IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MTHATHA)

Case No.: 862/2024

Reportable	**Yes / No**

In the matter between:

SAMUEL NYAKUDYA Applicant

and

O.R TAMBO DISTRICT MUNICIPALITY Respondent

JUDGMENT

Cengani-Mbakaza AJ

Introduction

[1] On 12 March 2012, the applicant, a Zimbabwean national was granted a temporary residence permit allowing him to reside in the Republic of South Africa (RSA) and seek employment in the category of general work as provided for under the Immigration Act (the Immigration Act).[1]The permit's expiry date was 30 April 2014. After the expiration of the said permit the applicant was

[1] Section 10 of the immigration Act 13 of 2002 read with the provisions of regulation 18 (4) of the Immigration Regulations of 2014.

granted a second general work permit commencing on 14 May 2014 and expiring on 31 March 2015.

[2] The applicant was employed as a research assistant from 2009, with his contract being:

(a) Initially a 3-year term (2009-2012).

(b) The initial contract was replaced by a 5-year contract (2011-2014).

(c) The contract was rolled over for 1year-periods (2014-2015, 2015-2016, 2016-2017).

(d) There was another extension of a 5-year term from 2017-2022.

(e) After the last term expired in March 2022, he continued working with the respondent's approval.

[3] In November 2023, the respondent terminated applicant's employment contract due to allegations of its unlawfulness and irregularity.

The relief sought

[4] The applicant is now seeking an order declaring the respondent's decision to terminate his contract of employment wrongful, unlawful, and constitutionally invalid. In addition, the applicant is seeking reinstatement of his position of employment which he had obtained before the termination of the contract. Furthermore, the applicant seeks a cost order against the respondent. The respondent opposes the application.

[5] The applicant contests the sudden termination of his contract of employment without notice or proper procedures being followed. His argument hinges on the concept of legitimate expectation and the alleged failure to follow due processes in terminating the employment relationship.

[6] The respondent acknowledges that despite the written contract expiring on 31 March 2022, it permitted the applicant to continue working. The respondent asserts, however, that the contract was terminated due to its irregular and unlawful nature, specifically because the applicant's work permit had expired at the time of employment. These reasons are cited in a letter dated 30 November 2023 (termination letter) addressed to the applicant. Furthermore, at paragraph 14 of it answering affidavit, the respondent acknowledges that the applicant's contract was extended due to an oversight of its personnel. Therefore, so the averment goes, the termination of contract was necessary to rectify the position.

Issues

[7] The issues up for debate and the determination by the court are whether the termination of the applicant's contract was unlawful and whether he is entitled to be re-instated in his initial position.

Discussion

[8] Our law prohibits the employment of a foreigner without a valid work visa. Section 38 of the Immigration Act, the provision that I was referred to by Mr Ngumle on behalf of the respondent provides that:

> '(1) No person shall employ–
>
> (a) an illegal foreigner;
>
> (b) a foreigner whose status does not authorise him or her to be employed by such person; or
>
> (c) a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status.
>
> (2) An employer shall make a good effort to ascertain that no illegal foreigner is employed by him or her to ascertain the status or citizenship of those whom he or she employs.

(3) If it is proven, other than by other means of the presumption referred to in subsection (5), that a person was employed in violation of subsection (1), it shall be presumed that the employer knew at the time of employment that such person was among those referred to in subsection (1), unless such employer proves that he or she–

(a) employed such person in good faith; and

(b) complied with subsection (2), provided that a stricter compliance shall be required of any employer who employs more than five employees or has been found guilty of a prior offence under this Act related to this section.'

[9] The employment of an illegal foreigner in violation of the Immigration Act constitutes a criminal offence and therefore punishable. Section 49 (3) of the Immigration Act provides:

> 'Anyone who knowingly employs an illegal foreigner or a foreigner in violation of this Act, shall be guilty of an offence and liable on conviction two a fine or to imprisonment not exceeding one year, provided that such person's second conviction of such an offence shall be punishable by imprisonment not exceeding to years or a fine, and the third or subsequent conviction of such offences by imprisonment not exceeding three years without the option of a fine.'

[10] Mr Ngumle raised a sound and supported argument that if a person's employment is prohibited by law, it is not possible for such a person to perform his duties lawfully.[2] Despite this compelling argument, counsel overlooked the legal principle which entails that an employer may terminate an employee's contract due to legal incapacity, provided that the dismissal is fair and in accordance with the labour laws and the Constitution[3]. Section 185(a) of the Labour Relations Act[4] (LRA) provides that every employee has a right not to be unfairly dismissed. The laws governing fair labour practice apply to all individuals regardless of their legal status. Mr Ntayiya on behalf of the applicant,

[2] Defining Fairness in Dismissals unauthorized Foreign Nationals by K Newal (PER/PELJ 220 (23).

[3] Section 23 of the Constitution, Act 108 of 1996.

[4] 66 of 1995.

referred to *Discovery Health Limited v CCMA*[5](Discovery Health Limited), a case which confirmed this position.

[11] Although the court in *Discovery Health Limited*[6] was dealing with a review application, its points of discussion find relevance in the mater before me. In *Discovery Health Limited*, the court held:

> '30 There is a sound policy for adopting a construction of s 38 (1) that does not limit the right to fair labour practices. If s38(1) were to render a contract of employment concluded with a foreign national who does not possess a work permit void, it is not difficult to imagine the inequitable consequences that might flow from a provision to that effect. An unscrupulous employer, prepared to risk criminal sanction under s 38, might employ a foreign national and at the end of the payment period, simply refuse to pay the remuneration due, on the basis of the invalidity of the contract. In these circumstances, the employee would be deprived of a remedy in contract…….and she would be without a remedy in terms of the labour legislation.'

[12] In the present matter, the fairness of the termination of the applicant's contract can be evaluated by assessing the tone and the content of the termination letter which reads:

> 'Dear Mr Nyakudya
>
> **RE: TERMINATION OF EMPLOYMENT: YOURSELF**
>
> The above matter bears reference
>
> We are writing to address a matter that has recently come to our attention regarding your contract of employment. Upon perusal of your personal file we noted with concern that your five (5) year contract of employment expired on the 31 March 2022 as per the approval letter dated 08 March 2017.
>
> Furthermore, this contract was extended based on your work permit which ended on 07 June 2018.You are also reminded that we requested your South African Identity

[5] [2008] BLLR 635 (LC).

[6] Ibid.

Document which was requested by Auditor General but till to date you have not submitted the same.

Given the circumstances, the municipality is left with no option but to terminate your services, effective immediately. Therefore, the contract of employment with the municipality is unlawful and remain irregular due to the reasons mentioned herein above.

Please make arrangements to return any municipality property or any other items that remain in your possession at your convenience. Your final settlement ,including any accrued leave and other entitlements ,will be processed in accordance with our internal policies and applicable legislation.

If you have any questions or require further clarification, please do not hesitate to contact Human Resource Management section.

We appreciate your understanding in this matter and wish you the best in your future endeavours….'

[13] Upon examination, it is clear that the applicant's employment was terminated despite his skills being valued by the respondent. The primary obstacle was the applicant's work permit and his identity document. As already alluded, being an illegal foreigner alone does not automatically grant an employer the right to summarily terminate an employment contract. The proper procedures and legal grounds for termination must still be followed. Furthermore, terminating the employment contract does not rectify the oversight stemming from the improper extension. The Immigration Act imposes a duty on employers to ascertain the citizenship status of their employees.

[14] In *casu*, the respondent's actions contradict the legal precedent which requires adherence to proper labour law procedures when terminating a contract of employment specifically against a foreign national. The termination letter itself confirms the applicant's assertion that no proper notice was given before the termination of his contract was effected. This raises serious concerns about the fairness of the termination of the applicant's contract. Chapter five of the Basic

condition of employment Act[7](the BCEA) outlines a proper procedure regarding the notice of termination of contract of employment. The relevant provisions provide:

> **'NOTICE OF TERMINATION OF EMPLOYMENT**
>
> 37. (1) Subject to section 38, a contract of employment terminable at the instance of a party to the contract may be terminated only on notice of not less than-
>
> (a) one week if the employee has been employed for one year or more; or;
>
> (b) two weeks, if the employee has been employed for more than four weeks but not more than one year;
>
> (c) four weeks, if the employee-
>
> (i) has been employed for one year or more; or
>
> (ii) …'

[15] Pursuant to the provisions of section 37 (4) (a) of the BCEA, notice of a termination of contract of employment must be given in writing, except when an illiterate employee gives it. The primary purpose of giving a prior notice to the employee is to prepare for the smooth transitional process. In the matter under consideration, it is common cause that the respondent contravened the BCEA failing to provide prior notice before the terminating the applicant's contract. Consequently, the failure to notify the applicant of his contract termination constitutes an unfair labour practice, contravening the BCEA principles of fairness and international standards. Based on the evidence presented, I find that the termination of the applicant's contract of employment was unlawful.

[16] The next question is whether the applicant is entitled to reinstatement as prayed for. The legal position is that re-instatement must be shown to be fair, when considering the competing interests of employee and employers. Section

[7] Act 75 of 1997.

193 (2) of the LRA provides for the exceptions for the remedy of reinstatement or re-employment. These exceptions are:

'(a) the employee does not wish to be re-instated or re-employed;
(b) if the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
(c) it is not reasonably practicable for the employer to re-instate or re-employ the employee; or
(d) the dismissal is unfair only because the employer did not follow a fair procedure.'

[17] The legal position as codified in section 193 (2) of the LRA was reinforced in *DHL Supply chain (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Others*[8], where the Labour Appeal Court (LAC) held that "*Labour Relations Act 66 of 1995 prescribes reinstatement unless it is proven to be intolerable or impracticable…the evaluation of this question is clinically objective, having regard to the balance of fairness between employer and employees and a decision is the outcome of the exercise of discretion… A decision in terms of this section is therefore, in part, a value judgment and part, a factual finding made upon the evidence adduced about the unworkability of the resumption*".

[18] At paragraph 28.4 of its answering affidavit the respondent asserts that the position held by the applicant no longer exists in the organisational structure. The applicant failed to counter this claim in his replying affidavit. The legal position is that a court can only grant an order that is practical, enforceable, and clear. Given the circumstances of this case, re-instatement is deemed impractical, making it impossible for the court to grant such a relief. When reinstatement is not feasible, the LRA allows for compensation which must be just and equitable. These are motion proceedings, and no such alternative relief was sought in the papers filed.

[8] [2014] 9 BLLR 860 (LAC).

Order

[19] In the result, the following order is issued:

1. The termination of the applicant's contract of employment is declared unlawful and is hereby set aside.

2. The respondent shall pay costs of this application on Scale A as contemplated under Rule 67A read with Rule 69 of the Uniform Rules of Court.

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant	:	Mr. F. Ntayiya
Instructed by	:	FIKILE NTAYIYA & ASSOCIATES MTHATHA
Counsel for the Respondent	:	Adv. L.L. Ngumle
Instructed by	:	STATE ATTORNEY MTHATHA
Date Heard	:	06 February 2025
Date Delivered	:	27 May 2025