



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 263 OF 2018

VICTORIA IPOMAI.....CLAIMANT

V

SANLAM KENYA PLC.....RESPONDENT

RULING

1. Victoria Ipomai (applicant) was appointed as Group Chief Finance Officer by Pan Africa Insurance Holdings Ltd (changed name to Sanlam Kenya PLC)(Respondent) through a letter dated 16 November 2015.
2. On 3 October 2016, the Respondent appointed the applicant to act as Acting Principal Officer for a subsidiary, Sanlam Life Insurance Ltd in addition to her role as Group Chief Finance Officer (the applicant served in the capacity until 27 June 2017).
3. On 17 November 2017, the Respondent instituted investigations on an *ex gratia* payment allegedly made without authorisation.
4. On 1 February 2018, the Respondent's Board Chairman, John Simba and 2 other senior managers summoned the applicant to a meeting at a hotel where she was informed that the investigations had found her culpable (gross negligence/unacceptable conduct), and that it had been resolved that the parties mutually separate.
5. According to the applicant, the Chair handed to her a draft *Mutual Termination Agreement* and gave her 2 hours to make a decision thereto, and because of an apparent loss of trust, she agreed to the mutual separation on principle, but subject to negotiations.
6. The parties appear to have made some concessions and a *Revised Draft Agreement* was forwarded to the applicant on 5 February 2018.
7. Around the same time the applicant sought legal advice, for on the same day her legal advisers wrote to the Respondent proposing the issuance of a satisfactory *Certificate of Service*, *payment of back pay at recommended basic rate for job grade 10 together with pension contributions*, *12 months remuneration as compensation*, *retention of loan subsidy at 6% to 7% and continuance of medical insurance for a further 1 year*.
8. Instead of responding to the proposed demands by the applicant, the Respondent's acting Group Chief Executive Officer wrote to the applicant on 13 February 2018 notifying her to appear for a disciplinary hearing in Cape Town, South Africa on 8 March 2018.
9. The invitation letter set out some 6 allegations the applicant was informed she would answer to and also informed of the right to be accompanied by a fellow employee of her choice during the hearing.
10. As to the process of hearing, the letter advised the applicant that the disciplinary hearing would be chaired by a Labour Relations Advisor while the Respondent would be represented by its Regional Executive with the Group Human Resources Manager sitting in as an observer.
11. The Respondent indicated it would cater for all related costs.
12. The Respondent further asked the applicant to proceed on paid leave.
13. The invitation to the disciplinary hearing prompted the applicant to move Court on 5 March 2018 under certificate of urgency seeking orders

2. THAT pending the hearing and determination of this application as well as the Claim filed herein inter-partes, this Honourable Court be pleased to stay the intended disciplinary hearing proceedings against the Claimant scheduled for 8th March 2018 in Cape Town South Africa.

3. THAT this Honourable Court do make any such further orders and issue any other relief it may deem just to grant in the interest of justice.

4. THAT the costs of this application be provided for.

14. When the application was placed before the Court on the same day, it certified it urgent and allowed order 2 in terms staying the hearing in Cape Town pending *inter partes* hearing on 13 March 2018.

15. The hearing could not proceed on 13 March 2018 because the applicant requested for time to study the Respondent's replying affidavit which had been served upon her the previous day. The applicant also sought to file a further affidavit.

16. The Respondent on its part drew the attention of the Court to a similar pending Cause/application, Nairobi Cause No. 218 of 2018, *Evans Nyagah Njoki v Sanlam Kenya PLC*.

17. The Court directed that the 2 Causes would proceed side by side and further ordered the applicant to file a further affidavit in readiness for a hearing on 19 March 2018.

18. The applicant filed the further affidavit on 19 March 2018 together with skeletal submissions. The further affidavit scuttled the hearing which was pushed to 23 April 2018.

19. The Respondent on its part filed submissions on 20 March 2018, and a further affidavit.

20. The Court heard oral addresses from the parties as scheduled 23 April 2018.

21. The Court has considered all the material placed before it and has seen no need to rehash the facts and arguments as presented in any detail at this interlocutory stage.

22. Before examining whether the applicant has met the legal threshold for the grant of injunctive relief at this stage, the Court notes that it will not delve into the factual disputes or substantial merits of what appear to be the parties contentions as presented through the affidavits and written submissions. That exercise must await the trial of the facts.

23. The relationship between the applicant and the Respondent is/was subject to the employment contract, the Respondent's *HR Policy and Procedures Manual*, the Employment Act, 2007 and ultimately the Constitution of Kenya.

24. In the view of the Court, the application of the *HR Policy and Procedures Manual* is decisive of the dispute at this stage of the proceedings.

25. Section 4 of the *HR Policy and Procedures Manual* has set out in fastidious detail the requirements and conditions to be complied with when addressing cases of discipline.

26. In terms of section 4.3.4 of the Manual, disciplinary cases involving senior employees such as the applicant must be initiated/processed by the Chief Executive, and that was done in the instant case.

27. The Chief Executive is then required to cascade the case to the *Human Resources Board Committee*, and it is the function of the Board Committee to determine the case.

28. The *Committee* which was constituted by the Respondent's Group Chief Executive comprised a Mr. Hennie Bredenkamp, a Labour Relations Advisor.

29. There is no evidence at all that the said advisor is a member of the Respondent's Board or for that matter the *Board's Human Resources Committee*.

30. The other members of the *Committee* were indicated as Julius Mugabe, Regional Executive and Miriam Wambui, Group Human Resources Manager sitting as an observer.

31. In the replying affidavit sworn by the Respondent's Group Human Resources Manager, Mr. Julius Mugabe is described as a Director of the Respondent, but there is no indication whether he serves as a member of the *Human Resource Board Committee*.

32. It is clear to the Court that the *Committee* constituted by the Respondent to handle the applicant's disciplinary case was not properly constituted in terms of its own Policies (the Court is of course alive to the possibility/desirability of an employer providing for an external expert to chair or participate in disciplinary hearings but there ought to be express provision for such in the relevant disciplinary procedures).

33. The question therefore begs what would be the implication or effect of an employer not complying with its internal disciplinary

procedures. Case law may assist in unravelling the answer.

34. In *The Post Office v Strange* (1981) IRLR 515, it was held that a failure by an employer to observe its own disciplinary procedures may amount to repudiation of contract.

35. Similar *dicta* appear from *Gunton v Richmond-upon-Thames LBC* (1980) ICR 755.

36. An employer who has a disciplinary policy should scrupulously comply with the requirements of such policy.

37. The employer's disciplinary policies and in this case the Respondent's *HR Policies and Procedures Manual* should also be understood within the context of section 12 of the Employment Act, 2007.

38. The next question which arises is whether the Court ought to intervene in a disciplinary process where there is non-compliance with the internal disciplinary policies or indeed with the statutory minimum protections such as is contemplated by section 41 of the Employment Act, 2007.

39. There is ample case law on that question.

40. The question has been addressed in cases such as *Kenya Plantation & Agricultural Workers Union v Finlays Horticulture Kenya Ltd* (2015) eKLR, *Rebecca Ann Maina & 2 Ors v Jomo Kenyatta University of Agriculture and Technology* (2014) eKLR, *Aviation & Allied Workers Union v Kenya Airways Ltd* (2012) eKLR, *Joseph Mutura Mberia & Ar v Council of Jomo Kenyatta University of Agriculture and Technology (JKUAT)* (2013) eKLR and *Booyesen v The Minister of Safety and Security & Or* (2011) 1 BLLR 83 (LAC)

41. From the authorities, it is clear that the Court has the jurisdiction to intervene in a disciplinary process, but such intervention must be in very exceptional cases where compelling reasons have been given to justify the Court's intervention.

42. The compelling reasons would include the fact that grave injustice would be occasioned to the employee and that the employee has no alternative means of attaining justice.

43. In the view of the Court, this case exhibits exceptional circumstances in that the contract in place between the parties was concluded in Kenya and was being performed in Kenya. The parties are also domiciled in Kenya. It was subject to Kenyan law as well and the applicant became assured of the protections thereunder.

44. Therefore, holding the disciplinary hearings outside the jurisdiction of the Court (in Cape Town) without a clear agreement as to the law to be applied leaves doubt at this stage as to whether the protections assured employees would be observed.

45. In effect, the Court finds and holds that the applicant has met the threshold for the grant of the order(s) sought and the Court orders that Pending the hearing and determination of the Claim herein, the intended disciplinary hearing against the applicant scheduled for 8 March 2018 or any other date in Cape Town South Africa are hereby stayed.

46. For clarity, the Court has not interdicted disciplinary proceedings within the country in accordance with the Respondent's Human Resources Policies and Procedures Manual.

47. Costs in the Cause.

Delivered, dated and signed in open Court in Nairobi on this 21st day of May 2018.

Radido Stephen

Judge

Appearances

For applicant Mr. Kinuthia instructed by Nyachoti & Co. Advocates

For Respondent Mr. Omondi instructed by Coulson Harney LLP, Advocates

Court Assistant Lindsey