

**IN THE INDUSTRIAL COURT OF SWAZILAND**

**HELD AT MBABANE**

**CASE NO. 511/08**

In the matter between:

**NJABULO KENNETH SIMELANE**

**Applicant**

and

**SWAZILAND INVESTMENT PROMOTION**

**AUTHORITY (SIPA)**

**Respondent**

**CORAM:**

**P. R. DUNSEITH : PRESIDENT**

**JOSIAH YENDE : MEMBER**

**NICHOLAS MANANA : MEMBER**

**FOR APPLICANT : M. NKOMONDZE**

**FOR RESPONDENT : Z. JELE**

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**J U D G E M E N T - 12/11/2008**

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1. The Applicant has instituted an urgent application on notice of motion, in which he seeks a final order:

1.1. interdicting the Respondent from terminating his services on 31<sup>st</sup> October 2008 on the grounds that such termination is unlawful and unprocedural;

1.2. interdicting the Respondent from carrying on with the

intended disciplinary hearing originally scheduled for 31<sup>st</sup> October 2008 on the ground that the Respondent has no authority or power in law to so discipline the Applicant.

2. When the matter came before the court on 31<sup>st</sup> October 2008 the parties informed the court that the disciplinary hearing scheduled for the same day had been postponed indefinitely to abide the outcome of this application. The Respondent's representative further undertook that the status quo would continue pending determination of the application and the Applicant would be permitted to attend work as usual. In view of these concessions, it was not necessary for the court to consider granting any interim injunctive relief.
3. The application was argued on its merits on the 5<sup>th</sup> November 2008.
4. The Applicant was employed as the Chief Financial Officer of the Respondent on or about 15<sup>th</sup> October 1998 on terms and conditions contained in a written contract of employment.
5. With regard to the period of employment, the contract provides as follows:

“3.1 Subject to paragraph 1, the employee shall commence work for the employer on the date specified in the letter of appointment and shall remain in its service for a period of 5 years or until the contract is

terminated in terms of the provision of clauses 4 or 18, or until the last day of the month in which the employee turns 60 years of age whichever is the sooner.

3.2 *At the end of the contract term the employer may or may not offer the employee a new contract for a period and on terms to be mutually agreed between the parties."*

6. The Applicant states in his founding affidavit that his fixed term contract ended on 31<sup>st</sup> October 2003 and fell due for renewal. He states however that *"Respondent and I did not expressly renew same and no new written contract of employment was signed ..... I however continued in the employ of the Respondent, still performing the duties of my position as Chief Financial Officer, and the Respondent continued to remunerate me in accordance with the initially agreed rate of remuneration"*
7. The Applicant submits that in these circumstances the Applicant's contract of employment was tacitly renewed on the same terms and conditions, save that in the absence of any agreement as to the renewal period his employment was indefinite and he became a permanent employee of the Respondent.
8. On or about 3<sup>rd</sup> October 2008 the Applicant received a letter from the Respondent's Chief Executive Officer which purported to confirm that his contract of employment would terminate on 31<sup>st</sup> October, and that the Respondent had decided that the contract would not be renewed when it expired.

9. The Applicant denies that his contract expired on the 31<sup>st</sup> October 2008. He submits that he became a permanent employee when his employment was tacitly renewed, and as such he is an employee to whom section 35 of the Employment Act 1980 applies. The services of such an employee may not be terminated without a fair reason in terms of section 36 of the Act. He argues that his employment has not terminated by effluxion of time and the Respondent has purported to dismiss him without any legitimate or fair reason. He submits that in these circumstances the court may grant him urgent injunctive relief to prevent the irreparable harm that he will suffer if the unlawful and unfair dismissal is allowed to take effect.
10. The Respondent denies that the Applicant's contract of employment was renewed for an indefinite period in 2003 so that the Applicant became a permanent employee to whom section 35 of the Act applies.
11. The Respondent's Chief Executive Officer states in his answering affidavit that he joined the organization in June 2007 and he has no personal knowledge of the events in 2003 surrounding the renewal of the Applicant's employment. He says he has been unable to trace any written renewal contract or document, but he asserts that the Applicant's employment was renewed in 2003 for a fixed period of 5 years which expires on 31<sup>st</sup> October 2008. He gives a number of reasons for this assertion, which may be summarized as follows:
  - 11.1 The Respondent's policy is that all members of its

executive management are engaged on fixed term contracts and there is no reason why an exception would have been made when the Applicant's first fixed term contract fell due for renewal;

11.2 The Respondent is a parastatal organization which is governed by the provisions of the Public Enterprises (Control & Monitoring) Act 1989. The policy of the Public Enterprises Unit constituted by such Act is that all members of executive management in parastatals are engaged on fixed term contracts;

11.3 When the Chief Executive Officer joined the organization in June 2007, he requested the Applicant to furnish him with details of the contractual employment status of executive management employees with particular reference to the date of expiration of their contracts. The CEO says the Applicant is the head of the Respondent's administrative department which includes the Human Resource function, and as such he is the custodian of human resources records within the organization. The CEO alleges that the Applicant duly provided him with a schedule setting out the status of the contracts of employment of members of the executive management. This schedule recorded that the Applicant's own contract was due to expire in October 2008.

- 11.4 In correspondence written by the Applicant in which he queried the decision not to renew his contract, the Applicant makes reference to a “second five-year contract term”, a “second contract term” and “two five years terms.” The Respondent submits that these references indicate that the Applicant himself acknowledged a second five year contract.
- 11.5 The Respondent also points out that in his correspondence the Applicant at no stage expressly and unequivocally denies that he was employed for a fixed term of 5 years expiring on 31<sup>st</sup> October 2008, and he rather appears to challenge the decision not to renew his contract for a further term.
12. There is a clear dispute of fact on the papers filed by the parties as to whether the Applicant was employed for a fixed term which expired on the 31<sup>st</sup> October 2008. The Applicant’s right to an interdict against termination on his services on 31<sup>st</sup> October 2008 depends on this dispute being determined in his favour.
13. It is the view of the court that the dispute cannot be determined without the hearing of oral evidence. Whilst the evidence adduced by the Respondent is largely circumstantial, it brings into question the veracity and/or probability of the Applicant’s version. The contents of the Applicant’s correspondence does prima facie imply

that the Applicant understood his employment to be subject to a second fixed term contract. The alleged departure from a policy of fixed term contracts for executive management, if true, does call for an explanation. The Applicant's alleged representation to the Respondent's CEO that his contract expired on 31<sup>st</sup> October 2008 is also irreconcilable with his version of indefinite employment. All these issues require proper and full investigation by way of oral evidence. Questions of probability and credibility should not be decided in motion proceedings.

14. The court was not convinced by the argument of counsel for Applicant that the Swaziland Investment Promotion Act prohibits the engagement of a Chief Financial Officer on a fixed term contract. The Act makes no such prohibition, nor can any such prohibition be implied from the fact that the Act limits the term of appointment of the Chief Executive Officer to four years.
15. The Respondent alleges that the Applicant's employment contract has expired by effluxion of time. The Applicant alleges that he is an employee to whom section 35 of the Employment Act applies, and his employment has been unfairly terminated contrary to the provisions of the Act. This dispute does not turn on a crisp issue of law, and is no different from the other unfair dismissal disputes that come before the Industrial Court in the normal way by action procedure after following the dispute resolution procedures prescribed by the Industrial Relations Act, 2000. The Applicant has not shown any ground why this dispute qualifies to jump the queue of other litigants and be dealt with by way of urgency. For that reason we find that it would not be appropriate to short circuit the normal procedures by referring the dispute of fact to trial. It

should come to trial in the normal way.

16. With regard to the interdict against the intended disciplinary hearing, the Applicant submits that the Respondent's Chief Executive Officer has no authority or power to discipline him. He submits that only the Disciplinary Tribunal established in terms of the Public Enterprises (Control & Monitoring) Act may deal with issues relating to his discipline.
17. The Chief Executive Officer is responsible for the day to day administration of the Respondent. Such responsibility usually includes the authority and power to discipline employees. The Public Enterprises (Control & Monitoring) Act provides that the Chief Financial Officer may only be dismissed by the governing body of the Respondent, namely its board of directors, but this provision does not preclude the CEO from instituting disciplinary action or convening a disciplinary hearing against the Applicant.
18. Section 11 of the Public Enterprises (Control & Monitoring) Act establishes a Disciplinary Tribunal. The functions of this Tribunal are to enquire into any contravention of the Act by any public enterprise and to recommend appropriate disciplinary action against the public enterprise or any member of its governing body or any of its officers (including the CEO and the Chief Financial Officer).
19. The fact that the Tribunal may discipline the officers of a public enterprise for a contravention of the Act by the public enterprise does not mean that the Tribunal can or should deal with all internal



disciplinary issues between the public enterprise and its officers. That is not the function of the Tribunal.

20. None of the disciplinary charges against the Applicant involves an alleged contravention of the Public Enterprises (Control and Monitoring Act) by the Respondent so there is no prospect of the Applicant being disciplined by both the Respondent and the PEU Disciplinary Tribunal for the same offence.
21. We find that no case has been made out for an interdict against the intended disciplinary hearing.
22. We do remark however that disciplinary proceeding may only be taken against an employee. The Respondent may only pursue the intended disciplinary hearing if it acknowledges that the Applicant remained its employee after the 31<sup>st</sup> October 2008.
23. The application is dismissed. We make no order as to costs.

The members agree.

**PETER R. DUNSEITH**  
**PRESIDENT OF THE INDUSTRIAL COURT**