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(3) REVISED.

23/01/2025
DATE

SIGNATURE



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR1452/2021

In the matter between:

**NATIONAL HEALTH AND ALLIED WORKERS UNION
obo MEMBERS**

Applicant

and

ADVOCATE RONNIE BRACKS, N.O.

First Respondent

**PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL**

Second Respondent

**NATIONAL DEPARTMENT OF HEALTH
& EIGHT OTHERS**

Third to Eleventh Respondents

Heard: 29 October 2024

Delivered: 23 January 2025

This judgment was handed down by agreement between the parties by circulation to the parties' legal representatives by e-mail. The date and time for handing down the judgment is deemed to be 23 January 2025.

Summary: application to review award – award reviewed – commissioner was wrong in finding that Section 198B of the Labour Relations Act 1995 does not find application to the contracts of Community Health Workers.

JUDGMENT

COOK, AJ

introduction

[1] This matter is an opposed review application in which the Applicant, (National Health and Allied Workers Union [NEHAWU]), on behalf of its members, who are Community Health Workers (CHWs), seeks to review and set aside the arbitration award under case number PSHS933-20/21 dated 27 October 2021 (the award) issued by the First Respondent (the commissioner).

[2] NEHAWU seeks that the award be substituted with the following declarator:

‘It is determined that the contracts of employment of the members of the applicants whose names are listed in the schedule attached hereto as “A”, are deemed to be of an indefinite duration.’¹

Background

[3] On 23 March 2021, NEHAWU referred a dispute to the Second Respondent (the bargaining council) in terms of Section 198D(1) of the Labour Relations Act, 66 of 1995, as amended (the LRA).² A certificate of non-resolution was issued on 26 April 2021³. Thereafter, the parties held a virtual “pre-trial” [sic] conference was held, and a minute was signed on 22 August 2022.⁴

[4] In terms of the pre-arbitration minute, the following was agreed:

1. ...

2. The dispute relates to the interpretation and application of Section 198B of the LRA and, without limitation thereto, more specifically Section

¹ Prayer 2 of the notice of motion, page 1 of the pleadings.

² Annexure “FA3”, pages 62-68 of the pleadings.

³ Annexure “FA4”, page 69 of the pleadings.

⁴ Annexure “FA5”, pages 71-76 of the pleadings.

198B(3).

...

4. In summary, the Applicant contends that the Respondents have employed its members in contravention of Section 198B(3) of the LRA, more particularly in that they have been employed by the Respondents on fixed-term contracts of employment for a period or successive periods exceeding three months in total.

5. The Respondents deny that they have acted in contravention of Section 198B(3). The Respondents contend:

5.1 The contracts concluded with each of the CHWs (including those who are members of the Applicant) are permitted by statute (in particular the Public Service Act, 1995 read with the Public Services Regulations, 2016) and a sectoral determination and/or collective agreement (in particular the Public Health and Social Development Sectoral Bargaining Council Resolution 1 of 2018, as amended), as contemplated in Section 198B(2)(c) of the LRA.

5.2 The Respondents were, as contemplated in Section 198B(3) read with Section 198B(4)(h) of the LRA, justified in concluding fixed-term contracts for periods longer than three months, in that all CHW positions were funded by an external source for a limited period.

5.3 The appointment of employees on a permanent basis into the public service/as public servants must be in line with the Public Service Act and Public Service Regulations.

...

8.1 The respondents contends that they complied with section 198B(3)(b) in that the justification lies in section 198B(4)(h) in that:

4.1.1 The CHW positions were funded by an external source.⁵

- [5] At arbitration, the parties relied on a common bundle. NEHAWU closed its case without calling any witnesses. The Respondents then called three witnesses, Mr Sifiso Khumalo, Ms Nancy Mafikeng and Ms Lindiwe Fortunate Madikisela.

The issues the commissioner was required to decide

- [6] In terms of the arbitration award, the commissioner recorded:

'ISSUES TO BE DECIDED:

3. I must determine whether the fixed term contracts between the Respondents and the community health workers (CHWs) attached hereto are subject to Section 198B(5) of the Labour Relations Act 66 of 1995 (the LRA), which deems a fixed-term contract to be of indefinite duration if the fixed-term contract is in contravention of sub-section (3).⁶

- [7] To answer this question, the commissioner had to determine the following issues:

- 7.1 Whether the Public Service Act (PSA) and its Regulations and/or resolution 1 of 2018 permitted the Respondents to conclude the fixed-term contracts, as contemplated in section 198B(2)(c) of the LRA.

- 7.1.1 If not, were the Respondents justified in concluding fixed-term contracts for periods longer than three months because the CHW positions were funded by an external source for a limited period.

- 7.1.2 Accordingly, the commissioner had to determine whether the conditional grant issued by the National Treasury was from an external source for a limited period.

- 7.2 However, before this was addressed, the commissioner needed to determine whether the Respondents were entitled to raise the justification. This required determining whether section 198B(6)(b) had

⁵ Annexure "FA5", pages 73-76 of the pleadings.

⁶ Page 200 of the pleadings.

been complied with and the consequences of not complying.

- 7.3 Finally, if the commissioner found that 198B(3)(c) was not applicable and that the Respondents had not proven a justifiable reason, could the commissioner order permanent employment because the Respondents failed to comply with the processes contemplated in the Regulations for appointing permanent positions?

The documentary evidence

PHSDSBC Resolution 1 of 2018

- [8] In terms of Resolution 1 of 2018 of the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC), (titled "AGREEMENT ON THE STANDARDISATION OF REMUNERATION FOR COMMUNITY HEALTH WORKERS IN THE DEPARTMENT OF HEALTH"):

'PURPOSE

- 3.1 To ensure the standardisation of payment of remuneration for CHWs in the DoH.
- 3.2 To ensure adequate protection for the remuneration payment of the CHWs into Personnel and Salary (PERSAL) system.
- 3.3 Ensure appropriate implementation and management of recruitment, selection, appointment, placement, remuneration, skills development, dispute resolution and occupational health and safety processes for all members of WBPHCOTs.
- ...
- 5.4 The provisions of this agreement shall apply to CHWs for duration of twelve (12) months upon signing the agreement."⁷

The CHW agreement

- [9] The parties agreed that the CHW agreement was a typical contract concluded

⁷ Page 93 of the pleadings.

between the respondents and all CHWs.⁸

[10] In terms of the definitions:

'Resolution 1 of 2018 means the agreement between the Department of Health and the Labour Unions on the standardisation of the community health worker remuneration in the Department of Health which was finalised in the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC).'

[11] The CHW agreement also contained the following terms:

3.1 Notwithstanding the date of signature by the parties, the provisions of this agreement shall become effective from 1st April 2020 and ending on the 31st March 2021.

3.2 The Department shall retain the sole discretion to extend this agreement in terms of clause 3.1.⁹

...

3.3.4 Any matter arising, which are not specifically provided for herein, shall be dealt with in accordance with the provisions of the PHSDSBC Resolution 1 of 2018 and Resolution 1 of 2019.¹⁰

3.6 The community health worker acknowledges and understands that:

3.6.1 this agreement is for a fixed-term of 12 (twelve) months and renewable at the sole discretion of the Department.¹¹

The commissioner's finding

[12] The commissioner ultimately found:

'72. In light of the above considerations it is my view that the collective agreement validates/regulates the fixed term contract. Thus the contract would not be subject to the provisions in Section 198B(3) – (7).

⁸ Annexure "FA5", paragraph 14.1, page 77 of the pleadings.

⁹ Page 105 of the pleadings.

¹⁰ Page 105 of the pleadings.

¹¹ Page 106 of the pleadings.

73. It is my further view that Section 198B does not find application to the contracts of CHWs – the Applicants cannot rely on the deeming provision.¹²

Relevant law

[13] In *Commission for Conciliation, Mediation and Arbitration v Commission Staff Association and Another*, the Labour Appeal Court held:

‘It appears common cause that a commissioner’s award can be reviewed if it is found that he or she committed a material error of law, either because the interpretation was unreasonable, or was wrong, and affected the outcome. In any event, this is consistent with what this Court has held.’¹³

Section 198B

[14] Section 198B of the LRA deals with fixed-term contracts with employees earning below the earnings threshold by the Minister of Labour in terms of section 6(3) of the Basic Conditions of Employment Act.

[15] The exclusion provisions of Section 198B(2) were not applicable in this matter as it was common cause the employees earned below the threshold and the Respondents employed more than 50 employees.¹⁴

[16] Nor was it contended that the nature of the work for which the CHWs are employed is of limited or definite duration. Accordingly, section 198B(3)(a) was irrelevant.

[17] The provisions that are relevant to this matter include:

(2) This section does not apply to –

...

(c) an employee employed in terms of a fixed-term contract which is permitted by any statute, sectoral determination or collective

¹² Page 213 of the pleadings.

¹³ [2019] ZALAC 69; [2020] 1 BLLR 9 (LAC).

¹⁴ Paragraphs 6.1 and 6.2, page 74 of the pleadings.

agreement.

- (3) An employer may employ an employee on a fixed term contract or successive fixed term contracts for longer than three months of employment only if –
- (a) ...; or
- (b) the employer can demonstrate any other justifiable reason for fixing the term of the contract.
- (4) Without limiting the generality of subsection (3), the conclusion of a fixed term contract will be justified if the employee-
- ...
- (h) is employed in a position which is funded by an external source for a limited period; or
- ...
- (5) Employment in terms of a fixed term contract concluded or renewed in contravention of subsection (3) is deemed to be of indefinite duration.
- (6) An offer to employ an employee on a fixed-term contract or to renew or extend a fixed-term contract, must-
- (a) be in writing; and
- (b) state the reasons contemplated in subsection (3) (a) or (b).
- (7) If it is relevant in any proceedings, an employer must prove that there was a justifiable reason for fixing the term of the contract as contemplated in subsection (3) and that the term was agreed.'

Do the PSA and the regulations permit the respondents to conclude the fixed-term contracts

[18] It was submitted on behalf of the Respondents:

'What is at the core of the application is whether the first respondent was correct or not in finding that the collective agreement entered into by and

between the third to the eleventh respondents and the applicant, amongst other constituent trade unions, in 2018 (Resolution 1 of 2018 -Agreement on the Standardisation of Remuneration for Community Health Workers in the Department of Health as amended, (hereinafter "the Collective Agreement") permitted the respondents to enter into fixed-term contracts of employment with the CHWs in excess of three months.¹⁵

- [19] Accordingly, the Respondents relied on the resolution being a collective agreement that permitted the CHWs to be employed on fixed term contracts. Consequently, the Respondents did not make any submissions that the PSA and Regulations permitted the conclusion of the fixed term contracts. Nor did NEHAWU refer to any provisions of any other statutes.
- [20] NEHAWU, on the other hand, in its submissions, acknowledged that section 8 of the Public Service Act contemplates the possibility of appointment on a fixed term contract.¹⁶
- [21] However, NEHAWU submitted that the statute must be one which itself permits the fixed term contracts. (NEHAWU provided examples of such statutes, such as the appointments of municipal managers and heads of departments). NEHAWU argued further that it is not sufficient that the statute merely empowers an official to conclude a fixed-term contract.¹⁷
- [22] NEHAWU reasoned:
- 'If it were otherwise, the provisions of s. 198B would, despite the provisions of section 209 (which expressly stipulate that the LRA binds the State), effectively be ineffective against the State. This would be an absurd result.'
- [23] The Court accepts this argument and finds that the Public Service Act and the Regulations do not permit the Respondents to employ the CHWs on fixed terms contracts as contemplated in section 198B(2)(c) of the LRA.

¹⁵ Paragraph 6 of the Departments heads, page 2.

¹⁶ Paragraph 89 of NEHAWU's heads, page 32.

¹⁷ Paragraph 94, NEHAWU's heads, page 34.

Does Resolution 1 of 2018 permit the respondents to conclude the fixed term contracts

- [24] The commissioner was correct in finding that the resolution was a valid, binding collective agreement that was incorporated into the employment agreement.
- [25] The purpose of the resolution was *inter alia* to ensure the standardisation and protection of payment of remuneration and the management of recruitment, selection and appointment.
- [26] The resolution does not mention fixed term contracts. The resolution only states:
- '5.4 The provisions of this agreement shall apply to CHWs for duration of twelve (12) months upon signing the agreement.'
- [27] Under this clause, the resolution's provisions would only apply to the CHWs for twelve months. The clause does not permit the CHWs to be employed on fixed term contracts for twelve months.
- [28] Considering the language, context, and purpose of the resolution, nothing permits the Departments to conclude fixed term contracts exceeding three months.
- [29] The resolution does not permit the CHWs to be employed in terms of a fixed term contract. The CHW employment contracts permit this, but they are not collective agreements.
- [30] The Court concurs with the arguments presented on behalf of NEHAWU that there is a huge leap in logic from the conclusion that because the Resolution is a collective that binds all CHWs and regulates the employment of all CHWs (as it sets out the recruitment process applicable to them and out their salaries), therefore, the resolution "validates/regulates" the fixed term contracts and, consequently, the fixed term contracts are permitted in terms of section 198B(2)(c) of the LRA. Nothing in the resolution permits the Respondents from entering into a fixed term contract for a period exceeding three months.
- [31] The commissioner's interpretation of the collective agreement was incorrect. The commissioner was wrong to find that the agreement permits the

Respondents to employ CHWs on fixed-term contracts exceeding three months. This incorrect decision resulted in an unreasonable outcome.

Were the respondents justified in concluding fixed term contracts

- [32] The commissioner found in favour of the Respondents on the basis that the collective agreement "*validates/regulates the fixed term contract*". Accordingly, the commissioner found the contract would not be subject to the provisions of Section 198B(3) – (7).
- [33] Based on this finding, the commissioner did not consider whether fixing the contract term was justified because the CHWs were employed in positions funded by an external source for a limited period.
- [34] Although paragraph 57 of the award reads:

‘Consequently, the Respondents were, as contemplated in Section 198B(3) read with Section 198B(4)(h) of the LRA, justified including fixed term contracts for periods longer than 3 months, that all CHW positions were funded by external sources for a limited period.’

- [35] If one reads this in the context of the award, it is not the commissioner's finding but a summary of the respondents' submissions.

Are the respondents entitled to raise the justification

- [36] NEHAWU submitted that unless there has been compliance with section 198 B(6), an employer cannot try to justify repeated extensions at a later stage and that any justification which may otherwise be available to the employer is lost.¹⁸

Was there compliance with section 198B(6)

- [37] The Respondents submitted that the offer of employment of the CHWs was in writing, and the reasons were contained in the Collective Agreement, which was incorporated into their fixed term contracts by reference.¹⁹

¹⁸ Paragraphs 102 and 103 of NEHAWU's heads, page 36.

¹⁹ Paragraph 16 Respondents heads, page 7.

[38] The resolution notes that:

‘The National Department of Health (DoH) has set aside funds for conditional grants to provinces for the implementation of standardisation of CHWs remuneration as an interim measure.’²⁰

[39] Accordingly, the reason for the justification of the fixed term contract being that the conditional grants was incorporated by reference into the employment contracts, and as such, the Respondent complied with section 198B(6).

[40] In any event, merely because there is non-compliance with 198B(6)(b), this does not prevent a party from attempting to prove that there was a justifiable reason for fixing the term of the contract in terms of 198B(7).

Is the conditional grant issued by the national treasury from an external source for a limited period

[41] In order to justify the reason for fixing the contract terms for longer than three months, the Respondents relied on the fact that the CHWs were employed in positions funded by an external source for a limited period.

[42] The Respondents correctly submitted that it was not disputed that the funding for the employment of the CHWs was a conditional grant approved by the National Treasury on an annual basis, based on the submission made by the Executive Authority, and that it is funded for 12 months²¹.

[43] What was, however, in dispute was whether the conditional grant was from an external source.

[44] The department receives all revenue from the National Treasury. Madikisela, in cross-examination, acknowledged that the funding for all public servants in the public service was sourced from the National Treasury²². The National Treasury also provided the funding for the conditional grant. The fact that the grant was conditional does not affect the funding source; the only distinction is that the

²⁰ 1.4, page 91 of the pleadings.

²¹ Paragraph 13, Respondents' heads, page 5.

²² Transcript: p. 86, ll. 11 – 14.

funding is a conditional allocation instead of a normal budget.

[45] The Respondents proved, on the evidence before the commissioner, that the CHWs were employed in a position that was funded for a limited period but not that they were funded from an external source.

[46] In the circumstances, the Respondents failed to prove a justifiable reason as contemplated in 198B(7) of the LRA.

Can the commissioner order permanent employment

[47] In terms of section 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.

[48] A commissioner has the power to grant a declaratory award confirming the status of an employee as a deemed employee in terms of section 198D of the LRA.²³

[49] Further on the strength of *Nowalaza and Others v Office of the Chief Justice and Another*²⁴ and *Public Servants Association on behalf of PSA member v National Prosecuting Authority and another*²⁵, the Court finds that the commissioner was permitted to declare that the CHWs' employment was of an indefinite duration despite the failure to comply with the processes contemplated in the Regulations for appointment to permanent positions.

Costs

[50] The Court finds no reason why the norm that costs do not follow the result should not apply in this matter.

[51] Accordingly, considering all the circumstances, including the law and fairness, a costs order is not appropriate in this matter.

²³ *Bata SA (Pty) Ltd & another v SA Clothing & Textile Workers' Union & others* [2024] 8 BLLR 866 (LAC); (2024) 45 ILJ 1541 (LAC).

²⁴ [2017] ZALC JHB 234.

²⁵ *Public Servants Association on behalf of PSA Members v National Prosecuting Authority & another* (2012) 33 ILJ 1831 (LAC); [2012] 8 BLLR 765 (LAC).

Order

1. The arbitration award dated 27 October 2021 issued by the First Respondent under case number BSHS933-20/21 is reviewed and set aside.
2. The arbitration award is substituted with the following:

‘It is determined that the contracts of employment of members of the Applicants whose names are listed in the schedules attached as Annexure A, are deemed to be of an indefinite duration.’
3. No order as to costs.



A.L. Cook
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate G. I. Hulley SC

Instructed by: Mametja Attorneys

For the Third to Eleventh

Respondents: L. A. Maisela

Instructed by: The State Attorney, Pretoria

LABOUR COURT