IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 2711/14

In the matter between:

AVENG WATER (PTY) LIMITED **Applicant**

and

KEITH JOHN NELSON **First Respondent**

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **Second Respondent**

COMMISSIONER M MOTSOENG N.O. **Third Respondent**

Heard: **11 May 2017**

Delivered: **17 November 2017**

JUDGMENT

WHITCHER, J:

Introduction

[1] The Applicant employed the First Respondent as a construction manager at its eMalahleni Water Reclamation Plant ("the project") in terms of a two year limited duration contract ("LDC"), concluded to run until 31 March 2014. On 1 April 2014, his contract was extended to 30 June 2014.

[2] On 23 July 2014, he referred an unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) in terms of s 186(1)(b) of the Labour Relations Act (LRA). He sought the "renewal of [his] contract on substantially the same or similar terms to completion of the project" and stated that the dispute arose on 30 June 2014.

[3] The Second Respondent ("the Commissioner") found that the Applicant's non-renewal of the First Respondent's LDC constituted a dismissal that was substantively and procedurally unfair. The Commissioner ordered the Applicant to compensate the First Respondent with an amount equivalent to 10 months' remuneration, *i.e*. for the period from 30 June 2014 to April 2015.

[4] The Applicant seeks to have this award reviewed and set aside. The main issue is whether the First Respondent proved the existence of facts that, in the ordinary course, would lead a reasonable person to anticipate renewal of his fixed term contract of employment.

[5] The Labour Appeal Court in the matter of *IMATU and Others v City of Johannesburg Metropolitan Municipality and Others,*[1] quoted with approval the test established in the matter of *SA Rugby Players Association and Others v SA Rugby (Pty) Limited and Others*[2] and confirmed:

> "The employee bears the *onus* to establish that he was dismissed. He must therefore prove on a balance of probabilities that he reasonably expected his employer to renew the fixed term contract of employment on the same terms and that the employer refused to do so. The employee had to adduce evidence which, objectively considered, established a reasonable expectation. The test to establish the reasonableness of the expectation is an

[1] [2014] 6 BLLR 545 (LAC)
[2] (2008) 29 ILJ 2218 (LAC)

> objective one. In *SA Rugby Players Association & Others v SA Rugby (Pty) Ltd & Others; SA Rugby (Pty) Ltd v SA Rugby Players Union and Another* the test was formulated thus: would a reasonable employee in the circumstances prevailing at the time have expected the employer to renew his or her fixed term contract on the same or similar terms.
>
> When assessing whether an expectation is reasonable all the surrounding facts and circumstances should be considered including the terms of the contract of employment, promises made by the employer – regardless of contractual terms which gainsay what the employer promised and the general conduct of the parties."

<u>The evidence and submissions before the Commissioner</u>

[6] The Applicant employed the First Respondent as a construction manager in terms of a two year limited duration contract ("LDC"), concluded to run until 31 March 2014.

[7] The First Respondent reported to the Project Manager.

[8] On 19 February 2014, the new Project Manager, Hendriks, emailed the outgoing Project Manager, Dorrington, stating that they needed to review the manhour forecast for the project.

[9] On 27 February 2014, Dorrington emailed a response to Hendricks, which set out proposals on various LDCs on the project. In respect of the First Respondent, he proposed that his contract be extended until the end of June 2014 only and that he be replaced with a new site manager to be "appointed until (say) the end of February 2015, with expectation that a two month further extension may be required…end date April 2015".

[10] Dorrington noted that his recommendations were based on an updated manpower and *cashflow* forecast that he and Hendricks had prepared.

[11] Dorrington's email was forwarded to the First Respondent on 11 March 2014 at 04:38 PM, together with a further email of even date from Dorrington to

Hendricks asking if “Ester” (HR: Executive) could “action” the proposals sent on 27 February 2014.

[12] On 12 March 2014 at 07:48 AM, the First Respondent emailed a response to Hendricks:

> *“Noting the proposed contract extension (they mostly make sense) I have to raise, maybe motivate my situation. Last year, November, I enquired as to whether my contract would be extended. [Dorrington] came back to me in January with an extension to end of June that was related to some sort of practical completion….I am available for the duration of the contract…I believe that my current relationship and experience with the client, contractors and my peers will be conducive to successful (although late) completion of EWRP. It also does not make sense to bring in a new site manager in the last threads of construction/commissioning”.*

[13] Hendriks, on the 12 March 2014 at 08:24 AM responded:

> *“We do not intend terminating earlier than at least construction completion. A skeleton site staff then stay to assist with commissioning until completion or full handover…We will communicate as such with Ester [HR Executive] today and keep you copied”.*

[14] On 1 April 2014, Hendriks gave First Respondent a new LDC contract to sign. In terms thereof, the First Respondent’s contract was extended until 30 June 2014, that is, for a period of only 3 months.

[15] On 20 June 2014, the Applicant advised the First Respondent in a letter that in terms of the contract he signed on 1 April 2014 his employment will terminate on 30 June 2014.

[16] The First Respondent testified that he formed the impression, based on Hendrik’s email of 12 March 2014, that his employment as the construction manager would continue to the end of the construction phase of the project in April 2015. That expectation was bolstered by a manpower forecast prepared

by Hendriks and which reflected his inclusion up to April 2015. Furthermore, after he received the letter of 20 June 2014, Hendriks told him that “there was still a chance” his contract would be extended because he was “still trying to convince EXCO to extend his contract” and the client [on whose behalf the project was being undertaken by the Applicant] was not happy with the termination of his contract. Moreover, the Applicant had assigned his duties to two employees, Roux and Deysel who, in his view, were not sufficiently qualified for the job. The client appeared to share this view, hence their dissatisfaction with the termination of his contract.

[17] When he was given only a three month contract to sign on 1 April 2014 a mere two weeks after Hendriks’ email he did not question this because all LDC’s were to be extended until 30 June 2014 and thereafter until the end of the project period.

[18] Under cross-examination, he agreed that the manpower forecast was open to change and that it did not mean that every individual cited therein would be employed until 30 April 2015, but said he had not observed any amended forecast in the time he was on site. He said Hendriks had given him the document as “back-up assurance” as to “what was budgeted for to complete the project”.

[19] He agreed, however, that he had known that the project was running at a huge financial loss and, on this basis, the Applicant was entitled to review the extension of contracts. He further agreed that EXCO, or as he put it – “the financial management”, had the final say on the extension of LDC’s.

[20] He also agreed that that his own email to Hendricks dated 12 March 2014 and Dorrington’s email did not support his version that all LDCs would be aligned to 30 June 2014 and thereafter to the end of the construction phase.

[21] Hendriks testified that, although he used the term “we” in his email of 12 March, the email had merely reflected his view as the new project manager and a proposal he intended to take to EXCO. He had no authority to conclude and extend LDC’s.

[22] He claimed that he had verbal discussions with the First Respondent where he undertook to motivate with EXCO for an extension of his contract until the completion of the construction phase, which he did, but EXCO made the decision to extend the contract only until the end of June 2014 on the basis of financial constraints.

[23] Hendriks confirmed that the forecast document presented the First Respondent reflected that the First Respondent would be present until April 2015. He stated, however, that this was merely a forecast which changed on a monthly basis. The forecast document presented by the First Respondent was one of the earlier forecasts done in early 2014. The forecast would have been different later after the Applicant's contract was only extended for three months until the end of June 2014.

[24] At the time of giving evidence [in November 2014], Hendriks predicted that the construction phase of the project would likely end in February 2015. However, at the time the First Respondent's contract was extended until the end of June 2014, the forecast was that the construction phase of the project would end in November 2014.

[25] He testified that the client had eventually accepted that Roux and Deysel were fit to take over the functions of the First Respondent.

[26] It was contended in argument that Hendriks' email constituted an unequivocal intent on the part of the Applicant not to terminate the First Respondent's employment before project completion and Hendriks had never intimidated to the First Respondent that the authority to conclude and extend contracts lay elsewhere – namely with EXCO.

Analysis and findings

[27] In my view the First Respondent could not reasonably have interpreted Hendriks' email as an unequivocal intent on the part of the Applicant not to terminate his employment before project completion.

[28] Dorrington's email which was in response to Hendriks' request that *they* needed to review the manpower forecast and sent to the First Respondent at 4:38 PM on 11 March reflected a recommendation that the contract be extended to 30 June and no further. This was consistent with the offer Dorrington had communicated to the First Respondent in November 2013.

[29] Dorrington's email moreover indicated that the proposal was based on a *cashflow* forecast that he *and Hendriks* had prepared.

[30] There were clearly material contradictions between Dorrington and Hendriks' emails, which were communicated to the First Respondent in very close proximity.

[31] The point is that Hendriks' email of 12 March 2014, read in conjunction with Dorrington's email, is confusing. It required clarification.

[32] Both Dorrington and Hendrik's emails further revealed that the recommendations still had to be sent to the HR Executive for signing off.

[33] In any event, any subjective expectation the First Respondent may have held as a result of Hendriks' email of 12 March 2014 was dispelled only two weeks later on 1 April 2014 when he was given a three month contract to sign.

[34] One would have thought that if Hendriks' email had conveyed an unequivocal intent in the mind of the First Respondent, he would have queried and protested the three-month contract, particularly when it was delivered by Hendriks who had purportedly made a promise to the contrary.

[35] His explanation regarding why he did not protest against a three month contract was shown to have no reasonable basis.

[36] Hendriks' conduct after the First Respondent received the letter of 20 June 2014 does not assist the First Respondent's case. On the First Respondent's own version, Hendriks undertook to *continue* to *motivate* for the extension of his contract.

[37] The above events renders more likely than not Hendriks' version that round about the time of his email he had discussions with the First Respondent to the effect that he intended to motivate with EXCO for an extension of his contract until the completion of the construction phase, which he did, but they returned with only a three month extension.

[38] Finally, the undisputed evidence before the Commissioner was that the manpower forecast was a budget management document and that it changed from time to time – it had no rigidity or binding effect as an indicator of the expected duration of the employment relationships between the company and the various employees depicted thereon.

Order

[39] In the premises, I make the following order:

1. The arbitration award issued by the Second Respondent on 3 December 2014 under case number GAJB17611-14 is reviewed and set aside and substituted with an order that Mr Keith John Nelson is found not to have been dismissed by the Applicant, as a consequence of which the Second and Third Respondent did not have jurisdiction to arbitrate the dispute.

2. There is no order as to costs.

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Benita Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Mervyn Taback Inc
For the First Respondent:	Wright, Rose-Innes Inc