

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT DURBAN.**

Case No. DA31/2001

In the matter between:

PETER WILLIAM WALKER

Appellant

And

**RAINBOW FARMS (PTY) LIMITED
THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION
COMMISSIONER L MAHLANGU
COMMISSIONER B PURDON**

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

JUDGMENT

DAVIS AJA

INTRODUCTION:

[1] In November 1991 appellant was employed by first respondent. In terms of his contract of employment his retirement age was stipulated as being 62 in November 1999. Accordingly his last day of service was 30 November 1999 Appellant then remained on in the service of first respondent until 29 February 2000 performing similar work earning the same salary as he had previously earned.

[2] On 18 February 2000 first respondent wrote to the appellant rejecting a request to remain on employment and alleging that a fixed term contract had been concluded which would come to an end on 29 February 2000. Appellant did not accept this interpretation of their relationship. He contended that he had been unfairly dismissed and he referred the matter to the second respondent.

[3] Second respondent said that first respondent had not concluded a fixed term contract and thus could not have relied on such a contract to terminate the employment relationship with appellant. For these reasons second respondent found that the dismissal of the appellant was unfair and hence he awarded reinstatement.

[4] On review, the Labour Court, per **Pillemer AJ** found that appellant could have been under no illusion that there was no offer of employment beyond 29 February 2000. On the contrary, he had been informed by representatives of first respondent that he would not get an extension of employment beyond the end of February 2000. For this reason **Pillemer AJ** found that, ‘while there was no agreement on the duration of the employment contract everything else had been agreed upon albeit tacitly and with regard to duration, Fourth Respondent knew that the most then on offer was an extension to the end of February. When he decided to stay on he knew that come end of February, if there was no extension, Applicant considered the contract to be at an end. In my view there was a tacit contract embodying the resolutive condition contended for....’ Against this judgment appellant has appealed to this court.

SUMMARY OF THE FACTS.

[5] It was common cause that, in August 1999, appellant was advised that his employment would not be extended past November 1999 and that he would be retired on 30 November 1999. In September 1999 he was approached to stay for a few months to complete the implementation of the “autonet refrigerated transport contract”. Discussions took place between September 1999 and November 1999 concerning the terms on which appellant was to be employed after his retirement. Appellant had a discussion with Mr Meade, his immediate superior, about the possibility of further employment. As he testified ‘There was still going to be some work – there still going to be work similar to that I had done, that would continue to happen but not to the same extent. So again, I said to him: “Look, until you make some provision for permanent employment with these people....” and he also hadn’t found a replacement for me, although they had advertised, they hadn’t had a reasonable response. I said: “until you can find people, I am willing to

take that, I am now willing to still do those three jobs that I talked about in March”.

[6] On 1 December 1999 appellant returned to work and continued to perform similar tasks until the 8 December 1999. On that date he met with Meade who offered him a fixed term contract for a period of two months terminating at the end of January 2000. The appellant refused to sign the fixed term contract and asked for time to consider the terms thereof. Two days later he informed Meade that he would not sign it. Appellant told Meade on 8 December that he was determined to persuade Mr McNolty, the Chief Executive Officer of first respondent (“the CEO”) to extend his contract, at least until he had attained the age of 65.

According to Meade, appellant had previously been informed that Meade had ‘gone to Rod Saadie and to the CEO to fight on Peter’s behalf and in fact that a continuation and was told quite categorically in terms of the company position, that Peter was going to retire. I fed that back to Peter. I gave him that. That all took place in November’.

[7] Notwithstanding his intention to persuade CEO to extend his contract of employment to 65, appellant continued to work in the employ of first respondent and, despite the terms of the contract which had been presented to him on 8 December 1999 he performed similar tasks which he had undertaken prior to 30 November 1999.

[8] On 28 January 2000 the appellant acceded to a request by Meade to continue working for February as some work was still outstanding and a new cost saving idea had surfaced which required appellant to prepare a feasibility study. According to a memorandum prepared by appellant the following then occurred: ‘On 31 January my superior advised me that since the CEO was away, Mr Parsons had agreed I should stay on for Feb. but that this ‘was definitely the last month’. I told my superior I would pursue try to negotiate the continued employment issue directly with the CEO. On 2 February my superior handed me Feb’s offer (an extension of the offer made 8 Dec) to sign but I again declined to sign. When he protested that my refusal to sign ‘left him as piggy in the middle’ I offered to stop work immediately to save him from further embarrassment. What was becoming an impasse required resolution so we later met with H R Director Mr P September....’

[9] On 15 February 2000 appellant wrote to Meade stating that the offer which had been made regarding the extension of his service represented inferior terms when compared to those contained in his letter of appointment dated 28 November 1991. He then went on to say: This letter is my service contract with Rainbow and is believed by third party and myself to remain valid in all respects until such time as service termination is invoke by either party. No good reason exists for me to favourably consider Rainbow’s latest offer/ s while a service contract already accepted to me remains in place’.

[10] On 18 February 2000 Mr Parsons, the general manager’ sales and marketing, wrote to appellant, **inter alia**, ‘in order to complete certain tasks the company entered into a

fixed term contract with you until the end of January 2000 on the understanding that your permanent employment with the company was terminated. Your contract of temporary employment has been extended to end on 29 February 2000. On that day you will be paid all your due benefits’.

[11] On 29 February 2000 appellant was handed a letter written by Meade and Rajoo informing him that that was his last day of employment. He then replied by way of e-mail reserving his rights and requesting finality on the grievance procedure.

APPELLANT’S CASE.

[12] Mr Schuman, who appeared on behalf of appellant, submitted that, in circumstances where appellant remained in the employ of first respondent after his official retirement date of 30 November 1999 and without any express agreement on the terms of such employment having been concluded, a new contract of employment had arisen on the same terms and conditions as had previously existed and for an indefinite period. Mr Schumann justified this submission by way of the application of doctrine of “tacit relocation”.

[13] In this connection Mr Schuman relied on the decision in **Tiopaizi v Bulawayo Municipality** 1923 AD 317 at 325 where **De Villiers JA** said ‘Parties to a contract of letting and hiring may either agree that the contract should run for a definite fixed term or they may leave its duration undefined.....Now if the parties agree upon a definite time for the expiration of the contract, it follows that no notice of termination is required. The contract expires by effluxion of time, and with it the relationship of lessor and lessee ceases. But in the same passage Voet (19.2.9) proceeds to point out that by our law what

is called a tacit relocation may take place, e.g. by allowing the tenant to retain possession of the premises after the contract has expired.....Now... tacit relocation is one of the consensual contracts for which a **nudus consensus** sufficed even in the Roman law, such consent being inferred from the fact that the relationship is allowed by both parties to continue after the contract had come to an end. It was to guard against this danger, therefore, and not to terminate the contract, that notice became essential....Unless notice is given before the date of expiry of the lease, it will be too late to resist the presumption that there has been a tacit relocation of the premises. And from this it follows that no definite power was required for such notice. As long as the notice was given before the contract actually came to an end it sufficed. There was no hardship on the tenant in getting such notice even at the last moment, for having agreed upon a definite time, he must be taken to know when the lease expires and that the notice was merely for the purpose of preventing him, by remaining on, from setting up the tacit renewable contract’.

[14] According to Mr Schuman, an indefinite contract of employment had come into existence after 1 December 1999. Such contract could be terminated in a number of ways, including impossibility of performance, the death of the employee, insolvency of the employer, material breach of the contract and resignation. None of these alternatives had been contended for by first respondent and, in the absence of any agreement by the appellant that his services were terminated on 29 February 2000, his contract of employment would continue past that date.

EVALUATION.

[15] Had appellant come to work on 1 December 1999 without there having been any previous discussions and debate on negotiations about his future and first respondent had accepted his services on that basis, it may well have been that, by 8 December 1999, it

would have been too late for first respondent to assert a tacit relocation of the kind contended for by Mr Schuman had not taken place. But these were not the facts of the present case. The appellant returned on 1 December 1999 because first respondent had need of his services, at the very least, until the conclusion of “the autonet refrigerated transport contract”. During this period he hoped to persuade the CEO of the need to retain his services until he attained the age of 65. First respondent accepted the return of appellant because of its short term employment needs. That the two parties may not have achieved a consensus on the exact terms of the new contract is a justifiable conclusion to be drawn from the facts. The evidence indicates that appellant was under no illusions on 1 December 1999 that first respondent had accepted his for an indefinite period. His own description of events on 2 February 2000 makes this clear, particularly when he comments on his refusal to accept a written contract on 8 December 1999: ‘I commented that it didn’t matter whether I signed letters or not, I prefer not to sign since it proved to be a problem for me if this matter ever got into lawyers hands. P.M. asked what I meant by ‘lawyers’ and I said I wasn’t a lawyer and at this stage hadn’t seriously considered that course of action but knew enough not to agree to anything that might later turn out to be unfavourable to my cause. I prefer to think positively and I was still confident I could convince that YL (CEO) that my continued employment at Rainbow would yield mutual benefits. Dependant on YL’s response I would then have to decide what to do next but there was no point now, in pursuing the subject and I didn’t know enough about it. I repeated my offer to stop work today if formalising the extension contract remained an embarrassment but said I wanted to continue to serve Rainbow as well and as long as I could. Although it had been at Rainbow’s request I stayed on after 1

December, I was also pleased to be kept active and earn income until YL found time to deal with my request to meet. PM said it had been agreed I could stay for February so that wasn't an issue. PS decided this matter had to be throughout and 'during the window of February provided and undertook to discuss YL'.

[16] This memorandum prepared by appellant confirms the evidence of Meade, namely that it had been made clear to appellant that he had to retire on 29 November 1999. He knew well that any further employment would be on a fixed term basis unless they decided otherwise.

[17] At best for appellant there was a contract of employment, which, due to an extension, terminated on 29 February 2000. Appellant's evidence makes it abundantly clear that even he considered that an indefinite contract of employment had not come into existence when he returned to work on 1 December 1999.

[18] For these reasons the appeal is dismissed with costs, including the costs of two counsel.

—

DAVIS AJA

I agree.

—

ZONDO JP

I agree.

—

DU PLESSIS AJA

Appearance:

For the Appellant: Adv P Schumann

Instructed by: Millar & Reardon Attorneys

For Respondent: Adv KG Kemp SC and Adv CA Nel

Instructed by: Knight Turner Inc

Date of Hearing: 3 September 2002

Date of Judgement: 6 December 2002