

IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

REPORTABLE

CASE NO: JR1032/04

In the matter between:

MORGAN SIBANDE

APPLICANT

AND

COMMISSION FOR CONCILIATION,

MEDIATIO AND ARBITRATION

1ST RESPONDENT

COMMISSIONER S. KHOZA

2ND RESPONDENT

DUNWELL PROPERTY SERVICES

3RD RESPONDENT

JUDGMENT

Molahlehi J

Introduction

[1] This is an application to review and set aside the arbitration award issued by the Second Respondent (the Commissioner) under case number GA 21845/03 dated 16th April 2004. In terms of that award the Commissioner found that dismissal of the applicant Mr Morgan Sibande, who in this judgment is referred to as the employee, to be fair and confirmed the dismissal.

[2] The review initially came before Rampai J on the 20th March 2007. In his judgment subsequent to hearing and considering the matter on the unopposed

basis the Learned Judge reviewed and set aside the arbitration award of the Commissioner and ordered that the employee be reinstated in the position he occupied prior to his dismissal.

- [3] Rampai J's judgment was made in default, the third respondent having failed to oppose the review application. On receipt of the judgment the third respondent filed an application to rescind the judgment granted in default. The judgment was rescinded on 12th June 2008 by Cele J.

Background facts

- [4] The employee who prior to his dismissal was employed as a manager by the third respondent was dismissed because he was alleged to be an illegal immigrant.
- [5] After his dismissal the employee referred an unfair dismissal dispute to the first respondent, the CCMA which dispute was subsequent to failure of conciliation arbitrated by the Commissioner. The Commissioner found the dismissal to have been fair and upheld the dismissal.
- [6] The third respondent in support of its case during the arbitration hearing relied on the testimony of Mr Xulu who testified that prior to the dismissal he accompanied the employee to the YMCA. Apparently on their arrival at the YMCA they found the employee's wife, Mrs Sibande involved in a fight with a security guard. The fight between the two concerned an office which Mrs Sibande claimed she was entitled to occupy.

- [7] According to Mr Xulu, the employee took sides and attacked the security guard. He had to intervene to stop the employee from continuing assaulting the security guard.
- [8] The issue of the assault was reported to the other staff members by Mr Toda, the director of the third respondent, and Mr Watkins the following Monday. After the report a meeting was convened attended by Mr Watkins, the employee and Mr Xulu. At this meeting Mr Watkins informed the employee that the third respondent had a problem in keeping him (the employee) in its employ because his citizenship was questioned by the Department of Home Affairs.
- [9] The employee in testifying on his own behalf during the arbitration hearing indicated that he was arrested, charged but found not guilty of the alleged assault on the security guard. He believed that the real reason for his dismissal was because of the alleged assault including the fact that the third respondent sought to avoid having to pay him compensation in the amount of R250 000.00 arising from an incident where he was shot in the neck while on duty. It was for this reason, according to him that the third respondent conspired with Mr Chivoze, the immigration officer of the Department of Home Affairs, to have him deported out of the country.
- [10] The employee denied that he was an illegal immigrant and testified in this respect that he was a holder of a valid South African identity document. He further testified that Mr Chivoze seized his identity document, because he suspected him to be a Zimbabwean citizen. Thereafter, the employee filed an

application to the High Court demanding that Mr Chivoze should return his identity document.

The grounds for review

[11] The employee contended that the award was reviewable because the Commissioner disregarded the certified copy of the identity document which he produced during the arbitration hearing confirming that he was a South African citizen. In this regard the employee further contended that the Commissioner ought not to have found the dismissal to have been fair in the absence of documentation confirming that he was an illegal immigrant.

[12] The employee further contended that the Commissioner committed a gross irregularity in finding that the dismissal was fair in the absence of proof that he was an illegal immigrant.

The Commissioner's award

[13] As concerning procedural fairness of the dismissal the Commissioner found:

*“... although the applicant disputed that a disciplinary **hearing** was held... prior to his dismissal, he however did not dispute that a **meeting** did take place between himself and Mr Watkins in the presence of Patrick wherein he was **informed** about the **reason** for his dismissal.”*

[14] The Commissioner found the dismissal to have been substantively fair because the employee was not dismissed for any misconduct, *“but was dismissed after he was declared an illegal immigrant.”*

Evaluation

[15] Whilst the judgment of Rampai J was rescinded as indicated earlier in this judgment, I had the opportunity to read it and fully agree with the reasons and the conclusions reached therein. Firstly, I concur with the conclusion of the Learned Judge concerning the procedural fairness of the dismissal of the employee. In this respect the Learned Judge had this to say:

“[19] Certainly a meeting between an employer and an employee can never be a substitute for a disciplinary inquiry as the relevant labour legislation envisages. To the extent that in the instant case the commissioner reasoned that it could, I find that she committed a gross irregularity. The employer’s second witness testified about the meeting of 23 June 2003 between the employer’s director, Mr. Watkins, and the employer’s manager Mr. Sibande. What happened there came nowhere close to a hearing of any sort. Mr Watkins, speaking on behalf of the employer, did not go over there to ascertain Mr. Sibande’s response to Mr Chivoze’s suspicion that he was an illegal immigrant. He was clearly not on a fact-finding mission. According to Mr. Xulu, Mr Watkins went over there and informed the employee that his status as a citizen was questioned.

[20] *The employer heard only one side of the story and without hearing the other side as well, concluded that the employee was an illegal immigrant, informed him accordingly and dismissed him. Mr Xulu's evidence showed that Mr. Watkins merely informed the employee of a decision already taken elsewhere. He did not invite the employee to any disciplinary hearing. In short, no formal charge was formulated, no notice of hearing was served and no disciplinary hearing was held.*

[21] *The commissioner's finding that:*

"... this was one of the cases which did not require a disciplinary hearing to be held because the applicant was not dismissed for any misconduct..."

is untenable. If the employee had committed no workplace misconduct, then he should not have been dismissed. Obviously, the employer accepted the immigration officer's suspicion that the employee was an illegal immigrant as the absolute truth and saw no need to afford the suspected employee an opportunity of defending himself. No papers from the Department of Home Affairs referred to in Mr. Xulu's evidence were ever shown or given to the employee during the meeting he had with Mr. Watkins."

[16] As to the reason why the third respondent ought to have held a disciplinary hearing the Learned Judge held that:

“[22] ... Therefore, a disciplinary inquiry should have been held. The immigration officer should have been called and the alleged documents in support of the claim that the employee was an illegal immigrant, should have been produced to prove the misconduct and the employee afforded an opportunity to answer an answerable case. It was never done. As a result of the defective steps taken by the employer, the employee was denied procedural fairness. He was clearly prejudiced. In my view, the dismissal was procedurally unfair. Therefore, I would set the commissioner’s contrary finding aside.”

[17] Mr Boda for the third respondent argued that, Rampai J was wrong in his conclusion about the Commissioner’s finding in relation to substantive fairness, because at the time the applicable legislation at the time was Aliens Control Act 96 of 1991 (Aliens Control Act).

[18] The Immigration Act 13 of 2002 (Immigration Act) repealed the Aliens Control Act. Both pieces of legislations give the immigration officers certain administrative powers in dealing with the issue of a person being suspected or regarded as an illegal immigrant.

[19] Mr Boda further argued that the status of the employee as an illegal immigrant was determined by the immigration officer and if the employee was dissatisfied with that determination his remedy lied with the Immigration Court in terms of the Immigration Act. The argument went further to say that once the

immigration officer has made a decision determining the citizenship of a person such a decision is binding until set aside by the Court. It is for this reason that the CCMA would not have the powers to go beyond the decision of the immigration officer.

[20] I accept the argument that an order by an Immigration Officer declaring a person to be an illegal immigrant is valid and enforceable until it is set aside by a competent Court or tribunal.

[21] Thus in the present instance the key issue is whether or not the employee was declared an illegal immigrant? The contention of the third respondent during the arbitration hearing was that the employee was dismissed because he was declared an illegal immigrant. The third respondent relied on what it was told by Mr Chivoze, in particular that the employee's case interdicting the Department of Home Affairs from deporting him was dismissed. This understanding is confirmed in the letter of dismissal which the relevant part reads as follows:

“... The reason for the termination is that your employer has been informed by the Department of Home Affairs that you have been using a fraudulent identity document and that Home Affairs has obtained a court order to have you deported...”

[22] In the rescinded judgment of the Labour Court, Rampai J found that the real reason for the dismissal was because the employee deceitfully represented to the employer that he was a lawful citizen of South Africa when he was not. The

Learned Judge found that it was this perceived misconduct which led to the dismissal of the employee and accordingly a disciplinary hearing should have been held.

[23] The issue of the validity of a contract concluded between a South African employer and an illegal immigrant received attention in *Discovery Health Ltd v CCMA & Others* (2008) 7 BLLR 633 (ILC). The other issue which the Court was confronted with in that case was whether an illegal immigrant can be regarded as an employee. This issue did not arise in this matter. The issue of the validity of an illegal contract received attention also in *Kylie v CCMA and Others* [2008] 9 BLLR 870 (LC).

[24] Van Niekerk J in *Discovery Health* held firstly that even if the contract between Lanzetta and employer was invalid, Lanzetta would still fall within the definition of an “employee” in terms of the Labour Relations Act 66 of 1995 and accordingly the definition would have to be reconciled with the fair labour practice conferred on every employee by the Constitution. In “*Kylie*” the Court held that prostitutes were entitled to constitutional protection “as persons” but not as employees. The Court found that prostitutes did not have the protection provided for in the Labour Relations Act because their activity was criminalized by the Sexual Offences Act 23 of 1957. Thus the difference between these two cases is in the nature of the work which the two people were doing. In *Kylie’s* case the work was declared illegal by the Sexual Offences Act whereas in the *Discovery Health’s* case the work done by the employee was not prohibited, but the issue concerned the status of the person.

- [25] The facts of the present case whilst very similar to those in *Discovery Health*, they are however distinguishable. In the *Discovery Health* matter it was common cause that the employee was an illegal immigrant whereas in the present matter the employee contended that he was a South African citizen and that his identity document was wrongfully taken from him by the immigration officer. *Discovery Health*, had to do with the issue of jurisdiction of the CCMA and thus Court on review did not have to deal with the merits and the remedy to be made if it was to be found that the dismissal was unfair.
- [26] Before dealing with the issue of the status of the employee, I need to dispose off the argument raised on behalf of the third respondent that Rampai J was wrong in applying the provisions of the Aliens Control Act instead of the Immigration Act. I may mention that Stegmann J in the High Court case also applied the same Act in dismissing the employee's application. The reason for the approach adopted by both Courts is simply that the Immigration Act which repealed the Aliens Control Act came into operation on the 12th March 2003. Thus at the time the immigration officer seized the identity document of the employee on the 27th March 2002, the Immigration Act had not yet come into operation. The application to interdict the Minister of the Department Home Affairs from causing the employee to be arrested for purposes of arranging his deportation was brought on 24th June 2002.
- [27] The process which had to be followed in determining and declaring the employee an illegal immigrant is thus set out in the repealed Aliens Control Act. The Aliens Control Act gave the immigration officer the power in terms of

section 7(1)(ii) to require any person who in the opinion of such officer is not entitled to be in South Africa, to produce documents showing that he or she was authorised to enter or to be in South Africa. The immigration officer had powers in terms of section 9(1) to declare a person, who failed to produce documentation showing that he or she was entitled to be in South Africa, to be a prohibited person. Having declared a person to be a prohibited person, the immigration officer has further powers in terms of section 10(1)(a) to issue such a person with a provisional permit authorising the person to remain in South Africa for a given period.

[28] Another important section in the consideration of this matter is section 10(5)(a) of the Aliens Control Act, which provides that before the expiry of a provisional permit the immigration officer shall after making such investigation as he or she might deem necessary make a determination as to whether the person is a prohibited person. If he or she determines that the person is a prohibited person, he or she is obliged to inform the person of his decision in writing and give him notice to leave South Africa.

[29] It is trite that in terms of section 192 of the Labour Relations Act 66 of 1995 (the LRA), the burden to show that the dismissal was fair rests with the employer, the third respondent in this instance. In my view the facts and the circumstance of this case show that the third respondent had failed during the arbitration hearing to discharge its duty in as far as the burden of proof was concerned.

[30] In this respect it was never, in my view, the finding of the High Court that the *rule nisi* was to be discharged because the immigration officer had declared the employee a prohibited person or an illegal immigrant for that matter. The critical finding of the High Court in this respect is found at page 15 line 4 to 14 of the judgment, where Stegmann J had this to say:

“It must also be pointed out that the respondent’s immigration officer had not complied with the requirements of section 10(5), namely, that before the expiry of the permit he should make a decision on the question whether or not the appellant was a prohibited person (my emphasis). If he had decided that the applicant was not a prohibited person, it would presumably have become unnecessary for the respondent to take any further steps against the applicant. On the other hand, if he had decided that the applicant was a prohibited person, then further powers would have come into play. But in the absence of any decision, further powers did not, as I see it, automatically come into play.”

[31] It was also on the basis of the above that Rampai J concluded that:

“[31] It follows from the foregoing passage that the employee was never declared to be an illegal immigrant. Therefore, the commissioner’s finding that the employee “was dismissed after he was declared an illegal immigrant” was incorrect. Such a finding was based on the aforesaid High Court judgment which was clearly misconstrued. Stegmann J found

that Mr. Chivoze, the immigration officer, failed to make the requisite decision and to serve the requisite notice in terms of section 10(5)(a). The practical implications of the immigration officer's non-compliance with this particular section are obvious. Firstly, the employee did not know that he was a prohibited person because he had not been declared to be one. Secondly, the employee did not know that he had to leave the country because he had not been officially informed by a way of a written notice to do so."

[32] I align myself with the above conclusion and the finding which the Learned Judge had made earlier on in the judgment at paragraph 22 when he said:

"[22] ... Therefore, a disciplinary inquiry should have been held. The immigration officer should have been called and the alleged documents in support of the claim that the employee was an illegal immigrant, should have been produced to prove the misconduct and the employee afforded an opportunity to answer an answerable case. It was never done. As a result of the defective steps taken by the employer, the employee was denied procedural fairness. He was clearly prejudiced. In my view, the dismissal was procedurally unfair. Therefore, I would set the commissioner's contrary finding aside."

[33] In essence, had the Commissioner applied her mind to the evidence before her she ought to have realised that the case of the third respondent was based on what it was told by the immigration officer. That information did not establish as fact that the employee was a prohibited person or an illegal immigrant. The case of the third respondent was based on the suspicion of the immigration officer that the employee was an illegal immigrant. The suspicion that a person is a prohibited person does not establish a fact or legal position that such a person is a prohibited person but simply in law give rise to a process which is intended to establish the true status of the person. The suspicion which the immigration officer had that the employee was an illegal immigrant was accepted by the High Court and it was for that reason that the Court discharged the rule *nisi*. The reason for discharging the rule *nisi*, was because the Court found that there was good grounds for the suspicion by the immigration officer that, the employee was a prohibited person. The Court further found that because there was reasonable ground for suspicion the immigration officer could not be said to be abusing the powers given to him by the provisions of the Aliens Control Act. In other words the immigration officer was entitled to proceed with the process as set out in both sections 9 and 10 of the Aliens Control Act. There is no evidence that that such a process was concluded in a way that it would have supported the case of the third respondent namely that the employee was declared a prohibited person in terms of section 10(5)(a) of the Aliens Control Act.

[34] It therefore follows that the conclusion reached in the award cannot be supported by the evidence which was presented before the Commissioner. In this respect

the Commissioner failed to appreciate the task which was before her which was to determine on the evidence whether or not the third respondent had discharge its duty of showing on the balance of probabilities that a fair and valid reason existed for the dismissal of the employee. The reason could never been valid because it was based on a suspicion of the true status of the employee. Mr Chivoze was never called to testify as to the true status of the employee, neither did the third respondent produce any document confirming that the employee was an illegal immigrant.

[35] The key ground upon which the employee based its challenge to the arbitration award is gross irregularity as envisaged in section 145 of the Labour Relations Act. Section 145(2) of the Labour Relations Act reads as follows:

“(2) A defect referred to in subsection (1), means -

(a) that the commissioner -

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner’s power;. . .”

[36] In *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC), held that the provisions of section 145 of the Labour Relations Act was suffused by the constitutional standard of reasonableness. The standard

of reasonableness is determined by answering the question which was formulated in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others* 2004(7) BLLR 687(CC) as follows; “Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?”

[37] The test for gross irregularity as was articulated in *Gold Fields Investment Ltd & another v City of Johannesburg & another* 1938 TPD 551 is summarised in *Sidumo* by Ncobo J (at page 1178-F) as follows:

“... *patent irregularities*,” that is *irregularities that take place openly as part of the proceedings, on the one hand, and “patent irregularities, that is irregularities that take place inside the mind of the judicial officer which are ascertainable from the reasons given by the decision maker.”*

[38] The crucial enquiry in determining the existence of gross irregularity in terms of *Sidumo* is whether the conduct of the decision maker complained of prevented a fair trial of the issues. This inquiry focuses on the method or conduct of the decision-maker and does not concern itself with the correctness of the decision reached by the decision-maker. It is not every irregularity that would constitute gross-irregularity. It has however been found in a number of cases that a commissioner commits gross irregularity if he or she fails to apply his or her mind to a matter material to the fairness of the sanction. See *Sidumo* at 1179 A-C and 1180 A-C).

[39] In my view had the commissioner in the present instance applied his mind and appreciated the task before him, he ought to have found that the third respondent had failed to discharge its duty of showing that the dismissal of the employee was for both a valid and fair reason. Accordingly, the Commissioner has committed a gross irregularity in that he failed to fairly determine the issues before him.

[40] In the light of the above, I am of the view that the Commissioner's award stands to be reviewed. I see no reason why the matter should be remitted back to the CCMA, as there is sufficient information and material upon which this Court can determine the matter.

[41] In the premises I make the following order.

- (i) The arbitration award issued by the second respondent, on 16th April 2004 under case number GA 21845-03 is reviewed and set aside.
- (ii) The dismissal of the applicant was both procedurally and substantively unfair.
- (iii) The third respondent is directed to reinstate the applicant to the position he held immediately prior to his dismissal on 23rd June 2003 on terms and conditions no less favourable and with full benefits.
- (iv) There is no order as to costs.

Molahlehi J

Date of Hearing : 26th February 2009

Date of Judgment : 30th July 2009

Appearances

For the Applicant : Mr Morgan Sibande (in person)

For the Respondent: Adv Boda

Instructed by : Chiba-Jivan Incorporated