



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 76 OF 2019

LUCIEN KOUAKOU.....CLAIMANT

V

INTERNATIONAL PLANNED PARENTHOOD FEDERATION.....1<sup>ST</sup> RESPONDENT

ALVARO BERMEJO.....2<sup>ND</sup> RESPONDENT

RULING

1. For determination is a motion dated 6 February 2019 which was brought under certificate of urgency by Lucien Kouakou (applicant) seeking orders

1. ...

2. ...

3. **THAT** pending the inter-partes hearing and determination of this application and/or until further orders of this Court, this Honourable Court be pleased to issue an order of temporary injunction restraining the Respondents herein, its agents, servants and/or persons acting under their instructions from propagating, disclosing, promulgating, publishing, divulging or causing the propagation, promulgation, publication of any of the allegations surrounding the disciplinary process herewith and/or any defamatory material of and concerning the applicant herein.

4. **THAT** pending the inter-partes hearing of the application herewith and/or the suit, this Honourable Court be pleased to stay the applicant's suspension from duty and the applicant herein be allowed to resume his duties within the 1<sup>st</sup> Respondent as the regional Director, Africa region unconditionally.

5. **THAT** pending the inter-partes hearing and determination of this suit and/or until further orders of this Court, this Honourable Court be pleased to issue an order of temporary injunction restraining the Respondents herein, its agents, servants and/or persons acting under their instructions from convening and/or conducting the re-hearing of the disciplinary hearing against the applicant scheduled for the 7<sup>th</sup> of February 2019 at 2.00pm or as may be rescheduled to any other day whatsoever in respect of the fraud allegations against the applicant.

6. **THAT** pending the inter-partes hearing and determination of this suit and/or until further orders of this Court, this Honourable Court be pleased to issue an order of injunction restraining the Respondents either by themselves, their agents or persons acting their instructions from propagating, disclosing, promulgating, publishing, divulging or causing the propagation, promulgation, publication of any of the allegations surrounding the disciplinary process herewith and/or any defamatory material of and concerning the applicant herein.

7. **THAT** the cost of this application be provided for.

2. When the application was placed before the Duty Judge *ex-parte*, order 2 was allowed pending *inter-partes* hearing on 21 February 2019.

3. The hearing could not proceed on the scheduled date because the 1<sup>st</sup> Respondent successfully urged the Court to be granted more time to file responses to the application. The Court extended the interim orders.

4. The 1<sup>st</sup> Respondent filed 2 replying affidavits sworn, one by its Change Manager on 19 February 2019, and another by the Safeguarding

Consultant on 20 February 2019.

5. It also filed documents which had been inadvertently omitted on 25 February 2019.

6. The applicant filed a further affidavit on 1 March 2019 and documents and authorities on 11 March 2019.

7. The 1<sup>st</sup> Respondent filed supplementary list of documents on 1 March 2019 and a bundle of authorities on 8 March 2019. The 1<sup>st</sup> Respondent also filed a complete copy of letter dated 6 February 2019 which the applicant had not filed.

8. The Court took arguments on 12 March 2019 and on 19 March 2019.

9. Some background would be in order.

## **Background**

10. The applicant has been serving as Regional Director, Africa of the 1<sup>st</sup> Respondent. The contract was to lapse on 30 November 2019.

11. On 9 August 2018, the applicant and the 1<sup>st</sup> Respondent's Director General had a telephone conversation where the behaviour and conduct of the applicant was part of the discussions.

12. The telephone conversation was followed with a letter dated 13 August 2018 from the Director General referenced *Notification of investigation and stepping down from your duties during investigation*.

13. The letter set out 5 allegations the subject of the investigations, and these were *sexual harassment; bullying and intimidation; discrimination against staff; preferential treatment of staff and breach of Kenyan labour laws in a restructuring process*.

14. The letter also informed the applicant that the investigations would be carried out by the law firm of Anjarwalla & Khanna

15. Further, the letter put the applicant on notice that certain allegations on *fraud* would be conducted CCW, the 1<sup>st</sup> Respondent's Internal Auditors, and that as at the time of writing the letter, there were no *fraud* allegations against him.

16. It was estimated that the investigations would take up to 6 weeks.

17. The applicant acknowledged receipt of the letter the same day. In further correspondences exchanged, the applicant sought to be assured of confidentiality of the investigations.

18. The 1<sup>st</sup> Respondent kept the applicant updated through email on the status of the investigations and also sought to and did interview him.

19. On 13 October 2018, the Director General emailed the applicant (and 2 others) to inform him that the investigations in respect of the 5 allegations and *fraud* had been completed.

20. The email indicated that out of the 5 allegations, only the *bullying* and *harassment* allegations had been substantiated, and that investigations on *fraud* would continue and that the applicant would be advised if there was need for disciplinary action later.

21. In the meantime, the applicant was allowed to return to work on 15 October 2018 on condition that he would be updated on the status of the *fraud* investigations and any disciplinary procedures.

22. On 18 October 2018, the Director General advised all staff about the completion of investigations and that the applicant would resume full responsibilities as Regional Director, but with a rider that there were still a couple of matters yet to be concluded (the applicant was put under a coaching programme on his communication style).

23. On 10 November 2018, the Director General emailed the applicant to inform him that he was activating a disciplinary process based on new information coming out of the investigations, and that he would send him a notice of a disciplinary hearing together with relevant evidence (attached to the email).

24. The email also alerted the applicant that the disciplinary hearing would most likely be held in London.

25. The notice, referenced *Attendance at a disciplinary hearing* and dated 9 November 2018 indicated that the allegations related to *fraud* which had taken place in 2016/2017. Details of some 4 incidents were outlined and the hearing was set for 18 November 2018.

26. The applicant made a written response to the *fraud* allegations on 14 November 2018, and requested to be allowed to be accompanied with an advocate.

27. The hearing proceeded as scheduled in London and the copies of the minutes of the hearing were sent to the applicant on 23 November 2018 to confirm.

28. Soon thereafter, the 1<sup>st</sup> Respondent wrote to the applicant to notify him that after reviewing the case, it had been decided that he be summarily dismissed with effect from 27 November 2018. He was informed of a right of appeal.

29. A *clearance* meeting was held on 28 November 2018, and the applicant was issued with a certificate of service. A letter confirming the terms of *clearance* was issued to the applicant on 3 December 2018.

30. Dissatisfied, the applicant appealed against the summary dismissal around 4 December 2018, and on 12 December 2018 he was invited to an appeal hearing.

31. Although confirming availability for the appeal hearing, the applicant raised *competency* questions in respect of the constitution of the Appeal Panel. He made reference to terms of the *Disciplinary Policy and Procedures, 2010*.

32. The applicant's appeal was heard on 17 December 2018 and on 24 December 2018, he was advised that the appeal had been upheld on the ground that he (the applicant) had not been provided with the full investigations report by Anjarwalla & Khanna, in violation of clauses 2(d) and 4(l) of the *Disciplinary Policy and Procedures Manual*.

33. The Appeal Panel directed that a fresh hearing be held.

34. On 10 January 2019, the 1<sup>st</sup> Respondent issued a fresh notice to the applicant setting out 4 *fraud* related allegations.

35. The applicant responded to the notice on 19 January 2019 decrying the publication of the allegations in various media.

36. On the same day, the applicant's advocate wrote to the 1<sup>st</sup> Respondent alleging breach of statute, contract and unfair termination of employment. The letter also demanded for several documents.

37. In a response dated 25 January 2019, the 1<sup>st</sup> Respondent's advocate sought for time to get instructions.

38. The said advocate in a more detailed response dated 1 February 2019 notified the applicant's advocate that a fresh disciplinary hearing would be held on 7 February 2019 at a mentioned venue.

39. The 1<sup>st</sup> Respondent wrote to the applicant on the same day notifying him of the disciplinary hearing.

40. On 4 February 2019, the applicant's advocate sent another letter to the 1<sup>st</sup> Respondent's advocate seeking to be furnished with a copy of the *investigations* report, and other documents.

41. Three days later, on 7 February 2019, the applicant moved the Court seeking the orders set out in paragraph 1 above.

### **Evaluation**

42. The Court has keenly considered all the material placed before it (voluminous as they are, and it is regrettable that half of the documents filed had no relevance or materiality to the issues in the instant application) as well as the oral submissions made in Court, and is of the view that it need not rehash the arguments in this ruling.

43. The orders sought by the applicant are interlocutory in nature and seek that the Respondents be restrained from taking certain actions, and therefore the threshold outlined in the case of *Giella v Cassman Brown & Company Ltd (1973) EA 358 should be satisfied*.

### **Interdicting publication of allegations against the applicant**

44. The applicant filed extracts of newspapers in which the facts surrounding his case were published. However, he did not demonstrate that it was the Respondents who were responsible for causing the publication(s) and/or *leaking* to the said outlets the details of the allegations against him.

45. With no direct or indirect linkage of the Respondents to the publications, the Court finds that proposed orders 3 and 6 are not merited.

### **Stay of suspension**

46. In order for the applicant to get an order *staying* or lifting his suspension, it was incumbent upon him to demonstrate that the *suspension* violated the terms of his employment or some law.

47. The 1<sup>st</sup> Respondent's *Disciplinary Policies and Procedures Manual* at clause 5 allow *suspension* of an employee during the disciplinary process and because the applicant is facing a disciplinary process, the Court is unable to agree with him that the *suspension* violated any contractual or legal provision.

### **Fresh disciplinary process**

48. The applicant spent the most time in urging that the fresh disciplinary proceedings against him should be interdicted because, according to him, he had been taken through a disciplinary process on the *fraud* allegations, and exonerated and that he had not been furnished with material forming the basis of the allegations.

49. The contentions by the applicant cannot be correct.

50. The applicant was furnished with the investigations report on the eve of moving the Court on 7 February 2019 and nothing turns on the ground.

51. The Court has looked at the allegations set out in the notice of 13 August 2018.

52. The allegations did not include *fraud* allegations.

53. The allegations concerned *sexual harassment; bullying and intimidation; discrimination against staff; preferential treatment of staff and breach of Kenyan labour laws in a restructuring process.*

54. Further, the notice of 13 August 2018 expressly informed the applicant that he was not facing *fraud* allegations at the time, and that the *fraud* allegations would be investigated by the 1<sup>st</sup> Respondent's Internal Auditors, and could form the basis of disciplinary process at a later stage.

55. It was not until 10 November 2018 that the 1<sup>st</sup> Respondent formally advised the applicant of *fraud* allegations, and initiated a disciplinary process thereof.

56. The process, however aborted because of procedural lapses on the part of the 1<sup>st</sup> Respondent as a consequence of which an Appeal Panel decided that the disciplinary process commence afresh.

57. The Court cannot discern any violation of the 1<sup>st</sup> Respondent's *Policies and Procedures* in the decision by the Appeal Panel for a fresh disciplinary hearing.

58. Equally, the Court cannot find any legal violation of the applicant's rights merely on account of a decision for fresh disciplinary process wherein it was found that there were contractual procedural lapses.

### **Conclusion and Orders**

59. The Court finds and holds that the applicant did not demonstrate a *prima facie* case warranting the grant of any of the orders sought and the Court orders the application dated 6 February 2019 dismissed with costs to the 1<sup>st</sup> Respondent.

**Delivered, dated and signed in Nairobi on this 26<sup>th</sup> day of March 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For applicant Mr. Amalemba instructed by Maloba & Amalemba Advocates

For 1<sup>st</sup> Respondent Mr. Esmail instructed by Anjarwalla & Khanna Advocates

Court Assistant Lindsey