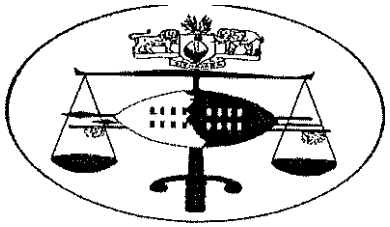

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE Case No 32/2022

In the matter between:

DLAMINI BUHLE BONGANI Applicant

And

ESWATINI PUBLIC PROCUREMENT REGULATORY AGENCY Respondent

Neutral citation: Dlamini Buhle Bongani v Eswatini Public Procurement Regulatory Agency [32/22) [2022] SZIC 20 (14March, 2022)

Coram: **NGCAMPHALALA AJ**
(Sitting alone)

Date Heard: 18th February,

2022 Date Delivered: 14 March, 2022

SUMMARY: Application brought on a certificate of urgency- non renewal of contract-legitimate expectation for renewal of contract restructuring made position permanent and pensionable Respondent raised point in limine- dispute of facts.

Held- ***Point in limine upheld- application dismissed.***

JUDGMENT

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[l] The Applicant is Dlamini Buhle Bongani, a Liswati male of Mbabane in the Hhohho Region, a former employee of the Respondent as Director Policy, Legislation and Investigation, which position was altered to Head of Legal having been/or is employed by the Respondent.

[2] The Respondent is Eswatini Public Procurement Regulatory Agency, a statutory body dully established as such with power to sue and be sued in its own name, carrying its business at RHUS office Park, Karl Grant Street, Mbabane, Hhohho Region.

[3] BRIEF BACKGROUND

The present proceedings seek to interdict and restrain the Respondent from proceeding with the process of recruitment/employment of any personnel to fill the Applicant's position pending finalization of this matter. Further that the Court declare that Applicant's contract of employment has been automatically renewed for the next five years on the same terms and conditions of employment. Alternatively, the Applicant seeks that he be compensated the remainder of his contract, which he alleges lapses in December, 2023, including the payment of all outstanding leave days and all outstanding financial obligations.

[4] Applicant averred that on the pt of February, 2022, he received correspondence from the Respondent signed by the Chief Financial Officer

one Mr. Musa Sikhondze whose content was advising him of the termination of his fixed term contract, on the 15th February, 2022. It was the Applicants submission that he was employed by the Respondent on the 5th August, 2016 as Director, Policy, Legislation and Investigation (DPLI) for a duration of five years. He averred that this was an exco position reporting directly to the Chief Executive Officer.

[5] Applicant submitted fmiher that on or about the year 2019 to June, 2020, the Respondent embarked on a restructuring exercise subsequent to a new strategic plan. During this period the Applicant had to attend to the writing of exams at the University of Pretoria, and was away for a period of one week in South Africa. Upon his return he received correspondence advising him that he was no longer Director Policy, Legislation and Investigation, but his position was now Head of Legal. This change in position came with no support staff, and he now rep01ied to the Head of Regulatory Services a position below that of Chief Executive Officer.

[6] It was the Applicant's averment that as a consequence of the restructuring process the position of Director Policy, Legislation and Investigation became redundant, and that his subsequent position as Head of Legal was a demotion which Respondent implemented without any prior notice or proper consultation on the restructuring process. He further submitted that the variation by the Respondent of his terms and conditions of employment was unlawful as same was done without prior proper consultation.

[7] He averred that to further compound the situation, the new position of Head of Legal is one that is at manager level, making it a permanent and pensionable position. This therefore means that the position of Head of Legal is now a permanent and pensionable position, as per the Human Resources Policy. In support of this allegation, he annexed correspondence written by the Human Resources office directed to Standard Bank advising the bank that the Applicant was a permanent employee.

[8] Applicant submits that sometime in December, 2021 he received a notice of the intended non-renewal of his contract of employment, he proceeded to request for a meeting with the Respondent which was denied. Thereafter on the 2pt January, 2022 he received an email from the Human Resources office inviting him to a meeting wherein he expressed his concerns of having his contract terminated without reasons given as per the termination clause in the contract itself. He avers that in that meeting he was advised that his contract had been extended by email as it lapsed

on the 15th August 2021, and that such extension was for a period of six months which lapsed on the 15th February, 2022.

[9] It was his submission that at all material times from the date the restructuring exercise took place in June, 2020, he considered himself a permanent and pensionable employee. This further was compounded by his appointment to the Workload and Capacity Assessment Committee (WCA), in terms of the statutory obligations, **Section 27(3) of The Procurement Act, 2011.**

[l O] In conclusion it was his averment that the termination and/or non-renewal of his contract was unlawful and contrary to clause 15 of his contract of employment and Human Resource Policies. Further that before his contract can be terminated, in terms of the law he should have been given an opportunity to be heard. It is on this basis that the Applicant has approached the Court under a Certificate of Urgency, seeking an order in the following terms:

10.1 The Applicant is condoned for the non-compliance with the time limits and matter is enrolled to be heard as one of urgency.

10.2 A *rule nisi* is hereby 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:

10.3 The Respondents letter for the Applicant dated the 1'[1] of February, 2022 is hereby set aside;

10.4 It **is declared that the Applicant's employment with the Respondent is permanent and pensionable;**

10.5 The Respondent is interdicted and restrained from employing anyone that will take up duties of the Applicant and/or that the Respondent is interdicted from proceeding with the recruitment of any personnel to fill the Applicant's position pending finalization of this matter;

10.6 It is declared that the Applicant's contract of employment has been automatically renewed for the next five years on the same terms and conditions of employment;

10.7 Alternatively, that the Applicant's employment is coming to an end in December, 2023 as per his appointment to the Workload and Capacity Assessment Committee (WCA), which is for a duration of 3 years, from the 3rd December,2020 until December, 2023;and

10.8 Alternatively, that the Applicant be compensated the remainder of his employment to the year December, 2023, including all outstanding leave days and the Respondent being ordered to pay all outstanding financial obligations made by the Applicant to financial institutions on the strength of allowances due that the above Order operates with interim effect pending the finalization of the matter.

10.9 It is ordered that pending finalization of this matter in due course, prayers 10.5 supra is to operate with immediate and interim effect.

10.10 The Respondent is ordered to pay the costs of this application.

10.11 Granting the applicant further and/or alternative relief.

[11] The Applicant's Application is opposed by the Respondent and an Answering Affidavit was duly filed and deposed thereto by Mr. Musa

Sikhondze the Respondent's Chief Financial Officer. The Applicant thereafter filed its Replying Affidavit.

[12] The matter came before Court on the 9th February, 2022 wherein the parties agreed on timelines for the filing of all pleadings, heads of argument and that the matter would be argued on the 15th February 2022. On the said return date, the matter did not proceed, as the Applicant filed its heads of argument on the date set for argument. The matter was accordingly postponed to the 18th February, 2022, on which date the matter was argued with only the Judge sitting in the matter. (This was by consent of both parties). The parties further agreed to deal with the matter holistically, dealing with the points *in limine* therein raised then the merits.

ANALYSIS OF FACTS AND APPLICABLE LAW

[13] Through the Answering Affidavit of the Respondents Chief Financial Officer, a point *in limine* was raised by the Respondent, in its Answering Affidavit;

Non-Disclosure of Material Facts

[14] First to address the Court was Mr. Magagula on behalf of the Applicant, it was his argument that the Respondent had raised a point *in limine,* of non disclosure of material facts resulting in a dispute of facts. It was his submission that it was the Respondents contention that the Applicant was employed by it as Director Policy, Legislation and Investigation which was later changed to Head of Legal. It was further the Respondents contention that the Applicant was employed on a fixed term contract, that came to an

end on the 15th of August, 2021, and same had no renewal clause. That the Applicant was consulted prior to the structural change and that he agreed to these changes in a meeting that took place on the 27th of May, 2020.

[15] Prior to the lapse of his agreement through a letter dated the 12th August, 2021, the Applicant was advised of the extension of his contract for a period of 6 months, and that thereafter it would lapse on the 15th February, 2022. It was the Applicants submission that the Respondent's argument therefore, is that the Applicant employment conditions after the restructuring exercise; remained under the same fixed term contract; the Applicant's employment was never permanent and pensionable; and therefore, as a result of these averments the application is marred with dispute of facts and cannot be dealt with properly on motion proceedings and should be dismissed.

[16] The Applicant's argument to these averments were as follows;

The Applicant was employed on a fixed term contract in terms of **clause** 7, thereof. **Clause 15** of the Applicant's contract of employment provides for conditions of termination of the contract. It was his argument that contrary to the terms of the contract as demonstrated in clause 15, none of the instances have given rise to the termination of the Applicant's contract of employment and/or non-renewal.

[17] Further that in terms of clause 6.1 of the contract of employment the parties are required to enter into a performance contract, against which the employees will be regularly evaluated and appraised. It was Applicant

averment that this clause envisaged an appraisal before a determination as to whether or not to renew the contract of employment. The exercise however was never carried out by the Respondent. Applicant avers that instead the Respondent issued c01Tespondence to the Applicant tenninating his employment without appraisal or communication that his contract will not be renewed. This is in struck contrast with the contract of employment which envisaged an appraisal process before termination.

[18] It was Mr. Magagula's submission that, by virtue of being employed on a fixed term contract, an employee should not be subjected to disadvantages which are not applied to permanent employees. It was his averment that the action of the Respondent of terminating the Applicant's contract without appraisal was indeed less favorable treatment.

[19] It was Mr. Magagula's further submission on behalf of the Applicant that over and above the wrongful termination of the Applicant's contract, the Respondent failed to properly consult with the Applicant, when his position was changed from Director Policy, Legislation and Investigation. Applicant averred that the Respondent failed to follow **Section 40 of The Employment Act, 1980,** when his position as Director was declared redundant by the Respondent.

[20] Applicant contends that there was a duty on the Respondent to consult him properly before his position was declared redundant, and changed to the position of Head of Legal. It was the Applicants argument that the general principal when it relates to redundancy in law, requires for the employer to

have a bona fide reason for declaring a employees position redundant, and the position must be rationally justifiable. The law then places a burden on the employer to engage the employee (s) or their representative. The Applicant cited the case of **SACWU V AFROX LTD (1999) 20 ILJ 1718(LAC)** in support of this argument.

[21] The Applicant went on to submit that the averment by the Respondent that he was consulted prior to the declaration of his position redundant or changed to that of Head of Legal, was flawed and supported by bona fides . on their part. The Applicant then cited paragraph 6 and 9.6 of the Respondents Answering Affidavit in support of his argument. Several other cases were used by the Applicant in support of its case which included, . **SIMELANE V AUDELL METAL PRODUCTION (PTY) LTD (1987) 8 ILJ 438 (IC),** and that of **KUNENE AND OTHERS V SWAZI MTN LIMITED IC CASE NO 273/12.**

[22] In closing his argument the Applicant averred that he had a legitimate expectation that his contract would be renewed. It was his submission, that there being a termination and an appraisal clause in the contract of employment, he had expected that even though he was on a fixed term contract, the pre-condition stipulated in his contract would be considered by the Respondent before his contract was tenninated.

[23] He aven-ed further that his appointment to the Workload & Capacity Assessment Project Committee until December, 2023, further embellished the expectation that indeed his fixed term contract would be renewed. A

letter written by the Respondent to Standard Bank confirming the Applicant as a permanent employee compounded the matter even further, raising Applicant's expectation that his employment with the Respondent goes beyond the fixed term contract. It was his assertion that there has never been a retraction of these letters by the Respondent, if same was issued in error. It was his submission that he has met all the requirements, which would entitle him to an order in terms of the notice of motion.

[24] The Respondent in rebuttal argued that the Applicant was employed by the Respondent on a written fixed term contract of employment. Fmther that it is common cause that in terms of clause 7 thereof, the contract of employment was to commence on the 15th August, 2016 valid for five years. The contract of employment has no renew ! clause. It was further Respondent's submission that clause 17 of the contract provides that;

"This document constitutes the sole agreement between the parties. "

Further that no agreement varying the terms thereof will be valid until approved by the employer, reduced into writing and signed by the patties.

[25] Respondent submitted that in the present matter it had not terminated the fixed term contract of employment of the Applicant. The contract of employment has simply come to an end by effluxion of time in that the period of engagement has expired. It averred that the insurmountable difficulty that the Applicant now faces, is that he cannot establish any right whatsoever to renewal of the contract which would entitle him to the relief sought. This is in so far as there is no contract! alleged which the Applicant

can be deprived of, it was Respondent's contention that the question of being consulted therefore does not arise.

[26] Respondent also argued that the Court is not empowered to order renewal of a fixed term contract of employment for a further period, when the contractual right to renewal is alleged and not proved. It was Respondent's contention that where an employee has been engaged for a fixed te1m, and that te1m has expired, the employee does not have protection as per **Section 35(2) of The Employment Act, 1980.** Respondent argued that the Applicant's contract in this case has not been terminated but the contract in this case came to an end, in that the period of engagement has expired. The consideration in such circumstances must be whether there is any contractual right to renew. In this particular instance the Respondent averred that nothing in this contract afforded the Applicant the right to renewal.

[27] In further rebuttal the Respondent dismissed the claim that the Applicant was ever permanently and pensionable employed by it. It was the Respondents averment that at all material times the Applicant was appointed on a fixed term contract. Even when the title of his position was changed due to a restructuring process by it, the Applicant remained on a fixed term contract. Respondent stated that after the restructuring process, of which the Applicant was well aware of and consulted on, received correspondence from the Applicant on the 23rd June,2020 enquiring on the lapse of his contract of employment. Respondent avers that the Applicant

was advised that there was no change to his initial fixed term contract, but that only his title had changed. The letter read,

" ..... *start and end date remains the same* ... "

[28] The Applicant therefore as from the gth July, 2020, lmew that his contract of employment was coming to an end on the 15th August, 2021. On the issue regarding correspondence addressed to the bank, it was the Respondents assertion that same was done in error by the Human Resources Officer, and that in any instance the correspondence was not directed to the Applicant, and further did not seek to amend the lapsing of the fixed term contract of employment. The appointment of the Applicant into the Workload and Capacity Assessment Committee, was also dependent upon him still being an employee of the Respondent. Respondent stated that upon termination of the employment relationship, his appointment to the Workload and Capacity Assessment Committee also comes to an end.

[29] To close his case the Respondents submitted that at all material times the Applicant was aware of the lapse of his contract on the 15th August, 2021. Several meetings were held and correspondences exchanged between the parties, addressing issues surrounding his change of title and the lapse of his contract. Respondent stated that instead of being candid with the Court, the Applicant has failed to provide these documents to the Court, but has gone at lengths to sway the Court in its favor. As a result, thereof the Applicant is guilty of non-disclosure of material facts in the matter, in an attempt to gain the Courts sympathy and as a result the application should be dismissed.

[30] The law in our jurisdiction dictates that if a Court is unable to decide the application on paper, it may dismiss the application or refer the matter for oral evidence or refer the matter to trial. Overarchingly, unless the application is dismissed, the Court should adopt th.e procedure that is best calculated to ensure that justice is done with the least delay. In every case the Court should examine the alleged dispute of facts and determine whether there is a real issue of facts that cannot be satisfactory resolved without trial. The emphasis is on proper examination of facts as it stands on paper.

[31] The decision is not taken lightly. A robust approach may be employed to avoid fastidiousness and abuse of procedure. The approach must be applied within reason and the advantages of oral evidence must be carefully weighted to prevent the settling of facts on probabilities. The manner in which *viva voce* evidence would disturb the balance of probabilities is the yard stick, and whether a factual dispute exists is not a discretionary decision it is a question of fact.

[32] In the **ROOM HIRE CO (PTY) LTD V JEPPES STREET MANSION (PTY) LTD 1949 (3) SA, 1155 (T),** it was stated that (except) in interlocutory matters, it is undesirable for the Court to attempt to settle dispute solely on probabilities disclosed in contractionary affidavits was denounced 90 years ago by Tindall, J in **SAPERSTEIN V VENTER'S ASSIGNEE 1929 TPD 14 P.H AT (71)** and it is still the law. This law has been given full judicial effect in the jurisdiction, the principal having been stated in **DIDABANTFU KHUMALO V THE ATTORNEY GENERAL**

CIVIL APP NO. 31/2010 and **HLOBSILE MASEKO (NEE SUKATI) AND OTHERS V SELLINAH MASEKO (NEE MABUZA) AND OTHERS NO. 3815/2010.**

[33] The Applicant alleges that he is an employee protected by **Section 35 of The Employment Act, 1980.** It is his averment that after a restructuring exercise by the Respondent his position changed from that of Director Policy, Legislation and Investigation to Manager Head of Legal. That the change in his position was changed without proper consultation with him. He alleges that several meetings and correspondences was exchanged between himself, wherein he raised the concern. It was his averment that the position of Head of Legal was a managerial position, which is a permanent and pensionable position.

[34] He further avers that he was not properly advised that his fixed term contract would not be renewed. he stated that his contract has been illegally terminated, that it provides that an appraisal exercise be undertaken before it is decided whether it shall be renewed or not. Further that he had a legitimate expectation that it would be renewed, because of correspondence addressed to Standard Bank, advising that he was a permanent and pensionable and his appointment to the Workload Committee. Respondent on the other hand avers that the Applicant was at all material times employed on a fixed te1m contract. That Applicant's contract has not been terminated, but has simply come to an end by **effluxion** of time, in that the period of engagement has expired. Further that there is no obligation on the

either in contract or in law to consult the Applicant with regards to the expiring of the contract.

[35] The Applicant having been engaged on a fixed term contract, and there being no renewal clause, the Applicant does not have any protection in terms of **Section 35(2) of The Employment Act, 1980.** It is evident that the issue in dispute goes to the heart of the relationship between the Applicant and the Respondent. The issue being firstly whether the Applicant was a pennanent and pensionable employee, or an employee on a fixed term contract. Secondly whether the Applicant was properly consulted by the Respondent on his new employment position, and lastly whether there was a legitimate expectation for the renewal of the contract.

[36] **Section 14 (6)(a) and (b)** of the Rules of the Industrial Court, prescribe that where no dispute of facts is reasonably foreseeable in the sense that the application is solely for the determination of a question of law, the procedure laid down in **Part VIII of the Industrial Relations Act,2000 (as amend,ed)** can be dispensed with. The inherently level form and nature of evidence on affidavit means that on occasion an application will not be able to be properly decided on affidavit, because there are factual disputes which cannot or should not be resolved on paper in the absence of oral evidence. The various provisions of **Rule 14** of the **Industrial Court Rules,** takes cognisance of this reality. **Rule 14(5)** requires the Applicant to set out the material facts in the Founding Affidavit with sufficient particularity to allow the Respondent to reply to them. While **Rule 14(8)** expects the same on the part of the Respondent.

[37] The difficulty that the Applicant now faces in this matter is that notice of dispute of facts as raised by the Respondent cannot be considered by the Court, to be bald fictious, implausible or lacking in genuineness. The issues raised by the 1st Respondent in its Answering affidavit are actually properly raised, and with requisite particularity.

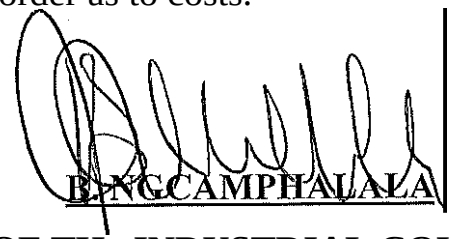
[38] Having regard to the evidence adduced by both parties, it is the Courts view that the Applicant must have foreseen the many disputes of facts, the major dispute being the nature of the relationship between the Applicant and the Respondent, *inter alia* the status of Applicants employment. Other issues include the context of the meeting held by the Applicant and Respondents acting Chief Financial Officer, and the content of subsequent correspondence exchanged. It is evident from the submissions made that this application is marred with dispute of facts, which can only be cured by the giving of oral evidence. It is therefore the courts decision that the point *in limine* stands.

[39] **Rule 14(1)** of the **Industrial Court Rules** provides that, where a material dispute of fact is not reasonably foreseeable, a party may institute an application by way of notice of motion. However, its further states in **Section 14(6)** that in applications involving a dispute which requires to be dealt with under **Part VIII of the Act,** a certificate of unresolved dispute issued by the Commission (CMAC), is required unless the application is solely for determination of a question of law. Having total regard to the submissions made by the parties, and for the reasons articulated by the law

above, the Court considers that there is little value if any to be gained, by referring the matter to oral evidence, as opposed to directing the Applicant to start afresh using **Part VIII,** of the **Industrial Relation Act, 2000 (as amended).** Further it is the Courts view that this pourse of actiQn should have been adopted by the Applicant from the very onset, since it must have foreseen or at the very least, should have foreseen the numerous disputes of facts, which have arisen. It is evident now that the application cannot be resolved by way of motion proceeding. As a result of these reasons, the application is dismissed. Applicant is directed to file fresh proceedings, using the provisions of Part VIII of the **Industrial Relations Act, 2000 (as amended).**

[40] In light of the above finding of this Court, the Court makes the following order;

1) The application is dismissed.
2) There is no order as to costs.



B. NGCAMPHALALA

ACTING JUDGE OF TH INDUSTRIAL COURT OF SWAZILAND

For Applicant: Mr. H. Magagula (Dynasty Inc Attorneys).

For Respondent: Mr. D. Jele (Robinson Bertram)