

Employment Law and Immigration Law

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SOUTH AFRICA

Dismissal of a foreign national without a work visa ruled unlawful



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Dismissal of a foreign national without a work visa ruled unlawful

Nyakudya, a Zimbabwean national, was employed by the OR Tambo District Municipality (Municipality) on successive fixed-term contracts from 2009 to March 2022. After the expiry of Nyakudya's last fixed-term contract, the Municipality allowed Nyakudya to continue working without a new fixed-term contract.

Nyakudya was not always in possession of a work visa during the course of his employment.

On 30 November 2023, the Municipality issued Nyakudya with a letter informing him that his fixed-term contract expired on 31 March 2022, and that he had failed to provide the Municipality with a copy of his South African identity document, despite being requested to do so by the Auditor-General. The Municipality said it was left with no option but to terminate Nyakudya's contract of employment with immediate effect as his contract was unlawful, specifically as his work permit expired at the time of his employment.

While Nyakudya could have challenged the fairness of his dismissal before the Commission for Conciliation, Mediation and Arbitration (CCMA), he chose instead to approach the High Court to challenge the termination of his contract.

Having considered the facts of the case, the court found that the termination of Nyakudya's employment contract was unlawful.



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Determining the unlawfulness of the termination

In arriving at its finding of unlawfulness, the court considered the Immigration Act 13 of 2002 (Immigration Act) and the Basic Conditions of Employment Act 75 of 1997 (BCEA).

In terms of the Immigration Act, the court considered section 38, which deals with an employer's duties and obligations in relation to the employment of foreign nationals. Specifically, section 38(1) of the Immigration Act which states that no person shall employ: (i) an illegal foreigner; (ii) a foreigner whose status does not authorise them to be employed by such person; or (iii) a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status.

In addition, the court considered section 49(3) of the Immigration Act, which states that anyone who knowingly employs an illegal foreigner, or a foreigner in violation of the Immigration Act, shall be guilty of a criminal offence.

Having considered the above provisions, the court confirmed that the employment of an illegal foreigner in violation of the Immigration Act constitutes a criminal offence, which is punishable by the imposition of a fine or imprisonment upon conviction.

In relation to the summary termination of Nyakudya's contract of employment, the court considered the application of section 37(1) of the BCEA, which states that either party may terminate the employment relationship on the provision of one week's notice if the employee has been employed for less than six months; two weeks' notice if the employee has been employed for more than six months but less than one year; or four weeks' notice if the employee has been employed for more than one year. In considering this section, the court highlighted that the primary purpose of providing an employee with adequate notice of termination is to prepare them for a smooth transition.

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Findings

Nyakudya was not in possession of a work visa or South African identity document. The court held that the employment of a foreign national without a work visa is prohibited.

Nyakudya's employment contract was terminated with immediate effect. In applying section 37 of the BCEA, the court held that the Municipality contravened the BCEA by failing to provide Nyakudya with proper notice prior to his termination. In the circumstances, the court found that the termination of Nyakudya's employment contract was unlawful. This notwithstanding, Nyakudya was not reinstated to his position, as reinstatement was deemed to be impractical.

The relief may have been more favourable for Nyakudya had he instead challenged his dismissal as being unfair in the CCMA or a bargaining council.



Key takeaways

This case underscores that employing a foreign national without a work visa does not automatically grant an employer the right to summarily terminate the employment contract. Even if a foreign national is employed in these circumstances, they must be provided with proper notice of their termination in line with section 37(1) of the BCEA. Failing to provide such notice may result in the termination being unlawful.

This is aside from the protections afforded to a foreign national under the Labour Relations Act 66 of 1995 to fairness in reason and process pre-dismissal.

**Imraan Mahomed
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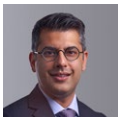
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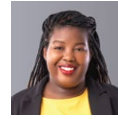
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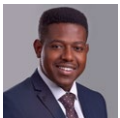
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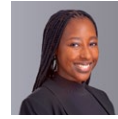
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