

**IN THE INDUSTRIAL COURT OF ESWATINI**

1--IELD AT MBABANE

Case No: 341/2021

In the matter between:-

**SABELO DLAMINI**

APPLICANT

And

**ESWATINI CIVIL AVIATION AUTHORITY**

RESPONDENT

**Neutral citation:** Sabelo Dlamini v Eswatini Aviation Authority

(341 /2021)[2022] SZIC 16 (03 March 2022)

**Coram:**

**MSIMANGO, ACTING JUDGE**

(Sitting with Mr S. Mvubu and Mr M.Mtetwa nominated

Members of the Cami).

**Date Heard:**

05<sup>th</sup> JANUARY 2021

**Delivered:**

03<sup>rd</sup> MARCH 2022

**Summary: The Applicant alleges that he received a letter from the Respondent dated 04t1, November 2021. The import of the letter was to terminate the Applicant's fixed term contract on its own on the 30<sup>th</sup> November 2021. The Applicant argues that his letter of appointment read together with his contract of employment envisages a renewal of the contract based on performance, further that, clause 12 of the contract describes the elaborate performance appraisal process to be followed by the Respondent before a decision is taken whether to renew or terminate the contract.**

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#### JUDGEMENT

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1. The Applicant is an adult Liswati male of Matsapha, employed by the Respondent as Director Marketing.
2. The Respondent is Eswatini Civil Aviation Authority, a statutory body duly established as such with the power to sue and be sued in its own name, carrying its business at Matsapha Airport, in the Manzini Region.
3. The Applicant instituted an application under a certificate of urgency against the Respondent, seeking the following orders:-
  - (i) That Applicant be condoned for the non-compliance with the time limits and manner of service and the matter be enrolled to be heard as one of urgency.

- (ii) A rule nisi be issued calling upon the Respondent to show cause on a date to be fixed by the court why an order in the following terms should not be made final:
- (iii) The Respondent's letter to the Applicant dated the 04<sup>th</sup> November 2021 be hereby set aside.
- (iv) It be declared that the Applicant's employment contract has a renewal clause.
- (v) The Respondent be interdicted and/ or restrained from employing anyone that will take up the duties of the Applicant and /or that the Respondent be interdicted from proceeding with the recruitment process pending finalization of this matter.
- (vi) It be declared that the Applicant's contract of employment has been automatically renewed for the next 5 years on the same terms and conditions of employment.
- (vii) Alternatively, the position of the Applicant be declared redundant as a result of the restructuring of the Respondent, and the Applicant be compensated accordingly as a redundant employee.
- (viii) It be ordered that pending the finalization of the matter in due course the prayers above are to operate with immediate and interim effect.
- (ix) The Respondent be ordered to pay the costs of this application.
- (x) Granting the Applicant further and/ or alternative relief.

**4. It was argued on behalf of the Applicant that:-**

- 4.1 His contract of employment provided for renewal, for the reason that clause 12 of the contract describes the elaborate performance appraisal process to

be

followed by the Respondent before a decision is taken whether to renew or terminate the contract. Therefore the assertion by the Respondent that the contract is not renewable is misplaced and affronts the wording of the letter of offer of employment and the contract of employment itself.

4.2 The letter of offer of employment read together with the contract of employment envisages a renewal in the contract, and such cannot be read in isolation of the other as suggested by the Respondent. Furthermore, the Respondent is by law debarred from declaring the position redundant or terminate the contract without proper consultation or without a prior hearing to that effect being conducted. It is now trite law that employees engaged on a fixed term contract whose term of engagement has expired, but wish to have their contract renewed, are entitled to be heard before the employer decides to renew or not to renew.

4.3 Further that, the renewal of the contract is premised on performance and appraisal, hence, both parties had a duty to ensure that the appraisals were done. In this regard there was a legitimate expectation that the contract was to be renewed based on previous appraisals by the Respondent.

4.4 The Respondent has not acted in good faith and has dismally failed to conduct itself in accordance with fair labour practices, in that if the Respondent had intended not to renew the contract when it lapsed on the 30<sup>th</sup> November 2021, a notice should have been issued out just like the other executives who received their notices on the 08<sup>th</sup> June 2021. The Applicant has a right to be given proper notice as envisaged by clause 13 of the contract of employment if the contract is to be terminated.

4.5 Hence any subsequent recruitment and/or advertisement of the post and/or redundancy exercise is null and void for failure to follow any procedural and/ or substantive requirement of the law.

**5. It was argued on behalf of the Respondent that:-**

5.1 The Applicant states that his employment contract provides for due process which is in terms of clause 12 of the contract of employment. Clause 12 of the contract places an obligation on both parties to embark on an evaluation performance process, whereas the Applicant complains that the process envisaged under clause 12 of the contract was not conducted. The Clause reads as follows:-

***"The employer and the employee shall agree on the criteria to be utilized to evaluate the performance of the employee, which shall be incorporated in a performance contract to be signed by both the employer and the employee on an annual basis".***

5.2 For performance evaluation to take place, there has to be the above mentioned agreement. The employment contract was signed in July 2017 and the Applicant wants to rely on the issue of evaluation as a basis upon which this application should succeed. The Applicant became aware of this clause in 2017 and from the year 2017 to 2021, he has not given any explanation as to why he did not raise the issue of evaluation.

5.3 Furthermore, the contract of employment signed by the parties thereof states as follows:-

*"This document constitutes the sole record of the agreement between the parties in respect of the employment of the Director-Marketing and Corporate Affairs".*

The Applicant now wants to place reliance on the letter of offer which it is submitted is not binding upon the parties based on the provisions of the above mentioned clause.

5.4 The Applicant also misconstrues the provisions of clause 13 of the employment contract which provides for procedure to be followed when the contract is to be terminated before its time, or as a result of consensual termination. Hence, it is submitted that Applicant's contract of employment did not terminate as a result of early or consensual termination, the contract has simply run its course. The letter of the 04<sup>th</sup> November 2021, was simply confirming what the Applicant already knew. The Applicant knew that his contract was coming to an end on the 31<sup>st</sup> November 2021. Thus the comi does not have power to then contract on behalf of the parties by adding a clause for renewal.

5.5 For all intents and purposes, the Applicant's application is based on legitimate expectation to have his contract renewed. The comi is directed to the case of Professor ANNETTE SINGLETON JACKSON V THE UNIVERSITY OF ESWATINI: INDUSTRIAL COURT CASE NO. 354/2019, where it was held that:-

*"Legitimate expectation does not give rise to a substantive right of renewal of the contract, but a procedural right to be heard before an adverse decision is taken. Applicant fails to establish that she had a right or legitimate expectation to be heard before the decision not to renew her contract was taken".*

5.6 The applicant in the above cited case, sought similar prayers, one prayer related to the setting aside of a letter advising her that her employment contract will not be renewed, and on the other hand praying that her contract of employment be renewed. The Honourable Court dismissed the Applicant's application. In totality the Applicant's case has no merit and stands to be dismissed with costs.

6. 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. When establishing whether the non-renewal of a fixed term contract constitutes a dismissal, the terms of the contract itself are an important indication that the parties in fact intended the contract and relationship to terminate on the date mentioned.

7. In this matter before me the relationship between the parties is based on a written contract. The contract was for a period of 5 years, it was therefore a fixed term contract. Such a contract is permitted by **Section 35 of the Employment Act No. 5 of 1980**, which deals with unfair termination of employee's services and 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.



8. 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 **UNIVERSITY OF PRETORIA VS C CM A & Others (2012) 32 IL J 183 (LAC)**, the court held that:-

*"the dismissal of an employee whose fixed term contract was not renewed did not constitute an unfair termination or dismissal".*

9. Furthermore the Applicant submitted that there was an obligation by the Respondent to renew the contract in terms of the letter of offer, which reads as follows:-

*" .....I am pleased to advise that you have been offered a five (5) year contract of employment with the Swaziland Civil Aviation Authority (SWACAA) as Director- Marketing and Corporate Affairs, effective 01 December 2016 ending 31 November 2021 renewable based on performance ..... "*

10. It must be highlighted that there is a difference between a letter of offer and a contract. A letter of offer is a communication employers use to extend a job offer, it can consist of a number of different details about a given position, the employee's new title, their schedule, what is expected of them, to whom they will report and their salary. The primary take away is that a letter of offer gives a basic understanding about the position offered and the role of the candidate within the company, it is not a legally binding document. It does not include promises of future employment. Whilst on the other hand an employment contract is a legally binding document that more concretely and explicitly describes the terms and conditions of a person's employment. Unlike a letter of

offer, an employment contract is meant to create a binding promise between the employer and employee.

11. Dealing with a similar matter **MLAMBO AJ** had this to say in the case of **MALANDOH VS.A BROADCASTING CORPORATION (1994) 18 IL J 544 (LC)**

*"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 so doing, I would be imposing a different contract to that which the parties entered into".*

12. In principle, it is not open to the court to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms.

13. In support of the above principle the court in the case of **S.A MUTUAL AID SOCIETY V CAPE TOWN CHAMBER OF COMMERCE 1962 (1) S.A 598**, stated that:-

*"Where the parties have expressly agreed upon a term and given expression to that agreement in the written contract in unambiguous terms no reference can be had to surrounding circumstances in order to subvert the meaning to be derived from a consideration of the language of the agreement only".*

14. The court will adopt the same approach and give effect to the contract entered into by the parties. There is no clause in the contract that obliges the Respondent to renew the contract.
15. The Applicant further argued that he had a legitimate expectation that his contract would be renewed. The principle of legitimate expectation is a legislative inroad in the South African context, found in **Section 186 (1) (b) of the Labour Relations Act No. 66 of 1995**, which provides as follows:-

*"It is a form of dismissal when an employee reasonably expected the employer to renew the 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"*

16. It is therefore established in our law that a legitimate expectation of renewal does not give rise to any contractual entitlement. The court in the case of **NHLANHLA HLATSHWAYO V SWAZILAND GOVERNMENT AND THE ATTORNEY GENERAL (IC) CASE No. 398/2006**, held that:-

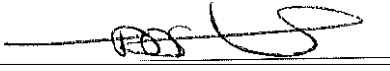
*"There is currently no legal precedent in our law to accord a substantive right to an employee on the basis of legitimate expectation. There cannot be in the court's view, any reasonable expectation of permanent employment arising from un-renewed temporary contracts".*

17. Similar sentiments were shared by the court in the case of **BERNARDIN B. BANGO VS THE UNIVERSITY OF SWAZILAND (IC) Case No. 342/2008**, where the court held that:-

***"even a legitimate expectation to have a contract of employment renewed does not give rise to any contractual entitlement".***

- 18.** It must also be mentioned that the inclusion of a clause that the contract will be subject to re-negotiation with a view to renewal before its expiry date does not in itself create a legitimate expectation of renewal. In the case of **SOUTH AFRICAN BANK OF ATHENS LTD V CELLIER & OTHERS (2009) 30 IL J 197 (L C)** the court found that the mere fact that the fixed term contract made provision for the negotiating of the possible renewal of the contract, does not in itself mean that there is a reasonable/ legitimate expectation for renewal.
19. In light of the above cited authorities the court is of the view that there is no basis for legitimate expectation as argued by the Applicant.
20. In the circumstances the comi finds that the contract of employment was for a fixed period terminating on the 31<sup>st</sup> November 2021. In the absence of an agreement to renew the contract, the court can not order the Respondent to renew or extend the contract. The issue of renewal falls squarely within the discretion of the employer.
21. The following order is hereby made;
- (i) The Application is hereby dismissed.
  - (ii) Each party to pay its own costs.

The Members Agree.



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**L.MSIMANGO**

**ACTING JUDGE OF THE INDUSTRIAL COURT OF ESWATINI**

For Applicant : Mr M. Dlamini. (Dynasty Inc Attorneys)

For Respondent : Mr B. Gamedze. (Musa M. Sibandze Attorneys)