IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE **Case No.** 339/2022

In the matter between:

EDWIN MANANA Applicant

And

ESWATINI WATER & 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 & Agricultural Development Enterprise (ESWADE) and Others (339/2022) [2023] SZIC120 (22 November 2023)

Coram: **V.Z. Dlamini – Judge**
(Sitting with Mr. D. Mncina and Mr. D.P.M. Mmango – Nominated Members of the Court)

DATE HEARD: 06 July 2023

DELIVERED: 22 November 2023

Summary: *The Applicant filed an urgent application seeking an interdict, specific performance, declaratory order and damages for breach of contract of employment that was about to expire by effluxion of time in two days. The Respondents challenged the jurisdiction of the court based on urgency and Applicant's failure to comply with* ***Part VIII*** *of the* ***Industrial Relations Act, 2000 (as amended).*** *Court upheld point on urgency, but Applicant successfully appealed and matter referred back for hearing before another bench of the court five months after application was initially filed.*

Held: *Question of urgency no longer justiciable as contract expired by effluxion and Applicant failed to apply for interim relief at the time application was initially heard. Furthermore, prayers for interdict, specific performance and declaration also no longer competent as such remedies appropriate in enforcement of existing rights not past*

invasion of rights. Prayer for damages also not competent as Applicant claimed using motion proceedings instead of action.

JUDGMENT

INTRODUCTION

[1] The Applicant, a liSwati male of Matsapha was employed on a three-year contract between 1st November 2019 and 31st October 2022 as Human Resources & Administration Manager Indirect Channel Manager by the 1st Respondent, a public enterprise incorporated and registered in accordance with the Company laws of Eswatini and situated in Mbabane. The 2nd and 3rd Respondents are the Chairman and the Board of the 1st Respondent respectively.

BACKGROUND FACTS

[2] Four days before the sunset of the employment contract, the Applicant instituted an urgent application against the Respondents seeking the following orders: -

1. ***Dispensing with the normal forms in terms of timelines, manner of service and hear this matter as one of urgency.***
2. ***Declaring that the Respondent is in breach of Clause 1 of the contract of employment.***
3. ***Reviewing and setting aside of the letter dated 5th October 2022.***

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

5. ***Declaring that the 2nd and 3rd Respondent[s] acted ultra vires in influencing the decision of the non-renewal of the Applicant's contract of employment.***

6. ***That, any purported recruitment to replace the Applicant be suspended pending finalization of the matter.***

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

8. ***That, a rule nisi to operate with interim and immediate effect, in terms of prayer 1, 2, 3, 4, 5, 6 and 7 be issued pending finalization of this matter.***

9. ***Alternatively, granting and ordering the 1st Respondent to compensate the Applicant for the period of a three year fixed contract.***

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

11. ***Costs of suit.***

12. ***Such further and / or alternative remedy as the court may deem appropriate.***

[3] The Respondents opposed the application by filing their answering affidavit on or about the 28th October 2022 and the Applicant filed his replying affidavit on the same day. This court per Hlophe J heard arguments on the 31st October

2022 and delivered judgment on the 6th December 2022 in which she dismissed the application for lack of urgency.

[4] Being dissatisfied with the judgment of the court, the Applicant noted an appeal to the Industrial Court of Appeal (ICA). The appeal was heard on the 5th April 2023 and judgment was delivered on the 31st May 2023 in terms of which the ICA upheld the appeal, set aside this court's judgment and remitted the entire matter to this court and directed that it be heard by another bench.

APPLICANT'S CASE

[5] The Applicant told the court that on the 18th August 2022, he wrote a letter to the 1st Respondent's Chief Executive Officer (CEO) expressing his interest to have the contract of employment renewed (***exhibit "EM2"***). On the 5th October 2022, the Applicant received a response from the CEO in which he advised the former that his contract would not be renewed because the 3rd Respondent had unilaterally passed a resolution to that effect (***exhibit "EM3"***). Being dissatisfied with the CEO's response, the Applicant wrote to the former on the 10th October 2022 seeking clarification on the factors that were taken into account by the 3rd Respondent in deciding not to renew his contract (***exhibit "EM4"***).

[6] The application that was triggered by the 1st Respondent's failure to respond to ***exhibit "EM4"*** stands on the following pillars:

6.1 That the Respondents' non-renewal of the contract was in breach of Clause 1 of the employment contract, which required that the decision to renew or not to renew be based on factors such as performance,

delivery, operational requirements, project timelines and availability of funds. According to the Applicant, he was entitled to be heard and informed that he did not meet the requirements set by Clause 1 prior to the non-renewal of his contract so he could take legal steps to protect his right; in as much as renewal of the contract was at the discretion of the 1st Respondent, the requirement that the aforesaid factors should first be considered was mandatory.

6.2 That the Applicant's contract of employment was signed by the CEO representing the 1st Respondent; administratively and operationally the former reported to the latter; it followed therefore that the decision to renew or not to renew the contract was the prerogative of the CEO and not the 2nd and 3rd Respondents. As a result, the 3rd Respondent acted *ultra vires* their mandate when they usurped the functions of the CEO. Moreover, in the management structure of the 1st Respondent, only the CEO and the Chief Financial Officer (CFO) were employed by the 3rd Respondent; all other members of executive management were employed by and answerable to the CEO.

6.3 That since management was entrusted with overseeing the operations of the 1st Respondent and the 3rd Respondent's mandate was to oversee its policy direction, the 3rd Respondent's unilateral decision over operational issues constituted an unfair labour practice and was unlawful.

6.4 That the matter was urgent because the Applicant's last day at work was the 31st October 2022 and he became aware on the 21st October 2022 that the 3rd Respondent would not respond to his request for clarification or afford him an opportunity to make representations to try

and persuade them to modify their resolution. Moreover, the Applicant asserted that he might not be afforded substantial redress in due course if the matter was not heard urgently because the 1st Respondent might employ someone else to replace him. Once that happens the matter would be rendered academic. Furthermore, the Applicant stated that he need not comply with the provisions of **Part VIII** of the **Industrial Relations Act, 2000 (as amended) (IRA)** because the issues for determination revolve around questions of law.

6.5 That the Applicant had a clear right because the Respondent breached the terms and conditions of his contract of employment. Furthermore, if ***exhibit "EM3"*** was not set aside by the court, the Applicant would be without a job; which would result in his family suffering financial prejudice.

RESPONDENTS' CASE

[7] Conversely, the Respondents' opposition to the application is based on the following grounds:

7.1 That the urgent application was nothing but an abuse of the court process because the Applicant became aware that his contract would not be renewed as early as the 5th October 2022, but elected to rest on his laurels until the eleventh hour. The Applicant should have acted at the first available opportunity, which was within forty-eight hours of being aware of the peril or threat.

7.2 That reviewing and setting aside of ***exhibit "EM3"*** will not change the status quo being that the contract would expire on the 31st October

2022; consequently, even if granted by the court, that specific order sought by the Applicant is not capable of enforcement. The Applicant ought to have sought a review and setting aside of the resolution of the 2nd and 3rd Respondents of the 16th September 2022. Furthermore, the requirements of a stay had not been satisfied.

7.3 That the Applicant has prayed for two declaratory orders, but has dismally failed to meet the requirements thereof; to succeed, he must have an interest in an existing, future and contingent right. His interest must not be academic. Not only must he establish a right, but a legitimate expectation as well.

7.4 That the order sought by the Applicant to compel the Respondents to comply with Clause 1 of the contract was incompetent because in terms of the said clause, the 1st Respondent had a discretion to decide on its own whether or not to renew the contract; consequently, the court could not compel the 1st Respondent to exercise its discretion in a particular manner. As for the factors that should be taken into account by the 1st Respondent when exercising its discretion, the Respondents stated that the Applicant failed to state conclusively that he satisfied all the factors which would persuade the Respondents to renew his contract. In the absence of such averments no case was made, not to mention a *prima facie* case. In any event, the contract of employment does not provide that the Applicant was entitled to make representations as to why his contract should be renewed or not.

7.5 That the court lacked the jurisdiction to hear and determine the matter because the Applicant ought to have first complied with the provisions of **Part VIII** of the **IRA** by reporting a dispute to the Conciliation

Mediation and Arbitration Commission (CMAC). The court could not prevent the expiration of the contract by effluxion of time and as such, the issues that the Applicant complained about could be resolved in due course.

7.6 The Respondents denied that the 2nd and 3rd Respondents interfered with the 1st Respondent's prerogative. While the 2nd and 3rd Respondents conceded that it was the 1st Respondent's prerogative to renew or not to renew the Applicant's contract, there was no clause in the contract of employment as well as the 1st Respondent's policies excluding the contribution of the 2nd and 3rd Respondent to that decision. Furthermore, 2nd and 3rd Respondents proclaimed that there was no provision in the aforesaid legal instruments prohibiting these structures of the 1st Respondent from making recommendations on how the latter should be operated as the former are ultimately answerable for the overall performance of the latter.

7.7 The Respondents also denied that the non-renewal of the Applicant's contract is inimical to the spirit of fairness. The likelihood of renewal or non-renewal are part of the terms of the employment contract which the Applicant signed and agreed to be bound thereto. Furthermore, the Respondents asserted that the parties had freedom of contract and courts were reluctant to interfere with that right.

7.8 According to the Respondents there was nothing barring the 1st Respondent from recruiting a replacement of the Applicant since his contract was about to expire. Furthermore, the Respondents denied that the Applicant had a clear performance record.

ARGUMENTS

APPLICANT

[8] The Applicant's counsel Mr. Magagula submitted that the Applicant had advanced reasons why he could not be afforded substantial redress in due course; consequently, as was held in the case of **Graham Rudolph v Mananga College IC Case No. 94/2007**, the application had met the requirements for enrolment as an urgent matter.

[9] Mr. Magagula further argued that the degree of delay in the filing of the application was justified because the Applicant had hoped that the Respondents would afford him the opportunity to be heard as per the dictates of the contract and such explanation was plausible; under such circumstances courts had enrolled similar matters. In support of the aforegoing proposition, Mr. Magagula referred to the case of **Nico Kriek in re Nico Kriek v Net Construction (Pty) Ltd and Another HC Civil Case No. 2283/08** and the cases cited therein.

[10] It was Mr. Magagula's contention that the Respondents had subjected the Applicant to gross irregularities, grave injustice and unfair labour practice; these constituted good cause for the court hearing the matter as one of urgency. Counsel referred the court to the cases of **Zodwa Mkhonta v Swaziland Electricity Board IC Case No. 343/2000** and **Vusi Gamedze v Mananga College IC Case No. 267/2006** as authority for the aforesaid proposition.

[11] The Applicant's counsel also submitted that as a court of equity, this court was more concerned about finalizing the real merits of a matter as opposed to dissecting technical defects that are unlikely to result in a miscarriage of justice. To that extent, counsel relied on the case of **Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors Appeal Case No. 23/2006.**

[12] Mr. Magagula argued further that the court had jurisdiction because there were no foreseeable disputes of fact as the matter turned on the determination of a question of law; consequently, the Applicant need not report a dispute to CMAC in accordance to **Part VIII** of the **IRA.** In support of this principle, counsel relied on the following authorities: **Ministry of Tourism and Environmental Affairs and Another v Stephen Zuke and Another (96/2017) [2019] SZHC 37 (2019); The Attorney General v Sipho Dlamini and Another ICA Case No. 4/2013**; and **Isaac Dlamini v The Civil Service Commission and 2 Others IC Case No. 338/2012.**

[13] The Applicant's counsel also submitted that apart from the provisions of Clause 1 of the contract, Clause 2.5 bulletin 8 [sic] of the 1st Respondent's Human Resource Procedure Manual supports the Applicant's assertion that the 2nd and 3rd Respondents usurped the CEO's prerogative to decide whether or not to renew the Applicant's contract and clearly shows the Board's role on recruitment of personnel. According to Mr. Magagula Clause 2.5 bulletin 8 reads as follows:

> *"All appointments will be made strictly on merit and related to the requirements of the job. Letters of offer for jobs below EXCO level will*

be signed by HRAM whilst those for EXCO will be by the CEO. The Chairman of the Board will appoint the CFO and CEO."

[14] It was Mr. Magagula's contention that the court dismissed an application which sought an order setting aside a letter of non-renewal in the case of **Sabelo Dlamini v Eswatini Civil Aviation Authority (341/2021) [2022] SZIC**, however the **Sabelo Dlamini** case was distinguishable because the Applicant in that matter relied on a legitimate expectation that his contract would be renewed and yet the Applicant in the present case relied on the Respondents' failure to follow laid down procedures of the 1st Respondent. Counsel further referred the court to the case of **Jacob Mashaba & Others v The Municipal Council of Manzini & Others Civil Case No. 3931/2009**.

RESPONDENT

[15] The Respondents' counsel Mr. Mdladla submitted that the matter was now academic because when it was first enrolled, the Applicant never insisted on an interim order to stay the effectiveness of ***exhibit "EM3"***. In fact, none of the prayers were granted on an interim basis and naturally the contract ran its full course and subsequently expired. The contract of employment having expired, it follows that the matter cannot be urgent in its current form.

[16] Mr. Mdladla further argued that, if according to the Applicant the remedy for the Respondents' breach of Clause 1 of the contract is an award of compensation, it follows that the issue for determination ceases to be a question of law; a claim for damages flowing from breach of contract can only be resolved through trial. Moreover, the Respondents' counsel contended that, in any event in the circumstances of this case, the decision as to whether there was a breach or not is intertwined with the decision whether there has been a fair dismissal or not. It therefore follows that the Applicant ought to have reported a dispute to CMAC in terms of **Part VIII** of the **Industrial Relations Act**.

[17] It was also Mr. Mdladla's contention that not only do the Applicant's papers fall short of supporting a grant of any of the orders sought, the prayers are legally incompetent.

[18] In support of his submissions, Mr. Mdladla referred the court to the following authorities: **Richard Simelane v Sebenta National Institute & 2 Others (54/2017 SZIC (12 April 2017); Sabelo Dlamini v Eswatini Civil Aviation Authority (above); Prof Annette Jackson v The University of Eswatini (354/2019) [2020] SZIC 164 (1 December 2020); The University of Pretoria v The Commission for Conciliation Mediation and Arbitration & Others (JA 38/2010) ZALCA** and **Vusi Gamedze v Mananga College (above).**

ADJUDICATION

[19] On account of the Industrial Court of Appeal's directive that all aspects of the application, including the question of urgency and the merits be considered and decided afresh by this court, we conceived a conundrum brought about by the time it has taken the court to finally determine the matter. The puzzle faced

by the court is whether in the present circumstances, the question of urgency is adjudicable. Unfortunately, when counsel were invited to give guidance, they could only agree with the court that the directive of the Industrial Court Appeal presented a legal enigma, which still had to be complied with by this court.

[20] On urgent applications, **rule 15 (1) and (2)** of this court reads as follows:

> *"A party that applies for urgent relief shall file an application that so far as possible complies with the requirement of Rule 14.*
>
> *The affidavit in support of the application shall set forth explicitly —*
>
> *(a) the circumstances and reasons which render the matter urgent;*
>
> *(b) the reasons why the provisions of Part VIII of the Act should be waived; and*
>
> *(c) the reasons why the Applicant cannot be afforded substantial relief at a hearing in due course."* [Emphasis added].

[21] **Rule 15** prescribes three requirements that should be applied by the court to determine the question of urgency; these appear under **sub rule (2) (a), (b)** and **(c)** quoted above. In our view, as in all disputes that come before it, the court should apply the aforesaid requirements in a matter where the question of urgency is a concrete controversy and not an abstract, hypothetical or academic one. See: **Martha Nokuthula Makhanya and Others v Sarah B. Dlamini (23/2016) [2017] SZSC.**

[22] We hold the view that there would be no point in applying the three requirements to the facts of this matter because the mischief that was sought to be prevented by the Applicant through an application for urgent relief, occurred twelve (12) months ago (31st October 2022). Mr. Magagula did not dispute Mr. Mdladla's submission that no interim relief was prayed for and granted by the court.

[23] Where the issue of urgency has been disposed of by the court either by enrolling the matter as one of urgency or by striking the matter off so that it takes its normal or it has been dissipated by a delay caused by court processes (as is the case in this matter), it can never be resuscitated for adjudication at a later stage. In the case of **William Andrew Bonham v Master Hardware (Pty) Ltd t/a BUILD IT and Two Others *in re:* Master Hardware (Pty) Ltd t/a BUILD IT and Two Others v Ryan Moyes Nevil Civil Trial 294/2008** at **para 10,** the High Court said the following:

> *"The first point was correctly and wisely abandoned for the reason that the decision as to whether a matter is sufficiently urgent to justify a departure from the application of the normal rules, involves the exercise of a discretion by the Judge who determines the issue of urgency. Once he or she has done so,* then *cadit quaestio on that issue. The parties may not, on the hearing of the matter on the merits advert to urgency even if they correctly hold the view that the Court erred in ruling that the matter was urgent. This is even so notwithstanding that the Judge dealing with the matter on the merits is otherwise inclined. Were the situation otherwise, it would amount to a Judge of co-ordinate*

jurisdiction reviewing a ruling of his Brother or Sister Judge, which is an untenable practice and proposition in our law."

[24] Furthermore, in the case of **Minister of Labour and Social Security and Another v National Public Service & Allied Workers Union and 3 Others (15/2019) [2019] SZIC 63 (29 June 2019)** at **para 9,** Nsibande JP made the following statement:

"As already alluded to, by the time the point on urgency was argued, the Court had issued an interim order in terms of Section 90 of the Act and the parties had filed all the pleadings due. Effectively the matter had been enrolled and the court had even had to refer a constitutional question to the High Court at the behest of the Respondents. The High Court of Eswatini has had occasion to consider the question on whether once the Court has granted interim relief, ordered papers to be filed and set a matter down for hearing, where a case is launched on an urgent basis, this automatically renders the point in limine raised on urgency archaic. In the matter of Hellenic Football Club v National Football Association of Swaziland and Others High Court Case No. 175/10, the Court held that the question of urgency will remain open in these circumstances, only where the Court has demonstrated that it still has to pass master, before granting interim orders or ordering processes to be filed. In casu, when the matter was called on 27th January 2019, the issue of urgency was not raised at all. The issue of the applicability of Section 90 of the Act brought to the fore and was the issue the Respondents prioritised and sought to argue. In the circumstances and in our view, the matter was effectively enrolled and the issue of urgency has been overtaken by events……."

[25] A party who files an urgent application seeks a deviation from the normal time and form that the rules prescribe; if that application is not enrolled and heard within the abridged timelines, it loses its urgency. It is therefore irrational to still call that matter urgent if it gets to be heard six or twelve months later. It is trite law that even where the court is not inclined to enroll the matter on the urgent roll and strikes it off, the matter will take its normal course.

[26] In the case of **Nedbank (Swaziland) Ltd v Kenneth G. Ngcamphalala Civil Appeal Case No. 08/2013 at paras 11-13,** the Supreme Court opined as follows:

> *"The application was made on the basis of urgency. Argument was heard on 2 November 2012 before Maphalala PJ, who gave his decision on 21 February 2013. He dismissed the application in its entirety on the basis that it was not urgent, in that any urgency was of the Appellant's own making. It is against Maphalala PJ's decision that the present appeal is being heard. Assuming the decision that the matter was not urgent was correct, the learned Judge's course should simply have been to dismiss the application to hear the matter on an urgent basis, to make no decision as to the merits, and to direct that the matter be enrolled in the normal course. It would have been up to the Appellant to decide how to proceed. As Cameron JA pointed out in Commissioner, SARS v Hawker Air Services (Pty) Ltd 2006(4) SA 292 (SCA), urgency is the reason which may justify deviation from the times and forms that the rules prescribe. It relates to form, not substance. If a matter is not urgent, the court declines to hear it. The Applicant can then set the*

matter down in the normal manner. See also South Africa: South Gauteng High Court Johannesburg 2012 [2012] AGPJHC 165 and in particular paragraph 18 where the learned Judge observed: "[18] Urgency is a matter of degree. See Luna Meubel Vervaardiger (Edms) Bpk v Makin (t/a Makins Furniture Manufacturers) 1977 (4) SA 135 (W). Some applicants who abused the court process should be penalised and the matters should simply be struck off the roll with costs for lack of urgency. Those matters that justify a postponement to allow the respondents to file affidavits should in my view similarly be removed from the roll so that the parties can set them down on the ordinary opposed roll when they are ripe for hearing, with costs reserved." See too: Humphrey Henwood v Maloma Colliery and Anor CIT 1633/1994 Swaziland Law Reports 1987-1995 Volume 4 at pages 48 to 55." [Underlining added].

[27] We shall now turn to consider whether the other prayers are also justiciable. In the court's view, the Applicant seeks four distinct and competent remedies for the alleged breach of contract; these are an interdict or stay, declaration of rights, specific performance and damages. In the case of **Basson and Others v Hanna 2017 (3) SA 22 (SCA)** at **para 22,** the South African Supreme Court of Appeal said the following:

"Christie's Law of Contract in South Africa 7 ed at 616 states: 'The remedies available for a breach or, in some cases, a threatened breach of contract are five in number. Specific performance, interdict, declaration of rights, cancellation, damages. The first three may be regarded as methods of enforcement and the last two as recompenses for non-performance. The choice among these remedies rests primarily with the injured party, the plaintiff, who may choose more than one of them, either in the alternative or

together, subject to the overriding principles that the plaintiff must not claim inconsistent remedies and must not be overcompensated." [Underlining added].

[28] The relief sought by the Applicant appears in paragraph 2 of the judgment. In **prayers 2** and **5** he seeks a declaration of rights, **prayers 6, 7** and **8** are for an interdict, **prayer 4** is for specific performance and **prayer 9** is for damages. In our view, the prayers for an interdict and specific performance are not sustainable because the Applicant's contract of employment has expired by effluxion of time. As will be seen from the South African authorities cited below, it is an established principle that an interdict is a remedy to protect existing rights, not past invasion of rights. Furthermore, specific performance is a remedy for enforcing contractual rights. There is no doubt that the said principles are also law in this jurisdiction.

[29] In the case of **National Council of Societies for Prevention of Cruelty to Animals v Openshaw 2008 (5) SA 339 (SCA)** at **para 20**, the Supreme Court of Appeal said the following with respect to the remedy of an interdict:

"An interdict is not a remedy for past invasion of rights but is concerned with present or future infringements. It is appropriate only when future injury is feared. Where a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated."

[30] In the case of **Farmers' Co-operative Society (Reg) v Berry 1912 AD 343** at **p. 350**, the Appellate Division made the following statement regarding the remedy of specific performance:

> *"..... As remarked by KOTZE, C.J., in Thompson v Pullinger (1 O. R., at p. 301), "the right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt." It is true that Courts will exercise a discretion in determining whether or not decrees of specific performance should be made. They will not, of course, be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages...."*

[31] Still on specific performance, the Labour Appeal Court in **Septoo v City of Johannesburg (2018) 39 ILJ 580 (LAC)** at **paras 16** and **19,** observed as follows:

> *".....The first is that the appellant accepted the second contract and performed in terms of that contract; it was therefore not possible for her to perform in terms of her first contract nor did she tender such performance. Furthermore nearly two years after she concluded the second contract she resigned from the respondent's employ. Again there was no tender to perform in terms of the first contract; these actions were manifestly inconsistent with a claim for specific performance, more particularly for a declaratory relief that the first contract still subsisted.....In my view, having accepted that the contract was cancelled, the only right that could have been reserved was a claim for damages. This is so because when one party repudiates a contract, the other party has an election to either accept the*

repudiation and seek damages or refuse the repudiation and seek specific performance. Enforcement and cancellation are inconsistent with each other or mutually exclusive, the innocent party must make an election between them and cannot both approbate and reprobate the contract, or as the adage goes a party cannot blow both hot and cold. These are mutually exclusive choices and cannot be exercised at the same time. This signifies that an election of specific performance axiomatically excludes a case for damages unless the claim for damages is pleaded in the alternative in the event that the claim for specific performance failed……"

[32] As for the prayers for a declaratory order and damages, which are dissimilar remedies, the court's view is that they are linked and as such should be determined at the same time. In **prayers 2** and **5**, the Applicant seeks orders declaring that the Respondents are in breach of Clause 1 and that the 2nd and 3rd Respondents acted *ultra vires* in influencing the 1st Respondent's decision not to renew the contract. The nature of the aforesaid prayers is such that, if the Applicant were to succeed, an award for compensation would be an appropriate remedy.

[33] Put differently, in a trial based on a claim of damages for breach of contract, the court would be inquiring into whether Clause 1 of the contract of employment was breached and or whether the 2nd and 3rd Respondents acted *ultra vires* and if they did, did their act constitute a breach of contract warranting an award for damages. It would therefore serve no purpose to hear evidence and determine **prayers 2** and **5** (declaratory orders) separately from

prayer 9 (compensation). In fact, determining **prayers 2** and **5** without a pronouncement on **prayer 9** would prejudice either party and or pre-determine the outcome of the trial of the latter prayer.

[34] While a claim for damages for breach of contract is appropriate where specific performance and an interdict are no longer suitable remedies, the procedure that was used by the Applicant to claim compensation is incongruous with established practice. For one, the compensatory claim has not been quantified. Secondly, the Applicant has used motion proceedings to file his claim instead of action.

[35] In the case of **Greyling v George Randell High School (2023) 44 ILJ 1254 (LC) pars 77 – 80,** the Labour Court said the following regarding the procedure adopted in filing a claim for damages based on breach of contract:

> *"I, mero motu, enquired from the bench as to whether it was even competent for Mr Greyling to have instituted a claim for unliquidated damages for breach of contract by way of application proceedings. As appears from what is set out below, in my assessment the weight of authority holds that it is impermissible to approach a court by way of application proceedings when unliquidated damages are sought. Where a party claims damages pursuant to a delictual or contractual claim then, except where the damages have been liquidated by agreement or by a court of law, they are classed as unliquidated damages. The court has a discretion to determine whether a claim is a*

liquidated one in the sense that it is susceptible to prompt ascertainment. In Economic Freedom Fighters & others v Manuel the proper process for prosecuting such claims. An unliquidated claim for damages must be pursued by institution of an action. No less so, when an aggrieved victim of a defamatory statement seeks compensation. That has always been the position and it is reflected in the Uniform Rules of Court. Uniform Rule 17(2) compels a person claiming unliquidated damages to use a long-form summons and file particulars of claim, and Uniform Rule 18(10) obliges "a plaintiff suing for damages [to] set them out in such manner as will enable the defendant reasonably to assess the quantum thereof" and plead thereto. . .. This is not mere technicality. Claims for unliquidated damages by their very nature involve a determination by the court of an amount that is just and reasonable in the light of a number of imponderable and incommensurable factors. That exercise cannot be undertaken in proceedings by way of application.'..... Having traversed the authorities, the court concluded as follows at para 105: 'Motion proceedings are particularly unsuited to the prosecution of claims for unliquidated damages, whether in relation to defamation or otherwise....." [Emphasis added].

[36] The court agrees with the above statement of law by the Labour Court and affirms that it also forms part of our law. In the premise, the appropriate remedy open to the Applicant in the present circumstances is to report a dispute under the provisions of **Part VIII** of the **IRA**, in order to subsequently file an application for the determination of an unresolved dispute, which is tequivalent of a combined summons in the case of the High Court.

CONCLUSION

[37] The court has found that **prayers 2** and **5** (declaratory orders), **prayers 6, 7** and **8** (interdict) and **prayer 4** (specific performance) are no longer adjudicable because the contract of employment expired by effluxion of time. As for **prayer 9** (damages), we have found that the Applicant has used an inappropriate procedure.

[38] In the result, the Court orders as follows:

[a] **Prayers 4, 6, 7** and **8** of the application are hereby dismissed.

[b] **Prayers 2, 5** and **9** of the application are refused.

[c] Each party to pay its own costs.

One member agrees and the other disagrees.

V.Z. DLAMINI

JUDGE OF THE INDUSTRIAL COURT

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

FOR RESPONDENTS : Mr. S. V. Mdladla
(S.V. Mdladla & Associates)