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A brief retrospective on two cases about UIF and asylum seekers

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Introduction

The end of February 2020 marks the anniversary of an important court victory which confirmed the rights of asylum seekers to access benefits from the Unemployment Insurance Fund ("UIF"). This is therefore an opportune moment to reflect on that case, as well as a preceding case which took a different approach to dealing with the same problem.

Background

In a nutshell, asylum seekers were previously excluded from claiming UIF benefits despite having made contributions to the Fund during the course of their employment. This was occasioned by an exclusionary statutory requirement that claimants seeking UIF benefits were required to provide identity or passport numbers – which asylum seekers, by virtue of their status as such, do not ordinarily possess.

This position, however, was patently unlawful and litigation to effect the necessary corrective reforms was inevitable. What follows is a brief comparative overview of two cases which sought to address this issue.

The First Case – *Saddiq v Department of Labour (Vereeniging) and Others* (unreported judgment of the Equality Court for the Sub-District of Emfuleni, held at Vereeniging, Case No: EQ04/2017)

In this case, an asylum seeker who had been employed for three years lost his job and approached the Department of Labour ("DOL") to claim UIF benefits. Despite monthly contributions having been deducted from his salary and paid to the Fund, the DOL prevented him from submitting a claim on the basis that he did not have an identity number.

Consequently, the complainant approached the Equality Court (at the Vereeniging Magistrates Court) seeking an order: declaring the respondents' conduct unconstitutional; amending unconstitutional department policies; and directing the respondents to issue an unconditional apology, amongst other things. Although the judgment does not explicitly state on which provision/s of the Equality Act the complaint was based, a reasonable inference can be made from the judgment that the complaint was one of unfair discrimination.

The respondents cited in the matter were: *"Department of Labour (Vereeniging)"* as the first respondent; *"Dingaan Bassimane (Director Department of Labour Compensation Fund)"* as the second respondent; and *"Peter Godongwana (Assistance Director Department of Labour Compensation Fund)"* as the third respondent. It appears that the respondents did not oppose the complaint.

Having considered the matter, the court handed down judgment on 4 July 2017 ordering, amongst other things, that the respondents: pay the complainant the UIF benefits due to him; correct their computer systems to allow asylum seekers to be compensated; and tender an unconditional apology to the complainant.

The Second Case – *Musanga and Others v Minister of Labour and Others* (unreported judgment of the North Gauteng High Court (Pretoria), Case No: 29994/18)

As in the First Case, the applicants in this matter were similarly employed for several years, made monthly contributions to the UIF, approached the DOL following their dismissals and were prevented from claiming benefits from the Fund because they did not have identity numbers.

Aggrieved, the applicants (represented by Werksmans Attorneys' pro bono department) approached the North Gauteng High Court, Pretoria to challenge the constitutionality of the legislative provisions and systemic conduct that prevented them from being able to claim UIF benefits. More specifically, the applicants sought, amongst other things, an order: declaring that Regulations 1 and 2 of the Regulations to the Unemployment Insurance Act 63 of 2001 were unconstitutional insofar as they prevent asylum seekers from claiming UIF benefits; directing the respondents to update or adjust their systems to recognise asylum seeker permit reference numbers in applications for UIF benefits; and directing that the respondents pay the applicants the benefits due to them.

The respondents cited in the matter were the Minister of Labour (first respondent), Director-General of the Department of Labour (second respondent), Unemployment Insurance Commissioner (third respondent), and Minister of Home Affairs (fourth respondent). The matter was vehemently opposed by the first, second and third respondents.

On 27 February 2019 (the date of the hearing), however, the respondents conceded the merits of the application, as a result of which the applicants were granted the aforementioned relief sought, including (importantly) a specific declaration that the impugned regulations were unconstitutional.

Main Differences between the Two Cases

The first significant difference between the two cases is the courts' treatment of the question of constitutionality. In the First Case, the court explicitly shied away from deciding on the constitutionality of the respondents' conduct. This approach was correct because Section 170 of the Constitution prohibits courts of a lower stature than the High Court from enquiring into or ruling on constitutional issues. Therefore, because the Equality Court was sitting in a magistrates court, it could not determine this issue as it lacked jurisdiction to do so.

This, however, was not a limitation in the Second Case. The very basis of the Second Case was the constitutional non-compliance of the exclusionary circumstances; the remaining relief sought was contingent on the determination of this issue. Having made an order that the impugned regulations were unconstitutional, the court ordered that: certain words be read into Regulation 1 to make it constitutionally compliant; and corrective structural and systemic reconfigurations of the DOL's systems be implemented.

A further difference between the cases is the cited respondents. In the First Case, the aforementioned respondents were not the appropriate parties to be cited for two reasons. First, the parties cited therein are limited to the Vereeniging DOL in particular; which is self-evidently incorrect because the order could therefore technically only apply to Vereeniging and cannot bind other branches of the DOL. Secondly, the inclusion of the respondents cited therein does not comply with sections 2(1) and 4A of the State Liability Act 20 of 1957, which specify that in proceedings brought against a national or provincial department, the relevant cabinet minister or member of the executive council, respectively, as the executive authority of the department concerned must be cited as a respondent. While this requirement was complied with in the Second Case, the First Case did not take this into account thereby rendering the citations defective and/or irregular.

A final difference (for present purposes) is the inclusion of the ambiguous reference to *"Department of Labour Compensation Fund"* in the citations of the second and third respondents in the First Case. These references are misleading in that they suggest that the matter is against the Compensation Fund, which unlike the UIF, is governed and regulated by the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

Aftermath

While these differences seem small, their importance is most noticeable in the differences in impact of the two decisions. It does not appear that the First Case had any impact beyond payment of compensation to the complainant. This is evidenced by the fact that following the order no apparent structural or reformative changes were made by the DOL as asylum seekers continued to be turned away when submitting UIF claims.

However, the Second Case had a discernible impact in that it led to corrective measures and legislative reforms by the DOL at a national level. Notably, on 14 February 2020, the Minister of Employment and Labour published an amendment to Regulation 1 (see Government Gazette No. 43023, Government Notice No. R. 173) which gave legislative effect to the wording of the court order.

While it appears that the corrective reforms are now in place, Werksmans continues to monitor any developments in the treatment of asylum seekers by the DOL.



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