



IN THE INDUSTRIAL COURT OF SWAZILAND

JUDGMENT

Case NO. 186/13

In the matter between:

LONDIWE SITHOLE

Applicant

And

**NATIONAL PUBLIC SERVICE & ALLIED
WORKERS UNION GROUP FUNERAL SCHEME**

1st Respondent

**NATIONAL PUBLIC SERVICE AND ALLIED
WORKERS UNION**

2nd Respondent

Neutral citation:

Londiwe Sithole v National Public Service & Allied Workers Union Group Funeral Scheme & Another (186/2013 [2013] SZIC 23 (July 31 2013)

Coram:

NKONYANE J,
(Sitting with G. Ndzinisa & S. Mvubu
Nominated Members of the Court)

Heard : 15 July 2013

Judgment delivered: 31 JULY 2013

Summary:

Applicant employed in terms of fixed term contract. 1st Respondent failing to renew the contract. Applicant claiming that contract was tacitly renewed.

Held--In order to establish tacit renewal the Applicant had to prove, by preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to renew the contract. Applicant failed to discharge the onus, application dismissed accordingly.

**JUDGMENT
31.07.13**

[1] The Applicant instituted the present Notice of Motion under a certificate of urgency.

[2] The Applicant is seeking an order in the following terms:-

“1. Dispensing with the usual terms of time limits, form, service and hearing this matter as a matter of urgency.

2. That a rule nisi do issue operating with interim and immediate effect calling upon the Respondents to show cause on a date to be fixed by the court why prayers 3,4,5,6 and 7 herein below should not be made final orders of court.

3. *Interdicting and restraining the 1st Respondent from recruiting and hiring an employee to replace the Applicant pending finalization of the contractual dispute hearing between the Applicant and 1st Respondent by the 2nd Respondent.*
4. *Declaring the recruitment exercise already undertaken by the 1st Respondent as unlawful and null and void.*
5. *Directing the 2nd Respondent National Executive Committee (NEC) to facilitate a hearing of the dispute between the Applicant and 1st Respondent and bringing it to finality.*
6. *Interdicting and restraining the 1st Respondent from the unlawful termination of the Applicant's contract of Employment.*
7. *Alternatively that the Applicant be re-instated to her current position in the event the 1st Respondent has hired someone else before the finalization of this application.*
8. *Declaring that the Employment Contract which terminated on the 30th of April has been tacitly renewed.*

9. *Cost of suit.*

10. *Granting further and or alternative relief.”*

[3] The matter first appeared before the court on 03rd June 2013. On that day a *Rule Nisi* was issued in terms of prayer 3 returnable on 26th June 2013. The court was also informed that the parties were engaged in negotiations concerning the dispute before court.

[4] The negotiations did not yield a positive results. The court finally heard arguments on 17th July 2013. The 2nd Respondent on 15th July 2013 informed the court that it was withdrawing its defence. The remaining parties therefore are now the Applicant and the 1st Respondent.

[5] **Factual Background**

The 1st Applicant is a Funeral Scheme established by the 2nd Respondent for its members. It exists in terms of its own Bye-Laws. The Bye-Laws are annexed to the Applicant's application marked “LS6”. The Applicant was first employed by 1st Respondent by means of a fixed term contract on 1st November 2011 as Office Administrator. The fixed term contract was for six months ending on 31st April 2012. On 02nd May 2012 the parties again entered into a fixed term contract for

six months ending on 31st October 2012. The last contract was signed on 1st November 2012 and was to come to an end on 30th April 2013. The 1st Respondent did not sign a new contract of employment when the last one expired on 30th April 2013, hence the present application brought to court on an urgent basis.

[6] The 1st Respondent filed its Answering affidavit in opposition. The Applicant duly thereafter filed her Replying Affidavit thereto.

[7] In the Answering Affidavit the 1st Respondent raised certain points *in limine*, namely;

7.1 *That the court lacks jurisdiction to entertain the matter as the Applicant was employed by the 1st Respondent in terms of a fixed term contract which expired by effluxion of time on 30th April 2013.*

7.2 *There was no urgency.*

7.3 *There are material disputes of fact in the matter which the Applicant ought to have foreseen.*

7.4 *The Applicant has failed to meet the requirements of an interim interdict.*

- [8] The points *in limine* raised were argued simultaneously with the merits of the case on 17th July 2013. The court will therefore issue a final judgment in this matter.

[9] **Fixed Term Contracts**

It is not in dispute that the Applicant was employed by the 1st Respondent in terms of fixed term contracts. A fixed term contract expires automatically on the arrival of the date or occurrence of the event on which the parties agreed that contract would terminate.

(See: **John Grogan: “Workplace Law” eighth Edition p. 110.**)

- [10] Employees on fixed-term contracts may claim that they have been dismissed, and challenge the fairness of the dismissal 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

(See: **Farrant v. Key Delta (1993) 14 ILJ 464 (IC).**

[11] In the present application if the court finds that the fixed term contract that expired on 30th April 2003 was tacitly renewed, the Applicant would have to resume her duties as normal for the next six months. If the court finds that it was not, *cadit quaestio*, and the application would be dismissed.

[12] In the present case, the Applicant's argument is based on two grounds, namely; legitimate expectation and tacit renewal. She stated that she expected the contract to be renewed because;

12.1 *Since her engagement by the 1st Respondent on 1st November 2011, she knew that the contract would be automatically renewed because that has always been the case.*

12.2 *In the past occasions when the contract was renewed, it was done so automatically.*

12.3 *There is no basis for the non-renewal of the employment contract.*

12.4 *The last fixed term contract was tacitly renewed as she continued to work even after expiration of the agreed period.*

- [13] She argued that it was tacitly renewed because she continued to work even after the date of expiration of the contract on 30th April 2013.

[14] Analysis of the Evidence and the Law Applicable:-

As already mentioned in paragraph 9, above, a fixed-term contract expires automatically on the arrival of the date on which the parties agreed that the contract would come to an end. In this case the Applicant's argument is that she expected the fixed term contract to be renewed automatically as that was what happened with the previous contracts. The Applicant's argument is based on paragraph 5 only of the Founding Affidavit. This was clearly not enough to enable the court to infer such expectation. **John Grogan (op cit) at page 111** stated as follows when dealing with this question;

"That a fixed-term contract has been renewed a number of times is not, however, in itself indicative of the existence of a reasonable expectation of renewal. Whether there was a reasonable expectation of renewal must be determined from the perspective of both the employer and the employee."

- [15] The principle of reasonable expectation is a legislative inroad in the South African context found in section 186 (1) (b) of the Labour Relations Act No. 166 of 1995. There is no similar provision in our Industrial Relations Act No. 1 of 2000 as

amended. As already pointed out in the preceding paragraph, it is not enough to simply rely on the fact that the fixed term contract has been renewed more than once. The learned author John Grogan (op cit) at page 111 goes on to state other requirements as follows:

“The conduct of the employer in dealing with the relationship, what the employer said to the employee at the time the contract was concluded or thereafter, and the motive for terminating the relationship have been cited as factors to be considered when determining whether an employer implied that a fixed term contract would be renewed.”

From the evidence in the papers before the court, these requirements have clearly not been met.

Tacit Renewal:

- [16] The Applicant argued that the fixed term contract was tacitly renewed because she continued to work beyond the expiration period. From the evidence before the court, it seems that the Applicant continued to work because of what the 1st Respondent's Chairman told her on 29th April 2013 that she was going to serve a thirty days notice period after the expiration of the contract on 30th April 2013. The Chairman was relating the resolutions of the 1st Respondent's Committee

meeting that was held on 25th April 2013. That meeting was however unconstitutional as the members did not form a quorum. According to Article 9.4 of the 1st Respondent's Bye-Laws, a quorum is formed by five people being the Chairman, the Secretary, the Treasurer and two other members. In the meeting held on 25th April 2013 there were only four members. The resolutions taken in that meeting were therefore null and void.

- [16] Dealing with the question of tacit renewal the Appeal court in the case of Standard Bank of South Africa Ltd v Ocean Commodities Inc. 1983 (1) SA 292 (A), the court held that;

"In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact consensus ad idem."

In the present case there were no sufficient primary facts set out in the Founding Affidavit from which it could be inferred that the parties intended to renew the contract that expired on 30th April 2013.

- [17] Even if it were argued that the Applicant was entitled to work beyond 30th April 2013 until 31st May 2013 as per the advice of the Chairman, albeit that it was

unconstitutional, that argument would not take the Applicant's case any further as it would mean that she knew that the contract was extended only up to 31st May 2013 and therefore the question of expectation or tacit renewal does not arise at all.

[18] From the evidence before the court it was clear that the 1st Respondent intended to give the Applicant one month's notice even though there is no provision of such in the written contract, the 1st Respondent can still do that even now in a spirit of good industrial relations by holding a properly constituted meeting.

[19] Although it is not the duty of the court to give legal advice, the 1st Respondent is however encouraged to review its Bye-Laws in terms of Employment of officers and staff and termination thereof.

[20] Taking into account all the evidence before the court and also all the circumstances of the case the court will make the following order;

- a) The rule nisi is discharged.
- b) The application is dismissed.
- c) There is no order as to costs.

[21] The members agree.

N. NKONYANE

JUDGE OF THE INDUSTRIAL COURT OF SWAZILAND

FOR APPLICANT: MR. MBUSO SIMELANE

(MBUSO E. SIMELANE & ASSOCIATES)

FOR 1ST RESPONDENT: MR. DERRICK JELE

(ROBINSON BERTRAM)

