

IN THE INDUSTRIAL COURT OF ESWATINI

HELD AT MBABANE

Case No 358/2023

In the matter between:

NONKULULEKO TREASURE MSWELI

Applicant

And

**WATERFORD KAMHLABA UNITED
WORLD COLLEGE OF SOUTHERN AFRICA**

Respondent

Neutral Citation : Nonkululeko Treasure Msweli v
Waterford kaMhlaba United World
College of Southern Africa Case No.
358/2023 SZIC 15[2024] (20 February
2024)

Coram : **MSIMANGO - JUDGE**
*(Sitting with Mr. S Mvubu and Ms N.
Dlamini-Nominated Members of the
Court)*

DATE HEARD : 20th December 2023

DATE DELIVERED: 20th February 2024

SUMMARY : The Applicant brought an application to court to declare and/or interdict the non-renewal of her fixed term contract by the Respondent as unlawful and without due process of the law. The Applicant argued that she has been an employee of the Respondent for the past seven years, wherein he was employed on fixed term contracts which have all been renewed at the end of their term, once a performance improvement plan was conducted between the Applicant and the Respondent. However, the Respondent has failed and/or neglected conducting a performance improvement plan for purposes of determining the renewal of the contract. The Applicant submitted that by law, the Respondent is debarred from terminating the contract without undertaking this process which is a vital requirement in making such a decision.

JUDGEMENT

- [1] The Applicant is Nonkululeko Treasure Msweli, an adult Liswati female of Mbabane in the Hhohho Region, employed by the Respondent as its Advancement Database Assistant.
- [2] The Respondent is Waterford kaMhlaba United World College of South Africa, an education institution duly established as such in terms of the Education Act of 1981, situate at kaMhlaba Park, Mbabane in the Hhohho Region.
- [3] The Applicant brought an application against the Respondent for an order in the following terms:

3.1 Condoning the Applicant's none compliance and/or abridgement of the Rules of court with

regards to notice and timelines for service of process.

- 3.2 That a rule nisi hereby issue interdicting and/or staying the termination of the Applicant's contract of employment as per notification of end of contract dated the 20th November 2023.**
- 3.3 That the Respondent provides the above Honourable Court with the Applicant's Performance Improvement Plan (PIP) and/or appraisal results on the performance of the Applicant.**
- 3.4 Or alternatively, that the Respondent is ordered to conduct a performance improvement plan or performance appraisal with the Applicant as per its policies and/or practice.**
- 3.5 That the Respondent is interdicted and/or restrained from employing any one and/or advertising the Applicant's post pending finalization of the matter.**
- 3.6 That pending finalization of the matter prayer 3.2 is to operate with immediate and interim effect pending finalization of the matter.**

3.7 That the Respondent is ordered to pay costs of this application in the event of unsuccessful opposition.

3.8. Further and/or alternative relief.

- [4] The Applicant alleges that she has been an employee of the Respondent for the past seven years, having been employed in the position of advancement Database Assistant and that for all these years she has been employed on fixed term contracts which have all been renewed at the end of their term once a performance improvement plan was conducted between the Applicant and Respondent.
- [5] On the 1st January 2022, the Applicant was again given a fixed term contract which was to commence on the aforesaid date and was to terminate on the 31st December 2023. On or about the 20th November 2023, the Applicant was called by the Respondent through the office of the principal for a PIP session. The Applicant was handed a form which was to be used for the performance improvement session with the Respondent, for the period commencing the 1st October 2023 to the 31st December 2023.
- [6] The Applicant submitted that to her surprise and whilst expecting to engage on a performance assessment session, the Respondent served her with a letter terminating the fixed term contract. The Applicant submitted further that, the turn of events came as a shock to her as the expectation was that she was to be assessed by

her employer and thereafter based on the results of her assessment, the decision whether to renew or not to renew the fixed term contract was then to be decided by the Respondent as per the practice that has been adopted by the Respondent on the previous renewals of the Applicant's fixed term contracts.

- [7] The Applicant alleges that she sought to engage the Respondent on this unfortunate turn of events, by letter dated the 30th November 2023 which was sent to the Respondent by her attorneys detailing the unlawful conduct of not renewing the contract without a prior performance Improvement plan being attended, however, the Respondent failed to respond to the letter and/or provide clarity to the position sought by the letter.
- [8] The Applicant brought to the Court's attention that she is in disagreement with the conduct of the Respondent in handling the matter, in particular on the following basis:-

8.1 That practice has dictated that prior to the Respondent deciding whether to terminate or renew the fixed term contract, a performance improvement exercise is undertaken so as to inform that decision.

8.2 That the Respondent has failed and/or neglected and/or aborted conducting a performance improvement plan for purposes of determining the renewal of the contract of employment, and that by law, the Respondent is debarred from terminating the

contract without undertaking this process which is a vital requirement in making such a decision.

- 8.3 That it is now trite law that employees engaged on a fixed term contract whose term of engagement has expired, but wish to have their contracts renewed, are entitled to be heard before the employer decides to renew or not to renew their contract.
- 8.4 That the Respondent has issued a notice that the last day of employment of the Applicant is the 15th December 2023, yet the contract of employment dictates that it terminates on the 31st December 2023, therefore, the notice of non-renewal is unlawful as it does not comply with the one (1) month notice period as envisaged by the contract of employment.
- 8.5 That any subsequent recruitment and/or advertisement of the Applicant's post is null and void on the basis that the Respondent has failed to adhere to procedure in as far as the renewal of the contract of employment is concerned.

[9] The Applicant submitted that the Respondent in terms of practice and their own policy, have always engaged her and/or conducted a performance improvement session so as to determine whether to renew or not to renew the fixed term contract. Furthermore, it was her humble belief that such practice and/or policy has given

rise to a legitimate expectation that even this time around, the Respondent would apply the same standard as it were.

[10] The Applicant argued that the onus to prove the existence of a reasonable or legitimate expectation lies with herself, by placing evidence before the Honourable Court demonstrating circumstances which justify such expectation, and that these circumstances could be for instance the previous regular renewals of the fixed term contract of employment, however, this has not been not been done by the Respondent and as a result renders the non-renewal of the fixed term contract unlawful.

[11] The Applicant thereafter prayed that the court grants an order as prayed for in the notice of motion.

[12] The Matter is opposed by the Respondent and has further raised a point of law on urgency. It must, however, be mentioned that the court will not deal with the point of law for the reason that it has been overtaken by events.

[13] On the merits the Respondent argued that the Applicant was engaged on a fixed term contract commencing on the 1st of January 2022 and terminating on the 31st December 2023, and further disputed that the previous contracts were renewed at the end of the term once a performance improvement plan was conducted.

[14] The Respondent contended that the Applicant was a poor performer from the outset, and always had an excuse for failing

to perform, as a result on the 28th February 2022 the Applicant was given a written warning regarding failure to keep the data base up to date, a task that was clearly within her job description. Furthermore, it is not correct that the Applicant was called for a PIP session in November 2023. On the 20th November 2023, the Applicant was simply reminded that her contract of employment would terminate on the 31st December 2023 and it was not a PIP session as alleged by Applicant.

[15] Prior to a date and in September 2023, the Respondent sought to put the Applicant on a PIP programme, the Respondent submitted that despite its best efforts, the Applicant did everything within her power to avoid that PIP session, wherein a trail of Messages were passed between the Applicant and her supervisor one Celiwe Dlamini in which the Applicant sought to avoid attending the PIP session in either one of the following ways:-

15.1 On the 9th October 2023 she informed her supervisor that she had been given three days off duty by a doctor and that she was attending counselling.

15.2 On the 10th October 2023 the Applicant alleged that she could not attend because she was not better yet.

15.3 On the 11th October she gave the excuse that she needed to be assessed by a doctor because she was having postpartum depression.

15.4 On the 7th November 2023 she sought to move the session which had been scheduled for that day in the morning to 10.00 a.m. on the basis that she had not slept because her baby kept her up and she ended up not attending the session.

15.5 On the 9th November 2023 she again apologized for being unable to attend the meeting because her baby kept her up all night. This led to her supervisor addressing an email to the Applicant expressing her concern and insisting that the Applicant attend the PIP, and again she never did.

15.6 On the 13th November she again gave the excuse that she was unwell with swollen eyes and that the doctor had given her five days to recover.

[16] The Respondent submitted that this avoidance of responsibility was nothing new, it was something the Applicant did quite often, such that on the 17th April 2023 she chose not to come to work on the basis that her car was giving her problems and she was far away.

[17] The Respondent submitted further that the Applicant was simply not serious and did everything in her power to avoid the PIP such that it became clear that she did not want to participate in same, which then resulted in the Respondent taking a decision that there was no purpose in further engaging in it.

[18] It was Respondent's argument that there is no practice in place which requires the Respondent to undertake a performance Improvement exercise before a fixed term contract of any employee comes to an end. The reason the Respondent decided on doing same was that it was clear from the Applicant's performance and more particularly her failure to commit herself seriously to her job that she required a PIP.

[19] The Respondent argued that a fixed term contract automatically terminates by effluxion of time on its contemplated termination date, therefore the Applicant's contract terminated on the 31st December 2023. The college closes on the 15th December 2023, of which the period between the 15th December to 31st December 2023 are days for annual leave, whereby, all employees in the Advancement Office are entitled to. The contract is therefore not being terminated prematurely, but terminates in accordance with the agreed and contemplated termination date.

[20] The Respondent submitted that the Applicant has not made out a case for the relief which she seeks, therefore, the Application should be dismissed with costs.

[21] The basis of the application by the Applicant is that the Respondent failed to conduct a performance improvement plan and/or appraisal before her contract was terminated as per the Respondent's policies or practice, as it has been the case for the past seven (7) years, wherein, the applicant was employed on

fixed term contracts which were renewed at the end of their term, once a performance improvement plan was conducted between herself and the Respondent.

[22] In casu the relationship between the parties is based on a written contract. The contract was for a period of two (2) years, commencing on the 1st January 2022 and was to terminate on the 31st December 2023, which makes it to be a fixed term contract.

[23] 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 the relationship to terminate on the date mentioned.

[24] The averments made by the Applicant are irrelevant as she has failed to furnish the court with the policies which she relies upon. Furthermore, there is no clause in the contract that obliges the Respondent to renew same. Therefore, in principle it is not open to the court to rewrite a contract entered into between the parties nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms.

[25] In the case of **MALANDOH V S. A BROADCASTING, CORPORATION (1994) 18 ILJ 544 (LC) MLAMBO AJ** dealing with a fixed term contract case had this to say:-

“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 doing so I would be imposing a different contract to that which the parties entered into”.

[26] The court will adopt the same approach by giving effect to the contract entered into by the parties, and not incorporate other factors which were not contracted upon.

[27] The Applicant further argued that she had a legitimate expectation that her contract would be renewed. A legitimate expectation arises where a person responsible for taking a decision has induced in someone who may be affected by the decision, a reasonable expectation that he will receive or attain a benefit or that he will be granted a hearing before the decision is taken (**De Smith, Woolf and Jowell, Judicial Review of Administrative Action 5th ed @ 417, para 8-037**). Furthermore, the law does not protect every expectation but only those which are “legitimate”. The requirements for legitimacy of the expectation include the following:-

- (i) The representation underlying the expectation must be clear, unambiguous and devoid of relevant qualification.
- (ii) The expectation must be reasonable.
- (iii) The representation must have been induced by the decision maker.
- (iv) The representation must be one which it was competent and lawful for the decision maker to make without which the reliance cannot be legitimate.

[28] Adopting and applying the above requirements the court concludes that the Applicant's expectation fails to meet same. There was no representation made to the effect that her contract would be renewed, let alone a clear, unambiguous and unqualified representation. The fact that the contract was renewed for the past seven (7) years does not in itself establish sufficient reason to expect a further renewal.

[29] Dealing with a legitimate expectation issue the court in **NHLANHLA HLATSHWAYO V SWAZILAND GOVERNMENT AND ANOTHER CASE NO. 398/2006** held that:-

“To be legitimate an expectation must have some reasonable basis. It must be more than a mere hope or ambition. In the present case, there is no evidence that any

promises or assurances were made to the Applicant to justify a belief that he would be promoted”.

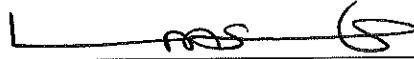
[30] It must be mentioned that contractual rights and obligations are governed by the law of contract, hence, the Applicant's employment was terminated in accordance with the terms of her contract. There is no provision in the contract, in particular a relevant clause that confer upon the Applicant the right to its renewal. Furthermore, the contract does not impose a duty on the Respondent to give the Applicant an explanation for its renewal. The Applicant is only entitled to be given the respondent's decision of renewal or non-renewal.

[31] In the circumstances, the court finds that the Applicant has failed to establish that she had a legitimate expectation for her contract to be renewed.

[32] In the result, the court orders as follows:-

- (a) The Application is hereby dismissed.**
- (b) There is no order as to costs.**

The Members agree.



LUNGILE MSIMANGO

JUDGE OF THE INDUSTRIAL COURT OF ESWATINI

FOR APPLICANT : MR H. MAGAGULA
(DYNASTY INC. ATTORNEYS)

FOR RESPONDENT : MR J. HENWOOD
(HENWOOD AND COMPANY)