THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: J 2406/16

In the matter between:

MICHAEL KAWALYA-KAGWA

Applicant

and

Respondent

DEVELOPMENT BANK OF SOUTHERN AFRICA

Heard: 27 October 2016

Judgment: 31 October 2016

JUDGMENT

VAN NIEKERK J

[1] This is an urgent application in which the applicant seeks interim relief pending the outcome of an unfair labour practice dispute referred to the CCMA. More specifically, the applicant seeks an order that the respondent pay his salary from 1 July 2016 to date, alternatively, from 26 August 2016 to date pending the outcome of the dispute.

[2] The applicant referred a dispute to the CCMA on 27 September 2016 in which he claims that the respondent committed an unfair labour practice by unfairly suspending him from his employment. At the hearing of the application, I was advised that conciliation had failed, and that the matter would be referred to arbitration.

[3] The applicant commenced working at the respondent (the bank) in 2009. He was contracted through an entity incorporated in the Netherlands, African Management Services Company (AMSCO) and was seconded to the respondent in terms of an agreement between the respondent and AMSCO. The applicant rendered services to the respondent's premises in South Africa and did so in terms of a work permit secured by AMSCO. During 2015, the respondent decided to terminate the agreement with AMSCO and contract directly with the applicant. The memorandum of understanding between AMSCO and the bank terminated on 31 December 2015, on the basis that the applicant (and other employees in the same circumstances) would sign contracts of employment but that AMSCO would be requested to extend the memorandum of understanding for a further six months specifically to permit the applicant the opportunity to '*get the necessary paperwork required from the Dept of labour*'.

[4] On November 2015, the applicant and the respondent signed an agreement in terms of which the applicant would be employed by the respondent for a fixed term contract, from 1 January 2016 until 30 September 2018. Clause 1 of the agreement reads as follows:

> "The Bank hereby appoints the Fixed Term Contractor as General Manager:

> Coverage in the International Financing Division reporting to the Group Executive: International Financing of the Bank or any other person allocated to supervise her\him from time to time. **Please note that this offer is subject to obtaining a valid work permit. Should a valid work permit not be obtained this offer will be withdrawn with immediate effect**. (Own emphasis)".

[5] During the course of 2016, the applicant continued to perform work at the bank and was remunerated for that work. In May 2016, the applicant was reminded that the terms of employment contract signed during November 2015 were subject to the applicant obtaining a valid work permit. The applicant was also reminded that his existing permit expired at the end of June 2016 and that it was therefore critical that he secure the permit. The applicant does not dispute this requirement, or the urgency with which he was required to act.

[6] On 8 July 2016, the applicant addressed a letter to his manager stating, amongst other things, that the 'process of regularisation has been undertaken' and that in the interim, he was prepared to continue working at no cost to the bank until the department of home affairs processing his documentation, or the issuing of the work permit. The applicant's manager, Mr Shaik, indicated on the same date by signature and endorsement of the letter that this proposal was acceptable. On 19 July 2016, the bank wrote to the applicant in which it recorded that the offer of employment accepted by him on 23 November 2015 was conditional on the applicant obtaining a work permit. The letter further recorded that the applicant's secondment from AMSCO had expired on 30 June 2016 and that a work permit had not yet been secured. The bank advised that it was willing to allow the applicant until close business on 31 August 2016 to secure valid work permit, failing which the offer of employment will lapse with immediate effect.

[7] What is significant for present purposes is that the terms of this letter were never disputed. I accept therefore that the applicant was aware that his engagement at the bank, at least until 30 June 2016 was on the basis of a secondment from AMSCO and that he was aware that he his employment directly with the bank, on

the terms of the contract concluded on 23 November 2015, were subject to the suspensive condition that he secure a valid work permit.

[8] On 30 August 2016, the applicant's attorneys wrote to the bank attaching a copy of a work permit. Initially, the bank was of the view that the work permit was an order and went so far as addressing a letter to the applicant welcoming him back to work. That letter was addressed to the applicant on 31 August 2016, and states the following:

> "I would like to acknowledge receipt of a scanned copy of your valid work permit received on 30 August 2016 through a Shamima Gaibie of Cheadle Thompson & Haysom attorneys. Kindly provide us with an original copy upon arrival at work.
> I can also confirm that we have verified through our Kroll/MEI checks the qualifications that you have submitted to the DBSA.
> Your fixed term contract of employment will come to an end on 30 September 2018 as per your signed employment contract.
> Your role and responsibility will still remain the same as well as the terms and conditions of employment…
> Thank you for sending the documents through and I welcome you back to the DBSA".

[9] The bank's case is that subsequent to the above letter, it contacted an expert in immigration law and practice who advised that the work permit submitted by the applicant is fraudulent. An affidavit has been filed by the person concerned, but it is not necessary for me to canvass the merits of his opinion. For present purposes, all that need be recorded is that the bank was concerned that the work permit had been issued in Angola in circumstances where the applicant is a British citizen who had been working and living in South Africa for the last eight years, without any obvious connection to Angola. On 6 September 2010, the bank's attorneys wrote to the applicant advising him that the bank was investigating the validity of the work permit and until the investigation was completed, the applicant ought not to report for duty. What followed was a flurry

of correspondence between the applicant's attorney on the one hand and the bank's attorney and the other regarding documentation sought by the bank in pursuance of its investigation. Of significance for present purposes is a letter from the bank's attorney stated 8 September 2016 in which the following is said:

> "…2. Our client has concerns about the validity of your client's work permit and it is obliged to investigate this.
>
> 3. Our client has made enquiries with the Department of Home Affairs, but this does not give your client the right to refuse to provide information that is material to the issue to our client.
>
> 4. Our client now formally instructs him to provide the information requested in a letter dated 6 September 2016 to it within 48 hours of receipt of this letter".

[10] On 29 September 2016 the bank's attorneys read to the applicant's attorney saying the following:

> "3. Our client will not physically take your client into employment until such time as the issue about the validity of his work permit has been resolved. Further, he has refused to comply with a reasonable instruction to provide our client with information and it will take appropriate disciplinary steps against him. Our client will communicate directly with your client in this regard".

[11] The dispute between the parties can be crystallised in the following terms - the applicant contends that the suspensive of condition contained in his contract signed in November 2015 was fulfilled when he produced the work permit on 26 August 2016, and that he is therefore entitled to be paid at least for the period following the issuing of the work permit, i.e. 26 August 2016 to date. I did not understand Ms Gaibie, who appeared for the applicant, to pursue seriously the relief sought in paragraph 2.1.1 of the notice of motion, i.e. the claim for the applicant's salary for the period 1 July 2016 to date. The correspondence between the applicant and his manager discloses the applicant's acceptance that any contract of employment between him and the bank was in effect suspended after 30 June 2015, (i.e. the date on which the contract between AMSCO and the

bank terminated) until the date on which the work permit was issued. The bank denies that the applicant has been suspended because it denies that the condition relating to the securing of a work permit has ever been fulfilled and thus that the applicant is its employee.

[12] As I have indicated, on his own version, the applicant accepts that his contract of employment was suspended for the period 1 July 2016 to 26 August 2016, on the basis that he was not required to render services and that he was not entitled to remuneration. As the correspondence indicates, this was a proposal made by the applicant himself, and accepted by the bank. Insofar as the contract of employment signed in November 2015 is concerned, the terms of the contract and the subsequent correspondence between the parties clearly establishes that the contract was subject to a suspensive condition, i.e. that a valid work permit be secured by the applicant. It is also clear from the terms of the correspondence between the parties that the date by which the applicant was obliged to secure the permit was 31 August 2016.

[13] The question therefore is whether on production of the work permit, the suspensive condition was fulfilled and the applicant became an employee of the bank. In my view, he did. The bank's letter addressed to the applicant says as much, and confirms the applicant's employment until 30 September 2018. The fact that the bank later formed suspicions about the validity of the work permit cannot in itself serve to establish that the suspensive condition was never fulfilled. In this regard, the applicant's case, as at the date of the hearing of the present application, was that it had secured the services of an expert whose opinion was that the work permit was not validly obtained. There is no unequivocal communication to the applicant or his attorney (other than through the medium of the answering affidavits) that the bank in fact regards the permit is invalid or in validly obtained – it would appear that the bank's investigation, frustrated as it may have been by the applicant's refusal to provide documentation sought, has not yet been completed nor has any unequivocal

decision been made and communicated to the applicant. The conclusion that the applicant became and remains an employee of the bank is sustained by the correspondence addressed by the banks attorney to the applicant's attorney. In particular, the letter dated 29 September 2016 in which disciplinary action is threatened against the applicant is significant. The bank cannot have it both ways – it cannot contend that the applicant is not an employee and at the same time, that he is subject to its disciplinary code and procedures and required to comply with its lawful instructions. I am satisfied that the bank regarded the applicant as an employee after he submitted the work permit and that for present purposes at least, he is and remains an employee. This is not to say that to the extent that it may be established by further investigation or otherwise that the permit is indeed fraudulent, the bank may not validly contend that the suspensive condition was never fulfilled. Indeed, the terms of that condition, as reflected above, make specific reference to a 'valid work permit'. But for the present, I must accept, as did the bank, on face value, that the permit is valid. I must necessarily emphasise that the conclusion that I have reached is relevant for the purposes of the present application only, on the basis of the papers before me, and is not intended to bind any other court or tribunal that may in future be seized with the same issue.

[14] However, it does not necessarily follow that the applicant is entitled to the relief that he seeks. The applicant does not rely on any contractual remedy – he does not seek specific performance, or any other contractual remedy. The present application is an application for interim relief (in the form of payment of remuneration) pending the outcome of an unfair labour practice dispute referred to the CCMA. The requirements for an interim relief are well-established. An applicant must show a clear right or a right *prima facie* established though open to some doubt, the well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted, the balance of convenience favours the granting of interim relief and the absence of any other satisfactory remedy.

[15] It follows from what I have said above that the applicant has satisfied the first requirement for interim relief. He is entitled to be treated in terms of the bank's disciplinary code and procedure which does not make provision for suspension without pay. However, in so far as a well-grounded apprehension of irreparable harm is concerned, this court has consistently held that as a general rule, a mere loss of income and benefits does not justify the granting of interim relief (see for example, *DENOSA v Director-general, Dept of Health* (2009) 30 *ILJ* 1845 (LC)). This is not an immutable rule, but it is incumbent on an applicant seeking remuneration by way of urgent interim relief to establish that special circumstances exist that serve to justify that relief. The applicant avers that his continued suspension will infringe his right to dignity. That is no doubt correct, but it is a consequence that affects any employee who is suspended. In so far as he avers that his financial well-being is prejudiced, the applicant has adduced no evidence (the bald assertion that the bank's conduct has caused him clear and irreparable harm aside), that he is unable to meet his financial commitments or that he has no access to any means necessary to sustain him and his family, that he is in danger of losing his accommodation, that he has no access to health care, that he is unable to service debts, and the like. Put another way, there is nothing in the papers before me to establish the nature and extent of any harm on which he relies or that any harm to him is irreparable. In his replying affidavit, the applicant records that a certificate of outcome was issued by the CCMA on 21 October 2016. The applicant has the right to refer his dispute to arbitration, if he has not done so already. If he succeeds, the CCMA is empowered to award him the salary that he contends he is owed, interest and compensation. That raises the next hurdle which in my view the applicant has failed to clear. On the papers before me, the referral of the dispute to the CCMA is in and of itself an adequate alternative remedy. For these reasons, the application stands to be dismissed.

[16] Finally, in relation to costs, in my view, the requirements of the law and fairness referred to in s 162 are best served by each party bearing its own costs.

I make the following order:

1. The application is dismissed.

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ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES:

For the Applicant: Ms S Gaibie, Cheadle Thompson & Haysom Inc.

For the Respondent: Adv. G Fourie, instructed by Norton Rose Fulbright