IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)
CASE NO: 17474/20

In the matter between

MUKURU FINANCIAL SERVICES (PTY) LTD FIRST APPLICANT
MUKURU AFRICA (PTY) LTD SECOND APPLICANT

AND

DEPARTMENT OF EMPLOYMENT AND LABOUR RESPONDENT
Heard: 02 December 2021

JUDGMENT delivered 18 February 2022

THULARE J

[1] This is an opposed application for condonation for the late filing of, as well as the review and setting aside of the respondent's decision. The applicants sought to apply for a corporate visa with the Department of Home Affairs (DHA). They were required to attach a certificate from the respondent confirming that despite a diligent search, they were unable to find suitable citizens or permanent residents to occupy the positions available in their corporate entities. The applicants alleged, in their applications, that they were unable to find suitably qualified employees fluent in the indigenous languages of Zimbabwe, Malawi and other relevant languages. The first

applicant applied for 100 sales and support consultants, 10 controllers and 5 call centre team leaders. The second applicant applied for 10 customer service representatives, 5 agents supervisors, 7 corridor champions, 10 number and verification officers, 10 regional sales supervisors, 20 verification officers, 23 information officers and 10 area sales supervisors. The essential academic requirement for all these posts was a Grade 12 or equivalent. The respondent rejected their applications for the certificate on the basis that the skills were available in the country and that the foreign language requirement was discriminatory to local citizens.

[2] The issue was whether the applicants needed suitably qualified employees fluent in the indigenous languages of Zimbabwe, Malawi and other languages which were unspecified but which the applicants called relevant languages. And further, did the lack of proficiency in the languages referred to, under the circumstances, make South African citizens or permanent residents unsuitable to occupy the positions available in the applicants as corporate entities. The application for condonation is granted in the interests of justice. Applicants to pay the costs thereof.

[3] The applicants are part of the Mukuru Group of Companies, which use financial technology solutions including mobile phone and web-based technology to facilitate domestic and international money transfers particularly across the African continent and parts of Asia. The second respondent (MA) offers customers who do not have a bank account an efficient means of transferring money to friends and relatives in their home countries. MA is in partnership with South African companies such as Pick n' Pay, Checkers, Ackermans, Spar and Makro. The first applicant (MFS) provided ancillary services to MA's unbanked customers in South Africa, such as card services and funeral cover. MFS had a staff compliment of 137, 124 of whom were foreign nationals while MA had a staff complement of 546, of whom 101 were foreign nationals.

[4] It is applicants' case that because their business is focused on the needs of foreigners, it was important to them to be able to service their clients in their native language, whatever that language may be. Their clients were more comfortable and confident when able to do business with a mother-tongue speaker of their native

language, in particular because what was involved was sensitive, being transfer of money. According to the applicants, foreign workers were essential to their business, permitting them to offer clients a service through consultants that were able to communicate with them in their own language and to relate to them on a cultural plane. This was not what a local employee could supply either by way of language skills or the ability to relate on a cultural and ethnic basis. Despite diligent search, no suitably qualified citizens or permanent residents could be found.

[5] On the condonation, the applicants indicated that after the response from the respondent, the Covid-19 national disaster intervened. The need for their application to DHA became less pressing as DHA did not issue visas and foreigners were not allowed to enter the Republic. The challenge of the decision would have been moot. The restrictions on entry by foreigners and visa applications have been lifted. As a result the applicants intended to proceed with the applications.

[6] The respondent's position was that the use of language appeared supplementary to and/or in support of the effective remittance services by the applicants to their customers. As a result the language requirement for the employment positions appeared arbitrary, exclusionary and unreasonable. The requirement, according to the respondent, violated the Constitution of the Republic of South Africa (the Constitution), the Basic Conditions of Employment Act (the BCEA) and the Employment Equity Act (the EEA). The issue of the certificate would have made the respondent an accomplice in the violations, and would also have violated the respondent's own constitutional obligations as an organ of State.

[7] On condonation, the respondent's case was that the applications were made in May and June 2019 respectively. The respondent's answer to both was made on 28 October 2019. The applicants were required to institute any proceedings for judicial review without delay and by no later than 180 days after 28 October 2019. The applicants enjoyed legal representation at the time of the applications. They only instituted review applications on or about 25 November 2020, which was more than approximately one year after 28 October 2019. The applicants knew about the response at least three to four months before the state of national disaster commenced in March 2020. There is no evidence that the applicants lodged an

appeal or made any contact with DHA. The alleged mootness is also not supported by any facts. The applicants did not explain what happened between November 2019 and March 2020. Against that background the respondent submitted that the application for condonation stood to be dismissed with costs.

[8] The respondent's case was that the core of the applicants' business operations and activities was based on the use of advanced financial technological solutions which included the use of advanced mobile phones and web-based technology to transfer money on behalf of its customers. Most of the transactions were electronically done. The applicants' competitors provided remittance services on the same basis. The use of foreign language was supplementary to and/or in support of the remittance services, but was not a requirement. A foreign language or a foreign culture did not constitute an essential and/or important requirement for purposes of provision of the service of financial technology solutions.

[9] The employees merely performed the functions of receiving cash from remitters for purposes of sending the money to a person nominated in the designated country on the relevant form issued by the applicants. The applicants desired to only appoint foreign nationals from Zimbabwe and Malawi on the basis of the language requirements of those countries to the detriment of South African citizens and permanent residents. The transfers also took place to and from South Africa, that is domestically, and thus included its citizens and permanent residents. The requirement was discriminatory and there was no operational reason provided to show that it was an essential component of the applicants' provision of services.

[10] Rule 53(1) of the Uniform Rules of Court provided as follows:

"53 Reviews

(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected –

(a) Calling upon such person to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) Calling upon the magistrate, presiding officer, chairman or officer, as the case may be, to dispatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so."

[11] The relevant parts of the preamble to the Immigration Act, 2002 (Act No. 13 of 2002) (the IA) provided as follows:

"PREAMBLE

In providing for the regulation of admission of foreigners to, their residence in, and their departure from the Republic and for matters connected therewith, the Immigration Act aims at setting in place a new system of immigration control which ensures that-

(c) interdepartmental coordination and public consultations enrich the management of immigration;

(d) economic growth is promoted through the employment of needed foreign labour, foreign investment is facilitated, the entry of exceptionally skilled or qualified people is enabled, skilled human resources are increased, academic exchanges within the Southern African Development Community is facilitated and tourism is promoted;

(g) immigration laws are efficiently and effectively enforced, deploying to this end significant administrative capacity of the Department of Home Affairs, thereby reducing the pull factors of illegal immigration;

(h) the South African economy may have access at all times to the full measure of needed contributions by foreigners;

(i) the contribution of foreigners in the South African labour market does not adversely impact on existing labour standards and the rights and expectations of South African workers;

(j) a policy connection is maintained between foreigners working in South Africa and the training of our citizens;"

[12] Section 21 of the IA provided:

"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) No corporate visa may be issued or renewed in respect of any business undertaking which is listed as undesirable by the Minister from time to time in the Gazette, after consultation with the Minister responsible for trade and industry.

(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."

[13] The Immigration Regulations, 2014, issued in terms of section 7 of the IA provided as follows in Regulation 20(1)(b):

"20. Corporate visa. –

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

(b) a certificate by the Department of Labour 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 for 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] The phrases ‘needed foreign labour’ and ‘exceptionally skilled or qualified people’ are not defined in the IA or in its Regulations. Section 9(4) of the Constitution provided as follows:

“Equality

9. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3).”

The grounds listed in subsection (3) includes race, ethnic or social origin, culture, language and birth. It follows that where the applicants seeks to employ foreign nationals on the basis of these grounds, they have to establish that their discrimination of citizens of the Republic on these grounds, is fair.

[15] I am satisfied that the applicants have shown that it is necessary for their business health, to have amongst their personnel, persons who speak languages other than official languages of the Republic as envisaged in section 6(1) of the Constitution. I accept that the applicants must take into account the language usage and preferences of their clients. In my view, the Legislature recognized the possibility of the challenge now faced by the applicants. It is against that background that it determined that the economy of the Republic may have access at all times to the full measure of needed contributions by foreigners [(h) in the Preamble to the IA].

[16] However, the establishment of the need for the contributions by foreigners could not be the end of the matter for the applicants. In order to demonstrate the fairness of the discrimination, the applicants had to also ensure that their conduct does not adversely impact amongst others on the rights and expectations of South African workers [(i) in the Preamble to the IA]. The applicants missed on the old lyrics of Peter Tosh in his 1981 Album titled “Dread and Alive” in the song “Poor man feel it”. He sang:

“The poor man feel it. Gas gone up, busfare gone up, the rent gone up, for meal gone up, lighting gone up, the tax gone up, car parts gone up and mi can’t take the first law. Time gone up, scallion gone up, onion gone up, red beans gone up, black pepper gone up, chicken gone up, and the parents them angry cause the pickney them hungry. Gotta find a solution to the pollution. Gotta be the solution to this pollution. The poor man feel it.”

The social impact of business decisions is also the business of business and that is clear in the immigration law of this country, which is binding on the applicants as well.

[17] The Legislature expressed the 1981 "Gotta be the solution to this pollution" clarion call of Peter Tosh in (j) of the Preamble to the IA in that it called for the maintenance of the policy connection between foreigners working in the country and the training of South African citizens. It is therefore useless for the applicants to call for further debate and discussion instead of documenting to demonstrate their portfolio of evidence as regards their actions on the training of South African citizens in meeting their business needs. This subsection in the Preamble makes it very clear that the IA is intended to help to push back the historical racial estates which entrenched the three evils of poverty, structural inequality and consequential unemployment.

[18] Business, especially those which relied on foreign nationals for their existence and growth, should comprehend the fundamental need to reorient themselves and do the internal search necessary for conceptual, practical and innovative means to help address the social ills of the Republic. It is their social responsibility. It has to be acceptable and implemented to be a successful intervention to inform business activities around their dual nature of their responsibilities and rights to foreign nationals and South African citizens. Conventional methods, which are generally based on maximum consumption and barest minimum maintenance expenditure, represent and are a manifestation of a failure to transform our economics and an unmitigated allegiance to the *status quo,* whose defining facial feature is Black poverty.

[19] Already in 1973, Sen A (1973) in *Poverty, Inequality and Unemployment, Some Conceptual Issues in Measurement,* Economic and Political Weekly*,* 8 (31/33), 1457-64 noted that poverty has been identified not merely with inequality but also with unemployment. The IA is deliberate in its pronouncement of a politico-economic and social management of migration in South Africa. What the IA envisaged, is an effective and operational integrity in multi-party stakeholder engagements. The respondents are responsible for the nexus where the apartheid consequence of structural unemployment that found, constructed and was inextricably linked to

poverty met the need for economic development that should use the contribution by foreign nationals. Growth and business social programmes are not mutually exclusive. Comprehensive strategies and programmes are a necessary condition without which economic relations of a developmental and transformative State is not possible.

[20] In my view, the IA requires that when business talk to the State about entry of foreign nationals in relation to corporate visas, the respondent on behalf of the State need not even ask: “What about South African citizens?”. The (j) in the Preamble, in my view, envisaged a duty on the applicants to speak and address the need of foreign nationals to work in their establishments in South Africa as well as the training of South African citizens to address that specific need. To be properly considered by the decision-makers in the position of the respondent, both the need for foreign nationals to work in the business establishments and the training of South African citizens to meet that specific need must form part of the portfolio of evidence in the application for the corporate visa.

[21] It must be borne in mind that the respondent is responsible for the administration of the Employment Equity Act, 1998 (Act No. 55 of 1998) (the EEA). The purpose of the EEA is set out as follows in section 2:

“Purpose of this Act

2. The purpose of this Act is to achieve equity in the workplace by –

(a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and

(b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.”

Section 6 of the EEA specifically prohibits unfair discrimination directly or indirectly against on grounds which included race, ethnic or social origin, culture, language and birth.

[22] The pursuit of massive growth and high turnover is the life-blood of business. However, the impact of the contribution of foreign nationals in the country’s labour market as well as the rights and expectations of South African citizens is the fresh air

necessary to be inhaled into the lungs of business as its oxygen for compliance with the law. Economic growth that does not address unemployment, poverty and inequality is useless for the stability of this country. The superior logic in our laws on its own is no longer able to sustain the hope of the poor majority in a constitutional and democratic State. The character of those in leadership, including in the private sector, has become the immediate and real threat to the stability of the country.

[23] Economic growth that enrich the business elite and do nothing for the poor citizens needs a serious disruption in the interests of the Republic. This explains why the respondent through assessment, have to diagnose, monitor and evaluate the applicants' strategies and programmes. The co-ordination which includes the respondent, put into action the State's commitment to guarantee the South African citizen's rights and expectations. The omission of the training of South African citizens as an important consideration by the DG of DHA and during the assessment by the respondent is, in my view, a serious oversight in section 21 of the IA and Regulation 20(1)(b). It is clearly one of the objects of the IA as expressed in the Preamble and should be pronounced in section 21 and Regulation 20.

[24] Interaction with their clients, who are foreign language speakers, in those clients' mothers tongue may be necessary in the applicants' developmental trajectory. What I am unable to understand, is why it is essential to strive to communicate with foreign national clients in the clients' mother tongue whilst denying South African citizens opportunities within their entities. The applicants utter no single syllable in their papers, as part of their cutting edge growth path as an example, in training South African citizens on proficiency in the languages which they deem to be so central to their existence and development. The applicants did nothing to show that the adage "local is lekker" is untrue in their developmental instance. The papers do not indicate that French, Portuguese, Spanish, Arabic or indigenous languages spoken by foreign nationals coming from countries who speak these languages, was beyond the comprehension of local citizens of South Africa.

[25] Furthermore, although South Africa has 11 official languages, it is a well -known fact that English has become the language most widely used in the workplace, business and in meetings. Although it occupied number six as regards percentage of

population by home language, English, by usage, has become the most commonly used and the primary language of official business and commerce in South Africa [Statistics South Africa]. It may be accepted that communicating in English to foreign nationals who are not proficient therein may result in misunderstandings. However, nothing suggests that the same will be true if South African citizens are trained by the applicants in the languages of the applicants' choice, as part of the path to gravitas and growth of their business. This will not in any way deny the applicants an opportunity to market their business directly and effectively to foreigners, who are their target market.

[26] I do not see how a South African citizen, trained in the colonial or indigenous language of a foreign national who is a client of the applicants and used that client's language to communicate, will in any way be an affront to such client's human dignity or be disrespectful towards them. The applicants deliberately made being able to speak a foreign language a prerequisite and a necessary requirement for the jobs that ordinarily require matric. If the applicants prefer persons with those language skills for their target market and growth aspirations, training and development of South African citizens is a necessary route in terms of the IA.

[27] The employment opportunities sought to be filled clearly indicated that these are posts where such personnel, customer services on behalf of the applicants, interact with their clients personally at various stages of the applicants' processes. The foreign language requirement is also a marketing strategy for the applicants' business for its cross-border remittance service on the international platform. It has been established as a need, under very limited circumstances. However, the applicants failed to provide a portfolio of evidence in respect of the training of South African citizens to meet the need currently only found in foreign nationals. In the absence of any countervailing evidence, I conclude that the applicants do not have strategies and programmes to train South African citizens as envisaged in the IA.

[28] The applicants unfairly exclude South African citizens from employment opportunities in South Africa, in favour of foreign nationals. In my view, this constituted unfair discrimination on grounds which included race, ethnic or social origin, culture, language and birth. This unfair discrimination resulted in that the

applicants were found wanting in respect of private sector development as a strategy of the developmental and transformative State. They failed to promote economic growth which include contributions by foreign nationals but also helped reduce poverty through deliberate actions to defeat the financial exclusion of the poor South African citizens. For them, the unemployed poor South Africans who are Black in the majority, despite the promising document of the Constitution, should still experience exclusion in the engines or war rooms of economic growth in the private sector. Where the respondent alleged unfair discrimination, the applicants had to establish that it was fair [section 11 of the EEA. The applicants failed to establish that it was fair.

[29] The unfair discrimination caused the applicants to be part of the root causes of poverty, which is the inability to create opportunities for those South African citizens who are relatively unskilled [*Poverty, Inequality and Unemployment in South Africa: Context, Issues and the Way Forward,* M Chibba and J Luiz, Economic Papers, Vol. 30, No. 3, September 2011, 307-315]. In the first paragraph of their conclusion, the authors of the article said:

"First, there is a fundamental need to reorient policy such that the next generation approach to Poverty, Inequality and Unemployment problems is not a spin-off from conventional economics and thus "more of the same". Instead, the new approach needs to be both eclectic and innovative in nature in the sense that it should integrate the diverse and multidisciplinary aspects of PIU matters and development – the profound interconnectedness of which continues to be largely ignored in policies and programmes in South Africa."

[30] For these reasons I make the following order:

The application for the review and setting aside of the decision of the respondent is dismissed with costs.

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DM THULARE

JUDGE OF THE HIGH COURT