

IN THE INDUSTRIAL COURT

OF ESWATINI

CASE NO. 02/2019

In the matter between:-

JABULANI MANANA

Applicant

AND

SWAZILAND BUILDING SOCIETY

Respondent

Neutral citation: *Jabulani Manana vs Swaziland Building Society 02/2019*
[2019] SZIC 11 (18 February, 2019)

Coram: N.NKONYANE, J
(Sitting with G. Ndzinisa and S. Mvubu Nominated
Members of the Court)

Heard submissions: 29/01/19

Judgement delivered: 19/02/19

SUMMARY---Labour Law---Applicant employed in terms of a three-year fixed term written contract---Contract not renewed in writing for the second term---Applicant continuing to render uninterrupted

service to the Respondent---Contract deemed to have tacitly renewed---Applicant continuing to render uninterrupted service after the expiration of the second three-year period---Applicant arguing that the contract was tacitly relocated on the same terms and conditions for another three years to end on 31st May 2019---Evidence showing that the Respondent communicated to the Applicant its intends to introduce a new contract with new terms and conditions of service---Applicant arguing that the relocated contract was for a period of three years like the expired contract and therefore refusing to sign the new contract.

Held---The Applicant having continued to render service to the Respondent after the termination of the contract on 31st May 2016, the contract was tacitly renewed on the same terms and conditions of employment as the expired contract.

Held further---The duration of the relocated contract need not be the same as the expired contract, the life span of the relocated contract must be determined in the light of the particular circumstances of each case.

JUDGEMENT

1. The Applicant is an employee of the Respondent. He is currently occupying the position of Mortgage Manager.

2. The Respondent is a financial institution established in terms of the Building Societies Act, number 1 of 1962 and is carrying on banking business in all the four Regions of the country.

3. The Applicant instituted the present legal proceedings against the Respondent under a certificate of urgency and is seeking an order as follows;

“1. *That the usual forms and service relating to the institution of proceedings be dispensed with and that this matter be heard as a matter of urgency.*

2. *That the Applicant’s non-compliance with the Rules relating to the above –said forms and service be condoned.*

3. *Pending finalization of this application, that a rule nisi does hereby issue calling upon the Respondent to show cause, on a date to be determined by the above Honourable Court, why final orders in the following terms should not be granted namely:*

3.1 *An order declaring that a valid and enforceable contract of employment between the parties, on the same terms and*

conditions as the first contract of employment entered into between the parties in 2010, had come into existence with effect from the 1st June 2016 and that the said existing contract shall endure until the 31st May 2019.

3.2 *An order interdicting the Respondent from terminating the employment of the Applicant or deeming same to be terminated should the Applicant refuse to sign a different contract of employment with retrospective effect, as demanded by the Respondent in the Respondent's letter dated the 8th January 2019.*

4. *Costs of suit.*

5. *That, pending the final determination of the order sought in Paragraph 3 above, that the Order in Paragraph 3.2 above be and are hereby granted as an interim order with immediate effect.*

6. *That the above Honourable Court issues directives as to the filing of further affidavits herein.*

7. *Such further and/or alternative relief as this above Honourable Court may deem fit."*

8. When the matter first appeared before the Court on 02nd January 2019, the parties agreed that the *status quo ante* will be maintained pending finalization of the matter. The matter was postponed until 29 January 2019 for argument.
9. The Respondent is opposed to the Applicant's application. In its answering affidavit the Respondent raised points *in limine* relating to lack of jurisdiction by the Court and dispute of facts. The parties agreed that the points *in limine* be argued simultaneously with the merits. Having heard the argument on both the points in limine and the merits, the Court will therefore issue a final judgement.

Background Facts:

10. During 2009 the Respondent, due to some operational needs, changed its employment regime for managers and moved them from permanent positions to fixed term contracts. The Applicant was thus employed by the Respondent as a Mortgage Manager in terms of a three-year renewable contract with effect from 01st June 2010. This means the first contract expired on 31st May 2013. When the contract expired on 31st May 2013, the parties did not sign any new employment contract but the Applicant on 01st June 2013 continued to work for the Respondent under

the same terms and conditions of the first contract. The second three-year contract expired on 31st May 2016. Again, despite the expiry of the second three-year contract, the parties did not sign a new contract and the Applicant remained in employment as from 01st June 2016 to date.

7. On or during 2016, the Respondent sought to introduce a new fixed term contract for the Applicant and other Managers. The Applicant refused to sign the new contract on the basis that having been allowed to continue working after the expiration of the second three-year contract on 31st May 2016, a new three-year contract came into operation on 01st June 2016 on the basis of tacit relocation and that this new contract will come to an end after three years on 31st May 2019. The Applicant also refused to sign the new contract because he was of the view that it offered less favourable terms and conditions of employment.

8. Seeing that the Applicant was not about to sign the new contract, the Respondent gave the Applicant an ultimatum to sign the new contract by 10th January 2019 failing which his services will be deemed to have terminated on 11th January 2019. After the receipt of this ultimatum, **Annexure “JM9”**, the Applicant then ran to Court to seek its intervention, hence the present application.

9. **LACK OF JURISDICTION:**

It was argued on behalf of the Respondent that the Court has no jurisdiction in terms of Rule 14 (6) (b) of the Industrial Court Rules. It was argued that a Court will not grant declaratory order where the issues involved require it to enquire into both questions of fact and law. Rule 14 of the Industrial Court Rules deals with Notice of Motion. Rule 14 (6) (a) and (b) provides that;

“(6) The Applicant shall attach to the affidavit-

(a) All material and relevant documents on which the Applicant relies; and

(b) In the case of an application involving a dispute which requires to be dealt with under Part VIII of the Act, a certificate of unresolved dispute issued by the Commission, unless the application is solely for the determination of a question of law.”

10. On behalf of the Applicant it was argued to the contrary that the Court does have jurisdiction as the Court is only called upon to make a legal determination on facts that are common cause between the parties. It

was argued further that, even if it could be said that there are disputes of fact, such are not material or germane.

11. The Court will dismiss the point of law raised. From the evidence before it, the Court is being called upon to make a determination of a question of law, the issue being whether or not there is an existing contract between the parties. The Court is called upon to interpret the conduct of the parties. The facts are not in dispute. The Applicant continued to render uninterrupted services to the Respondent after 31st May 2016 to date. The respondent continued to pay the Applicant his monthly salary on the same terms and conditions of employment as the expired contract. In the case of **KPMG Chattered Accountants (SA) V Securefin Ltd and Another (2009) (4) SA 399 (SCA)** where the Court was dealing with the interpretation of a contract, the Court held at paragraph 39 that;

“....interpretation is a matter of law and not of fact and accordingly, interpretation is a matter for the Court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question.)

12. In casu, the Applicant is relying on facts that are common cause. The Court will not need to make a factual enquiry. It is common cause that the Applicant signed only one written contract in June 2010. That contract came to an end on 31st May 2013. On 01st June 2013 the

Applicant did not sign a new contract, but he continued to render services to the Respondent until 31st May 2016. On 01st June 2016, the Applicant continued to work for the Respondent without interruption. The question that arises is; what, is the effect of the Applicant's conduct of uninterrupted service to the Respondent. This is a legal question to be decided on what is common cause between the parties.

13. The answer to the present enquiry is also found in the Respondent's own papers. After the Respondent had finished putting in place the new contracts for its managers, it caused correspondence to be sent to the Applicant dated 29th June 2016 which the Applicant received in August 2016, **Annexure "TN12"**. This document states inter alia, that;

"We are happy to advise that the new fixed term contract document has now been finalized and was approved by the Board.

In view of the fact that your contract document for the second term of your contract was not ready for signature for an extended period of time and the fact that the second term is in itself about to expire, we are advised that in law since you continued to work after the expiry of the first contract the terms and conditions of the first contract continued to apply in the second term of the contract and are binding on both yourself and the company."

14. From the above, it is clear to the Court that the Respondent was aware of the legal implications of uninterrupted continuous employment after the expiry date of a fixed term contract. The author of the letter, the Managing Director, TRT Nhleko, stated in his own words that *“we are advised that in law since you continued to work after the expiry of the first contract the terms and conditions of the first contract continued to apply in the second term of the contract”*. Similarly, the Applicant having continued to work uninterrupted after the expiry of the second contract, there was a tacit relocation of the contract. The present issues therefore require application of the law, not a factual enquiry by the Court.

15. The legal principles applicable to the present application are now trite and they were stated by Professor John Grogan in his textbook, **Workplace Law, 8th edition** at page 45 as follows;

“If after the agreed date for the termination of the contract the employee remains in service and the employer continues to pay the agree remuneration, the contract is deemed to have been tacitly renewed, provided that an intention to renew is consistent with the parties conduct.”

16. As already pointed out by the Court, it was not in dispute that after 31st May 2016, the Applicant continued to render service to the Respondent uninterrupted. It was also not in dispute that the Respondent continued to pay the Applicant's monthly salary to date according to the same terms and conditions of the expired contract. The conduct of the parties was therefore clearly consistent with tacit renewal of the expired contract.
17. The question to be determined is whether or not there was a tacit relocation of the expired contract of employment. The Court comes to the conclusion that this is a question of law and the Court has the necessary jurisdiction to entertain the present application as envisaged by Rule 14(6)(b) of the Industrial Court Rules of 2007.

Dispute of Facts:

18. It was also argued on behalf of the Respondent that the application should be dismissed on the basis of the dispute of facts which the

Applicant should have foreseen. This point of law will also be dismissed by the Court because of the reasons that follow herein. There is no dispute of facts on the issues that the Court is called upon to decide. It is not in dispute that the second three-year term contract expired on 31st May 2016. It is not in dispute that no new written contract of employment was entered into by the parties after the contract lapsed on 31st May 2016. It is not in dispute that up to the present moment, the Applicant remained in service and the employment relationship between the parties continued uninterrupted. It is on the basis of these undisputed facts that the Applicant claims that the original contract was relocated.

19. It was also argued that there is a dispute of about whether or not the third contract was prejudicial to the Applicant. This argument cannot be sustained when one has regards to the issues to be determined by the Court. The Court is not presently called upon to make a determination on the validity or otherwise of the new contract. There is nowhere in the Applicant's prayers where the Court is being entreated to make a determination on the terms and conditions of employment that the Respondent wants to introduce.

20. **Declaratory Order:-**

It was also argued on behalf of the Respondent that the Court has no Jurisdiction to entertain the application because the Applicant is seeking a declaratory order. It was argued that the Court cannot make a declaratory order as to facts. It was argued that the Applicant in prayer 3.1 did not assert that he has any right against the Respondent.

21. The Court does not agree with the Respondent's argument. Prayer 3.1 of the Applicant's application was correctly framed. The declaration that the Applicant seeks does relate to a right. It is the right that the Applicant has based on the employment relationship that he has with the Respondent. The Court is not being asked to make a declaratory order on an intellectual, abstract or academic question. The declaratory sought will address rights and duties that will be binding on the parties.

THE MERITS:

22. The main argument by the Respondent in this case was that the Applicant has no legal basis to refuse to sign the new contract of employment because long before 01st June 2016, the Applicant was made aware that the employer intended to introduce new terms and conditions of service. The Applicant did not deny that he was aware of the Respondent's intention. His argument was that, since on 31st May

2016 no new contract was signed by the parties, and on 01st June 2016 he continued to work for the Respondent uninterrupted and the Respondent continued to pay him his salary for the services rendered based on the same terms and conditions of the expired contract, the contract was therefore tacitly renewed for another three years up to 31st May 2019. The Applicant argued therefore that he does not need to sign any new contract because he already has a running contract that will lapse on 31st May 2019.

23. As already pointed out herein, the present application is governed by the principles of law stated by **Professor John Grogan (Supra at page 45)** where he stated that;

“If after the agreed date for the termination of the contract the employee remains in service and the employer continues to pay the agreed remuneration, the contract is deemed to have been tacitly renewed, provided that an intention to renew is consistent with the parties’ conduct. The relocated contract will continue on exactly the same terms and conditions as the previous fixed term contract, except that the duration of the contract need not be the same as that of the original contract; the life of the relocated contract must be determined in the light of the particular circumstances of each case. However, unless a

contrary intention can be inferred from the facts, it will generally be assumed that the parties intended the new contract to be of indefinite duration terminable by reasonable notice given by the either party.”(Underlining for emphasis only).

24. When Applying these principles of the law to the facts of this case, the following becomes clear;

24.1 After the agreed date of termination of the second contract on 31st May 2016, the Applicant continued to render services for the Respondent.

24.2 The Respondent continued to pay the Applicant the agreed remuneration.

24.3 There was therefore a tacit renewal of the contract.

The next question for determination is whether the relocated contract was for the same duration, that is, three years up to 31st May 2019. In dealing with this question the Court will have regard to the conduct of the parties and the circumstances of the case generally. The approach to the facts of the case should be an objective one. The subjective views of any party as

to the effect of his or her actions are normally not relevant. (See: **Erastus Ipinge Negonga & Another v Secretary to Cabinet & 5 Others**, case number LCA 58/2015 (Namibia Labour Court of Appeal) at page 28).

25. As already pointed out in this judgement, the facts of this case are not in dispute. The Applicant did not dispute that he was aware of the Respondent's intention to introduce the new contracts for the managers with new terms and conditions. In paragraph 5.2.12 of his replying affidavit he stated that Mrs. Elizabeth Arden gave her the draft in December 2016. Again, in paragraph 6.3.2 of his replying affidavit the Applicant stated that he was aware of the Respondent's intention to introduce the new contracts to managers.

26. In casu, in line with the principles of the law stated by Professor John Grogan in the preceding paragraphs, the Court must take into account the clear intentions of the Respondent which were communicated to the Applicant prior to 01st June 2013 in determining the life of the relocated contract. The authorities are clear that a tacit relocation of an agreement is a new agreement and not the continuation of the old one. (See: **Golden Fried Chicken (Pty) Ltd V Sirad Fast Foods CC and Others** 2002 (1) SA 822 (SCA) at 825 D-E).

27. From the undisputed evidence that the Applicant was aware that the Respondent was reviewing the first contract and intended to introduce new contracts for the Managers, the Applicant cannot successfully argue that the relocated contract was to endure for another three-year period until 31st May 2019. Professor John Grogan (*supra*) stated that “...*the life of the relocated contract must be determined in the light of the particular circumstances of each case.*” The particular circumstances of this case are that the conduct of the Respondent was clear and it was communicated to the Applicant and the other managers long before 01st June 2013, that new contracts with new terms and conditions of service would be introduced. The Court will therefore accept the Respondent’s argument that the relocated contract was to endure pending the signing of the new contract by the parties.
28. The evidence before the Court was that the need to introduce the new contracts was because of the operational requirements of the Respondent. Dealing with this issue, the Labour Court of South Africa in the case of **The Member of the Executive Council for the Department of Health, Eastern Cape v DR. JP Odendaal & Two Others**, case number **P504/07**, stated the applicable principle as follows at paragraph 53;

“Although it is not permitted in terms of the common law to unilaterally amend the terms and conditions of employment, it is accepted that an employer may, after a proper consultation process, implement changes to conditions of service in accordance with its operational needs.”

29. The Applicant did not dispute that the Respondent had valid operational reasons that led to the new contractual dispensation for the managers. The evidence revealed that the Applicant has issues with the new contract and has refused to sign it. As already pointed out herein however, the Court is not presently called upon to make a determination on the validity or otherwise of the new contract. Such issues are dealt with in terms of Section 26 of the Employment Act.
30. It is not the duty of the Court to give legal advice to the litigants, but the Respondent had no right to threaten the Applicant with an unreasonable ultimatum in the manner that it did in this case. Employment contracts are protected by the law in this country. The Applicant was clearly entitled to approach the Court to interdict any conduct by the Respondent which seeks to illegally sever the employment relationship between the parties.

CONCLUSION:-

31. The Applicant having been allowed to render uninterrupted services to the Respondent beyond the date of expiry on 31st May 2016, the contract was tacitly renewed. The intention to renew is consistent with the parties conduct as the Applicant was allowed to continue rendering service to the Respondent and the Respondent continued to pay the agreed remuneration in terms of the expired contract. The relocated (novated) contract is a new contract and not the continuation of the expired contract. The Court must make a determination on the facts before it whether the parties tacitly agreed to a new contract on the same duration or continued the employment relationship on the basis of an indefinite period pending the signing of the new contract. The facts in this case revealed that the Respondent made its intentions known to the managers including the Applicant before 01st June 2016 that it intends to review the existing contracts and introduce new contracts with new terms and conditions of employment. The intentions of the parties therefore exclude any assumption that the relocated contract was going to be for a three-year fixed term period like the expired contract. The Court will therefore come to the conclusion that the relocated contract was to endure pending the signing of the new contract.

32. If the Applicant is of the view that the new contract offers him lesser terms and conditions than he previously enjoyed, he has recourse in terms of Section 26 of the Employment Act.

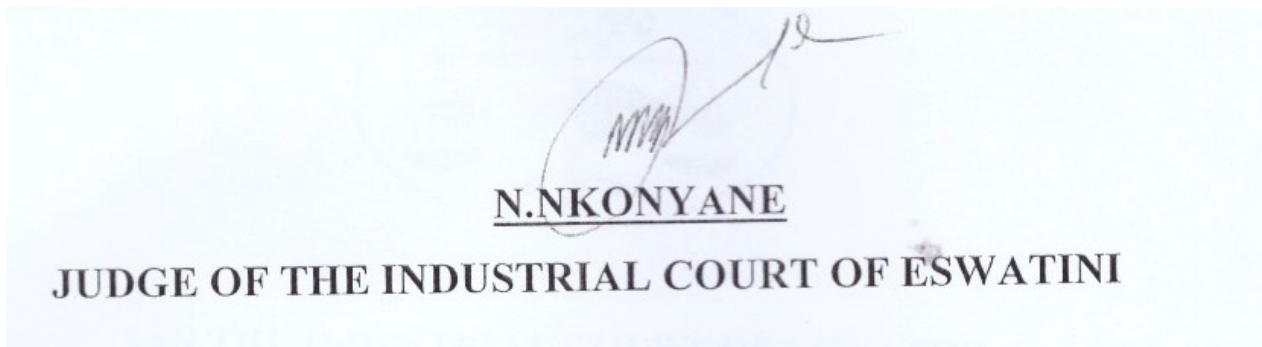
33. The Court will therefore make the following order;

a) An order is made declaring that there is a valid and enforceable contract of employment between the parties for an indefinite period pending the signing of the new contract.

b) The Respondent is interdicted from terminating the contract of employment of the Applicant in the manner envisaged by the letter dated 08th January 2019 (Annexure “JM9”) or by any other illegal means.

c) Each party to bear its own costs.

37. The members agree.



For Applicant: Advocate M. Van Der Walt
(Instructed by LR Mamba & Associates)

For Respondent: Advocate P. Kennedy
(Instructed by Robinson Bertram)