IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE CASE NO: 339/22

In the matter between:

EDWIN MANANA Applicant

And

ESWATINI WATER AND AGRICULTURAL DEVELOPMENT ENTERPRISE (ESWADE) 1st Respondent

THE CHAIRMAN OF THE BOARD OF DIRECTORS OF ESWADE 2nd Respondent

THE BOARD OF DIRECTORS OF ESWADE 3rd Respondent

Neutral citation: Edwin Manana vs Eswatini Water and Agricultural Development Enterprise and 2 Others 339/22 [2022] SZIC 147 (06 December, 2022)

Coram: **L.L. HLOPHE–JUDGE**
(Sitting with Mr. M.P. Dlamini and Mr. EL.B. Dlamini – Nominated Members of the Court)

HEARD: 31st October, 2022

DELIVERED: 06th December, 2022

SUMMARY: *Labour law, urgent application-On the 5th October 2022 Applicant received a letter from Respondents advising him that his fixed term contract which was due to lapse on the 30th October 2022 would not be renewed. - Applicant alleging breach of contract -filed an urgent application. Applicant seeking a declaratory order that Respondent acted in breach of clause 1 of Applicants contract providing for renewal of contract-Further that 2nd Respondent and 3rd Respondent acted ultra vires the scope of their establishing instruments in influencing the decision not to renew the Applicant's contract of employment.*

HELD: *The matter concerns a labour dispute between an employer and employee-labour disputes are reported in the first instance to the commission (CMAC) failing conciliation the matter is referred to the Industrial Court to determine the fairness or otherwise of the non-renewal of the employment contract.*

HELD: *The matter is not urgent-application dismissed- Part VIII of the Industrial Relations Act 2000 (as amended) to be complied with- no order as to costs.*

RULING

INTRODUCTION

[1] The Applicant described himself as Edwin Manana, an adult Liswati male of Mbabane, Eswatini. The 1st Respondent is described as Eswatini Water and Agricultural Development Enterprise (ESWADE), an agricultural entity that carries on farming activities in some parts of the country and which is the employer of the Applicant. The 2nd Respondent is the Chairman of the Board of Directors of ESWADE whilst the 3rd Respondent is the Board of Directors of ESWADE.

[2] Applicant contended that he, on the 5th October 2022, received a letter from the Chief Executive Officer of the 1st Respondent advising him that his contract of employment would not be renewed following a Board resolution dated the 16th September 2022. Applicant's fixed term employment contract with the Respondent was meant to terminate through effluxion of time on the 31st October 2022. It however provided for a renewal which it said would be at the discretion of the employer and will be dependent on such factors as performance, delivery, operational requirements, project time lines and availability of funds. The contract signed between the parties also made it clear that the foregoing list of factors did not comprise the full list to be considered for the said purpose. The Applicant submitted further that the Board acted outside the scope of its duties or functions in taking such a resolution. In other words, it allegedly acted *ultra vires* its establishing instruments. Applicant's contract had had a five year duration at the time applicant was informed it was not going to be renewed.

[3] In challenging the decision of the Board referred to, the Applicant instituted an application under a certificate of urgency seeking the following orders against the Respondent:

3.1 Dispensing with the normal forms in terms of timelines, manner of service and having to hear the mater as one of urgency.

3.2 Declaring that the Respondent is in breach of Clause 1 of the Applicant's contract of employment.

3.3 Reviewing and setting aside the letter dated the 5th October, 2022.

3.4 Directing and ordering the Respondents to comply with Clause 1 of the contract of employment dated the 4th February 2020.

3.5 Declaring that, the 2nd and 3rd Respondents acted *ultra vires* in influencing the decision of the non-renewal of the Applicant's contract of employment.

3.6 That any purported recruitment to replace the Applicant be suspended pending finalization of the matter.

3.7 Pending finalization of this matter, the effectiveness of the letter dated 5th October 2022 is hereby stayed.

3.8 That a rule nisi to operate with interim and immediate effect, in terms of prayers1,2,3,4,5,6 and 7 pending finalization of this matter, be issued.

3.9 Alternatively, granting and ordering the 1st Respondent to compensate the Applicant for the period of three years in line with the fixed term contract.

3.10 Granting the Applicant leave to file such further affidavits and documentary evidence if it becomes necessary.

3.11 Costs of suit.

3.12 Such further and or alternative remedy as the Court may deem appropriate.

[4] After a glance of the above prayers, a comment is merited or an observation has been made. It is that although the Applicant seeks elaborate reliefs, reality cannot be lost of the fact that the issue he is complaining about is a labour dispute in terms of the **Industrial Relations Act 2000 (as amended).** According to both the Industrial Relations Act and the Rules of this Court, before disputes can be dealt with by the Court, they must first be conciliated upon in terms of the dispute resolution mechanism established in terms of **Part VIII of the Industrial Relations Act 2000 (as amended).**

POINTS OF LAW RAISED

[5] It was argued on behalf of the Applicant that he had a legitimate expectation that his contract, which was to end on 30 October 2022, would be renewed based on clause 1 which reads as follows:

"This agreement is subject to terms and conditions set out herein and in accordance will all ESWADE company policies and procedures, this contract is governed by the laws of Eswatini and it supersedes all previous contracts of employment entered into between the two parties. The renewal of the contract shall be at the discretion of the employer and will be based on, but

not limited to, such facts as, your performance, delivery, operational requirements, project time lines and availability of funds."

[6] Applicant's contention is that the Board acted outside the scope of its duties in influencing the non-renewal of his contract which was subject to renewal depending on whether the above stated factors were met. This he complains extinguished the legitimate expectation he had on his part that his contract was going to be renewed.

[7] The application is opposed by the Respondents and the points of law stated here under were raised in its answering affidavit:-

7.1 **Lack of urgency.**

It was argued that the matter is not urgent as Applicant became aware that his contract was not going to be renewed as early as the 5th October 2022.

7.2 **Lack of Jurisdiction.**

It was argued in this regard that the Court does not have jurisdiction as the matter ought to be dealt with initially through CMAC.

THE APPLICABLE LEGAL PRINCIPLES

[8] **Section 35 of the Employment Act 1980** reads as follows:-

"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."

[9] It cannot be disputed that in so far as the letter written to the applicant amounted to a confirmation that his contract was going to terminate at the end of the month of October 2022, he was no longer going to be covered under **Section 35 (1) of the Employment Act**. The employer had taken a decision whose effect was similar to that of a dismissed employee. A challenge against a dismissal is not done through a review or a declaratory to Court but is done through the aggrieved party having to follow the procedure set out in **Part VIII of the Employment Act 2000**, which is reporting a dispute to CMAC.

[10] The position of our law is now settled that once a fixed term contract has terminated there is no obligation on the employer to re-engage such an employee. See **Msombuluko Mahlalela and 15 others v Royal Swaziland Sugar Corporation; Nhlanhla Hlatshwayo v Swaziland Government and Attorney General IC Case No. 398/06; Sabelo Dlamini v ESWASA: Annette Singleton Jackson v The University of Swaziland IC Case No. 354/2019.**

[11] In **Nkosenhle Ben Kunene V Public Service Pension Fund Case 320/2005 Nsibande AJ** (as he then was) stated the following at paragraph 15 of the judgement:

"The Southern African Labour Relations Act No.56 of 1995 expressly provides that failure by an employer to renew a fixed term contract constitutes a dismissal if the employee reasonably expected renewal. We have no similar provision in our law."

We align ourselves with the Honorable Judge's sentiments. This Court cannot compel the employer to renew a fixed term contract that has lapsed. If the Applicant is aggrieved by the non-renewal of the employment contract, this is a matter to be addressed in terms of **Part VIII of the Industrial Relations Act**, as a dispute arising out of an employment contract.

[12] According to clause 1 of his expired contract, Applicant envisaged a situation where the Chief Executive Officer (CEO) would conduct an appraisal of his performance and decide whether to renew the contract or not. Instead he argues that the Board took a unilateral decision not to renew his contract of employment. One needs only to comment that the contract itself did not confine the renewal or otherwise of the Applicant's contract to performance. There were other factors to be considered. Further, even if procedure was not followed it all amounted to the Applicant entertaining a dispute about the decision taken by the First Respondent. In labour context in this country, all labour disputes are dealt with in terms of a set dispute resolution mechanism established in terms of **Part VIII of the Industrial Relations Act**. As indicated earlier this is the route for the Applicant to take.

[13] Faced with a similar set of facts as are prevailing in this matter, this Court in **Velekhaya Mthethwa V Manzini Wanderers FC 266/22** stated as follows:

"To set aside a decision that has led to the dismissal of an employee there must be a finding that the dismissal is unfair substantively or otherwise. The statutory process for that purpose is the ***Industrial Relations Act of 2000 (as amended).*** *It appears to me that this procedure can neither be circumvented nor abridged. The matter must be reported as a dispute and be dealt with by the appropriate structures before it gets to the Industrial Court as an unresolved dispute."*

[14] Similarly in **Bernadin B. Bango v The University of Swaziland (IC) Case No. 342/2008** it was held as follows:

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

[15] The inclusion of a clause that the contract will be subject to re-negotiation or review with a view to renewal before its expiry date does not in itself create a legitimate expectation of renewal.

See. **South African Bank of Athens Ltd V Cellier and Others (2009) 30 ILJ 197 (LC).**

[16] In the absence of an agreement to renew the contract, the Court cannot order the Respondent to renew or extend the contract. The issue of renewal falls squarely within the discretion of the employer. Once an employer has exercised its prerogative to terminate the services of an employee, the contract of employment comes to an end. It follows that the validity or otherwise of such dismissal, including the question whether the right body or individual within Respondent's establishment was clothed with requisite authority or

mandate to dismiss the Applicant are matters for the Court to determine at the point it deals with the question whether the said termination had followed a fair process and whether it was for a fair reason as envisaged in **Section 42 of the Employment Act**. This process can only be after conciliation of the dispute.

[17] Whether or not the Board acted outside the scope of its duties cannot be an issue *in casu*. An Applicant employee who is aggrieved with a decision not to renew his contract of employment resulting in him losing his employment should file a dispute with the Commission (CMAC) in terms of **Part VIII of the Industrial Relations Act.**

[18] It is not possible for this Court to decide whether or not the contract of employment between the parties was terminated unlawfully or otherwise before the Commission makes the mandatory conciliation. The Court in **Velekhaya Mthethwa's Case (Supra)** went on to explain that in such matters the Applicant's remedy does not lie in a review or declaratory order but lies in the mechanism under **Part VIII of the Industrial Relations Act.**

[19] That the Board's decision cannot be challenged at CMAC is not an issue for consideration *in casu*. What is important is that effectively the Applicant's employment was terminated unfairly hence the procedure prescribed for dealing with such disputes is as stated above.

[20] Msimango J stated the position as follows in **Velekhaya Mthethwa's Case (Supra):**

*"In the absence of such enquiry the Court cannot in the circumstances make a determination on the unlawful termination of the employment contract. The Applicant's remedy does not lie in a review or declaratory order, but lies **under the mechanism provided under Part VIII of the Industrial Relations Act (as amended)** [own emphasis added]*

In so far as Applicant seeks an order declaring or reviewing the board's decision not to renew his contract the procedure he has adopted is flawed in terms of the established practice in this jurisdiction.

[21] Applicant alleges that the board acted *ultra vires* in taking a decision that his contract should not be renewed when this, according to him, was the preserve of the CEO. In light of the position we have taken that the Applicant's matter should first go to CMAC in light of what he is complaining about amounting to a dispute, we find it unnecessary to comment on the correctness or otherwise of that contention. We can only express the view that it seems to be in the context of Administrative Law whose principles may not necessarily be the same as those of Labour Law.

[22] Such determination the Court will make or undertake once the pre-litigation and dispute procedures set out in **part VIII of the Industrial Relations Act** shall have been engaged. See in this regard **Gcina Dlamini V NERCHA and Another Case No. 164/2016** where the Court stated the following:-

"Once the employer has exercised its prerogative to terminate the services of an employee, the contract of employment comes to an end. The industrial Court has the power and jurisdiction thereafter to award compensation for unfair dismissal, whether the fairness is substantive or procedural or to

restore the employment contract by making an order for re-instatement or re-engagement. The Court must however, take into consideration all the circumstances of the dismissal, and may not simply set aside the dismissal on the basis of a review of the disciplinary hearing. A private sector employee who wishes to seek redress for his/her dismissal must ordinarily comply with the reporting procedures prescribed by ***Part VIII of the Industrial Relations Act.***"

See also the **University of Pretoria v CCMA and Others (2012) 32 ILJ 183 (LAC)** where it was held that: - *"The dismissal of an employee whose fixed term contract was not renewed did not constitute an unfair dismissal"*

Whether this be in terms of a decision of a lawfully authorized individual or body in the company structures is a matter for the Court to deal with after conciliation as stated above where if it will be necessary, it would be redressed through the reliefs the court may award as at that point.

URGENCY

[23] With regards the question of urgency, it was argued in support of the point in limine raised that the matter is not urgent because whilst the Applicant got to know of the fact that his contract was not going to be renewed on the 5th October 2022, he did not institute proceedings immediately but waited for an excessive period of twenty (20) days until the 20th October 2022 when these proceedings were instituted under a certificate of urgency. It is argued that by purporting to move the application, as an urgent one after such a wait, the urgency relied upon (namely that in about four or so days later, the contract was being terminated, was of the Applicant's own making, although the Applicant wants to create an impression that he had been waiting for a

response on whether or not the Respondents were considering his request so as to review the decision they had taken, there can be no denying that it was unreasonable for him to end up waiting for that long. A decision had already been communicated to him it would only be reasonable if he had put them to whatever reasonable terms so as to be able to avoid having to explain the delay in filing his application.

[24] A party who desires to institute proceedings by means of urgency is required to do so at the earliest possible time to avoid having to put everyone under unnecessary and extreme conditions when that could have been avoided. In the context of this matter, we agree that it was unreasonable and inappropriate for the Applicant to take the time he did only for him to jump up at the eleventh hour and rush everybody else including the Court. We agree that the purported urgency was in the circumstances of the Applicant's own making and cannot be allowed to stand. It should therefore result in the matter not being enrolled.

[25] There is an even more fundamental reason why the matter is not urgent. It was argued that the Applicant was effectively challenging a dismissal if he was contending that his contract was not going to be renewed. Employees are otherwise dismissed everyday one can inquire what the situation would be like if everyone who lost a job could run to Court under a certificate of urgency. The Court machinery would be rendered dysfunctional. It is for this reason that all such matters have to follow the dispute resolution machinery as established in terms of **Part VIII of the Industrial Relations Act.** We agree that this being a labour matter and not an administrative law one, the Applicant had a duty to adhere to the procedure established in terms of **Part VIII of the**

Industrial Relations Act. That his dismissal was unreasonable or mere egregious, does not make it urgent. See in this regard the **Graham Rudolf V Mananga College Industrial Court Case No. 941/2007** where the following was said:-

> *"A manifest injustice or grossly unfair labour practice in itself does not qualify a party to jump the queue of cases awaiting hearing. It must be shown that the Applicant cannot be afforded substantial redress in due course if the matter was to be dealt with in the normal way."*

[26] We are therefore convinced that a case has not been made for the matter to be heard as one of urgency which means that it should be dismissed on that point alone. Consequently, we have come to the conclusion that the point *in limine* raised by the Respondent should be upheld. The effect of that is that the Applicant's application should be dismissed without an order for costs and we go on to so order.

The Members have agreed with this conclusion.

L. L. HLOPHE
JUDGE- INDUSTRIAL COURT

FOR APPLICANT: Mr. K. Q. Magagula
(Sithole Magagula Attorneys)

FOR RESPONDENT: Mr. M. Fayiya
(S.V. Mdladla and Associates)