IN THE LABOUR COURT OF SOUTH AFRICA

REVISED/REPORTABLE

HELD AT DURBAN

Case no.: D255/00

In the matter between:

YOEL MORAG Applicant

and

DORTECH (PTY) LTD Respondent

JUDGMENT 19 MARCH 2001

PILLAY J

The issue for determination *in limine* is whether the applicant was dismissed as defined in section 186(1)(b) of the Labour Relations Act No 66 of 1995, ("the LRA"), or whether his services terminated on the expiry of a fixed-term contract.

The parties had entered into a written contract of employment in terms of which the applicant was employed as the managing director of the respondent, formerly known as New Lane Traders (Pty) Limited, with effect from 1 January 1997 to 31 December 1999. His remuneration amounted to a package of about R45 000 per month. The applicant was responsible for the day-to-day management and administration of the respondent. He also had to deliver to the respondent whenever required to do so all books of account, records, papers, documents and correspondence relating to the respondent. The applicant specifically undertook to defer to and comply with all instructions given to him about the respondent by its director Mr Michael Hörmann.

The applicant commenced employment and established the business for the respondent. Initially the respondent was satisfied with his performance. Subsequently, and for reasons discussed below, the respondent became dissatisfied with the applicant. On 23 November 1999 the applicant was notified that his contract of employment would not be renewed when it expired on 31 December 1999. The applicant was paid until the end of December 1999. His last day at work was 23 November 1999.

It was common cause that the applicant bore the *onus* of proving subjectively and objectively that he had a reasonable expectation that the contract would be renewed.
Mr Broster for the respondent conceded that the applicant satisfied the subjective test in that he believed that the contract would be renewed. It remained for the applicant to establish that objectively there was a reasonable basis for believing that the contract would be renewed.

(*Dirks v University of South Africa* (1999) 20 ILJ 1227 at 1246.)

The applicant relied, firstly, on the contract to prove that the parties intended renewing it. Clause 5.2 of the contract provides,

"Six months prior to the termination of this contract the company and the appointee undertake to meet with a view to discussing and, if possible, agreeing upon renewal of the appointee's employment contract with the company upon mutually acceptable terms and conditions."

The applicant also relied on the words "initial period", and "the provision of accrued leave to a maximum of 30 days" in the contract. He testified that he expected to be employed by the respondent for at least ten years. Curiously, in his draft proposal to renew the contract, the applicant confined himself to renewing the contract for a period of five years only.

The plain meaning of clause 5.2 is that the parties intended the renewal of the contract to be no more than a mere possibility. If that possibility did not materialise the initial period would remain the only period of employment and the leave would not escalate beyond 30 days. In so far as reliance was placed on these extracts from the contract, they are weak indicators of an intention to renew the contract. They do not go far enough to prove unequivocally that the respondent intended to renew the contract.

It was common cause that the parties did not meet in terms of clause 5.2. Accordingly, it was conceded that the respondent was in breach of that clause. The contract makes no provision for consequences of breach of the agreement. Nor did the applicant put the respondent on terms to comply with clause 5.2. Even if the respondent was compelled to comply with clause 5.2 the highest that the applicant could pitch was to meet with the respondent and discuss the possibility of renewal. Neither section 186(1)(b) of the LRA nor clause 5.2 of the contract conferred on the applicant a right to employment.

On the applicant's own version, he had attempted to get Mr Hörmann to discuss the renewal of his contract on several occasions within the six months prior to its expiry. Mr Hörmann did not do so. The applicant put this down to Mr Hörmann's inclination to do things on trust without wanting to put things in writing. Objectively, Mr Hörmann was clearly avoiding the renewal of the contract. The respondent's failure and refusal to discuss the renewal of the contract on every occasion that it was approached to do so is the clearest expression of its unwillingness to renew the contract. Nothing in the conduct of any of its representatives even remotely suggested otherwise. The respondent's preparedness to abide by the existing contract could not necessarily be extended to imply a desire to renew it.

The second reason the applicant advanced for believing that the contract would be renewed was his relationship with Mr Hörmann. Mr Hörmann had sought him out, persuaded him to resign from his employment with Nortech, a potential competitor, and to establish the respondent's business. There was a high level of trust between them. Applicant would have the Court accept that he, the applicant, was even prepared to commence his employment without a signed contract. The applicant was given sufficient funds to establish the business. As the managing director, he was placed fully in control of the business valued at about DM 2 million. Whenever they interacted Mr Hörmann got along very well with the applicant. He extolled the latter's virtues to third parties. The applicant denied that his relationship with

Mr Hörmann had ever been impaired. Likening it to a marriage, he said that there were good and bad times.

Under cross-examination the applicant conceded that he had secured a written contract of employment after he had negotiated the terms thereof with the respondent and before commencing employment. On the applicant's own version, he was aware that as a result of certain incidents discussed below, Mr Hörmann was highly critical of, angry and upset with him.

Thirdly, Mr Hörmann authorised the applicant to buy a car of his choice in March 1999. He would not have done so, so it was submitted, unless Mr Hörmann was pleased with his performance. The vehicle may well have been, as the applicant put it "fun" for him. However, he conceded that Mr Hörmann was persuaded to buy it because it made good financial sense. Furthermore, the vehicle remained the property of the respondent.

Fourthly, Mr Hörmann authorised payment of his legal fees incurred as a result of a dispute with the respondent, the payment of a 5% incentive bonus, 100% of his medical aid, a salary increase for him in May 1998 and the employment of his wife by the respondent. This was done despite the fact that the applicant had recently been issued with a final written warning for misconduct.

For the respondent, paying the applicant what he wanted was not an affordability problem. In fairness to him, his remuneration was increased, as would be expected after a period of service. Mr Hörmann, being based in Germany, was in a vulnerable position. He could not afford to have a discontented managing director upon whom he had to rely to run his business. The increase in remuneration and benefits do not prove conclusively either on their own or in the context of all the evidence that the respondent wished to renew the contract.

Fifthly, Mr Hörmann allowed and encouraged the applicant to travel abroad on the respondent's business. He even invited him in September 1999 to visit a moulding factory when he was in Germany. Mr Hörmann also accepted some of his suggestions, such as patenting a product. Consequently Mr Hörmann, it was submitted, could not have considered him to be a poor performer.

Mr Hörmann confirmed that he had exposed the applicant to new businesses and accepted some of the applicant's suggestions that were good. There was no reason not to. The applicant was employed to manage the business. His duties involved travelling and looking at new opportunities. He was remunerated for his services. It could hardly be expected of the respondent to ignore a good suggestion from the applicant merely because his contract would not be renewed.

Sixthly, the applicant believed that he was doing a good job. Therefore the respondent had every reason to renew the contract. On this score the applicant failed dismally to prove that he was doing a good job. He repeatedly disregarded the respondent's instructions. The first incident occurred in March 1998. On 12 February 1998 Mr Mader, who was Mr Hörmann's legal and tax adviser, requested Mr Dave Engelbrecht, the respondent's financial manager, to furnish him with, amongst other things, the latest financial statements of the respondent and a summary of all payments to its employees, including the applicant. The

applicant discovered that Mr Engelbrecht had been reporting directly to the principals in Germany and tried to obstruct him from doing so. Mr Hörmann immediately instructed the applicant not to interfere with Mr Engelbrecht's work or to offend him. He was told to "Just leave him alone until we arrive in South Africa". That instruction was issued on 23 February 1998. Mr Hörmann also expressed his opinion that Mr Engelbrecht was doing a good job. Despite these instructions, the applicant suspended Mr Engelbrecht on the afternoon of Friday, 27th February 1998.

Mr Mader arrived in South Africa on Sunday, 1 March 1998. The applicant gave no satisfactory explanation for not delaying the suspension until Mr Mader arrived, nor has he explained why he did not revert to Mr Hörmann with reasons as to why his instructions should not have been executed. As a result of the discord between Mr Engelbrecht and the applicant, the respondent had little choice but to pay Mr Engelbrecht nine months' salary and terminate his services.

At about the same time the respondent was investigating certain financial irregularities committed by the applicant. Following Mr Engelbrecht's departure, the applicant was issued with a final written warning for twelve acts of misconduct of a financial nature. Furthermore, his telephone privileges were curtailed. The tone and content of the final written warning made it quite clear that the respondent was far from pleased with the applicant.

The applicant disregarded Mr Hörmann's instructions once again when the latter had to point out to him that it was his responsibility to organize his leave in collaboration with Mr John Brass, the engineering manager, and that the respondent would not pay him in lieu of leave. Despite this instruction, the applicant did not take his leave. This incident also manifested the applicant's inability to organize the affairs of the respondent so that he could take leave and furthermore, to recognise that it was his responsibility to deal with such elementary operational issues.

The next incident occurred about January 1999. Mr Brass submitted his resignation on 22 December 1998 to the applicant. It was to take effect from March 1999. On 23 January 1999 Mr Hörmann learnt from Mr Brass that he had given notice of his resignation in October 1998. The applicant, on the other hand, had informed him, Mr Hörmann, that Mr Brass had only indicated that he was leaving about the middle of January 1999. The applicant admitted that he had not informed Mr Hörmann immediately on receiving the resignation. His explanation was that he wanted to find a substitute first and resolve the problem before breaking the news to Mr Hörmann. This was a gross error of judgment on the part of the applicant, considering that Mr Brass was the person primarily responsible for production in the factory. More serious, however, is his lie to Mr Hörmann about when he had learnt that Mr Brass would be resigning. From then on, if not before, the applicant could not be trusted. The applicant was aware of Mr Hörmann's displeasure towards him as a result of this incident.

Thereafter Mr Klaus Goldstein, acting on behalf of Mr Hörmann, requested the applicant to furnish his budget, a profit and loss account, with budget variance analysis, and to reconcile certain travel expenses and inventory differences. This fax was sent on about 16 February 1999 when the information was already due on 12 February 1999. Despite the

information being overdue the applicant had to be reminded again on 3 March 1999. On 23 July 1999 Mr Goldstein asked the financial manager, Mr Lawrence Levy, for a reporting package for the second quarter, the gross margin analysis and income statements for May and June. Despite reminders on 2 August 1999 and 14 September 1999 the information was still not supplied by the end of September 1999. Eventually, when the information was supplied the respondent's representative doubted its accuracy. The kind of information that was sought and which the applicant admittedly could not supply was essential for effective management and financial control of the business. His explanation that the respondent had "bad luck" with its financial managers and that Mr Levy was "over-busy" were not acceptable.

The respondent remunerated the applicant well and was entitled to expect a superior quality of performance from him. Instead the applicant failed to install elementary and effective controls. As inventory constituted a significant component of the respondent's investment the applicant should have installed systems for effective recording and tracking of the inventory. He had the tools to do so. He had bought the Pastel software package and could have hired staff to install it, if necessary. He did not do so. Assistance was also offered by Mr Yusuf Essack, the auditor, but it was not accepted.

He was obviously oblivious to the importance of having systems of control and the need for accurate information. Furthermore, he misconceived his role as a managing director. While he was not expected to involve himself deeply in the operational side of the business he could also not delegate and then abdicate his responsibilities. On his own evidence, the applicant appreciated that he was ultimately accountable to Mr Hörmann for every aspect of the business. He should have taken firm steps to ensure that his subordinates implemented his instructions. His failure to discipline his subordinates had less to do with attracting an adverse reaction from Mr Hörmann following the Engelbrecht incident. It is more likely that he failed to see the importance of some of the responsibilities assigned to his subordinates for his own overall effectiveness as the managing director of the business. Putting in systems, developing strategic plans and getting staff to comply were not insurmountable problems, as Mr Silen, the applicant's successor, demonstrated.

The applicant's inability to manage the business efficiently and therefore provide the respondent with timeous and accurate financial reports deepened the distrust between the parties. This was confirmed by Mr Essack. Mr Essack had also made it known to the applicant that Mr Hörmann did not trust him.

The applicant's assertions that he made substantive profits for the respondent were not supported by the financial information. While the income statement for 1999 reflected a net profit, a closer scrutiny of the accounts revealed that, firstly, the revenue was made up of sales mainly to Merantech of which Mr Hörmann was the controlling shareholder. In other words, the applicant did not generate sales from his own or new sources. Secondly, other operating income was derived mainly from a foreign exchange gain and from incentives paid by the Department of Trade and Industry. This was also not from sales generated by the applicant. The financial results of the respondent therefore did not bear out the applicant's case that he was doing a good job.

In October 1999 the respondent called on the applicant to explain his unauthorised use of the respondent's funds. Amongst other things, he had paid for his wife's private travel way back in May 1999 from the respondent's funds. His explanation was that the travel agent had debited the incorrect accounts. However, the applicant had not done anything to correct the debit until after Mr Mader had queried it.

In the same month Mr Mader and Mr Hörmann visited the factory. They were given a draft inventory which led them to believe that the business was being run at a loss. The validity of this belief was not the issue. Of prime concern was the applicant's inability to deliver accurate financial information despite repeated requests to do so. The respondent believed that there was a loss of about R1 million.

Mr Hörmann made his displeasure abundantly clear to the applicant. The applicant acknowledged this in a letter dated 25 October 1999 to Mr Hörmann, in which he referred to Mr Hörmann forming "a highly critical impression of me and my management which you announced in no uncertain terms". After this incident the applicant reminded Mr Hörmann again of the renewal of his contract. Less than a month later the applicant was notified that his contract would not be renewed.

Mr Hörmann summarised his reasons for not renewing the contract as the applicant's failure to provide financial information, his management of financial information and accurate reports and his management of staff through fear instead of persuasion. When he was presented with the applicant's draft renewal proposal in about September 1999 he was already looking for a replacement. He shrugged off the proposals as being stupid. He could not have been more explicit about not wanting to renew the contract, he said, because he did not have a replacement. Moreover, he was afraid that the applicant was a "revengeful" person who might harm the business. The contract with Mr Silen was secured the day before the applicant was issued with a notice informing him that his contract would not be renewed. In the circumstances, I find that the applicant has not proved that there was an objective basis to expect that his contract would be renewed. The applicant has accordingly failed to discharge the *onus*. I find therefore that the employment terminated on the expiry of the contract on 31 December 1999.

The parties agreed that the costs must follow the result. In the circumstances, I grant an order in the following terms.

The applicant's claim is dismissed. The applicant is ordered to pay the respondent's costs. The parties are given leave to approach the Court on the same papers to resolve any dispute relating to the applicant's holiday pay and the quantum of the 5% bonus.

JUDGE D. PILLAY

For the Applicant:	Attorney A. Prior
Instructed by:	Prior and Prior Attorneys
For the Respondent:	Advocate L Broster
Instructed by:	Cox Yeats Attorneys