



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JS 560/23

In the matter between:

NTHABELENG ANNA KOLOBI

Applicant

and

SIBANYE GOLD EASTERN OPERATIONS (LTD)

Respondent

Heard: 05-06 May 2025

Heads of Argument: 08 May 2025

Delivered: 27 May 2025

JUDGMENT

MABASO, AJ

Introduction

[1] The Applicant has instituted a claim of unfair discrimination against the Respondent, asserting that the discrimination is based on an arbitrary ground in accordance with section 6(1) of the Employment Equity Act (EEA).¹ It is uncontested that the principal issue at hand pertains to the Applicant's nationality and has been categorized by the parties involved as "a foreign national." The Respondent opposes this application, arguing that the employment of the Applicant would contravene the immigration laws of the Republic of South Africa.

Relevant evidence and analysis

[2] In the referral, the Applicant stated that she responded to an advertisement from the Respondent inviting applications for the Mineral Resource Technician C3 position. She was shortlisted and attended an interview for the advertised role, during which she performed commendably. In November 2022, she received a communication from a Human Resources department's representative, whose name she could not recall, informing her that the hiring manager had recommended her for an alternative position at a lower level, specifically that of Mineral Resources Technician, Grade B5. She accepted this offered position and was subsequently directed to undergo a screening process for background checks. However, the results were not released. Later, regarding this, she was informed by the Respondent contractor that it does not conduct screenings for foreign nationals; thus, no further engagement on this matter would be pursued. Therefore, she contends that this action constitutes discrimination against her on unclear or arbitrary grounds.²

[3] The Respondent's statement of response provides the following points in defence:

¹ 55 of 1998.

² Despite the Applicant alleging that she was recommended for the lower position, it is prudent to indicate that this matter has nothing to do with an unfair dismissal dispute.

3.1 In accordance with the recruitment and selection policy applicable to all job applicants, any offer of employment is contingent upon the successful completion of pre-employment and engagement processes.

3.2 The role for which the Applicant had applied relates to its subsidiary, Burnstone, which has not submitted a Corporate Visa application.

3.3 Consequently, under the current legal framework, Burnstone cannot employ foreign nationals. The Applicant screening revealed that she is a foreign national who lacks the necessary authorisation to work in South Africa at any time, in accordance with the relevant immigration laws and regulations.

[4] The parties have submitted concise pre-trial minutes in which they have reached an agreement on key points, namely that the Applicant is a foreign national from Lesotho who responded to a job advertisement published by the Respondent for a Mineral Resource Technical Level C3 position in September 2022. Following the submission of her application, she was invited to participate in an interview on 17 October 2022 and was subsequently directed to undergo a pre-employment screening process. In the same pre-trial minutes, the parties outlined, *inter alia*, the disputed facts as follows: that the Respondent does not possess a Corporate Visa that would permit it to employ foreign nationals, and that legislation disqualifies the Respondent from hiring the Applicant. This Court was invited to determine whether the Respondent's conduct towards the Applicant constituted discrimination. If this question is answered affirmatively, then the fairness of such actions should be assessed.

[5] Both parties presented their respective witnesses: for the Applicant, it was her, and for the Respondent, it was Ms Cilliers. Little significance emerged from the latter's evidence, particularly as, by the close of the former's case, the issue of the Respondent's lack of a Corporate Visa had been undisputed; therefore, considered resolved, since the Applicant did not provide evidence to demonstrate that the Respondent possessed this type of Visa. The importance of this point is augmented hereafter.

[6] During cross-examination, the Applicant conceded in her testimony that the Respondent's recruitment policy includes provisions regarding recruitment, stating that the Respondent must adhere to the Immigration Act. Furthermore, it specifies that recruitment from remote and traditional regions, such as Lesotho, shall be strictly limited to situations where the requisite competencies and local experience are unavailable and that recruitment efforts will prioritise hiring novice employees from local areas, except in instances where a position is filled due to a fatal accident. The Applicant confirmed that she does not meet this requirement. Additionally, the Applicant conceded that she does not possess a work Visa, as the one she had expired in May 2022 after being obtained through a previous employer where she was employed.

[7] Her contention, in her closing submissions, is that the Respondent should be the one to apply for a work visa on her behalf. Furthermore, through her legal representative, she urges this Court to consider what she referred to as "section 19" of the Immigration Act.

[8] As the Applicant raised this dispute in terms of the EEA, the relevant provision is section 6, which provides that:

"(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.

(2) It is not unfair discrimination to-

(a) take affirmative action measures consistent with the purpose of this Act;
or

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job."

[9] Once one of the requirements, in terms of section 6(2), is met, then, as a matter of law, the conduct complained of cannot be deemed unfair discrimination; for example, it is generally not unfair discrimination for an employer to insist that employees meet the specified requirements before the employment process can be concluded. However, if it is based on specified ground, then the issue of onus, in terms of section 11(1) of the EEA, is on the Employer to show that such conduct did not take place, or is rational, and not unfair or justifiable. However, when allegations of discrimination are made based on arbitrary grounds, as pleaded in this matter by the Applicant, then section 11(2) of the same Act places the burden on the complainants to prove that:

- “(a) the conduct complained of is not rational;*
- (b) the conduct complained of amounts to discrimination; and*
- (c) the discrimination is unfair.”*

[10] The parties have reached an agreement in the pre-trial minutes indicating that one of the issues for determination by this Court is whether the Respondent holds a Corporate Visa that permits the employment of foreign nationals. This mutual acknowledgment suggests that both parties recognize the significance of immigration laws in this matter, particularly as the Respondent asserts that it was unable to employ the Applicant due to concerns regarding potential legal violations. Therefore, it is imperative for the Court to conduct a thorough examination of the applicable legal provisions in this context, as set out below.

[11] The government of the Republic of South Africa enacted the Immigration Act 13 of 2002 (“Immigration Act”), which, in its preamble, declares its aim to regulate the admission of foreigners to the Republic, including their employment, and the procedures to be observed when this is done. It specifically provides, inter alia, that economic growth is promoted through the employment of needed foreign labour. This indicates that the Republic accepts the employment of foreign nationals. Section 1 of the Immigration Act defines ‘work’ as including being employed or conducting activities consistent with being employed, or aligned with the profession of the person, with or without remuneration or reward, and “a corporate applicant” is defined as a juristic

person established under the laws of the Republic that applies for a corporate visa, as referred to in Section 21. It is commonly acknowledged that the Respondent falls under this definition, as it is a juristic person. A foreigner is defined as an individual who is not a citizen of the Republic. This fits the definition of the Applicant in this matter, as she has asserted. Section 1(j) defines "A visa" as the authority to temporarily sojourn in the Republic for the purposes of work as contemplated in section 21.

[12] Section 21 reads explicitly thus:

"21 Corporate visa

(1) Subject to subsection (1A), a corporate visa may be issued by the Director-General to a corporate applicant to employ foreigners who may conduct work for such corporate Applicant in the Republic.

(1A) ...

(2) The Director-General shall determine, in consultation with the prescribed departments, the maximum number of foreigners to be employed in terms of a corporate visa by a corporate applicant, after having considered-

(a) the undertaking by the corporate Applicant that it will-

(i) take prescribed measures to ensure that any foreigner employed in terms of the corporate Visa will at all times comply with the provisions of this Act and the corporate Visa; and

(ii) immediately notify the Director-General if it has reason to believe that such foreigner is no longer in compliance with subparagraph (i);

(b) the financial guarantees posted in the prescribed amount and form by the corporate Applicant to defray deportation and other costs should the corporate Visa be withdrawn, or certain foreigners fail to leave the Republic when no longer subject to the corporate Visa; and

(c) corroborated representations made by the corporate Applicant in respect of the need to employ foreigners, their job descriptions, the number of citizens or permanent residents employed and their positions, and other prescribed matters.

(6) A foreigner employed in terms of a corporate visa shall work for the holder of that corporate Visa.” (emphasises added)

[13] Regulation 20 of Regulations issued in terms of section 7 of the Immigration Act reads thus:

“20 Corporate visa

(1) An application for a corporate visa shall be made on Form 13 illustrated in Annexure A and accompanied by-

(a) proof of the need to employ the requested number of foreigners;

(b) a letter issued to the corporate Applicant by the Department of Labour to the effect that a certificate has been issued to the Department confirming-

(i) that despite diligent search, the corporate Applicant was unable to find suitable citizens or permanent residents to occupy the position available in the corporate entity;

(ii) the job description and proposed remuneration in respect of each foreigner;

(iii) that the salary and benefits of any foreigner employed by the corporate Applicant shall not be inferior to the average salary and benefits of citizens or permanent residents occupying similar positions in the Republic;

[14] Now, considering the points outlined above, it is clear that before the Respondent could employ the Applicant, it should have applied for a Corporate Visa, specifically under section 21(2)(c). This requirement is supported by regulation 20(1)(i), which outlines what needs to be demonstrated in the application. At the time of the hearing in this matter, it was common cause that it was a disputed fact that the Respondent had no Corporate Visa; the burden was on the Applicant to prove otherwise, but no evidence was presented to the Court to show that the Respondent had a Corporate Visa or had applied for one at the time of the recruitment process. Instead, the Respondent argued that its policy, which the Applicant accepted, indicated that she did not meet the specified requirements. This Court concludes that this policy is not unreasonable as it

clearly outlines the criteria for employing a foreigner, which do not provide anything contrary to the Immigration laws of the Republic.

[15] As the Applicant was required to show what section 11(2) states, and through evidence, she has unsuccessfully shown that “the conduct complained of is not rational”. Consequently, there is no evidence of discrimination or unfairness. Therefore, the claim could not succeed. Even if this matter was to be decided in terms of section 11(1) of the EEA whereby the Respondent would have had the onus of proof, which includes, among other things, justification of the conduct, this Court could have still concluded that the Applicant has no case because if the Respondent had employed the Applicant without it having a Corporate Visa, that would be a violation of the law, meaning there would have been justification, in terms of s 11(1)(c) of the EEA, on the part of the Respondent for not hiring the Applicant.

[16] In conclusion, this Court must address two pertinent issues. The Applicant has asserted that it is the Respondent's responsibility to apply for the Work Visa, referencing “section 19” of the Immigration Act. Conversely, the Respondent denies this and maintains that it cannot pursue a Corporate Visa, as this Visa is specifically intended for corporate entities seeking to employ multiple foreign nationals in designated roles; therefore, it contends that the Corporate Visa takes precedence. Upon thorough examination of both viewpoints, the Court has recognised that the section 19 cited by the Applicant has been repealed, and that the question of who applies for a Work Visa is academic in this matter, since the primary requirement was obtaining the Corporate Visa. The Court concurs with the Respondent's argument; consequently, there is no need for this Court to further consider the issue of who applies for a Work Visa. Furthermore, it is important to emphasise that, in this case, the Applicant is not requesting that this Court compel the Respondent to submit a Corporate Visa application and/or breach of promise; rather, it is evident that she seeks to establish that she has been subjected to discrimination, particularly concerning the EEA, which this Court has concluded has not been proved.

[17] Therefore, this Court makes the following order:

Order

1. The claim is dismissed.
2. Each part to bear own costs.

Sandile Mabaso

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Mr Leshaba, of Mitti Attorneys

For the Respondent: Adv Z Ngwenya

Instructed by: Solomon Holmes Attorneys

LABOUR COURT