

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR1577/07

In the matter between:

SOUTH AFRICAN REVENUE SERVICE

Applicant

and

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION

First Respondent

GERHARD JANSE VAN VUUREN, N.O.

Second Respondent

CHARLENE NADINE HAWKINS

Third Respondent

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JUDGMENT

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FRANCIS J

Introduction

1. This is an application to review and set aside an arbitration award issued by the second respondent (the commissioner) dated 20 April 2007 under case number GAPT5835-05. This was after the commissioner had found that the third respondent had been unfairly dismissed by the applicant and was ordered to compensate her R330 666,68 within fourteen days of the award and the costs of the award.
2. The application was opposed by the third respondent.

The background facts

3. The South African Revenue Service (the applicant) entered into a 12-month contract of employment with the third respondent, in terms of which she was appointed to work for the applicant as a SAP consultant from 15 February 2004 to 14 February 2005. She was assigned to work on the Kopano Project, with the business manager/business owner thereof being Gareth English (English) a senior manager within the applicant's financial division.
4. In late January/early February 2005, English held a meeting with the third respondent and informed her that her contract would not be extended. He offered her, instead, a three-month contract described by him as a termination contract, which she accepted. Alan Yates (Yates), a SAP consultant employed by Bytes Technologies and assigned to the applicant was also present at the meeting. Subsequent thereto, the parties entered into a three-month contract for the period 15 February 2005 to 14 May 2005. Her last working day with the applicant was 13 May 2005 with the three-month contract terminating on 14 May 2005.

The arbitration proceedings

5. On 8 June 2005, the third respondent referred a dispute to the first respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA), in which she contended that she was unfairly dismissed on 13 May 2005 and claimed six months' remuneration in compensation.

6. At the ensuing arbitration presided over by the commissioner, the third respondent testified and English, Yates and Johan Yssel (Yssel) a SAP consultant who had worked on the Kopana Project with the third respondent testified on behalf of the applicant.
7. The third respondent's case before the commissioner was based on the doctrine of estoppel. Her counsel contended that the matter could be essentially distilled down to the following issues:
 - 7.1 Did Yates promise the third respondent that her contract with the applicant would be extended for a period of six months?
 - 7.2 If Yates did so, should the applicant be liable for the breach of this agreement.
8. It was argued before the commissioner that it was apparent that Yates represented to the third respondent that her contract would be extended for a period of six months and that her contract had been approved. She had relied upon the correctness of the representation which was to her detriment. In the light of the delegated authority that Yates had as a team leader and the way the applicant allowed Yates to conduct himself and represent to the third respondent, the applicant should be estopped from denying that Yates did not have the authority to bind the applicant. She had no reason to doubt Yates when he told her that her contract had been approved, and no blame should be apportioned to her for relying upon this representation by Yates. The applicant's case was that Yates had not made any representations to the third

respondent and if he did he did not have the requisite authority to approve the extension of her contract.

9. The commissioner issued an award dated 20 April 2007. The commissioner found that the third respondent was dismissed because firstly Yates had created an expectation that the third respondent's fixed-term contract would be renewed. Secondly English a manager of the applicant and the business owner of the project that she had worked on, had treated her inconsistently *vis-a-vis* some of her colleagues whose contracts he had extended, with the result that Hawkins could reasonably have expected to be treated similarly. Having found that she was dismissed, he awarded her R330 668.68 as compensation.

Analysis of the facts and arguments raised

10. The applicant has raised several grounds of review. It is not necessary to deal with those grounds of review. The main issue is whether the third respondent had established that she was dismissed in terms of section 186(1)(b) read with section 192(1) of the Act. The applicant disputed that the third respondent was dismissed and relied on the decision of *SARPA v SA Rugby (Pty) Ltd & Others; SA Rugby (Pty) Ltd v Sarpu* [2008] 9 BLLR 845 (LAC) where the following was said at page 856 at paragraph 41:

“The question before the court a quo was whether, on the facts of the case, a dismissal had taken place. The question was not whether the finding of the commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether, objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts

did not exist, the CCMA had no jurisdiction irrespective of its finding to the contrary.

11. It is clear from the *Sarpu* decision that the issue at hand is whether the CCMA had jurisdiction and this is a factual one. The traditional grounds of review are therefore not applicable in deciding whether a dismissal had taken place. They will only become applicable once it was established on the facts that the CCMA had jurisdiction to hear the matter and the commissioner had made certain findings that are reviewable.
12. It is common cause that the third respondent was employed on a 12 month fixed term contract that was extended by a further three-month period. After her contract was not renewed, she referred an unfair dismissal dispute in terms of section 186(1)(b) of the Act. In her referral, she summarised her dispute as follows:

“The contract of employment expired on 14 May 2005. I had been told [by Yates] that the SARS was going to extend the contract for an additional six months. This was discussed with members of management and it was agreed that I would get a contract in writing before 14 May 2005. On Friday 13 May 2005, I asked management about the contract and was told that there was insufficient budget and that the contract could not be fulfilled.”
13. In terms of section 192 of the Act, an employee must establish the existence of a dismissal and if the existence of the dismissal has been established, the employer must prove that the dismissal was fair. The third respondent was required to establish that she was dismissed in terms of section 186(1)(b) of the Act. Once she had done so the applicant would then have to prove that the dismissal was fair. If the commissioner

found that the dismissal was unfair, the commissioner would then have to determine the issue of relief.

14. The issue that the commissioner had to decide like in the *Sarpu* matter was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then the CCMA had no jurisdiction to entertain terms of section 191 of the Act.
15. In an attempt to overcome the difficulties in proving that she was dismissed, the third respondent's case was based on the doctrine of estoppel. Her counsel who had represented her at the arbitration proceedings contended that the matter could be essentially distilled down to the following issues:
 - 15.1 Did Yates promise the third respondent that her contract with the applicant would be extended for a period of six months?
 - 15.2 If Yates did so, should the applicant be liable for the breach of this agreement.
16. The third respondent's case in essence was that she was promised a six-month renewal of her fixed term contract as a SAP consultant working on work stream 2 of the Kopano project by Yates, a consultant, who she contended was her line manager on work stream 2 from March 2005 onwards. She accepted that Yates did not have the authority to bind the applicant, but contended that Yates had expressly told her

that her new contract had been approved by English, who had signed her previous contracts, and had the authority to bind the applicant and who she had expected would sign her new contract. She contended that such approval on the part of English was expressly communicated to her by Yates at a meeting held at the Mug & Bean at the beginning of May 2005, which meeting was attended by Yssel. She denied that this discussion and other similar ones were undertaken by Yates in his capacity as a project manager involved in the planning of new/future projects. She contended that Yates/English had breached their promise when Yates advised her on 13 May 2005 that budgetary problems had arisen, which culminated in Yates failing to present her with her new contract by the time of the lapse of her existing contract on 14 May 2005. It was argued on her behalf that if Yates did not have actual authority to bind the applicant, it was, in the circumstances that transpired, estopped from denying that Yates lacked authority.

17. The applicant's case in essence was that Yates had only worked on work stream 2 for 2 weeks in December 2004 and March 2005 when he served as an acting team leader, and was not the third respondent's line manager. He had served as an acting team leader for 4 weeks. In April 2005, Yates had taken up the position of project manager of the Fundamental Investments for the Future Project (FIF project) and was responsible for planning/compiling the budget for the project. Once he had completed his planning, he would have to submit his budget/plan to Burger, to whom he reported, who would then submit it to English for final approval before the plan could be resourced. It was in this context that Yates had held discussions with *inter alia* the third respondent and Yssel and placed their names on the business plan as a potential resource as opposed to communicating a renewal of their contracts. Certain of those

discussions had taken place at the Mug & Bean, and, on occasion Yates had met Hawkins and Yssel together there. These discussions did not involve contractual negotiations and no offer of employment was made. Yates did not, at this planning stage, discuss renewing the third respondent's contract with English and English did not relay his acceptance of renewing the third respondent's contract to Yates. This was not challenged during cross examination when it was put to English that what had happened was that Yates had probably misrepresented to the third respondent that English had agreed to the new contract. Similarly, it was put to Yates under cross examination that he had made a promise that he knew he could not keep. Yates had also not told the third respondent that English had approved a renewal of her contract. When Yates ultimately failed to get budgetary approval for the FIF project, he informed the third respondent about it.

18 The requirements for estoppel are as follows:

18.1 A representation by words or conduct of certain factual position.

18.2 That the party act upon the correctness of the facts as represented.

18.3 There must therefore have been a casual connection between the representation and the act.

18.4 That the parties so acted or failed to act to his detriment.

18.5 That the person who made the representation could bind the defendant by means of a representation.

19. The commissioner was obliged in determining whether the third respondent was dismissed within the meaning of section 186(1)(b) of the Act to pose and answer the following two questions in her favour:

19.1 Did the third respondent have an expectation that her contract would be renewed?

19.2 If so, was her expectation reasonable?

20. The commissioner found that the third respondent had been dismissed because firstly Yates had created an expectation that her fixed-term contract would be renewed and secondly, English had treated her inconsistently *vis-a-vis* some of her colleagues, SAP consultants whose contracts had been extended, with the result that the third respondent could reasonably have expected to be treated similarly.

21. The commissioner did not deal with the issue of estoppel at all. It is also clear from the facts placed before the commissioner that Yates did not have the requisite authority to approve the extension of her contract. The only person who could do so was English and he had done so in the past. There was direct evidence on the part of both English and Yates on this issue which was not considered by the commissioner. The fact that the third respondent had no reason to doubt what Yates had said to her, which he denied, could not bind the applicant. Yates after all was a consultant of the applicant on a specific project. It cannot be said on the third respondent's version alone that she harboured a reasonable expectation that her contract would be renewed.

She had accepted that Yates did not have authority to bind the applicant.

22. The third respondent's counsel had put it to English when he testified that what had happened was that Yates had probably misrepresented to the third respondent that English had agreed to the new contract. This was not challenged. Similarly, it was put to Yates during cross examination that he had made a promise that he knew he could not keep. Yates had also not told the third respondent that English had approved a renewal of her contract.
23. The third respondent's claim is based on the promise made by Yates. She should perhaps have pursued other contractual remedies and not relied on the provisions of section 186(1)(b) of the Act. There was simply no evidence of a reasonable expectation and even if there was, this could not bind the applicant. The principles of estoppel would also not have been met since Yates could not bind the applicant. In conclusion, I am of the view that the third respondent has not shown that there had been a dismissal in terms of section 186(1)(b) and, as a result, the CCMA had no jurisdiction to entertain the dispute.
24. The application stands to be dismissed. It is, in my view, in accordance with the requirements of the law and fairness that there be no order as to costs.
25. In the circumstances I make the following order:
 - 25.1 The arbitration award dated 20 April 2007 under case number GAPT5835-05 and issued by the second respondent is reviewed and set aside and replaced

with an order that the third respondent was not dismissed in terms of section 186(1)(b) of the Act.

25.2 There is no order as to costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : A T MYBURGH INSTRUCTED
BY BRINK COHEN LE ROUX INC

FOR THIRD RESPONDENT : W G LA GRANGE INSTRUCTED BY
GLYN MARAIS INC

DATE OF HEARING : 15 APRIL 2009

DATE OF JUDGMENT : 10 JUNE 2009