SUMMARY

'Reportable'

CASE NO.: LCA 51/2010

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

OVERBERG FISHING (PTY) LTD v ALFONSO VILLAR DOCAMPO

PARKER J

2011 July 5

Labour Law - Appeal and cross-appeal – Appellant and cross-appellant appealing against decision of district labour court, Walvis Bay, made in terms of the previous Act (Act No. 6 of 1992) – Court finding that the district labour court misdirected itself when it failed to determine nature of employment contract between appellant and cross-appellant – Court concluding that such determination was critical and crucial in deciding whether there was even been a dismissal, and if there was, whether the dismissal was unfair – Court finding that the employment relationship between the appellant and cross-appellant was based on fixed term contract of employment which terminated by effluxion of time and it was terminated fairly – Court finding further that the misdirection was so serious that it amounted to failure of justice in the proceedings in the district labour court – Consequently, Court upholding appeal and dismissing cross-appeal – Court holding that in the circumstances, the Court was entitled to interfere with the district labour court's finding of unfair dismissal and the sanction imposed.

Held, that the principle of fixed-term contract of employment is still part of our law; and *a priori*, termination of fixed-term contract of employment by effluxion of time is still part of our law. These principles were not repealed by the previous Labour Act; neither have they been repealed by its successor Act, the Labour Act, 2007 (Act No. 11 of 2007).

Held, further that fixed-term contract of employment terminates by effluxion of time and the only thing that remains is whether the employee was given notice within a reasonable time before the expiration of the contract that the contract would not be renewed; and such notice is only required if the fixed-term contract contains a renewability clause; otherwise such notice is not a requirement of fairness.

CASE NO.: LCA 51/2010

IN THE LABOUR COURT OF NAMIBIA

In the matter between:

OVERBERG FISHING (PTY) LTD **Appellant**

and

ALFONSO VILLAR DOCAMPO **Respondent**

CORAM: **PARKER, J**
Heard on: 2011 April 8
Delivered on: 2011 July 5

JUDGMENT

PARKER J

[1] In this matter there are an appeal and a cross-appeal. There is the appeal by Overberg Fishing (Pty) Ltd and it is against the decision of the defunct district labour court ('DLC'), Walvis Bay. In the appeal Overberg Fishing (Pty) Ltd is the appellant, and Docampo the respondent; and I shall refer to the parties by name, that is, 'Overberg' and 'Docampo'. Then, there is a cross-appeal; also against the decision of the Walvis Bay DLC in which Docampo is the appellant, and Overberg Fishing (Pty) Ltd the respondent. In the cross-appeal, too, I shall refer to the parties by name.

[2] This is an appeal and a cross-appeal and so it is to the record that I direct my attention to determine whether or not to uphold the appeal and the cross-appeal. In the present proceedings it is my view that the critical and crucial threshold question that the DLC should, as a matter of law, have determined above all else is the nature of the employment relationship that existed between Overberg and Docampo; otherwise how could the DLC have determined the complaint that was lodged by Docampo, seeing that it was a labour matter. The DLC did not. In the opinion of the DLC, 'the nature of the agreement concluded between the two parties (i.e. Overberg and Docampo) is irrelevant and rather the manner in which it was terminated is to be addressed.'

[3] The upshot of the DLC's holding is that the DLC did not consider the crucial threshold question, as aforesaid. By so doing, the DLC took a wrong view of the law. It is only when the nature of the employment relationship evidenced by the contract of employment is enquired into and determined that the court or tribunal is able to determine judicially that one party or the other has not conducted himself or herself in terms of the Labour Act; in the instant case, the previous Labour Act, i.e. Act No. 9 of 1992; or even more important, to determine whether that employment relationship is subject to the Labour Act. For instance, it is crucial and critical for the DLC to have determined whether the contract of employment, allegedly entered into between Overberg and Docampo was a fixed-term contract or an indefinite-term contract. A fixed-term contract terminates by effluxion of time and the only thing that remains is whether the employee was given notice within a reasonable time before the expiration of the contract that the contract would not be renewed. For the avoidance of doubt, I note that such notice is only required if the fixed-term contract contains a renewability

clause; otherwise such notice is not a requirement of fairness. Thus, such notice is required where the contract of employment is a renewable fixed-term contract.

[4] The two causes, for our present purposes, by which an indefinite-term contract of employment terminates, are (1) dismissal (that is, involuntary termination) and (2) the giving of notice of termination of the contract (that is voluntary termination). In cause (1), the question a court or other tribunal will enquire into and determine is whether a proper notice was given in terms of the contract of employment or some collective agreement or in terms of the Labour Act. In cause (2), the question that the court or other tribunal will enquire into and determine is whether the dismissal was fair – substantively and procedurally. If the employer does not give proper notice, that could amount to unfair dismissal.

[5] In the instant case Docampo lodged a complaint on Form 2 in terms of rule 3 of the Rules of District Labour Courts ('the DLC Rules') under the previous Labour Act. Thereafter, Docampo filed with the DLC what Docampo called 'Notice to Amendment(d)'. In my opinion the DLC should not have paid any attention to this meaningless paper: a notice to amend is not an amendment of what the filer of the paper wishes to amend. Accordingly, the only paper filed in accordance with the DLC Rules was the complaint on Form 2; and so it was only Form 2 that had relevance in the proceedings before the DLC.

[6] Appearing in Annexure A to the aforementioned Form 2 are the following:

> 5. On the 30th of August 2007 the Respondent (Overberg), as represented by Mr. Ivo de Gouveia, presented a written employment agreement to

the complainant (Docampo), which was accepted and signed by the complainant.

6. In terms of the said written agreement it was, inter alia, agreed that the Respondent would employ the Complainant for a fixed term of one year as chief mate on the Vessel Campa Del Infanson, a fishing vessel of the Respondent operating from Walvis Bay.

[7] It seems to me clear from the Form 2 that was lodged in terms of the DLC Rules that the employment relationship that existed between Overberg and Docampo was based on a one-year-fixed-term contract of employment and that the contract came to an end in August 2008. And as I have shown previously, a fixed-term contract comes to an end by effluxion of time. And the procedure that was adopted by Overberg was fair in that in June 2008, that is, two months before the expiration of the fixed-term period, Overberg informed Docampo that the contract would not be renewed and, furthermore, Overberg did that which, in my view, was supererogatory: Overberg gave Docampo the reason why the contract would not be renewed at the expiration of the fixed-term period. Overberg was applying the provisions of the Affirmative Action (Employment) Act, 1998 (Act No. 29 of 1998) to the extent that there was sufficient 'affirmative action personnel' (i.e. preferential personnel) available who, in terms of that Act, took preference over Docampo.

[8] I find that Overberg cannot be faulted on any legal ground under the previous Labour Act for unfair conduct: Docampo's contract came to an end by effluxion of time. And two months before the expiration of the contract, Overberg informed Docampo that it would not renew the contract upon its expiration. Overberg furthermore informed

Docampo that Overberg applied affirmative action in its decision in terms of Act No. 29 of 1998.

[9] It cannot on any legal ground be argued that there has been an unfair dismissal. Who dismissed Docampo? With the greatest deference to the learned magistrate, the learned chairperson misread the *ratio decidendi* of *Meintjies v Joe Gross t/a Joe's Beer House* 2003 NR 221 (LC). The *ratio decidendi* concerns cause (2) in para [4], above. To illustrate my point; suppose for example, X, a Zimbabwean national was appointed to the post of Magistrate for a two-year-fixed-term contract, commencing 1 January 2008. In November 2009, the Magistrates' Commission informs X that her contract would not be renewed at its expiration because a Namibian UNAM Law graduate has been identified to take X's position. Can it seriously be argued that when X leaves her post, that X has been dismissed by the Commission? I do not think so. The principle of fixed-term contract of employment is still part of our law; and *a priori*, termination of fixed-term contract by effluxion of time is still part of our law. These principles were not repealed by the previous Labour Act; neither have they been repealed by its successor, the Labour Act, 2007 (Act No. 11 of 2007).

[10] By concluding that 'the nature of the (employment) agreement between the parties (Overberg and Docampo) is irrelevant and rather the manner in which it was terminated is to be addressed', the learned chairperson of the DLC, with respect, lost her bearing of the essence of the matter she was seized with. I have demonstrated previously that the nature of the employment contract is relevant and plays a critical role in determining whether there has been a dismissal and, if there has been a dismissal, whether such dismissal was unfair.

[11] Thus, without enquiring into and determining the nature of the employment relationship as evidenced by the contract of employment, the learned chairperson of the DLC misdirected herself; and the misdirection is so serious that it amounts to failure of justice in the proceedings in the DLC. I have demonstrated previously that Docampo was not dismissed by Overberg. Docampo's fixed-term contract of employment terminated by effluxion of time; and in a fair manner, Overberg informed Docampo timeously why his fixed-term contract would not be renewed upon the expiration of the fixed term.

[12] For the aforegoing reasoning and conclusions, it is my judgment that the appeal by Overberg succeeds; and Docampo's cross-appeal fails. That being the case, this Court is entitled to interfere with the DLC's finding of unfair dismissal and the sanction imposed, as I do.

[13] Whereupon, I order as follows:

(1) Overberg's appeal is upheld.

(2) Docampo's cross-appeal is dismissed.

(3) The award by the District Labour Court, Walvis Bay, is set aside, and the following is put in its place:

(a) Overberg must pay Docampo severance allowance:

Euros 843.75 x 3 (weeks wages) = Euros 2,531.25; such amount must be paid in Namibia Dollars, calculated at the foreign exchange rate ruling as at the date of this judgment; and further the amount must be paid on or before 31 July 2011; and if not so paid, the amount shall attract 20% p.a. *mora* interest from 1 August 2011 until the amount is paid.

(b) No order as to costs against any party.

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PARKER J

COUNSEL ON BEHALF OF THE APPELLANT:

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COUNSEL ON BEHALF OF THE RESPONDENT:

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