



**SOUTHERN AFRICAN DEVELOPMENT COMMUNITY
ADMINISTRATIVE TRIBUNAL (SADCAT)**



TRIBUNAL DE JUSTIÇA

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**BEFORE THE FIRST INSTANCE PANEL OF THE SOUTHERN
AFRICAN DEVELOPMENT COMMUNITY ADMINISTRATIVE
TRIBUNAL AT GABORONE, BOTSWANA**

Application No 2 of 2019

MAKHAMBIRA CHARLES MKANDIWIRE..... Applicant

V

SOUTHERN AFRICAN DEVELOPMENT COMMUNITY.....Respondent

Coram:

Honourable Mr. Justice Francis Bere, Presiding

For the applicants:

Counsel Batlhalefi Moeletsi (Moeletsi Attorneys)

For the respondent:

Counsel Tafa M.J (Armstrongs Attorneys)

SADCAT Secretary:

Honourable Mr. Nemaduthsingh Juddoo

Judgment

[1] The Honourable Mr Justice Mankhambira Charles Mkandawire (the applicant) is a national of Malawi, being an offshoot of the Malawi Judicial Service Commission.

[2] On the 1st of December 2008 the applicant made history by being appointed the first ever Registrar of the Southern African Development Community (SADC) Tribunal which was based in Windhoek, Namibia. There can be no doubt that the applicant's elevation to this regional tribunal was characterised by pomp and excitement.

[3] But alas!, the applicant's departure from the respondent was characterised by extreme humiliation which negatively impacted on the general welfare of his family. His wife and son who were enrolled at some universities in Namibia had to cut short their studies. The applicant himself had to find a quick solution to loans that he had secured in anticipation of his second full four year contractual term of employment which abruptly ended in its 16th month of execution. In short, the applicant made an unceremonious exit from the respondent. The whole script makes sad reading.

FACTUAL BACKGROUND

[4] The applicant was employed by the respondent as the Registrar of the (SADC) Tribunal in Windhoek, Namibia on a four year contract on the 1st of December 2008. The contract was to end on the 30th of November 2012. The applicant's condition of employment was to be regulated by his letter of appointment together with the Southern African Development Community Administration Rules and Procedures Handbook (the handbook).

[5] Realising that his contract of employment was due to expire on 30 November 2012, the applicant, in accordance with his terms of employment timeously applied for the renewal of his contract. By letter dated 21st January 2013, the applicant was duly informed by Tomaz Augusto Salomao, the then Executive

Secretary of the respondent, that management had approved the renewal of his contract as Registrar of the Tribunal for another period of four years effective from the 1st of December 2012 to 30th November 2016. Sixteen months into his second contract, the applicant received a letter from the new Executive Secretary of the respondent Dr Stergonena L Tax informing him that his newly signed contract of employment should be considered as having been extended, not for four years but until the completion of the review of the role of the SADC Tribunal which was expected to take place in August 2014.

[6] It is important to mention in passing that the review of the SADC Tribunal was at the behest of Zimbabwe which felt very strongly, *inter alia*, that the jurisdiction of the regional Tribunal was interfering with its national courts and making decisions which did not sit well with the Republic.

[7] Naturally, when the applicant received the letter from the newly appointed Executive Secretary of the respondent, he objected to it. The applicant's protest fell on deaf ears as evidenced by the letter of 26th August 2014 which gave the applicant three months notice to seize employment as Registrar of the respondent. Upon the termination of his employment the applicant was paid all his terminal benefits up to the end of August 2014.

[8] Aggrieved by the decision to terminate his second contract of employment midstream the applicant launched proceedings in the High Court of Botswana as the Southern African Development Community Administrative Tribunal (SADCAT) had not yet been established. Subsequently however, by consent of the parties the matter was referred to SADCAT for adjudication hence these proceedings.

THE APPLICANT'S CASE

[9] In his application filed before this Court, the applicant argued that his contract of employment was unlawfully terminated and that it should have been allowed to run uninterrupted its full four year course.

[10] For the alleged unlawful termination of his employment, the applicant sought the following relief;

- a) Payment in the sum of USD 380 184,71 being the total remuneration and benefits he would have received for the remainder of his contract of employment had it been allowed to run its full course.
- b) Interest thereon at the rate of 10 percent per annum from the 30th of November 2016 until the full amount is paid in full.
- c) Costs of suit.

THE RESPONDENT'S CASE

[11] Deriving from its statement of defence filed in this Court, the respondent took the position that the applicant's contract was lawfully terminated.

[12] The respondent's argument was premised on the fact that as at the date of the expiration of his contract, Council had taken the decision that no contract would be renewed, due to the fact that the role of the Tribunal was under review.

[13] The respondent further argued that given his position in the respondent, the applicant was fully aware that the respondent had taken the position that the applicant's contract was not to be renewed but extended pending the completion of the review of the role of the SADC Tribunal.

[14] The respondent also took the view that, the applicant, having refused to be redeployed following the closure of the SADC Tribunal had rendered himself redundant and that he had no cause of action against the respondent.

[15] Whilst acknowledging the contents of the mediation deliberations, the respondent argued that such deliberations were not binding on the parties to it.

[16] Consequently, the respondent took the firm position that the applicant's contract of employment was lawfully terminated as it had been unlawfully renewed. It sought the dismissal of the applicant's claim.

ISSUES FOR DETERMINATION

[17] At a meeting held by counsel for the parties and endorsed by the court at case management stage the following issues were identified for determination:

1. Whether or not the applicant's contract was lawfully renewed for a further period of 4 years which was to lapse on 30th November 2016.
2. Whether or not the applicant rendered himself redundant by refusing to take alternative employment with the respondent.
3. Whether or not the August 2012 Council decision was binding and therefore appropriately applied in relation to the renewal of the applicant's renewed contract of employment.
4. Whether or not the applicant is entitled to the relief sought.

THE EVIDENCE IN BRIEF

[18] The applicant was the sole witness in his case. Mr Hendrix Tonde gave evidence on behalf of the respondent. Both parties tendered documentary evidence whose significance will be commended upon in this judgment.

DETAILED EVIDENCE

[19] The applicant took the court through his relationship with the respondent as its first ever Registrar of the SADC Tribunal which was based in Windhoek, Namibia.

[20] It was the applicant's uncontroverted evidence that throughout his employment with the respondent, he performed his work with unmistakable

distinction which paved the way for the easy renewal of his contract with the respondent when the need arose before his initial four year contract ended in November 2012.

[21] Both witnesses concurred that the applicant timeously lodged his application for the renewal of his employment contract which was due to end on the 30th of November 2012. Both were also agreed that the applicant's contract was renewed. Their only point of divergence was that whereas the applicant was of the firm view that the renewal of his contract was properly done, Mr Tonde felt that the contract ought to have been extended. He was uncertain though as to the duration of that extension.

[22] Both witnesses were in agreement that owing to the complaints raised by the Republic of Zimbabwe on the jurisdiction of the SADC Tribunal, the activities of the Tribunal were subject of a review process by the respondent and that the effect of this was to curtail the activities of the Tribunal.

[23] It was common cause between the two witnesses that in August 2012, Council for the respondent (Council) approved the recommendation by its Ministers of Justice/Attorneys -General for the extension of the contracts of the staff members of the Tribunal (who included the applicant) pending the review of the role of the Tribunal.

[24] The applicant further testified that despite the mooted review of the Tribunal, the Tribunal employees headed by him continued to execute their functions, with the court hearings being the only missing element. He said they continued with their work and that their budget was approved by the respondent.

[25] The applicant also gave evidence to the effect that after his contract had been renewed in January 2013, in February 2013 Council raised its concerns with the contracts of the staff of the SADC Tribunal (himself included). He said council

expressed the need to revisit such contracts. This issue was raised without the participation or any input from the concerned staff members.

[26] His evidence was that the affected and restless staff members wrote to the Executive Secretary Dr Salomao highlighting their concerns of uncertainty in their employment. He further said that the issue was presented at a meeting held by Council in August 2013 in Lilongwe, Malawi (where he was barred from participating as an interested party in the deliberations).

[27] The applicant said that as a result of the 2013 deliberations in Malawi, in September of the same year a team from the Secretariat was dispatched to Windhoek to negotiate with the SADC staff on the best way to resolve the issue of their employment. He said the team from the Secretariat comprised Mr Mufaya (Director, Human Resources), Mr Clement Kanyama (Director, Finance), Dr Uate (Senior Legal Counsel) and Mr Hendrix Tonde (Head of Administration).

[28] The applicant said that two options were put on the table, namely, redeployment or compensation for the remaining period of the contracts. He said after frank and open deliberation he opted for compensation for the remaining period of his renewed contract. After the meeting a document headed "the mediation report" was produced and signed by all the heads of the negotiating teams including the facilitator. The document contained *inter alia*, detailed computation of the applicant's proposed compensation.

[29] He said when the issue of the staff contracts came up for discussion again in 2014 in Victoria Falls, Zimbabwe, he was not allowed to attend the meeting as he was regarded as an interested party in the issue on the agenda. According to the witness it was at this meeting that for the first time questions were raised about the alleged unlawfulness of the renewal of his contract and those of fellow staff members

which subsequently led to termination of the contracts. He said at that time he had only served sixteen months of his four year contract.

[30] Under cross-examination, the witness maintained his position. This came as no surprise at all as the bulk of his testimony was consistent with the evidence of the sole witness of the respondent, Mr Tonde.

[31] Of significance was the applicant's consistent position under cross-examination that the decision of Council of August 2012 in Maputo was properly implemented by the then Executive Secretary who enjoyed among other functions the exclusive prerogative to implement Council resolutions in accordance with the rules of engagement or the SADC employment guidelines.

[32] When it was suggested to the applicant in cross-examination by the respondent's counsel that because Council decision was to have his contract extended as opposed to renewed, he maintained that as far as he was concerned the terms renewal and extension were used synonymously especially if regard is had to the rules which regulated the applicant's contract of employment.

[33] The applicant further conceded under cross-examination that between the 2012 decision of Council and the renewal of his contract there was no any other resolution that altered the 2012 resolution.

[34] The applicant denied that he rendered himself redundant by refusing to take up a position with the respondent at its headquarters in Gaborone. His argument was simply that when he presented his profile during the mediation exercise in Windhoek, there was no suitable position for him hence his decision to opt for compensation instead, a position that was accepted by those who formed the high powered mediation team which also included a highly regarded facilitator.

[35] Finally, the applicant conceded that when he left employment with the respondent in 2014, he secured employment with the Malawi Judiciary as head of the Civil Division and that to avoid double dipping, his global amount of claim should take

into account his earnings in Malawi and that this was an anomaly which this Court should take into account in computing his entitlement in the event of him being successful in his claim.

[36] I now turn to deal with the evidence that was given on behalf of the respondent by Mr Hendrix Tonde who was then employed by the respondent as a Senior Officer in the Human Resources Division.

[37] The thrust of this witness's evidence was that the respondent's management had erred by renewing the applicant's contract of employment instead of extending it in line with the Council decision of August 2012 in Maputo as perceived by him.

[38] Mr Tonde confirmed that the review of the Tribunal had no specific time limit. In other words, no one knew when exactly the review of the Tribunal was to be completed. He speculated that the extension of the applicant's contract was not supposed to be for a "longer period."

[39] On the issue of the applicant's re-deployment, the witness confirmed that no specific position was offered to the applicant, the only assurance being that if the applicant had offered his services at the Secretariat, he was going to maintain his employment package.

[40] Whilst accepting that the respondent set up a strong team for mediation between the applicant and fellow staff members at the SADC Tribunal and the respondent to explore the best way forward in resolving the status of the staff members the witness stated that the mediation exercise was not binding on the respondent.

[41] It is of some significance that the bulk of the witness's evidence in chief led by respondent's counsel was devoted to have the witness interpret the Council decision of 2012. This was despite the fact that the witness did not project himself as an expert in interpretation. That was clearly not his field of expertise. As stated before,

the witness was a mere senior officer in the Human Resources section of the respondent.

ASSESSMENT OF EVIDENCE

[42] It is my well-considered view that the best way to consider or assess the evidence tendered in this Court by the two witnesses is to relate it to the issues identified by the parties during case management or pre-trial conference. I also further note that the issues that really emerge from the evidence are basically three, viz, whether or not the applicant's contract of employment was lawfully renewed if regard is had to the Council decision of August 2012 taken in Maputo, secondly, if the contract was lawfully renewed to how much is the applicant entitled for the remainder of his disrupted four year contract and finally, whether or not the applicant rendered himself redundant by refusing or declining to take up employment at the respondent's headquarters in preference for compensation for the remaining part of his contract.

I propose to deal with the issues in seriatim.

WAS THE APPLICANT'S EMPLOYMENT CONTRACT LAWFULLY RENEWED FOR A FURTHER PERIOD OF FOUR YEARS?

[43] It is not in dispute that the applicant's employment with the respondent was regulated by the SADC Administration Rules and Procedures Handbook (the Handbook). In terms of the handbook (Rule 15.3.4.) the applicant was entitled to apply for the renewal of his initial contract within the time frame specified in that Rule. Both the applicant and the respondent were in agreement that the applicant followed the correct procedure in seeking the renewal of his contract which was due to end on 30th November 2012.

[44] By his letter dated 2nd April 2012, the applicant sought the renewal of his contract. By this time there was no council resolution in place. After being assured on several occasions by the Secretariat that his application was being considered, on

21 January 2013, well into his second contract the applicant got the formal renewal of his contract. The letter read in part as follows:-

"... I am pleased to inform you that in line with the Council Decision of August 2012 Management has accepted your request and approved renewal of your contract as Registrar of SADC Tribunal for another period of four (4) years effective from 1st December 2012 to 30th November 2016."

[45] This letter of renewal alluded to the fact that Management had considered and accepted the applicant's application for renewal and it was duly signed by the then Executive Secretary of the respondent, Tomaz Augusto Salomao. See Exhibit MCM3 of the bundle.

[46] Counsel for the respondent argued that this renewal was inconsistent with the Council Decision of August 2012. To my mind the fallacy of this argument is laid bare by the Decision which in my view has been completely misunderstood. The Decision was worded as follows:-

"Council approved the recommendation by the Ministers of Justice/Attorneys – General for the extension of the staff members of the Tribunal pending the completion of the review of the role of the SADC Tribunal." (See p 85 of the bundle)

[47] Respondent's counsel sought to create some legal mileage by arguing that the contract could only have been extended and not renewed. To me that is clearly a distinction without a difference. I get the impression that if the word "extension" had been used instead of the word "renewal" in the applicant's contract, counsel for the respondent would never have taken issue with it.

[48] What respondent's counsel missed is that what the applicant applied for was for the renewal of his contract. This is what his contract of employment spoke to in terms of the handbook. The specific Rule in the handbook makes specific reference

to renewal and not extension. But even then I am more inclined to accept the argument as put forward by the applicant and reinforced by his counsel that within the context of the issue at stake, the term renewal and extension are synonymous. As noted by applicant's counsel, the Merriam Webster's Dictionary of Law defines the word renew as, *inter alia*, "to grant or obtain again as an extension."

[49] Macmillian's English Dictionary for Advanced Learners defines renew *inter alia* as "to arrange for something to continue for a longer period of time."

[50] The same dictionary defines the word extend, among others, as "to continue in space and time, or to continue for a particular period of time."

[51] It is clear from these definitions that the words extension and renewal are capable of being synonymously or interchangeably used.

[52] What is of significance in this case is that there was no fixed time for the review of the Tribunal. As confirmed by Mr Tonde and the applicant, the review period could have been for a week, a whole month or several months. I did not understand respondent's counsel to be arguing that the Secretariat was expected to renew or extend the applicant's employment for an unspecified period of time. The Secretariat, after consultations (as its letter suggests) felt it prudent to renew the contract for the next four years. If the respondent wanted to adequately protect its back in 2012, it could have specified the period of extension of the staff contracts. Council's decision lacked precision hence the Secretariat sought guidance from the handbook. In my view their interpretation cannot be faulted if regard is had to the wording of the much talked about Council decision of 2012.

[53] When it comes to interpreting any instruments there is no magic about it. In ***Coopers and Lybrand & Others v Bryant*** 1995(3) SA 761 (A) at 767D-F the court held among others as follows:

"... According to the golden rule of interpretation, the language in the document is to be given its grammatical and ordinary meaning, unless this would result in

some absurdity, or some repugnancy or inconsistency with the next of the instrument."

[54] In the case of ***Grey vs Pearson (1857) 10 ER 1216 at 1234***, Lord Wensleydale observed that words must be taken in their context and given their grammatical and ordinary sense,

"unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further."

[55] I did not find any absurdity in the interpretation given to the Council decision of 2012 by the then Executive Secretary, Dr Tomaz Augusto Salomao and his team.

[56] I found it extremely strange that Mr Tonde, despite his obvious limitations could have attempted to interpret the Council decision in question given that the handbook itself gives that prerogative to the Executive Secretary in terms of Rule 3 which is specifically couched as follows:

"Final Authority for the interpretation of these Rules and Procedures shall rest with the Executive Secretary."

[57] See also the decision of ***Clement Kanyama v SADC Secretariat case No. SADC (T) 05/2009***, which case was referred to me by the applicant's counsel. This case emphasised the important role of the Executive Secretary plays in the interpretation or implementation of SADC decisions.

[58] There was no evidence placed on record to demonstrate that the then Executive Secretary of the respondent had faced any challenges in the interpretation of the Council decision in question. Mr Tonde was clearly not qualified to infer an error in interpretation on the part of the Executive Secretary. That issue ought not to have arisen at all more so given that this witness was not even part of the

Management team at SADC. His enthusiasm to venture into and take definitive positions on issues which did not fall under his purview heavily compromised his credibility.

[59] I take the view that once the contract of the applicant was confirmed by the then Executive Secretary a binding contract was cemented between the applicant and the respondent.

[60] The subsequent letter from the current Executive Secretary of 3 April 2014, was an attempt to resile from a binding contractual agreement between the applicant and the respondent. Accepted, in terms of Article 11(2)(1) of the SADC Treaty, Council of Ministers has a mandate to determine the terms and conditions of service of the staff of the respondent. However, there is no room for such changes to be unilaterally done or to be done in complete violation of the Rules of engagement as what was clearly done in this matter.

[61] If such changes are to be made the respondent is bound to comply with its own rules which enjoins it to notify the employees of any proposed changes in writing. For the avoidance of doubt Rule 4 of the handbook was specifically created to deal with such changes. The Rule reads as follows;

"4. APPLICATION

The Rules of Procedure in this Handbook shall apply to all SADC institutions established under the Treaty.

The Council reserves the right to vary these Rules and Procedures at its own discretion, provided that employees shall be informed in writing of any changes to these Rules and Procedures so long as these changes are not a disadvantage to the employee" (emphasis added).

[62] Any attempt to change one's contract of employment during its tenure is clearly calculated to prejudice or disadvantage that employee and must be read to be

in violation of the Enabling Act. It is in this spirit that Dr Tax's letter of April 3, 2014 must be looked at.

[63] The same observation is made with regards to the two letters (exhibits MCM 10 and MCM 11) by Emillie A Muchobekwa. These letters came late when the contract between the applicant and the respondent had already been sealed by the letter of Dr Tomaz Augusto Salomao. Breaching the applicant's contract carried with it inevitable consequences.

[64] During summations, Mr Tafa for the respondent referred me to the decision of **Ovcharenko et al v Secretary-General of the United Nations, 2015 – UNAT-530**. A perusal of that decision did not project its relevance in this case which in my view is centred purely on interpretation of the Council decision of 2012.

[65] It is not without significance that both Dr Tax and Dr Salomao did not see it fit to testify in these proceedings. These are the officers who are given the prerogative to interpret and implement Council decisions and to seek guidance from Council if they encounter any difficulties. It was inappropriate, in my view to leave the respondent's case resting on the limping evidence of Mr Tonde. The failure by either of the two officers to give evidence created a yawning gap in the respondent's case.

[66] Consequently, I have not the slightest hesitation to conclude that the applicant's contract was unlawfully terminated.

DID THE APPLICANT RENDER HIMSELF REDUNDANT BY REFUSING TO TAKE ALTERNATIVE EMPLOYMENT WITH THE RESPONDENT?

[67] The uncontroverted evidence by both the applicant and Mr Tonde was that the respondent set up a high powered committee to deal with mediation between the applicant and his fellow staff members of the SADC Tribunal.

[68] It was clear that the respondent through its Council had capped the severance package for the employees at US\$1 381 00.00.

[69] The terms of reference for the mediation process were quite specific and the deliberation took place in a very conducive environment with the aid of a reputed facilitator. During these deliberations, the applicant was offered employment at the respondent's head office in, Gaborone. Upon presenting his profile, it turned out that there was no suitable vacancy for him. The applicant then opted for compensation for the remainder of his contract. Computations of his entitlement in compensation were made (see exhibit MCMS on p.56 of bundle). Somewhere along the way the mediation resolutions were not implemented in favour of the applicant. But ironically all other local employees were compensated for the remaining part of their contracts.

[70] There can be no doubt that the mediation exercise was meant to be binding on those that participated in it. The applicant waited in vain to be compensated in terms of that process but as already alluded to, there was no implementation of the resolution.

[71] In these circumstances it cannot be seriously contended that the applicant rendered himself redundant. Compensation was put on the table for him to consider and he opted for it. It cannot be the applicant's fault that the respondent failed to pay the agreed compensation. There can be no question of the applicant's alleged redundancy in this situation.

HOW MUCH IS THE APPLICANT ENTITLED TO?

[72] When the applicant gave evidence he was honest enough to advise the court that after his unceremonious departure from the respondent, he secured employment with the Malawi Judiciary as head of the Civil Division.

[73] The applicant conceded that by securing alternative employment he was in the process able to mitigate the loss that he had suffered due to his disrupted contract of employment.

[74] At the time we concluded this trial it was greed that the applicant would furnish the court with his cumulative earnings for the relevant period from his home country. Sadly, this information was not made available right up to the time of writing

this judgment. Despite this, the relief granted shall be framed in such a way that applicant does not double dip as a result of his employment in Malawi.

[75] In the final analysis the applicant partly succeeds in his claim. I make the following order:

IT IS ORDERED

1. The respondent is ordered to pay to the applicant the sum of US\$380 184.71 less the applicant's cumulative earning in Malawi from the time of the termination of his contract by the respondent up to 30th November 2016.
2. Interest on the amount of claim at the rate of 10% from 30th November 2016 until the whole amount is paid in full.
3. Costs of suit.

Delivered on the 7th of October 2020.



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HONOURABLE JUSTICE FRANCIS BERE

SADC ADMINISTRATIVE TRIBUNAL

