CASE NO.: LCA 41/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

MATHEWS ROELOF VAN OUERKERK APPELLANT

and

HANGANA SEA FOOD (PTY) LTD RESPONDENT

CORAM**:** MANYARARA, A J

Heard on: 27 March 2009
Delivered: 08 July 2009

JUDGMENT

MANYARARA, AJ.:[1] This is an appeal against the judgment of the Chairman of the Windhoek District Labour Court dismissing the appellant's claim of unfair dismissal in respect of which the appellant claimed the following relief –

1. reinstatement;
2. damages in an amount to be determined by the court; and
3. payment of salary for the period of 01 May 2005 to 31 October 2006.

[2] The appellant did not pursue his claim for reinstatement in the District Labour Court and does not pursue such claim in this appeal.

[3] The respondent opposed the relief claimed by the appellant on the grounds that –

1. The appellant had been employed on a contract for a fixed term commencing on 1 November 2003 and terminating on 31 October 2004;
2. Subsequent to the termination of the contract, the appellant had been employed on a month to month basis without a written contract while the respondent considered the possible extension or renewal of the expired contract; and
3. On 1 March 2005, while the appellant was so employed, he was informed by the respondent that no further or new contract would be entered into with him and he was given two months' notice with full pay of termination of his employment expiring on 30 April 2005.

The respondent further pleaded that, in the event that the court upheld the appellant's claim, account should be taken of the fact that the appellant entered into the employment of another employer during May 2005 and put the appellant to proof of the damages he claimed.

[4] As the cause of the complaint was unfair dismissal, the onus rested on the respondent to prove the contrary and the respondent called Verdun Van der Walt, its commercial manager, to testify.

[5] The witness confirmed the contents the written contract of employment, Exhibit A, and that the document was signed by the appellant personally and by Jacobus Du Plessis in his capacity as the respondent's general manager. The witness told the court that as the appellant

came from the Netherlands, also popularly called Holland, he required a work permit. The record of the evidence continues as follows:

"Q. What happened when the termination date approached?

A. *Before the end of October 2004 we had to apply for a work permit. Not sure if we still needed Ouwerkerk's services. August is when we began to consider his situation.*

Q. What was the background?

A. We were in discussions because of the economic situation and need to reduce costs. Looking at ways he cut costs (sic). This was from end of 2003. Company under pressure for survival. After end of Ouwerkerk's contract we were in the same position.

Q. Was Ouwerkerk asked to stay on? Was he promised a new contract?

A. There was agreement to extend his contract on a month to month basis.

Q. Any discussions of terms of the contract, if it would be renewed?

A. In one meeting it was discussed that maybe the conditions would be the same. Discussing the possibility of outsourcing. I do not recall discussing with him. He was present…

Q. At meetings was it indicated that he was offered a further contract?

A. No.

Q. For how long was (he) in employ(ment) without (a) written contract.

A. November 2004 to February 2005."

[6] As already mentioned, it was on 1 March 2005 that the appellant was handed a letter giving him two months' notice on full pay of termination of his employment on 30 April 2005.

[7] Van der Walt was shown the letter of dismissal which he said was handed to the appellant although the witness said that he was not involved in the discussion. The document, Exhibit B, is dated 1 March 2005 and directed to the appellant by the respondent's Financial Director, W. Schuckmann, in the following terms:

"<u>Termination of your services</u>

The Company is unfortunately not in the position to extend or renew your contract of employment any longer. You are herewith given 2 (two) months notice of termination of your services.

We would like to thank you for your services that you have offered to Hangana over the past year."

By then, Du Plessis's services had been "terminated."

[8] The appellant's attorneys replied to the respondent's letter by letter dated 11 March 2005, Exhibit C, as follows:

"We act on the instructions of MR VAN OUWERKERK.

Our client has handed to us for attention and reply your letter of termination dated 1 March 2005. Our client does not accept your notice of termination.

Our instructions are that during September 2004 our client entered into a new fixed term contract of employment with you for a period of 24 months, commencing November 2004, such contract being based on the terms and conditions set out in the original contract of employment entered into between our client and you during November 2003.

Our client is not prepared to nor does he accept your notice of termination dated 1 March 2005. Our client tenders his services against payment for the period contracted for and holds you liable for any damages he may suffer as a result of your breach or repudiation of the original agreement entered into."

[9] The respondent's attorneys replied to the above letter on 1 April 2005, Exhibit E, as follows:

"Your letters dated 11th March 2005 and subsequent letter dated 22nd March 2005 bear reference.

Our client denies having entered into a new contract of employment with your client – In fact our client never made any concession that could lead your client to believe that his contract of employment was extended for any period other than a month at a time.

Our instructions are to inform you, which we hereby do, that your client was kept in our client's employment on a month to month basis, once the written contract of employment lapsed on the 31st October 2004.

Any action forthcoming will be defended at all costs."

[10] The respondent also addressed a letter to the appellant requesting him to return the company's car and cell phone. The appellant initially resisted but he eventually relented and returned the car in exchange for a letter from the respondent's managing director, dated 18 May 2005, Exhibit H, stating that the respondent no longer required the appellant's services and he was free to seek employment by another company. The appellant in fact took up employment with Cadilu Fishing Company at the end of May 2005. Accordingly, the month of May 2005 was the only period during which the appellant was unemployed.

[11] In cross examination, Van der Walt stated that he was not involved in the negotiations leading to the appellant's employment; these were conducted by Du Plessis and Hans Werne Truke. He also did not know whether the promise of 3 years' employment was part of the negotiations. In reply to a direct question whether he disputed that on 31 October 2004 Du Plessis said to the appellant, *"Don't worry you will be further employ(ed) for 2 years,"* Van der Walt replied, *"That would be against what happened in meetings. Can't dispute because I was not present."*

[12] Another question put to Van der Walt was why Du Plessis, by letter dated 29 September 2004 requested the Ministry of Home Affairs for extension of the appellant's work permit for another 16 months. He replied that Du Plessis as the managing director would have had

authority to do so, adding, *"but the terms of the contract can be different"* and that it would be "irresponsible" to appoint a person without any contract.

[13] Van der Walt agreed that the respondent paid the appellant's cost of coming to Namibia; however, the question of the cost of his relocation back home would have been recorded in the agreement but it was not recorded.

[14] In re-examination, Van der Walt said that any promises that Du Plessis may have made to the appellant of employment for a minimum period of three years were not mentioned at the meetings he attended.

That was the respondent's case.

[15] The appellant gave evidence in support of his claim. He testified that Du Plessis approached him in Holland with the offer of employment by the respondent and they agreed on a time period of 3 years, salary and benefits and that the respondent would be responsible for bringing him, his family and property to Namibia and relocation of the same to Holland at the end of the period of his employment. The terms of the contract were finalized by fax and email and he came to Namibia and worked on the strength of the promises made to him by Du Plessis. Before 31 October 2004, Du Plessis told him that the contract would be extended for another two years to add up to three years.

[16] After Du Plessis left the respondent, Uys and Schuckmann called the appellant to their office, handed him the letter of termination of his services and paid his salary for March and April 2005. The appellant said that he protested the termination; he also told Uys and Schuckmann of the arrangements agreed with Du Plessis for his relocation to Holland and they denied knowledge of such an agreement and "put me on the streets in a strange country."

[17] Asked what he did to mitigate damages, the appellant replied that he took a job with another fishing company, Cadilu, which was arranged by Du Plessis who had by then left the respondent. However, there was a problem with his work permit and he struck a deal with the respondent already described to hand back the company car and other property in return for the respondent's consent for him to work for another company, to which the respondent consented.

[18] The appellant contends that, according to the promise made to him by Du Plessis of a three year contract, his employment would have terminated on 31 October 2006. In the circumstances, he had not received any income from 1 January 2006 to 31 October 2006, to which should be added his loss of income at the rate of N$30 000.00 per month from 1 November 2006 until finalization of this matter. A travel agent had estimated the cost of his return to Holland to be 3 times N$5,652.00 for plane tickets ("by the shortest route") and about N$40 000.00 for his personal belongings.

[19] In cross examination, the appellant admitted that he signed Exhibit A, the written contract; that the document makes no reference to a further period of two years and contains a clause prohibiting variation of or addition to the contract unless such variation or addition is reduced to writing and signed by the parties.

[20] Jacobus Du Plessis testified on the appellant's behalf. It was he who as the respondent's managing director negotiated the conditions of the appellant's employment and he confirmed the appellant's evidence in all material respects.

"I told him it would be three years <u>subject to work permit</u>," he said (Emphasis provided), plus the cost of bringing his family and furniture to Namibia. However, the terms of his oral agreement with the appellant were never reduced to writing. He confirmed that the written

agreement, Exhibit A, was signed by him and, according to him, the document was intended to cover the period of the appellant's work permit, adding that the purpose of his letter of 29 September 2007 to the Ministry of Home Affairs was to obtain renewal of the work permit and that, although there was still "a period of more than 2 years" of the appellant's employment, he had requested extension for 16 months only for two reasons – firstly, for the appellant "to bring" his potential successor up "to standard" and, secondly, because it was difficult at the time to get a work permit for longer than 12 months.

[21] However, Du Plessis did not explain why, in the circumstances, he had requested extension for a period which was 4 months longer than either the date to which it was suggested that the appellant's period had been verbally extended or renewed and also that much longer than the period he suggested that the Ministry was prepared to entertain applications for work permits. Du Plessis also said that there was discussion with the appellant for a work permit "with the same conditions as before" and that the "new contract" would be drawn up when a fresh work permit had been issued. However, Du Plessis left the respondent's employment over certain undisclosed "differences with the Group Chairman as to failure of Hangana" before the proposed contract was drawn up. There is no record of the discussions pertaining to the alleged new contract.

[22] Part of the record of cross examination reads as follows:

"Q: Duration 1 November 2003 to 31 October 2004. Nothing about 3 years period?

A: Yes this is one contract to cover part of the period and relates to the work permit.

Q: You are Managing Director. Enter agreement on behalf of Company. Now say there is oral agreement not confirmed in writing?

A: What is the problem with that.

Q: It contradicts written document?

A: Not at all. Written document covers first period of employment. Application would be made for another work permit and contract would go on. Why apply for work permit if no intention to go on.

Q: Clause 15 no variations unless----------where is it in writing that pay repatriation re-employed – after end renewal?

A I answered it. This contract is part of execution of a 3 years agreement. Apart from that the renewal clause is an omission. Never intended to repatriation at end of first contract but at end of 3 years.

Q: Agreement was drafted and entered into?

A: This is for a 1 year period to cover work permit. If work permit is renewed it would be extended I left Hangana before this was done….

Q: Put to you that application to Ministry don't say what you are stating in Court. You could have said?.....

A: That would have been lying. Initial permit 12 months. Expectation was work permit issued 12 months at a time. Situation in Hangana volatile and fluid because of Fishing Industry and bankruptcy of two large companies.

Q: Relevance?

A: Nothing was cast in concrete but Mr. Van Ouwerkerk was fixed.

Q: Nothing cast in concrete that is why provision made for termination on notice in contract?

A: Yes that is a standard Notice clause.

Q: Did you ever put on record in writing the fact of this alleged 3 years agreement?

A: When he was employed this was discussed. It was not incumbent on me to tell them our……

Q: Did you say in writing?

A: No. Many agreements entered into on handshake….

Q: Having entered 3 years agreement. What if work permit not granted?

A: He would return to Holland.

Q: Complainant bound to pay salary 3 years?

A: Probably not.

Q: After 1 year if not granted?

A: Would discuss settlement.

Q: After 1 year Respondent was bound for 3 years?

A: Explain.

Q: Termination of 1 year, application for work permit not approved would Respondent have to pay 2 years.

A: There would be as discussion on how to sever."

It is on the evidence set out above that the Chairman found as follows:

"Accordingly the Court finds as follows:

1. *The Complainant was employed by the Respondent by virtue of a written agreement for a fixed term from November 2003 until 31 October 2004. Thereafter the Complainant was offered an extended contract to coincide with a work permit to be obtained for a further twelve months to 31 October 2005. Complainant was thus in the employment of the Respondent, in March 2005, when he was served with a termination letter.*
2. *The Respondent tendered no evidence that the dismissal was fair. Accordingly this Court finds that the Complainant was unlawfully dismissed from employment.*
3. *Evidence showed that Complainant was employed by Cadilu Fishing from the end of May 2005 to December 2005 and received remuneration from Respondent until 30 April 2005. Thus the only losses he suffered for the period of the later unwritten contract would be one month's loss of remuneration for the Month of May 2005.*
4. *The Court accordingly finds for the Complainant in the sum of N$30 000.00 representing one month's loss of remuneration.*
5. *There is no order as to costs."*

[23] An appeal against the judgment was noted and the appeal is opposed. It is alleged in the grounds of appeal that the learned Chairperson "erred on the facts and in law" in various respects and the first ground of appeal alleges that the Chairperson erred in finding that the appellant was not employed in terms of a three year agreement or, alternatively, that the initial agreement was not renewed or extended.

[24] It is convenient to deal with the argument on this ground advanced by Mr. Van Vuuren who represents the appellant as also covering the fifth ground of appeal that the Chairperson erred in not ordering the respondent to effect payment of the appellant's repatriation costs as well as the seventh ground of appeal that the Chairman also erred in not ordering payment of the loss of income to cover the alleged three year duration of the employment agreement agreed between Du Plessis and the appellant. All three grounds of appeal referred to are founded on Du Plessis's evidence that he negotiated and agreed with the appellant that the contract of employment would be for a three year period on a salary of N$30 000.00 per month plus payment of the costs of transporting him and his family and belongings to and from Namibia.

[25] The written contract was produced as Exhibit "A". The relevant clauses are these:

"1. *<u>APPOINTMENT DATE AND POSITION</u>*

The employee shall be appointed as:

Position : Consultant: Fleet Operations

Grade :

Company : Hangana Seafood Pty Ltd

Place : Walvis Bay

Date of commencement of the agreement: 1 November 2003

Date of termination of this agreement: 31 October 2004. Subject to renewal of work.

The parties agree that this agreement is for a defined period of time only and shall automatically come to an end on (date of termination).

2. *<u>ANNUAL REMUNERATION</u>*

The employee's monthly remuneration package shall amount to N$30 000.00pm nett of tax. The remuneration package includes the company's contributions to

the medical aid and social security which may vary in accordance with such fund's provisions from time to time."

5. LEAVE (Based on a 5-day week)

The employee is entitled to 1.83 days paid leave per month.

12. PROBATION PERIOD

The engagement is subject to a period of probation of 3 (THREE) months. During this period, the Employee shall be on temporary staff only and at any time within the period his/her employment may be terminated by one month's notice

13. NOTICE PERIOD

During the contract period, after the probation period has been completed the notice period comprises two full calendar months:

Notice in writing shall be given on or before the first working day of the specific month from either side. Furthermore, notice periods may be amended by mutual agreement. In the event that the employee is found guilty of conduct, which is regarded by management as being inconsistent with the position he holds or if he/ she commits a criminal act or an act of gross negligence, the termination may be without notice or payment in lieu of notice.

18. VARIATION TO CONTRACT

No variations or additions to this contract are valid unless given in writing and signed by both parties."

It will be noted that the written agreement is silent on the appellant's transportation to and from Namibia.

[26] The norm is for parties to negotiate and agree the terms of a proposed contract verbally and then reduce the verbal agreement to writing and it is a trite principle of the law of contract that *parol* evidence cannot be introduced to vary the written agreement. See Kerr: The Principles of the Law of Contract 6th ed p348. In *casu* it is common cause that the written contract does not

contain any of the additional terms alleged by the appellant and his witness. Therefore, these additional terms should be disregarded.

[27] The fact that the respondent actually paid the cost of transporting the appellant to Namibia also does not complement the verbal agreement as the appellant seemed to believe: the payment is explicable on the basis that it was within Du Plessi's power as the respondent's general manager to arrange such payment. Neither does payment of a salary which happened to coincide with the figure mentioned by Du Plessis to the appellant somehow translate into fulfilment of the verbal agreement. The submission is merely clutching at a straw. The contract concluded by the parties is the contract recorded in Exhibit "A" - for a fixed period of one year commencing on 1 November 2003 and terminating on 31 October 2004 on the terms and conditions recorded therein. Hence the first, fifth and seventh grounds of appeal must fail and these are dismissed.

[28] It is alleged in the second ground of appeal that the Chairperson erred in finding that the only loss suffered by the appellant was for the period of May 2005 only, instead of the whole of the remaining two years of the alleged three year duration of the contract.

[29] The Chairperson based his finding to the contrary on evidence which he accepted that, upon the expiry of the appellant's one year agreement and his admittedly unfair dismissal from the respondent's employment, the appellant was unemployed for only the month of May 2005 before he entered into employment with Cadilu Fishing. In the circumstances, the salary he would have received from the respondent was N$30 000.00, representing the monthly salary paid to him before he took up employment with Cadilu Fishing. No reason was advanced why the appellant should have been paid more than that other than on the basis rejected by the Chairman that his contract was for a period of three years until 31 October 2006.

[30] The same reasoning disposed of the eighth ground of appeal, alleging that the Chairman erred in not ordering the respondent to effect payment to the appellant for loss of income for the duration of the rejected contention that the agreement was for a three year period. In my view, the Chairman's finding accords with section 46(1)(a)(iii) of the Labour Act 6 of 1992 on which the appellant relied. The section provides that, if a district labour court is satisfied that an employee has been dismissed unfairly, it may order the employer "to pay, whether or not such an employee is re-instated or re-employed, to such an employee an amount equal to any losses suffered by such an employee in consequence of such dismissal or an amount which would have been paid to him or her had he or she not been so dismissed." (The emphasis is mine).

[31] See also LAWSA which states that (in the above circumstances) an employee "is entitled to the wages he would have earned minus any amount which he earned elsewhere or with reasonable diligence could have earned if these wages are less than his previous wage or his *pro rata* wages until he was employed again." Vol 13 par 191.

[32] For the reasons canvassed above, I do not see any error of fact or law in the manner in which the Chairman arrived at the award he made.

[33] However, the Chairman conceded the third ground of appeal, that he was not entitled to dismiss the claim for leave pay because it was not claimed in the Rule 3 complaint. However, the Chairman stated that his finding would not have been different anyway.

[34] This finding also disposes of the fourth ground of appeal, alleging that the Chairperson erred in finding that the allegation of non payment, with specific reference to leave pay, was not put to the respondent's witnesses in cross examination as well as the sixth ground alleging non

payment of the appellant's "accrued leave pay." The Chairman's finding was also based on the rejected claim that the employment agreement was for a period of three years."

[35] However, it was not disputed that, in terms of the written contract, the appellant was entitled to 10 days' worth leave pay. In fairness, it was testified on the respondent's behalf that it was assumed that the appellant had been paid, which was not the case. It follows that the relevant order must be amended accordingly. The rest of the appellant's argument must fail and is dismissed.

[36] It follows that there is no merit in any of the grounds of appeal. Accordingly, the following order is made:

1. The finding of the Chairman of the District Labour Court rejecting the claim for leave pay is set aside and substituted with the order that the claimant shall be paid 10 years' leave pay calculated in terms of Clause 5 of the Contract of Employment.
2. The rest of the appeal is dismissed with no order for costs.

MANYARARA, J.

ON BEHALF OF THE APPELLANT Adv. Van Vuuren

Instructed by: Erasmus & Associates

ON BEHALF OF THE RESPONDENT Adv. Schneider

Instructed by: MB De Klerk & Associates