

Unfairly excluding South Africans from employment opportunities in favour of foreign nationals may be regarded as discrimination

By Nivaani Moodley, Justin de Wet | 22 June 2022

The employment of foreign nationals must not adversely impact the rights of unskilled South Africans and excluding South Africans from employment opportunities may constitute unfair discrimination.

The recent High Court ruling confirmed that businesses who seek to employ foreign nationals must show that they have tried to train South African citizens to meet their needs when applying for corporate visas for foreign nationals. (See *Mukuru Financial Services (Pty) Ltd and Another v Department of Employment and Labour* (17474/20) [2022] ZAWCHC 14.)

Mukuru Financial Services (Pty) Limited and Mukuru Africa (Pty) Limited (Mukuru) brought an application against the Department of Employment and Labour (DEL) after their application for corporate visas (for foreign nationals) in terms of section 21 of the Immigration Act 13 of 2002 was refused. Mukuru's business involves the use of financial technology solutions, including mobile phones and web-based technology to facilitate domestic and international transfers of money, predominantly across Africa.

In its application for corporate visas to the Department of Home Affairs, Mukuru was required to attach a certificate from the DEL confirming that despite a diligent search, it was unable to find suitable South African citizens or permanent residents to occupy the positions available. Mukuru contended that it required suitably qualified employees fluent in the indigenous languages of Zimbabwe, Malawi and other relevant languages. Notably, however, the only academic requirement for the posts was a Grade 12 or the equivalent thereof. The DEL rejected the applications for the certificate on the basis that the skills required were available in South Africa and that the foreign language requirement was discriminatory to local citizens.

The issues the Court considered were (i) whether Mukuru needed suitably qualified employees fluent in the indigenous languages of Zimbabwe, Malawi and other languages which were not specified, but which Mukuru considered relevant languages, and (ii) whether the lack of proficiency in the languages made South African citizens or permanent residents unsuitable to occupy the positions available.

Webber Wentzel

We are the leading full-service law firm on the African continent, providing clients with seamless, tailored and commercially minded business solutions within record times. Our alliance with Linklaters and our relationships with outstanding law firms across Africa ensure that our clients have the best expertise wherever they do business.

Contact Details

Cape Town

15th Floor, Convention Tower
Heerengracht, Foreshore
Cape Town
8001

Tel: +27 21 431 7000

Johannesburg

90 Rivonia Road,
Sandton
Johannesburg
2196

Tel: +27 11 530 5000



Mukuru argued that: (i) because their business was primarily focussed on the needs of foreigners, foreign workers were essential to their business as they would need to be able to service their clients in their native languages; and (ii) their clients were more comfortable and confident doing business with a mother-tongue speaker of their native language, as the business involved sensitive transfers of money.

The DEL argued that:

- the transactions were money transfers which were done electronically and as such, the use of foreign languages was merely supplementary to the service, and not a requirement;
- Mukuru's employees performed the tasks of receiving money from remitters, for the purpose of sending it to a person nominated in the designated country;
- only appointing foreign nationals based on language requirements, was detrimental to South African citizens and permanent residents; and
- the language requirement was discriminatory and that there was no operational reason provided to indicate that it was an essential requirement of Mukuru's provision of services.

The Court was satisfied that Mukuru had shown ample reasons as to why it was necessary for it to have, amongst their employees, persons who speak languages other than the official languages of the Republic of South Africa. But, for Mukuru to demonstrate the fairness of its discrimination, it had to ensure that its conduct did not adversely impact the rights of South African citizens and permanent residents.

The Preamble to the Immigration Act clearly requires that the contribution of foreign workers in the South African labour market does not adversely impact existing labour standards and the rights and expectations of South African workers. The Judge found that Mukuru failed to demonstrate and provide any evidence indicating their efforts to train South African citizens to meet their business requirements.

The Court concluded that Mukuru unfairly excluded South African citizens from employment opportunities in favour of foreign nationals. This constituted unfair discrimination on the grounds of race, ethnic or social origin, culture, language and birth.

While employing employees from the global workforce may be important to businesses in South Africa, employers must be mindful of the careful balance that the Immigration Act requires or face possible claims of unfair discrimination.

Key Contacts



Nivaani Moodley

Partner

+27115305096

Email this contact



Justin de Wet

Associate

+27115305076

Email this contact

Accolades



Chambers Africa 2021



IFLR1000 2020



Legal 500 2020



Chambers Global 2020



African Legal Awards 2019



International Tax Review 2019



**LEGAL DEALMAKERS
OF THE DECADE**

(M&A -by Deal Value)

DealMakers Annual Awards 2019



More from Webber Wentzel

Click to see more

Click to hear more

Subscribe

Disclaimer

These materials are provided for general information purposes only and do not constitute legal or other professional advice. While every effort is made to update the information regularly and to offer the most current, correct and accurate information, we accept no liability or responsibility whatsoever if any information is, for whatever reason, incorrect, inaccurate or dated. We accept no responsibility for any loss or damage, whether direct, indirect or consequential, which may arise from access to or reliance on the information contained herein.

© Copyright Webber Wentzel. All Rights reserved.