

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 59/2002

In the matter between:

MAGALELA NGWENYA

APPLICANT

AND

NATIONAL AGRICULTURAL

MARKETING BOARD

RESPONDENT

CORAM:

NKOSINATHI NKONYANE AJ.

GILBERT NDZINISA: MEMBER

DAN MANGO: MEMBER

FOR APPLICANT: MR. P.M. SHILUBANE

FOR RESPONDENT: ADV. D. SMITH

INSTRUCTED BY MR. B. MAGAGULA

JUDGEMENT 15/03/05

The applicant in this matter entered into a written contract of employment with the respondent which was to run for a period of three years from the 1st day of October 1998, to the 30th day of September 2001.

When the contract came to an end, it was not renewed by the respondent. The applicant had, in terms of the contract, exercised the option to request a renewal.

The applicant then reported a dispute with the Commissioner of Labour. He complained about the non renewal of the contract.

The applicant argued that the refusal to renew amounted to an unfair dismissal because it was not based on assessment of his performance. The respondent argued to the contrary that it had no obligation to renew the contract.

There was no settlement reached by the parties and a certificate of unresolved dispute was issued by the CMAC Commissioner.

The matter is thus before court under a certificate of unresolved dispute.

The applicant's application in part contains the following paragraphs;-

"4. On 5 April 2001 the applicant was wrongfully and unlawfully suspended from his employment without a hearing as required by law. A letter of suspension is annexed hereto marked "MG2"

5. In terms of clause 1.01 of the said contract of employment the applicant had an option to renew his contract of employment when it expired. He duly exercised his option to renew same as appears from annexure "MG3" hereto.

6. On 23rd July 2001 the Minister of Agriculture and Co-operative purported to inform the applicant that his contract had not been renewed as requested by him. A copy of the letter that his contract has not been renewed as aforesaid is annexed hereto marked "MG4".

7. The applicant submits that the termination of his aforesaid employment is unfair and unlawful and unprocedural in that:-

7.1 The applicant had a legitimate expectation to be heard before the decision not to renew his contract was made and also in terms of section 11(2) of the Public Enterprises (Control and Monitoring Act) 1989.

7.2 The respondent failed to act in terms of section 8(1) of the Public Enterprises (Control and Monitoring Act) 1989 in that the Minister of Agriculture and Co-operatives did not consult the standing committee as defined in section 2(b) thereof before refusing to renew the applicant's said employment contract.

7.3 The respondent in breach of the said employment contract, failed to act in terms of Clause 4.01 thereof.

8.1 The applicant reported the dispute to the Conciliation Mediation and Arbitration Commission and a conciliation meeting was convened by the said commission but the dispute between the parties could not be resolved as required by the Industrial Relations Act, 2000.

8.2 As a result the commission issued a certificate of an unresolved dispute as morefully appears from annexure "MG5".

9. The applicant seeks compensation for the said unfair termination and or dismissal in terms of section 16 of the Industrial Relation Act, 2000 as follows:-....."

The applicant therefore is relying on two grounds for its contention that it was unfairly dismissed namely; legitimate expectation and the provisions of the Public Enterprises (Control and Monitoring) Act No.8 of 1989.

Although paragraph 7.2 says that the applicant had a legitimate expectation to be heard before the decision not to renew his contract was made, it became apparent during the trial that in fact the applicant's case was that he had a legitimate expectation that his contract would be renewed.

The court will address the issues raised in the following sequence;

A. The contract

- B. Legitimate expectation**
- C. Unfair dismissal**
- D. The Public Enterprises Act**

A. THE CONTRACT

The relationship between the parties is based on a written contract. The contract is for a period of three years. It was therefore a fixed term contract.

Such a contract is permitted by the laws of this country. Section 35 of the Employment Act No.5 of 1980 which deals with unfair termination of employee's services provides that:

"35(1) This section shall not apply to -

- (a)**
- (b)**
- (c)**
- (d) an employee engaged for a fixed term and whose term of engagement has expired."**

In terms of this section therefore an employee who is engaged for a fixed term, and that term has expired cannot argue that he has been unfairly terminated.

In the present case the evidence revealed that the three-year contract between the parties ran its full course. It was never terminated.

The averments made in paragraph 7.3 of the applicant's application, that the respondent failed to act in terms of clause 4.01 are therefore irrelevant as that clause deals with termination. The undisputed evidence revealed that the contract was never terminated.

There is also no clause in the contract that obliges the respondent to renew the contract.

*In the case of **MALANDOH V. S.A. BROADCASTING CORPORATION (1994) 181L J 544 (LC)MLAMBO AJ** dealing with a fixed-term contract case had this to say at page 547:-*

"In my view the relationship between the parties was regulated by this contract and I am of the view that I should give effect to such contract I am loathe to incorporate other factors in the parties agreement as by doing so I would be imposing a different contract to that which the parties entered into."

We will also adopt that approach in this court and give effect to the contract entered into by the parties, and be loathe to incorporate other factors.

The contract between the parties is a fixed-term contract. It has no clause obligating the respondent to renew the contract or to give explanation in case of failure to renew.

B. LEGITIMATE EXPECTATION

The applicant argued that he had a legitimate expectation that his contract would be renewed. It is not clear to the court what is the legal basis for this argument.

*The concept of legitimate expectation is found in the **Labour Relations Act 66 of 1955, a South African statute. Section 186 (1)(b)** of that Act states:-*

"Dismissal means

(b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it"

The provisions of the South African Labour Relations Act, however, have no applicability in this country.

*The court was referred by the applicant's attorney to **JOHN GROGAN, "WORK PLACE LAW"** 7th edition, pages 106-108. On page 106 the learned author says that:-*

"At common law a fixed-term contract expires automatically on the arrival of the date or occurrence of the event on which the parties agreed that the contract would terminate. The termination of a fixed-term contract may now constitute a dismissal...."

When the learned author says that the termination of a fixed term contract may now constitute a dismissal, he is referring to the legislative intervention in terms of section 186 (1) (b) referred to above. At common law therefore the position is still that a fixed-term contract expires automatically on the arrival of the date or occurrence of the event on which the parties agreed that the contract would terminate.

The learned author goes on to point out the following on pages 106- 107:-

"Employees on fixed-term contracts may claim to be dismissed, and challenge the fairness of their dismissals, only if they can prove that they had some reasonable ground for expecting renewal. The onus of proving a reasonable expectation rests on the employee."

The case law that has developed in South Africa on the interpretation of section 186(1)(b) has formulated the following indices whether or not there was reasonable expectation:-

- a) *The number of times that the contract is renewed.*
- b) *The conduct of the employer in dealing with the relationship.*
 - a) *What the employer says to the employee at the time of concluding the contract and even during the course of their relationship; and lastly*
 - b) *The motive or reason for terminating the relationship by the employer.*

(see ZWANE V ELEGANCE JERSEYS (1998) ILJ 969 CCMA; FOOD & GENERAL WORKERS UNION & OTHER V. LANKO CO-OPERATIVE LTD (1994) 15 ILJ 876 (IC)).

A. Number of times contract renewed:

In this case the contract had only been renewed once. It cannot therefore be said that there was in existence a practice or custom of automatic renewals that made the applicant to expect that the contract was going to be renewed.

B. Conduct of employer:

The evidence revealed that the employer was not happy with the performance of the organization and the applicant. During the course of the contract the applicant was suspended by letter dated 05/04/01. That was an indication of a not so good a relationship between the parties.

C. What the employer says to the employee:-

*In the case of **TRUTER V. MECHEM: A DIVISION OF DENEL (1977) 18 ILJ 803 (CCMA)** the evidence revealed that the applicant was promoted during the course of her fixed-term contract, and was also told by the Manager that there was a future for her in the company if she worked hard. The commission found that because of those reasons there were equitable grounds for the applicant to expect the relationship to have continued. In this case the employer never made any undertaking or promise to the applicant to renew the contract.*

D. Motive or reason for termination:

In this case the respondent says it was not happy with the performance of the organization and of the applicant. It was the applicant's argument that it was unfair for the respondent to make a finding that he was not performing well as a Chief Executive Officer of the organization as he was not present to answer for himself before the commission of inquiry.

It is clear to the court however that the applicant failed to satisfy the requirements from A to C above. His argument therefore does not take his case any further in trying to establish legitimate expectation..

It is the court's findings therefore that reasonable expectation has not been proved by the applicant. The onus of proving reasonable expectation rested on him.

C. UNFAIR DISMISSAL:

Once the court finds that there was a legitimate expectation for renewal, the next issue that the court must consider is whether the dismissal was fair.

If the court has found that there was no legitimate expectation however, the matter comes to an end. The issue of unfair dismissal does not arise. In the case of **University of Cape Town V Auf Der Heyde (2001) 22 ILJ 2647 (LAC)** the court held as follows at page 2655:-

"I am not convinced that the respondent has proved that he had an expectation that his contract would be renewed. It is unnecessary to decide this question because even if he had such an expectation, it was for the reasons set out above not a reasonable expectation. In my view, the respondent did not reasonably expect the appellant to renew his fixed-term contract. It follows that the respondent was not dismissed. Therefore, the question of unfair dismissal does not arise."

The applicant having failed to prove legitimate expectation, the question of unfair dismissal does not arise.

D. THE PUBLIC ENTERPRISES (CONTROL AND MONITORING) ACT NO.8 OF 1989:

Section 11(2) of the Act provides that:-

"The function of the Disciplinary Tribunal shall be to enquire into any contravention of this act by any public enterprise which the Ministry may refer to it and to recommend removal from office of any member of the governing body or the Chief Executive Officer or the chief Financial Officer, or any other officer of the public enterprise concerned: provided that the Tribunal is of the opinion that the alleged contravention to the Director of Public Prosecution for appropriate action."

The wording of the proviso seems to be incomplete as it does not make sense as it stands. This section however deals with dismissal or removal from office. The applicant in this case was never dismissed or removed from office. His term of office simply came to an end.

Section 8(1) contains the following:-

"Except in the case of the University of Swaziland the governing body of each category A public enterprise shall nominate the Chief Executive Officer who shall be appointed or who may be dismissed, by the Minister responsible acting in consultation with the Standing Committee."

Again, the court will point out that this section also has no relevance as the applicant was never dismissed by the Minister, but his fixed-term contract expired.

The applicant having failed to prove that there were reasonable grounds for expecting a renewal it follows that there was no legal basis for alleging that he was unfairly dismissed.

The applicant's rights under the contract however remain intact. The fixed-term contract having expired the applicant was entitled to all benefits due to him. The applicant is therefore entitled to prayer b(1) being gratuity calculated at 27.5% as this was the second contract. The amount due under prayer b(1) therefore is

E138,000:00x3x 27.5% - E113,850:00

In prayer (2) it is not known to the court how the applicant arrived at the figure of E453 593.28. It is hard to believe that the amount calculated over two years can exceed the amount for gratuity calculated over a period of three years.

The certificate of unresolved dispute shows that the annual adjustment for 1999 was based on 7% and for the year 2000 it was 5%. The adjustment in 1999 therefore should have been E138,000:00 x 7 % = E9,660:00. The adjustment in the year 2000 should have

been E138,000:00 x 5% - E6,900:00. The figure in prayer (2) therefore is supposed to be E9,660:00 + E6,900:00 = E16,560:00.

In prayer (3) is a claim for 13 cheque for the year 2000. That amount is E138,000:00:- 12 = E11,500:00

Prayer (4) is for monies due to the applicant in terms of the Board decision. There were no minutes of the Board's decision to that effect before the court, submitted to prove this prayer. It will therefore fail.

Prayer (7) is for outstanding leave days and appears as follows:-

20 days x E430.00 =E8,613:50 It is not clear how the applicant arrived at that figure as 20 x E430.00 amounts to E8,600:00. The court will accordingly adjust the amount to E8,600:00.

The court will therefore make an order in the following terms:-

- a) **The applicant's application for compensation based on unfair dismissal is dismissed with no order as to costs.**
- b) **The applicant is to be paid the following benefits arising from the contract.**

to no

IV) Gratuity at 27.5% of basic salary	E113,850.00
Salary adjustment for the years 1999 & 2000	E 16,560.00
13th Cheque for the year 2000	E 11,500.00
Outstanding leave	<u>E 8.600.00</u>
TOTAL	<u>E150.510.00</u>

The amount to be payable within fourteen days after the delivery of this Judgement.

The members agree.

N. NKONYANE A.J.

INDUSTRIAL COURT