REPUBLIC OF NAMIBIA NOT REPORABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: LCA 20/2012

In the matter between:

ROADS CONTRACTOR COMPANY **APPELLANT**

and

WILFRIED HAUGK **RESPONDENT**

Neutral citation: *Roads Contractor Company v Haugk* (LCA 20/2012) [2012] NAHCMD 3 (26 October 2012)

Coram: HOFF J

Heard: **12 October 2012**

Delivered: **26 October 2012**

Flynote: Appeal against award by arbitrator – granted for unfair dismissal – arbitrator found that contract had been extended by appellant – nevertheless found respondent had been dismissed unfairly – facts do not support such finding. Evidence that respondent himself terminated his services – appeal succeeds.

Summary: The respondent and appellant concluded a contract of employment which would expire on 5 June 2010 - The contract was subsequently extended on more than one occasion – Respondent claimed appellant had terminated contract and that he was dismissed unfairly - The arbitrator found that the appellant had

extended the contract until 31 December 2011 but nevertheless found that the respondent had been dismissed unfairly on the basis that respondent had a legitimate expectation that his contract would be extended – The facts do not support a finding that the appellant had terminated the contract and had dismissed the respondent unfairly – It is an undisputed fact that it was the respondent who unilaterally terminated his services by inter alia requesting his letter of service – Appeal succeeds – award granted set aside.

ORDER

The appeal succeeds.

The award granted by the arbitrator on 9 May 2012 against the appellant is set aside.

JUDGMENT

HOFF J:

[1] This is an appeal against an award granted by the arbitrator, Ms Nicodemus in favour of the respondent in which the appellant was ordered to pay an amount of N$245 000 to the respondent on or before 31 May 2012. The arbitrator found that the appellant had unfairly dismissed the respondent.

[2] The appellant raised three grounds of appeal. This first ground of appeal was that the arbitrator had no jurisdiction to adjudicate the complaint. It was submitted in addition that the respondent had cited the wrong party to the proceedings and that the respondent should have cited RCC Zambia inter alia on the ground that the respondent was employed on a fixed term contract by RCC Zambia and that the respondent physically rendered his services in Zambia.

[3] The appellant and respondent entered into contract of employment for a period of two years on 5 June 2008 in Windhoek. The respondent was employed as

a plant manager in Keetmanshoop and was subsequently relocated to RCC Zambia in the same capacity. In a letter dated 2 March 2010 addressed to the respondent by the CEO of the appellant, Mr E Haihambo, the respondent was informed that his employment had been extended for a further period of one year. It was stated that he would continue to serve as plant manager at RCC Zambia and that his remuneration package would remain unchanged.

[4] In a letter dated 18 May 2011 the respondent was informed that his employment contract had been extended for a further period of six months from 6 June 2011 until 31 December 2011. This letter was forwarded to the respondent by means of the courier service DHL but it never reached the respondent. On 30 May 2011 (ie five days before the expiration of the previous contract) the respondent applied for leave for the period 6 June 2011 until 1 July 2011. Since the letter in which the respondent had been informed that his contract had been extended until 31 December 2011 was returned to the appellant, Ms Ingrid Benz an HR practitioner employed by the appellant scanned the contract and sent it via email to Ms Neo Mubiana, a site clerk, who was employed by RCC Zambia. The respondent who was on leave was informed telephonically on 9 June 2011 by Ms Mubiana that she had received the contract and that he needed to sign the contract. According to Ms Mubiana the respondent informed her that he would sign the contract on his return from leave. It appears from the evidence of Ms Mubiana that when the respondent was presented with the contract on his return from leave he replied that he did not want to see the contract. It is common cause that the respondent received his salary at the end of June 2011. On 11 July 2011 the respondent requested via email from Mr S Haraseb, his immediate supervisor in Windhoek, his last salary, payment in respect of his remaining leave days, a pro rata bonus, pension monies paid, and a letter of release. It appears from the email that this request was prompted by the fact that the respondent received no written response from the appellant in respect of the extention of his employment contract prior to 5 June 2011.

[5] Mr Philander submitted that in the respondent’s own mind his employer was RCC Zambia, that he rendered services in Zambia, that his duty station was in Lusaka and that the termination of his employment of his employment contract (when he forwarded the email) took place in Zambia. It is common cause that no contract of employment was signed between the respondent and RCC Zambia.

[6] I disagree that the arbitrator had no jurisdiction to hear the matter and that the appellant was wrongly cited as a party to the arbitration proceedings. It is apparent that the first contract of employment was concluded between the appellant and the respondent in Windhoek and had subsequently been extended by the appellant on more than one occasion. The respondent's immediate supervisor is stationed in Windhoek where the appellant has its headquarters and the respondent received his salary from the appellant. This ground of appeal, in my view, cannot succeed.

[7] The second ground of appeal is that the contract of employment was extended by the appellant and that the appellant did not dismiss the respondent. The respondent in his referral of a dispute to conciliation or arbitration (Form LC 21) indicated that the nature of the dispute was an unfair dismissal.

[8] The following findings appear from the arbitrator's award:

'46. Ms Mubiana testified that he (sic) called the applicant to come and sign his contract and that the appellant told him (sic) that he was on leave.
Again, the applicant's application for leave was recommended by Mr Haraseb on 30 May 2011 and approved by the CEO on the 22 June 2011. According to Collins Parker (*Labour Law in Namibia*, 2012) "where at the expiration of a an employee's fixed-term contract, the employee continues to work with the consent and co-operation of the employer, the employee's contract of employment is deemed to have been tacitly extended for a further term under the same terms and conditions". In this case the contract of the applicant never terminated by effluction of time on the 05th June 2011 as per the argument of the respondent.'

47. In the matter before me, the applicant leave (sic) was approved by the respondent and in terms of the Act, section 29(c), leave period is regarded as period of employment. This would therefore imply that the respondent extended the employment contract of the applicant.
48. . . . . It is evident as per the telephone list that the applicant did receive the call from Ms Mubiana. The applicant denied discussing the contract issue with her. The evidence of Ms Mubiana is admissible but it does not overwrite the fact that the company failed to deliver the contract before the expiration of the contract. Also, the respondent already extended the employment contract of the applicant tacitly by granting him leave from 30 May 2011 – 1 July 2011.'

[9] It is apparent from these afore-mentioned paragraphs that the arbitrator found that there was a tacit extention of the contract of employment by the appellant.

[10] The following appears from paragraphs 50 and 51 of the arbitrator's reward:

'50. The contract was sent to Zambia and which was never signed by the applicant was to be extended up to 31 December 2011. I am convinced that had there been no technical issues with DHL, the applicant was to perform his duty with respondent until the expiration of the contract. The applicant cannot be punished because of DHL's failure to deliver the contract on time. Again, the time Ms Mubiana called the applicant to sign the scanned contract; the applicant was on official leave and the original contract was still in Windhoek, at the head office where he met his supervisor Mr Haraseb on the 4 July 2011 after the expiration of his leave and he was never presented with the contract.

51. I am convinced that the applicant was dismissed unfair (sic) in that he had a legitimate expectation for his contract to be renewed. In fact, the respondent failed to deliver the contract on time and meanwhile approved the leave of the applicant . . . . .'

[11] In view of the finding of the arbitrator that the employment contract had been extended by the appellant, and in my view correctly so, it is difficult to understand why the arbitrator concluded that the respondent had been dismissed unfairly on the basis that the respondent had a legitimate expectation that his contract would be extended.

[12] This strange conclusion by the arbitrator can in my view possibly be explained if the arbitrator when referring to a 'contract' had in mind the physical document.

[13] It is trite law that a contract of employment, need not be in writing (*Paxton v Namib Rand Desert Trails (Pty) Ltd* 1996 NR 109) and the insistence that such a contract be reduced to writing and signed can be no justification for the termination of such a contract by one of the parties. It appears that the respondent was under the illusion that the renewal of his contract of employment should have been signed by him before 5 June 2011 and since it was not done he could 'terminate' the contract as he did on 11 July 2011 by sending an email to the appellant to that effect.

[14] Further factors which are indicative of the fact that there was an extention of the contract and that the respondent was not dismissed are the following:
The respondent knew that the previous contract would expire on 5 June 2011. If he did not regard himself as an employee of the appellant after this date why did he apply for leave that would extend until 1 July 2011 ? The respondent continued to provide his services beyond 5 June 2011. The respondent could not provide an actual date of his dismissal from the employment of the appellant. On the Form LC 21 the respondent stated that the date on which the dispute arose was 6 June 2011. This is the date on which the respondent was on leave. Respondent could give no answer as to how he could have been dismissed whilst on leave.

[15] I am of the view that it is apparent from the record that the appellant explicitly, alternatively tacitly extended the contract of employment of the respondent until 31 December 2011 and that the respondent was aware of this. The arbitrator accordingly misdirected herself on the facts and on the law by finding that the appellant had unfairly dismissed the respondent. The facts simply do not support such a finding. The appeal should accordingly succeed on this ground.

[16] The third ground of appeal was that it was the respondent himself who terminated the contract of employment.

[17] The respondent did not deny that he was the author of the email requesting his letter of release from the appellant. When it was put to the respondent during cross-examination that by sending such an email he indicated his unwillingness to continue with the appellant as an employee of the appellant, the respondent replied that he did it because he was upset. This shows that the respondent terminated his employment relationship with the appellant unilaterally. In these circumstances the appellant was under no obligation to compensate the respondent. The arbitrator by ordering that the appellant should compensate the respondent misdirected herself in this regard. The appeal should succeed on this ground as well.

[18] In the result the following order is made:

The award granted by the arbitrator on 9 May 2012 against the appellant is set aside.

E P B HOFF

Judge

APPEARANCES

APPELLANT:	SP Philander Of LorentzAngula Inc, Windhoek.
RESPONDENT:	C Brandt Of Chris Brandt Attorneys, Windhoek