed-term contract workers had been referred to the CCMA and subsequently settled in terms of the settlement agreement. The settlement agreement clearly deals with the question of the status of the fixed-term contract workers in terms of which PRASA was required to address their situation in order to become compliant with the LRA. While PRASA now concedes that the settlement agreement does not specify the issue of benefits separately, it is because the settlement agreement sets out a process in the form of a study, which will start off with identifying the affected fixed-term contract employees and determine who should become permanent. Implicit in the settlement agreement is that such employment would contain all the necessary terms, including benefits etc.

[21] If there was any complaint that PRASA had not complied with the settlement agreement, this ought to have been dealt with in terms of the PRASA Bargaining Forum Constitution as it was a dispute about the interpretation or

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application of the settlement agreement. Such a dispute would be referred to the CCMA or by agreement between the parties to private arbitration.

[22] As the employees were members of the trade unions, they were bound by the terms of the settlement agreement.

Second ground of review - jurisdiction

[23] As the settlement agreement had been made an order of the Labour Court, if the employees believed that PRASA was not compliant with its terms, then PRASA was potentially in contempt of the Labour Court's order and the appropriate remedy available to the employees was a contempt application to the Labour Court.

[24] The arbitrator did not have jurisdiction to deal with the dispute afresh in these circumstances.

Third ground of review - the arbitrator misconceived the nature of the enquiry

[25] According to PRASA, both referrals, the certificates of outcome and the facts in the stated case make it clear that the dispute was about the status of the employees, i.e. whether they should be deemed to have been employed on an indefinite basis after 1 April 2015 pursuant to the provisions of section 198B of the LRA.

[26] As the arbitrator ruled that the dispute was about the interpretation of section 198B of the LRA, it ought to have been referred to the CCMA for conciliation within six months after 1 April 2015 when PRASA did not declare them to be permanently employed and did not treat them as being permanently employed. Application for condonation was required in the circumstances. In the absence of condonation, the CCMA did not have jurisdiction to arbitrate the dispute.

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Fourth ground of review – an error of law: section 198B(8)(a)

[27] According to the arbitrator, once fixed-term contract workers are declared to be permanent or deemed to be permanent, they are from that date onwards entitled to be treated on par with their colleagues. Failure to do so would constitute an unfair labour practice or could even amount to discrimination". [11]

[28] The arbitrator conflated the status of employees covered by section198B, with employees covered by section 198B(8)(a). The latter deals with employees who remain on fixed term contracts for longer than three months and provides that they must not be treated less favourably than an employee employed on a permanent basis performing the same or similar work in the absence of a justifiable reason.

Fifth ground of review – the arbitrator treated the matter as an unfair labour practice

[29] The employees sought compensation for being treated differently since 1 April 2015 and the arbitrator believed that he had the power to make an award for payment of such compensation backdated to 1 April 2015.

[30] According to PRASA, there is no legal basis for this and certainly not one to be found in either section 198B or section 198D of the LRA. It is PRASA's submission that section 198D of the LRA provides for dispute resolution in relation to the interpretation or application of *inter alia*, section 198B. This has nothing to do with unfair labour practices or unfair discrimination disputes which are subject to their own dispute resolution processes. Section 198B does not refer to the remedial powers that a Commissioner has.

[31] The arbitrator erroneously relied on section 198B(8)(a) of the LRA which requires that employees employed on 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, without justification.

[11] Paragraph 18 of the Arbitration Award.

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[32] Even if the arbitrator had powers to make a back-dated award, he ought to have refused to do so on the basis that the employees had waited almost three years before they made the referral to the CCMA. The employees were acting in a dilatory manner without any explanation being furnished for the delay.

Sixth ground of review- irregularity in the conduct of proceedings

[33] The arbitrator ordered PRASA to pay the employees directly and not to make a payment to the provident fund in respect of the contributions which he found ought to have been made.

[34] According to PRASA, this amounts to making an order for compensation as opposed to directing the applicants to treat the employees the same as other permanent employees by making the provident fund contributions that it should have made. Nowhere in section 198D does a Commissioner have the power to make compensatory awards as a form of ancillary relief after a declaration for indefinite employment has been made. The arbitrator exceeded his powers and the award is thus reviewable on this basis as well.

Analysis

[35] I will not deal with all the grounds of review as it is not necessary for me to do so given the conclusions that I reach below.

Lack of jurisdiction – settlement agreement

[36] In my view the arbitrator lacked jurisdiction to deal with the dispute. In the settlement agreement the parties agreed that the way in which they would resolve the fixed-term contract issue was to commission a study which would verify the number of current fixed-term contract employees to be absorbed into PRASA in terms of an agreed criteria. This exercise had to be completed within a three month period of the signing of the agreement (end June 2016).

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[37] The first part of the exercise was therefore to establish how many fixed-term employees needed to be absorbed as permanent employees. The second part dealt with the criteria for the absorption. This would have to include the terms and conditions on which these employees would be made permanent and probably the timing thereof.

[38] What was specifically agreed to, for almost immediate implementation, was the extension of the death benefit to include fixed-term contract employees. This is an indication that the settlement agreement envisaged dealing with the benefits to which the employees would be entitled to upon absorption.

[39] It is telling that the trade unions were not party to the employees' dispute at the CCMA. Rather the employees elected to appoint attorneys to take the matter up on their behalf. This took place within close proximity of the unions' failed contempt of court application in this court. The employees may well have been disillusioned with their unions' handling of the matter and decided to pursue their own relief outside of the collectively bargained process.[12]

[40] Even if the employees parted ways with their unions, they remained bound by the settlement agreement by virtue of section 23 of the LRA.

[41] There can also be no doubt that the dispute was one about the interpretation and application of the settlement agreement. As I have mentioned, the settlement agreement provided for a process which was designed to lead to fixed-term contract employees being absorbed into PRASA as permanent employees. Agreeing to the terms and conditions applicable to these employees had to be part and parcel of this process. I say this because, in the absence of any collective agreement to the contrary, there was nothing prohibiting the parties from agreeing to a gradual or phased implementation of benefits to newly converted permanent employees, or even to lesser benefits.

[12] The settlement agreement was signed during April 2016. An update on the settlement agreement was prepared in November 2017. The referrals to the CCMA were done during February 2018.

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[42] The arbitrator's mind was closed to this possibility because he interpreted section 198B to mean that once the employees were deemed to be permanent they were automatically entitled to be treated equally to their permanent colleagues. In this regard, at paragraph 18 of his award, the arbitrator states that *"Once an employee is deemed to have become indefinitely employed they are from that date onwards entitled to be treated on par with their colleagues*."

[43] He continues with this line of thinking in paragraph 19 where he states that "*It was common cause that from 1 April 2015 the applicants had become indefinitely employed or "permanent". That is the date from which they are entitled not to be treated less favourably than their counterparts who had been "permanent" at that date. That is therefore also the date the Applicants had become entitled to be members of the Respondent's provident fund and to receive bonus payments.*

[44] In any event, even if it was not clear from the settlement agreement that benefits such as provident fund and bonusses would be covered, this in itself would have to be resolved through an interpretation and application dispute. In this regard, what the arbitrator was confronted with at the commencement of the arbitration on 25 April 2018 was, on the one hand, PRASA arguing that the dispute before him was covered by the terms of the settlement agreement and on the other hand, the employees argued that that the dispute before the arbitrator was not covered by the settlement agreement. In *HOSPERSA obo Tshambi v Department of Health, KwaZulu –Natal*[13] the court stated that:

> "What is a 'dispute' per se, and how one is to recognise it, demands scrutiny. Logically, a dispute requires, at minimum, a difference of opinion about a question. A dispute about the interpretation of a collective agreement requires, at minimum, a difference of opinion about what a provision of the agreement means. A dispute about the application of a collective agreement requires, at minimum, a difference of opinion about whether it can be invoked.

[13] [2016] 7 BLLR 649 (LAC) at para 17.

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[45] This is exactly what confronted the arbitrator and he should not have entertained the dispute, by, in effect, determining an interpretation and application dispute. The matter was not referred to him as an interpretation and application dispute and he had no jurisdiction to deal with it as such. The parties should have been told to resolve their interpretation and application dispute with reference to the dispute resolution provisions in the settlement agreement.

[46] In addition to the above, clause 4 of the settlement agreement provides in unambiguous terms that it is in full and final settlement of all disputes and all perceived disputes between the parties whether arising in contract, delict or statute. A dispute about an entitlement to benefits is a dispute arising out of statute, i.e. the LRA. Once again, if this interpretation was contentious the employees should have sought to resolve the dispute with reference to the dispute resolution clause in the settlement agreement.

[47] In the circumstances the review must succeed on this basis alone. However, even if I am wrong in this conclusion, the review must succeed for the further reasons below.

Section 198B

[48] While there are circumstances in which the use of fixed-term contracts are justified, such contracts have often been abused by employers to avoid making indefinite appointments and in the process denying employees statutory and constitutional protections. The affected employees are thus exposed to insecurity and vulnerability and often experience disparity in remuneration, benefits and terms and conditions of employment when compared with their counterparts employed on an indefinite basis.[14]

[49] Section 198 B was introduced into our law as part of the amendments which came into effect on 1 January 2015. The introduction was aimed at protecting

[14] Du Toit *et al Labour Relations Law: A Comprehensive Guide* (6th edition) at p 95.

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non-standard employees, including fixed-term employees.[15] The thrust of the protection is that an employer may employ an employee on a fixed-term contract or successive fixed- term contracts of longer than three months only if the nature of the work is of a limited or definite duration or the employer can demonstrate any other justifiable reason for fixing the term of the contract.[16]

[50] 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."* In *National Union of Metalworkers of South Africa obo members v Transnet SOC Ltd and others*[17] *the* Labour Appeal Court held that:

> "… in order to find that the contracts are of indefinite duration, it must be shown that they were, at least, in contravention of s198B(3). That subsection does not outlaw fixed-term contracts, but seeks to regulate their conclusion. It, in essence, provides that a fixed term contract, may be entered into with the employee, to whom s198B applies, for a period in excess of three months, provided certain conditions are met, namely: (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."

[51] In the case before me, at the commencement of the arbitration, PRASA conceded that the employees were deemed to be permanent employees in terms of section 198B(5) of the LRA. There was therefore no need for the arbitrator to make any finding in this regard. In *Masoga and Another v Pick n Pay Retailers (Pty) Ltd and Others*[18] the Labour Appeal Court, the underlying dispute turned around sections 198B and D and possibly section 198A of the LRA. In that case, the legal representative for the respondents conceded in his opening address that the appellants were employees of one of the respondents. According to the LAC, after it was confirmed that the appellants were permanent employees that should have been the end of the matter.

[15] See: The Memorandum of Objects on Labour Relations Amendment Bill, 2012 at p. 30 clause 36.
[16] Section 198B(3).
[17] [2018] 5 BLLR 488 (LAC) at para 23.
[18] Unreported judgment. (JA14/2018) [2019] ZALAC 59 (12 September 2019).

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[52] Section 198B is concerned with fixed-term contracts of employees earning below the earnings threshold. It has no application to employees employed on a permanent basis. Therefore, once it is conceded by an employer or determined by an arbitrator that employees are employed on a permanent basis, section 198B has no application to such employees. If these employees believe that they are being treated less favourably than their counterparts in respect of benefits, for example, they can then simply refer an unfair labour practice dispute. This is the same route which any other permanent employee would have to follow.

[53] Section 198D(1) deals with disputes. It provides that *"any dispute arising from the interpretation or application of sections 198A, 198B and 198C may be referred to the Commission or a bargaining council with jurisdiction for conciliation and, if not resolved, to arbitration."*

[54] Disputes under this section will typically relate to whether or not an employee is employed on an indefinite basis. It is in essence a declaration of an employee's status. It will also cover disputes by employees flowing from section 198B (8) which provides that:

> "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."

[55] Here, the complaint will be that a fixed-term employee is being treated less favourably than an employee employed on a permanent basis performing the same or similar work without there being a justifiable reason for the different treatment. Section 198D (2) sets out the circumstances in which different treatment may be justifiable, which includes considerations such as seniority, experience, length of service, merit, etc. Section 198D offers no other relief beyond this, and as stated above, in any event, is not concerned with the equal treatment or benefits of permanent employees.

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[56] For the reasons stated above the arbitrator could not, on the strength of section 198B, grant substantive relief to the employees in terms of remuneration and benefits. In so doing he committed an error of law and/or exceeded his powers and the award must be reviewed and set aside on this basis.

[57] The employees however also argue that the relief granted was nonetheless competent, in that, the arbitrator was entitled to deal with the matter as an unfair labour practice. I deal with this argument below.

Unfair labour practice

[58] Mr Bosch, who appeared on behalf of the employees, submitted that the employees' representative, at the arbitration, indicated that the dispute related to an alleged unfair labour practice.

[59] Mr Ackermann, who appeared on behalf of PRASA, argued that the arbitrator was not permitted to deal with the matter as an unfair labour practice as it was not conciliated as such and that it is clear from the evidence that the parties agreed to arbitrate a section 198B dispute. He said this for the following reasons:

59.1. The first dispute referred to the conciliation (Mdluli and 14 others) was a dismissal dispute in terms of section 186(1)(b) of the LRA relating to the non-renewal of fixed-term contracts. This was clarified in the certificate of outcome as being a section 198B dispute. The conciliating Commissioner therefore correctly determined the real dispute before him, as confirmed by the parties in the stated case as relating to section 198B. There is no mention of an unfair labour practice.

59.2. The second dispute referred to conciliation (Mhlakela and 152 others) was also referred as a section 186(1)(b) dispute and recorded as such in the certificate of outcome. This accords with the issue of permanent employment, and the only sensible interpretation of what transpired at conciliation is that it related to section 198B.

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59.3. The evidence is clear that what was conciliated was a section 198B dispute. This is what the arbitrator stated in paragraphs 4 and 5 of his award.

[60] The Constitutional Court in *September and Others v CMI Business Enterprise CC*[19] confirmed the general rule as set out in *National Union of Metal Workers of South Africa v Driveline*[20], that in order to determine what was conciliated, one must look at the 7.11 CCMA form, and the certificate of outcome. In the *September* matter the Constitutional Court came to the aid of employees who had loosely referred what they termed a 'discrimination dispute'. The actual dispute was a constructive dismissal dispute. The Constitutional Court found that one can look at extraneous evidence to determine what the actual dispute was.

[61] The arbitration took place on 28 April 2018 and 8 July 2018. At the first sitting, only the preliminary point relating to the CCMA's jurisdiction to deal with the dispute in light of the settlement agreement, was dealt with. An Advocate Viljoen represented the employees on this occasion. In his address to the arbitrator he mentions that the matter was *"originally referred as a section 186(2)(a). It deals with unfair labour practices."*[21] He later also says that *"I would submit that the CCMA does have jurisdiction to entertain the dispute in terms of Section 186(2)(a), and that the settlement agreement is not a bar to the CCMA's jurisdiction."*[22] He is then asked by the arbitrator if the matter should proceed by way of an unfair labour practice or in terms of section 198, to which he responds that it should be heard under section 186(2)(a), but that he also requests a ruling in terms of section 198B(3) and (5). After the arbitrator handed down his ruling on the *in limine* issue, the matter was postponed to 8 July 2018.

[19] (2018) 39 ILJ 987 (CC).
[20] 2000 (4) SA 645 (LAC).
[21] At page 11 of the transcript, paragraph 2.
[22] At page 15 of the transcript, paragraphs 12-14.

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[62] When the matter resumed on 8 July 2018, the employees had a new representative, an advocate Du Preez. At no stage during the proceedings does he refer to an unfair labour practice dispute. On the contrary, he states that as PRASA has conceded that the employees are permanent, the onus is on the employer to provide reasons why the employees are being treated differently and contrary to section 198B(8)(a).[23] He later continues by submitting that given that the employees have been employed, contrary to the provisions of section 198B(5), there can be no reason why they should be treated less favourably than their counterparts.[24]

[63] In the Mdluli referral, which was completed with the assistance of their attorneys at the time, they indicate (by ticking the relevant box) that the nature of the dispute was an unfair labour practice. The facts of the dispute are however summarised as *"Successive fixed term contracts followed by continued employment with no contract and reasonable expectation of a permanent position. Section 186(1)(b) of the LRA."* The outcome sought from the conciliation is recorded as *"Compensation and permanent position."* On the certificate of outcome, dated 6 March 2018, the commissioner records the following in respect of the dispute – *"Incorrect nature of dispute that is S186(2)(a) instead of S198B"* .

[64] It is clear that the commissioner who was appointed to conciliate the dispute identified the true dispute as one relating to fixed-term contracts as opposed to unfair labour practices. This also appears from the Conciliation Outcome Report prepared by the Commissioner on the same day that the certificate of outcome was issued. In the report the commissioner indicates the issue in dispute as being *"S198B permanently on contract the want to be appointed permanently with benefits (sic)."* The following day, on 7 Mach 2018, the employees' attorneys refer the matter to arbitration. Consistent with the certificate of outcome and Conciliation Outcome Report, they now refer to the issue in dispute as relating to section 198B. The desired outcome of the

[23] At page 27 of the transcript, paragraphs 5-12.
[24] At page 44 of the transcript, paragraphs 10-18.

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arbitration is recorded as *"to be appointed permanently and be compensated plus benefits.*"

[65] In the Mhlakela referral, which was also completed with the assistance of their attorneys at the time, they indicate (by ticking the relevant box) that the nature of the dispute was an unfair labour practice. The facts of the dispute are however summarised as *"successive fixed term contracts followed by continued employment with no contract and reasonable expectation of permanent position. Section 186(1)(b) of LRA."* The outcome sought from the conciliation is recorded as *"fixed term contracts be made permanent and maximum compensation."* On the certificate of outcome, dated 11 April 2018, the commissioner records the following in respect of the dispute – *"186 1 b Fixed term contract expectation of permanency."* In the Conciliation Outcome Report, prepared by the Commissioner on the same day that the certificate of outcome was issued, the commissioner indicates the issue in dispute as being *"Fixed term contracts have been renewed expectation of permanency".* Two days later, on 13 April 2018, the employees' attorneys refer the matter to arbitration. Despite what was recorded in the certificate of outcome and Conciliation Outcome Report, they now refer to the issue in dispute as relating to section 198B. The desired outcome of the arbitration is recorded as *"Permanent positions and maximum compensation.*"

[66] As indicated earlier in this judgment, the two disputes were subsequently consolidated on the basis that they were substantially similar in nature.

[67] From the above it is clear that the dispute was never dealt with as an unfair labour practice, either at conciliation or at arbitration. The submission made by Advocate Viljoen on behalf of the employees, at the first sitting of the arbitration on 28 April 2018, that the matter was *"originally referred as a section 186(2)(a) and deals with unfair labour practices"* is not correct. Nor was his submission that *"the CCMA does have jurisdiction to entertain the dispute in terms of Section 186(2)(a)".*

[68] To the extent that the arbitrator dealt with the matter on the basis that he was dealing with an unfair labour practice, he committed a gross irregularity. In

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any event, if the true dispute referred to conciliation was not an unfair labour practice dispute then the arbitrator had no jurisdiction to deal with the dispute as such.

[69] Even if I am wrong in the above conclusions, there is another compelling reason why the arbitrator could not resolve the matter on the basis that it was an unfair labour practice dispute. This is because he did not deal with the matter as if it was an unfair labour practice. In *Apollo Tyres SA (Pty) Ltd v CCMA*[25] the court reasoned that the LRA's prohibition of unfair labour practices relating to benefits mainly concerns the use (or misuse) of discretionary power by an employer in relation to a benefit scheme.

[70] One of the main elements a commissioner should consider when faced with a dispute over the exercise of an employer's discretion is whether that discretion was exercised fairly. Common elements indicating the unfair exercise of discretion are whether the exercise of discretion fails to meet an objective standard or is arbitrary, capricious or inconsistent, whether negligent or intended.[26]

[71] In *Solidarity obo Oelofse v Armscor (SOC) Ltd & Others* [27] this court considered the reasons put forward by the employer in deciding not to pay a benefit. The court further indicated that a point of departure was to establish why the employer decided not to pay the benefit and thereafter to consider the reasons provided in light of the factors outlined in *Apollo supra* (i.e. whether the reason put forward by the employer constitutes arbitrary, capricious or inconsistent conduct). According to the court it "*takes more than mere disagreement to upset the exercise of discretion*" by an employer.[28]

[72] Further, where an applicant relies on inconsistency the onus is on that applicant to prove that inconsistency exists and "*the case for inconsistency must be made out in sufficient particularity, identifying the other employees involved, so as to enable the employer to provide a proper answer to it. And*

[25] [2013] 5 BLLR 434 (LAC).
[26] At para 53.
[27] (JR2004/15) [2018] ZALCJHB 87 (21 February 2018).
[28] At para 39.

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even then, should it be shown that employees have been treated differently, a number of further requirements must still be satisfied in order to successfully make out an inconsistency case. These are first, that a like for like comparison must be conducted. Even if a like for like comparison points to possible inconsistency, it must then still be shown that the employer's conduct in treating employees differently was not motivated by arbitrariness, mala fides, capricious conduct or a discriminating management policy".[29]

[73] The point is that in this matter the arbitrator did not approach the matter as an unfair labour practice and it therefore cannot be correct that the relief which he granted was competent under the unfair labour practice provisions of the LRA.

[74] As far as costs are concerned, the underlying issue relating to the employees' indefinite employment and the benefits which may flow from that, is clearly an important issue for them. They were also not assisted by their trade union in the CCMA or in this court in their quest. I can therefore see no basis in law or fairness to burden the employees with a cost order.

[75] In the circumstances the following order is made:

Order

1. Condonation for the late filing of the review is granted.
2. The award issued by the second respondent on 17 July 2018 under case numbers WECT2826-18 and WECT3271-18 is hereby reviewed and set aside.
3. There is no order as to costs.

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BN. Conradie

Acting Judge of the Labour Court of South Africa

[29] At para 51.

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Appearances:

For the applicants:	Advocate L Ackermann
Instructed by:	Maserumule Attorneys
For the third to 167th respondents:	Advocate CS Bosch
Instructed by:	Marais Müller Hendricks Attorneys.

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