Not reportable
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Delivered 020810

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CASE NO J 1655/10

In the matter between:

MAKUMU FANI UBISI	**APPLICANT**
And	
THE BOARD OF SEDIBENG WATER	**FIRST RESPONDENT**
MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS	**SECOND RESPONDENT**

JUDGMENT

VAN NIEKERK J

[1] This is an urgent application in which the applicant seeks an interim order declaring that the first respondent's refusal to renew the applicant's employment contract is unlawful, and to compel the first respondent to renew the contract.

[2] I will assume for the purposes of this judgment that the application is urgent, and that the applicant's failure to comply with the time periods set out in the Rules of this court is justifiable. That being so, it is incumbent on the applicant to establish a prima facie right to the relief he seeks, an apprehension of irreparable harm, the absence of an alternative remedy and that the balance of convenience lies in his favour.

[3] The applicant was employed as the chief executive of the first respondent, with effect from 1 August 2005. The right on which the applicant

relies to claim that he is entitled to the renewal of his contract is derived from the terms of the contract itself. Clause 2 of the contract reads as follows:

> *The employee's employment shall commence on 1 August 2005 and the employment contract will expire on 31 July 2010 and* (sic) *renewable for five (5) years, save for gross misconduct and or non-performance. The employer will start contract extension negotiation with the employee six months before expiry of contract.*

[4] Clause 10 of the contract is headed "Termination of Employment", and reads as follows:

> *Either the EMPLOYEE or the EMPLOYER may terminate the EMPLOYEE'S service by giving 30 (thirty) days written notice, effective immediately.*
>
> *Either party may summarily terminate this contract for any cause recognised by the law as being sufficient, subject to this being reduced to writing. The EMPLOYER may terminate this agreement without any notice in the case of gross misconduct or dishonesty on the part of the EMPLOYEE. The EMPLOYER will in such event follow the procedure laid down in the disciplinary code and procedure.*

[5] On 28 June 2010, a little more than a month from the date of expiry of the applicant's fixed term of employment, the first respondent's acting chairperson wrote to the applicant to notify him that the first respondent wished to commence negotiations regarding a possible extension of the applicant's contract. This was followed up with a letter dated 22 July 2010, when the applicant was requested to provide reasons why he believed that his contact should be renewed. On 26 July 2010, the applicant wrote to the first respondent's acting chairperson, pointing out that the terms of his contract obliged the first respondent to renew the contract for a further five year period. On 28 July 2010, the acting chairperson responded to the applicant, stating

that he did not agree with the applicant's interpretation of the contract, and notified him that the contract would not be renewed.

[6] The high-water mark in the applicant's contention in these proceedings is that the word "*renewable*" in clause 2 of the contract means that the applicant was guaranteed a further five year extension of his contract, provided that he had not been guilty of gross misconduct or had not failed to meet the required performance standards. In other words, 'renewable' was qualified by the exceptions of misconduct and poor performance, and since these did not apply, 'renewable' carried no qualification and imposed an obligation on the first respondent to renew the contract for a further five year period.

[7] The applicant's interpretation of the contract requires the following reading: "The contract shall be renewed for a further five (5) years, save for gross misconduct or poor performance." In my view, this is not an interpretation that can be sustained by the plain meaning of the word "*renewable*". Black's Legal Dictionary (7th ed., Garner *et al*) defines "*renewal*" as "*The re-creation of a legal relationship or the replacement of an old contract with a new contract, as opposed to the mere extension of a previous relationship or contract*." The Oxford Dictionary of English (2nd ed., 2003) defines "*renewable*" to mean "*capable of being renewed*". Clause 2 means no more than that the contract was capable of being renewed, i.e. the renewal of the contract was not intended to be automatic; the consensus of both parties would be a prerequisite to it being renewed. This reading of clause 2 is reinforced by the requirement that negotiations on the extension of the contract be initiated six months prior to its expiry. If the applicant had a right to automatic renewal, there would be nothing to negotiate. While the first respondent initiated negotiations much later than it was required to do, this is a question of implementation rather than interpretation.

[8] Mr Sibuyi, who appeared for the applicant, submitted further that clause 2 of the contract should be read with clause 10 – the contention being, as I understood it, that the first respondent could terminate the contract only

by giving notice of its intention to do so (which it had not done) or by terminating the agreement summarily in the event that the applicant committed gross misconduct (which he had not). Clause 2 is indeed qualified by clause 10, but Mr Sibuyi's contention begs the question of the fixed term nature of the contract and the agreed termination of the contract, by the effluxion of time rather than by reason of any proximate act by the employer, on 31 July 2010.

[9] For these reason, in my view, the applicant has failed to establish a prima facie right, even one open to some doubt, and for this reason, the application must fail. It is not necessary therefore for me to consider the remaining requirements for the obtaining of interim relief.

[10] In these proceedings, the applicant has confined himself to an assertion of what he claims are his contractual rights – he disavows any reliance on those rights established by the LRA. Of course, nothing in this judgment precludes the applicant from claiming that the first respondent's refusal to renew his contract constituted a dismissal as defined in s 186(1) of the LRA, and from claiming that in the circumstances, his dismissal was unfair.

[11] In so far as costs are concerned, Mr Vally, who appeared for the first respondent, very fairly did not press for a costs order, and I do not intend to make one.

I accordingly make the following order

1. The application is dismissed.
2. There is no order as to costs.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of hearing: 30 July 2010
Date of judgment: 2 August 2010

Appearances:

For the applicant: Adv Sibuyi, instructed by Eversheds
For the first respondent: Adv B Vally, with him Adv C Ascar, instructed by Sunil Narian Attorneys