

IN THE LABOUR APPEAL COURT OF LESOTHO

In the matter between:-

THABO WILLIAM VAN TONDER

APPLICANT

and

**LESOTHO HIGHLANDS DEVELOPMENT
AUTHORITY**

RESPONDENT

JUDGMENT

CORAM : THE HON. MR JUSTICE S.N. PEETE

PANELLISTS: MESSRS MAKHETHA and MOFELEHETSI

DATE : 26TH OCTOBER, 2006

Summary

Labour Law – A fixed term contract – Several Renewals. Whether non-renewal constitutes unfair dismissal. Section 62 of the Labour Code Act 1992.

Where an employer in a fixed term contract decides not to extend such contract, such non-renewal does not amount to an unfair dismissal unless there was legitimate expectation that a fixed term contract would be renewed or extended.

Introduction

1. This is an appeal from the decision of the Labour Court delivered on the 28th day of April 2004 dismissing the applicant's case as being without merit.

2. In his originating application before the Labour Court, the applicant (present appellant) had alleged inter alia the following –
 - (a) That the respondent had engaged him on a three year contract running from the 1st October 1998 as head of Litigation and General Legal Services Branch.
 - (b) Per letter dated 12th July 1999 the respondent confirmed the employment contract after a three month probation.
 - (c) That after the said three year contract expired, the applicant received a letter from respondent extending the applicant's contract for eighteen 18 months – ending 31st March 2003.
 - (d) That another completely new contract (not annexed to the bundle) and “presented” to applicant and was duly and later signed by respondent and applicant on 5th October 2001 and 9th October 2001 respectively.
 - (e) That on the 1st April applicant received a letter from respondent for extending the contract another three (3) months ending 30th June 2003. The terms and conditions otherwise remained the same.
 - (f) That per letter dated 13th June 2003 the applicant was nominated to a management team that was tasked with the transformation and reorganization of the LHDA and to consult with the affected employees in the process.

- (g) Problems for applicant began when he received the letter from respondent dated 1st July 2003 and at the end of this letter the applicant appended his signature. The letter reads:-

*“Lesotho Highlands Development Authority
P.O. Box 7332
MASERU 100
Lesotho*

*Ref : HR/390/03/CO
File : LHDA/CONF/P/802*

1 July 2003

*Mr Thabo Van Tonder
Section Head: Litigation and General
Legal Services Branch
Corporate Service Group
LHDA
Maseru – 100*

Thru: General Manager: Corporate Service Group

Dear Mr Van Tonder,

**NOTIFICATIN OF CONTRACT EXTENSION – THABO
VAN TONDER**

In view of the Lesotho Highlands Water Commission’s query that the motivation for the renewal of your contract did not include specific tasks and time frames as well as hourly time sheets as required, the Project Authorities could only approve extension of your contract by one month i.e. to end of July 2003 while a properly structured and adequate motivation is resubmitted for their consideration.

The resubmission of a motivation for the renewal of your contract is in process and you will be advised of the outcome in due course.

In the meantime, this letter of contract extension by one month with no change in other terms and conditions of your employment takes effect today, Tuesday 2 July 2003.

Please confirm here below, your acceptance of the extension of your contract of employment to 31 July 2003 and return the signed copy to the Human Resources Branch.

Yours sincerely

R. TLALI
“ACTING CHIEF EXECUTIVE”

- (h) It is clear that any purported renewal of applicant's engagement beyond June 2003 had been queried by the Lesotho Highlands Water Commission because specific tasks and time frames as well as hourly time sheets had not been included.
- (i) It was quite clear that that the applicant's engagement was to end on the 31st July 2003 upon the understanding that resubmission of a motivation of contract was in process and applicant would be advised of the outcome in due course.
- (j) On the 4th August 2003, applicant wrote a letter to the Chief Executive of LHDA in which he complained that he had been warned by his Manager that when he reported to duty on the 1st August 2004 he did so on his “own risk”. In the letter the applicant noted that he had been reporting for work after the 1st August “upon expectation that the extension or otherwise of his contract was being processed and that he would be advised of the outcome in writing in due course.”

Applicant's letter dated 4th August 2003 reads:-

“Confidential

*P.O. BOX 13774
MASERU 100*

4TH AUGUST 2003

*The Chief Executive
LHDA
P.O. Box 7332
MASERU 100*

ufs

.....
*E R Mapetla
GM-CSG*

.....
*K. Mophethe
Legal Service Manager*

Dear Sir,

Re: EXTENSION OF MY CONTRACT

On the 3rd July, I received a letter Ref: HR/390/03/CO (File LHDA/CONF/P/812) dated 1st July 2003 from the then Acting Chief Executive to the Effect that “The resubmission of a motivation for the renewal of your contract is in process and you will be advised of the outcome in due course”. Copy of the letter is attached hereto for ease of reference.

Whilst waiting to be advised of the outcome as promised, my Manager called me in this morning and advised of the extension of my contract, I am reporting at work at my own risk. She advised me further that I am consequently not going to be paid for the month of August.

You will note, sir, that I have been reporting at work and

carried out my duties with the expectation that the extension or otherwise of my contract is being processed, and that I would be advised of the outcome in writing when that process is concluded. You will agree with me that what my Manager correctly advised, that I am here at my own risk, as I would not be paid for the month of August, means that my contract has not been renewed, but I have not been so advised to date of the outcome of the process as promised.

I consequently still trust that my case is still being considered, but, in the face of the likelihood of not receiving my salary for August, and the hardships attendant thereto, I would humbly request that I be advised of my fate as a matter of urgency.

Please also note that the contract had already been extended for three months from April to June 2003, and that the July extension was the second extension for one month.

Yours faithfully,

W T VAN TONDER
“SECTION HEAD – LITIGATION & GENERAL”

- (k) It was only in a letter dated 25th August 2003 (some three weeks later) in which the applicant was advised by the Chief Executive of Respondent that Applicant’s employment with the LHDA would come to the end at the end of August 2003 and payment of certain monies were offered as entitlements.
- (l) It is also common cause that the Lesotho Highlands Water Commission had in the meantime addressed itself to LHDA Chief Executive thus:-

*“The Chief Executive
Lesotho Highlands Development Authority
P O Box 7332
Maseru*

Dear Sir,

CONTRACT EXTENSIONS – LEGAL BRANCH

Please refer to the following documentation in respect of contract extension within the legal Branch:

- (a) LHWC letter, ref. SEC/LHDA/2741, dated 28 April 2003;*
- (b) LHWC letter, ref. SEC/LHDA/2741, dated 09 June 2003;*
- (c) LHDA letter, ref. HR/367/03/CO, dated 19 June 2003;*

The Commission reviewed the information submitted in relation to the four individuals for whom contract extensions are requested (i.e. Mr T. van Tonder, Mr S. Mathe, Mrs T. Matshikiza and (Ms M.L. Mosakeng).

The Commission already, in its letter dated 9 June 2003, addressed the extension of Ms. Mosakeng. The additional information provided to the Commission in respect of the three professionals, if anything, supports the argument that the LHDA does have excess capacity that is not applied effectively. The LHDA is requested to, based on the organization’s requirements and each individual’s expertise, select two individuals from the three candidates to be extended to the end of the financial year taking cognizance of individual (s) who can give meaningful input in Mohale Tunnel Claims. The extension periods are consistent with other extensions granted and does not pre-empt the recommendations of the Organization and Manpower Study.

The LHDA is requested to select the most appropriate two candidates before the end of August 2003.

Yours faithfully,

*C. Mwakalumbwa
COMMISSION SECRETARY*

*cc: GOL Delegation
RSA Delegation
Mr R. Mapetla – GM Corporate Services”*

- (m) Also attached to the papers is a twenty three paged document titled “*Staff Separation Policy and Procedure* (dated 27th January 1999). It is a document that covers matters of staff policy and principles, retrenchment procedures, payment packages, and privileges.
3. In the main, the respondent’s answer to the applicant’s claim is to the effect that the applicant was not at all unfairly dismissed but submit that his extended fixed term contract expired on the effluxion of time on the 31st July 2003 and that this was not any case of unlawful termination and further that applicant had no legitimate expectation about extension to entertain; and that there was no need to give applicant any notice that his employment with LHDA had come to an end. The respondent refutes the applicant’s contention that an offer made to him on 13.06.03 to participate in the reconstruction management team created a legitimate expectation that his fixed contracts would continue being extended (*ad infinitum*). One should however note at once that the tenor of this letter dated 13.06.03 is explicit that it was a mere nomination

to the management team – the terms and “*conditions of the basic extended contract remaining the same.*”

4. Indeed his 18 months contract (para 4) stipulates that the applicant may be called to do other work/duties that may reasonably be expected of him. In fact the very Mrs R. Tlali Acting CEO of LHDA wrote a very clearly worded letter dated 1st July 2003 indicating that in view of the Lesotho Highlands Water Commission’s query the applicant’s engagement with the LHDA was being extended “by one month” ... as from Tuesday 2nd July 2003; and on the 3rd July 2003 the applicant appended his signature accepting the one month’s extension “*with no changes in other terms and other conditions of (your) employment.*”
5. Understandably, when the month of July came to an end, both parties had to “*cross the Rubicon*”. Indeed on the 4th August 2003 the applicant wrote to the Chief Executive of the LHDA [see para 2 (j) (*supra*)]:
6. While the applicant’s position was thus in a limbo, certain events took place at the offices of LHDA and certain witnesses were called by this court to establish the true factual position. At issue was whether a new contractual relationship came into being when the applicant continued to report himself at LHDA offices with the expectation that the “*extension or otherwise*” of his contract was being processed.

7. The applicant's fate was soon sealed when on the 25th August 2003 the CEO of LHDA Mr Potloane wrote thus to applicant (probably after receiving the letter from LHWC dated 4th August 2003) –

“August 25, 2003

Mr Thabo Van Tonder
C/O LHDA
P.O. Box 7332
MASERU 100

THRU : GM – Corporate Services Group _____
E R MAPETLA

Dear Mr. Van Tonder

**SUBJECT: CONFIRMATION OF TERMINATION OF
EMPLOYMENT – MR THABO VAN TONDER**

You will kindly recall that your contract of employment with the Lesotho Highlands Development Authority was extended by one month to 31 July 2003 while the Legal Services Branch re-submitted the motivation for renewal of your contract of employment to the Lesotho Highlands Water Commission, (the Project Authorities), whose response has since been received.

You have been personally informed by the Manager: Legal Services Branch in discussions she held with you on 13 August that the Project Authorities were unable to justify the extension of both the two persons in your section beyond this month.

As the Manager: Legal Services Branch explained, your contract expired on 31 July 2003 and was only extended to the end of the month whilst awaiting the Project Authorities decision. Ms Matshikiza's current contract on the other hand is

still valid to end of October 2003. Therefore, the choice of which one of you has to remain was made by this factor.

Accordingly, this letter serves to formally confirm that regrettably, your employment with the LHDA will come to an end at the end of this month.

Upon termination of your employment you will be entitled to:-

- (i) Cash payment in lieu of six (6) leave days, you have earned during this leave year but have not yet taken;*
- (ii) Statutory severance for the period you have been in continuous employment with the LHDA which dates back to 1 October, 1998 less any moneys outstanding to the LHDA (if any); and*
- (iii) Refund of your superannuation contribution as administered by Nedbank Lesotho (Pty) Ltd.*

I wish to take this opportunity to thank you for the contribution you have made to the success of the Lesotho Highlands Development Authority and to wish you well in your future endeavours.

Yours sincerely

*E. L. POTLOANE
CHIEF EXECUTIVE”*

8. It should be noted that this letter was in effect terminating the applicant's services with immediate effect and also informing him that his contract could no longer be extended and informing him also of his cash entitlements.

9. Mr Ramosehlana Mapetla – both in his affidavit and in evidence before this court confirmed that whereas he knew that the applicant’s contract would come to an end on the 31st July 2003, he however reassured the applicant that he applicant would receive the August salary because the LHTC had not as yet decided upon the applicant’s retention and further extension of his contract. “*His was a contract for a fixed termand did not require any notice of termination,*” he explained.
10. In his evidence the applicant told the court that on the 1st August 2003 he nevertheless reported for duty fully knowing that his contract had expired on the previous day and that reacting to his presence, Mrs Mophethe had informed him that if he reported for duty he did so on is own risk.
11. It is the applicant’s case that once his contract was not extended on the 31st July 2003 his contract automatically relocated and a new indeterminate contract “kicked into action”. He claims that Potloane’s letter dated 25th August 2003 constituted a wrongful and an unfair dismissal; moreover, so the applicant submits, the LHDA retrenchment procedure as documented in the Staff Separation Policy and Procedure had been violated and against the LHDA “*last in first out*” principle; he strenuously argued that he was discriminatorily axed out from the legal section and that he was otherwise denied consultation – and he was not afforded any fair hearing before the CEO decided not to extend his contract.

12. Somewhat of importance is the clause 3.3 of the applicant's second contract (dated 1st October 2001) for 18 months. Clause 3.1 for instance reads:-

“3.1 The Contract shall subsist for a period of eighteen (18) months and shall come into effect on 1 October 2001, and shall automatically terminate on 31 MARCH 2003 and no notice of such termination shall be required of either Party, in accordance with Section 62 (3) of the Labour Code Order 1992.

3.2

3.3 If on the other hand, the services of the Employee are still required beyond the termination date of this Contract, the Parties may agree to extend the Contract for another specified period and on such terms and conditions as may be agreed between the Parties, whereupon, the LHDA shall advise the Employee THREE month/months in advance that his/her services shall be required for the extended period. Provided, where such advance notice is not given, then the provisions of subsection 3.1 shall apply.”

13. Salient in the facts of this case is that this 18 – month contract automatically ended on March 30th, 2003 and was later extended to June 30th and again renewed to the end of July 2003. It is not in dispute that the applicant voluntarily agreed to the shortening of the respective durations of his contract until being offered a one month's extension in June 2003. Applicant himself agrees that the three months notice in clause 3.3 in the original contract had in fact been waived.

14. He contends however that Mr. Mapetla's pious and considerate reassurances gave rise to some legitimate expectations that another renewal would come about.
15. For purposes of this judgment, I will hold in the applicant's favour that he was at work on the 1st August 2003 (probably a Friday) and again on Monday the 4th August and until he received the letter from the CEO terminating his services on the 25th August 2003.
16. It is common cause that during this period (2003) the LHDA was gradually reducing its workforce due to the successful completion of the Phase I of the Project. It was a critical period of transformation and reorganization and review of existing contractual relationships with many senior and junior personnel. The very downsizing of duration periods of the applicant's extended contracts supports the view that fixed term contract would automatically end on the agreed dates unless renewed. Mrs Mophethe – a Senior Supervisor or Legal Officer then at LHDA had this to say:

“...General expectation was that once one's fixed term contract ended if not renewed, it meant the contract had terminated...”

17. She informed the court that when she met the applicant at the LHDA offices on the 4th August 2003 she asked him why he had reported for duty as his contract had terminated and also telling him that he worked at his own risk.

18. She explained further that LHWC had decided to reduce the legal professionals and that since Ms Matzhikiza's contract was still valid till October 2003 and that Mr. Mathe's contract in the construction field was not affected and that the axe had unfortunately fallen on the month-to-month contract of the applicant.
19. She stressed that applicant's appointment to the Team was an internal and functional directive that did not affect the foundational contractual relationship between the applicant and LHDA and had no cause to raise any expectations that applicant's contract was to be renewed once more till the Team had completed its task.
20. Restructuring of staff and re-organization and/or retrenchment are basically what is often described as "*operational requirements*" of the organization; section 66 of the Labour Code 1992 is only relevant to those employees who are currently being contractually employed and it has no bearing to a situation where the contract comes to an end and the employer elects not to renew. Section 62 (3) of the Code reads:-

“62. (3) *A contract for one period of fixed duration shall set forth its date of termination. Such contract shall subject to the provisions of section 66 concerning dismissal, automatically terminate on that date and no notice of termination shall be required of either party.*

(4)

21. In this case renewal was not automatic; this fact is supported by the several renewal offers and acceptances. What was on the other hand automatic was the expiration of the extended contract in the sense that the employer did not have to do or say anything at the date of affluxion save, out of courtesy, to advise the employee that the contractual relationship was at end.
22. In cases of affluxion of time in a fixed term contract, allegations of nepotism or favouritism, even if probable, do not help the employee whose fixed term contract is not renewed. Only bitterness can remain.
23. One should be careful in the use of word/jargon under the Code. A contract “expires” on the fixed date – it does not terminate. A contract – whilst it is extant may be terminated lawfully or wrongfully. See **Consolidated France Cotton Corporation vs President Industrial Court 1985 ILJ 7**. Non-renewal of a fixed term contract cannot amount to a termination of contract because upon affluxion of time no contract exists. An existing and current contract can be terminated for various reasons by either party. See Code, section 63. And where there exists a legitimate expectation that a contract will be renewed, non-renewal may amount to an unfair dismissal (*Code 3 of Good Practice - 2003*).
24. In view of the fact since the last contract which the applicant had personally agreed upon and signed ended on the 31st July 2003, it was incumbent upon the applicant to show on a balance of

probabilities that during the month of August 2003, a cognizable contractual relationship (*ex lege*) existed between himself and the LHDA – such relationship should not be confused with an *ex gracia* situation where the employer suffers (allows) the employee to continue to work. As already stated, I decide this point in applicant's favour mainly because the LHDA's attitude during August 2003 was ambivalent and reticent. Applicant did however receive his August salary.

25. **Mr Van Tonder**, the applicant, has strongly relied upon an International Labour Organization Recommendation No.166 (3) which recommends that a contract of specific period should become a contract of indeterminate duration if it has not been renewed. This Recommendation (its generosity and benevolence aside) flies in the face of section 62 (3) of the 1992 Labour Code which speaks of automatic termination. In my view section 62 (3) is not ambiguous, and the ILO Recommendation is therefore not applicable (see Section 4(c) of the Code).

26. In our view, the applicant was never dismissed – what in fact happened was that his fixed term contract of one month surely expired. In the particular circumstances of the applicant's case, neither legitimate expectation nor *audi alteram partem* can be entertained because his contract under the then operational requirements of LHDA was a contract which reduced in duration from the initial 3 years, then to 18 months, then to three months and then to one month. See **Ludwick vs Samca** 1993 (2) SA 197

where **Khumalo J.** who dealt with the two issues of legitimate expectation and *audi alteram partem*. See also **Lunt v University of Cape Town** 1989 (2) SA 438; **Langeni v Minister of Health** - 1988 (4) SA 93 where **Goldstone J.** said:-

“The person exercising the power of dismissal is not required to have anything against the employee. He may wish to employ someone else or he may wish to reduce the size of the work-force ...”

27. In our view, these learned words apply with equal force in a case where an employer elects for whatever legitimate reason not to renew a fixed term contract. The fact that the fixed term contracts had been extended (renewed for several times) in no way conferred an additional right, interest or legitimate expectation upon the applicant. As **Khumalo J** in **Ludwick’s** case reasoned: *“To read this into a contract would amount to introducing something into the contract which was never intended by the parties”*. See also **Selodi and Others v Sun International Bophuthatswana** – 1993 (2) SA 174.
28. What the LHDA CEO did on the 25 August 2003 was to inform the applicant that that the road had ended and the contract would no longer be renewed. It was by no means a termination of applicants services without notice as vigorously contended by the applicant. The expiration of a fixed term contract requires no announcement or notice; it required no *audi alteram partem*; it has *ex contractu* and *ex lege* consequence.

29. We are of the view that section 65 of the Labour Code does not come to the assistance of the applicant because section 65 refers to “*termination*” of contract without reference to limit to time. This section 65 (2) reads thus:-

“If upon any termination as provided under sections 63 and 64 the employer suffers the employee to remain, or the employee without the express dissent of the employer continues in employment after the day on which the contract is to terminate, such termination shall be deemed to be cancelled and the contract shall continue as if there had been no termination, unless the employer and employee have agreed otherwise.”
(our underline)

30. In the circumstances of this case, we hold that applicant had no legitimate expectation that at the end of August 2003, his contract would again be renewed or that he ought to have been afforded opportunity before LHDA decided no longer to renew.
31. We hold however that a month’s notice should have sufficed. In exercise of our discretion, it is ordered therefore that Appellant be paid his monthly salary for September 2003. The application is otherwise dismissed. Each party to bear its own costs.

S.N. PEETE

JUDGE OF THE LABOUR APPEAL COURT

Panellist: _____ I agree

Panellist: _____ I agree

For Applicant : **Mr T. Van Tonder**

For Respondent : **Mr Mathe**