

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 164/2009

In the matter between:

SWAZI NKONDE

APPLICANT

and

INTERNATIONAL RELIEF DEVELOPMENT

RESPONDENT

CORAM:

S. NSIBANDE JOSIAH YENDE

PRESIDENT

NICHOLAS MANANA

MEMBER

MEMBER

MR. T. SIMELANE MR. M.

FOR APPLICANT FOR

SIBANDZE

RESPONDENT

RULING ON POINTS OF LAW - 20/05/09

1. The Applicant brought an application on an urgent basis seeking an order in the following terms:

"1. *Dispensing with the usual forms and procedures and time limits relating to the institution of proceedings and allowing this matter to be heard as a matter of urgency.*

2. *That a rule nisi be issued with immediate and interim effect, calling upon the Respondent to show cause on a date to be appointed by the above Honourable court, why an order in the following terms should not be made final:*

10.1 *Interdicting and or restraining the respondent from proceeding with the appointment of the new administrative and finance manager and or finance manager pending the finalization of*

this matter.

10.2 *Setting aside the notice of non-renewal of the Applicant's fixed term contract dated 26th March 2009 as irregular and not in compliance with clause 2.1 of the employment contract.*

10.3 *Ordering the Respondent to renew the fixed term contract of employment of the Applicant and /or reinstating her to the position of administrative and finance manager.*

10.4 *That prayer 2.1 above operates with immediate and interim effect pending finalization of this application.*

10.5 *Costs of suit.*

10.6 *Further and/or alternative relief*

2. The Applicant was employed by the Respondent on a fixed term contract (the initial contract) starting on 1st March 2008 and ending on 28th February 2009 in the position of Administrative and Finance Officer. In terms of clause 2.1 of this contract, the contract was *"to be renewed contingent upon employee's performance and availability of funds"*.

10.7 On 21st February 2009, seven days before the expiry of Applicant's contract of employment, the Respondent caused to be advertised the position of Finance and Administration Manager which position Applicant took to be her position. Since she expected her contract to be renewed, Applicant sought an explanation of the advertisement of the position from her supervisor. When there was no explanation forthcoming, Applicant sought the assistance of attorneys who wrote to the Respondent on 25th February 2009 demanding confirmation of the renewal of Applicant's contract and that the advertising of Applicant's substantive position cease forthwith.

10.8 Respondent's position to such demand is articulated in a letter written to Applicant's attorneys dated 26th February 2009. In that letter the Respondent states explicitly that:

"Your client was offered an extension to April... In the event your client does

not accept the extension or the terms cannot be agreed, your client's last day will be the 2nd February 2009 and your client will be paid one month in lieu of notice. Our client is in no position to renew the contract for one year as there is insufficient funding, nor is it obliged to do so."

5. On 27th February 2009 the Applicant signed the extension to her contract of employment (the extension) and her employment was extended from 1st March 2009 until 30th April 2009. In terms of clause 2.1 of this extension, the renewal of the contract was subject to the discretion of the employer.
6. On 26 March 2009, the Respondent reminded the Applicant in writing that the contract of employment would terminate on 30th April 2009. She was advised that she could *"utilize the time between receipt of this correspondence to the end of your contract to look for work or otherwise as you deem fit.*

Your last day of work will accordingly be the 27th March 2009.

You may collect your final pay for the month of April 2009 from the office on the 31st April 2009."

- 10.9 It is this letter that has caused the Applicant to bring this application. She sets out that clause 2.1 of the initial contract indicates that the contract would be renewed contingent on her performance and the availability of funds. She states that having performed exceptionally well in executing her duties and there being sufficient funds available to the Respondent, she had a legitimate expectation that her contract of employment would be renewed. She applies, therefore that the court orders the Respondent to renew her fixed term contract.
- 10.10 The Respondent opposes the application and has raised three points of law in its answering affidavit.

8.1 Urgency - Respondent submits that the Applicant's complaint is essentially one of unfair dismissal - i.e. she perceived that her employment services are being unfairly terminated. Insufficient reasons are placed before the court why the termination of the Applicant's services should be treated differently from any other claim of unfair dismissal. In the circumstances, the court was told, the application should not be entertained and should not be

treated as a matter of urgency.

10.11 Prima facie/clear right - Respondent alleges that on the facts of this matter the Applicant has failed to establish even a prima facie right to the relief she seeks because her contract of employment would end on 30th April 2009 at which date she will become a person whose employment on a fixed term contract has terminated by effluxion of time.

10.12 Alternative Remedy - Respondent states that the Applicant has failed to exhibit that in the event her application is not entertained and an interdict granted, she will have no further remedies. Respondent submits that Applicant would be entitled to report a dispute at CMAC in the normal course and approach the court for compensation alternatively reinstatement.

9. The Applicant sets out the following as grounds of urgency in her founding affidavit:

"The matter is urgent in that the Respondent has unlawfully terminated my employment services on the 26th March 2009 and is keen to employ someone else in my position. Should I follow the normal procedures in bringing this application the Respondent will employ someone else. My application to have the employment contract renewed would have been overtaken by events by the time the matter is heard within the normal time limits and I will suffer great prejudice if I am left unemployed."

10. Two issues arise from the above paragraph:

10.13 Firstly it is not correct that the Respondent has terminated Applicant's employment services on the 26th March 2009. What has in fact happened is that the Respondent has given notice that the contract of employment would not be renewed and given Applicant permission to be away from her work from 30th March 2008. The contract of employment is for a fixed period terminating on 30th April 2009. In the absence of an agreement to renew the contract, the position is that the contract terminated on 30th April 2009. The contract was to expire by effluxion of time on an agreed date. The court cannot order the Respondent to renew or extend the contract. Whether article 2.1 of the initial contract or 2.1 of the

extension is applicable, the matter of renewal falls squarely with the discretion of the employer. Unless the Respondent agrees to renew the contract or the court finds that the Applicant has been unfairly dismissed, the contract remains at an end as of 30th April 2009.

10.14 Secondly, the basic reason Applicant puts forth to found urgency is the economic difficulties she will suffer if she is left unemployed, whereas she has a legitimate expectation that her contract of employment would be renewed.

11. It is established in our law that a legitimate expectation of renewal does not give rise to any contractual entitlement. At best for the Applicant, it may (if proved and if not precluded by section 35 (i) (d) of the **Employment Act**) give rise to a claim of unfair dismissal.

This court is unable to determine an unfair dismissal dispute by way of motion proceedings, particularly where the preliminary conciliation procedures prescribed by Part V111 of the Industrial Relations Act 2000 have not been involved and a dispute reported.

See **Bernardin B. Bango and The University of Swaziland I. C. Case No. 342/08.**

12. Further the Applicant's reasons to justify urgency do not differ from the normal reasons set out by persons who have brought applications of unfair dismissal for determination by the court. It has been repeatedly stated by this court that financial prejudice is not a ground of urgency.

See **Kenneth Manyathi v Usuthu Pulp Co & Another (IC Case No. 245/2002).**

Kenneth Makhanya v NFAS (IC Case No. 286/2004).

The Applicant herein must report a dispute to CMAC who have the mechanisms in place to resolve the dispute through conciliation or arbitration.

From the afore-going, the application is dismissed.

There is no order as to costs.

There members agree.

PRESIDENT OF INDUSTRIAL COURT