



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS 528/2022

In the matter between:

KGALABI PITYA

Applicant

and

UNITED STATES OF AMERICA

Respondent

Heard: 21 April 2023

Delivered: 23 May 2023

(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 23 May 2023.)

JUDGMENT

VAN NIEKERK, J

[1] The applicant has referred a dispute to this court in terms of Rule 6, in which he claims compensation arising from the termination of his employment on 15 January 2021.

- [2] The respondent has raised a point in *limine*, contending that it enjoys immunity in terms of the Foreign States Immunities Act, 87 of 1981 ('the Act'), and under customary international law.
- [3] The applicant has also filed an application to review and set aside an arbitration award issued by the CCMA on 11 October 2021 under case number GAJB 1987-21. In the award under review, the commissioner ruled that the CCMA had no jurisdiction to arbitrate an unfair dismissal dispute referred to arbitration by the applicant, on the basis that the applicant's employment was directly related to the sovereign powers of a foreign state, and that the respondent enjoyed immunity under the Act. On 16 March 2023, Voyi AJ dismissed the review application, finding that the commissioner's reasoning when he held that section 5 (2)(b) of the Act ousted the CCMA's jurisdiction was unassailable.
- [4] The basis of the present claim is far from clear, but the applicant appears to invoke section 77(3) of the Basic Conditions of Employment Act to contend that the respondent failed to uphold his terms and conditions of employment and thus violated his right to dignity.
- [5] It is not disputed that the consulate at which the applicant was employed is part of the US diplomatic mission to South Africa, and a component of the US Department of State. The consulate is responsible for assisting US citizens with documentation related to their status, and also for the issuing of visas to non-US citizens. The Act regulates the immunity that is afforded to foreign states, defined in section 1 (2)(b) and (c) to include a 'government of a foreign state' and 'any department of that government'.
- [6] Section 2 of the Act reads as follows:

General Immunity from Jurisdiction

- (1) A foreign state shall be immune from the jurisdiction of the courts of the Republic except as provided in this Act or any proclamation issued thereunder.

- (2) A court shall give effect to the immunity conferred by this section even though the foreign state does not appear in the proceedings under question.

[7] One of the exceptions to the immunity established by section 2 is established by section 5. That section provides:

Contracts of employment

- (1) A foreign state shall not be immune from the jurisdiction of the courts of the Republic in proceedings relating to a contract of employment between the foreign state and an individual if—

- (a) the contract was entered into in the Republic or the work is to be performed wholly or partly in the Republic; and
- (b) at the time when the contract was entered into the individual was a South African citizen or was ordinarily resident in the Republic; and
- (c) at the time when the proceedings are brought the individual is not a citizen of the foreign state.

- (2) Subsection (1) shall not apply if—

- (a) the parties to the contract have agreed in writing that the dispute or any dispute relating to the contract shall be justiciable by the courts of a foreign state; or
- (b) the proceedings relate to the employment of the head of a diplomatic mission or any member of the diplomatic, administrative, technical or service staff of the mission or to the employment of the head of a consular post or any member of the consular, labour, trade, administrative, technical or service staff of the post.

[8] It is not disputed that the applicant was employed as a visa assistant at the consulate, and that his duties included accepting, reviewing, and processing non-

immigrant and immigrant visa applications, providing information to applicants, government officials and members of the US mission, data entry, visa printing, and the like. In this capacity, the applicant applied an extensive knowledge of US immigration laws and regulations when processing complex cases and responding to inquiries, and also initiating investigations in cases of suspected fraud. In his capacity as a visa assistant at the consulate, the applicant was a member of the 'consular, labour, trade, administrative, technical or service staff of post' for the purposes of section 5(2)(b). The exception established by section 5(1) is therefore not applicable, and immunity is retained under section 2. It follows that this court has no jurisdiction to entertain the referral made by the applicant on account of that immunity.

- [9] This court has reached similar conclusions in *Wilma Jonker v Embassy of the United States of America* [1999] 1 BLLR 31 (LC) and the judgment by Voyi AJ to which I have referred, *Kgalabi Pitja v Commission for Conciliation, Mediation and Arbitration and others* (JR 186/21). None of the authorities referred to by the applicant cast doubt on these decisions. In short, the respondent's point in *limine* stands to be upheld and the referral dismissed. In these circumstances, it is not necessary for me to consider the respondent's submissions based on customary international law.
- [10] Finally, in regard to costs, this court has a broad discretion in terms of section 162 to make orders for costs according to the requirements of the law and fairness. The court is ordinarily reluctant to make orders for costs against employees who misguidedly but in good faith pursue legitimately filed grievances against their employers. With some hesitation, I find that this case falls into that category and that the requirements established by section 162 are best met by an order that each party bears its own costs.

I make the following order:

1. The respondent's point in *limine* is upheld.
2. The applicant's referral is dismissed.

André van Niekerk
Judge of the Labour Court of South Africa

Appearances

For the applicant: Self

For the respondent: Mr. D Visagie, Webber Wentzel