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Sibande v Commission for Conciliation, Mediation and Arbitration & Others

JUDGMENT: Molahlehi J

Introduction

This is an application to review and set aside the arbitration award issued by the CCMA Commissioner. In terms of that award the Commissioner found that dismissal of the applicant Mr Sibande, who in this judgment is referred to as the employee, to be fair and confirmed the dismissal.

Background facts

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.

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.

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. 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.

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.

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

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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.

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

- 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.
- 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

As concerning procedural fairness of the dismissal the Commissioner found that although the applicant disputed that a disciplinary hearing was held prior to his dismissal, he did not dispute that a meeting took place between himself and Mr Watkins in the presence of Patrick wherein he was informed about the reason for his dismissal.

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

The court held that a meeting between an employer and an employee can never be a substitute for a disciplinary inquiry as the relevant labour legislation envisages. Since in the instant case the commissioner reasoned that it could, the court found that she committed a gross irregularity.

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



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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.

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.

In the court's view, the dismissal was procedurally unfair.

Thus in the present instance the key issue is whether or not the employee was declared an illegal immigrant?

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] ZALC 24; (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] ZALC 86; [2008] 9 BLLR 870 (LC)**. **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.

The court held that the facts of the present case whilst very similar to those in *Discovery Health*, 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.



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The court held that 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 the court's 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.

The court held that, 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.

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.

The key ground upon which the employee based its challenge to the arbitration award is gross irregularity as envisaged in **section 145** of the LRA. **Section 145(2)** of the LRA 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;

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

exceeded the commissioner’s power;. . .”



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Sidumo & another v Rustenburg Platinum Mines Ltd & others [2007] 12 BLLR 1097 (CC), held that the provisions of **section 145** of the LRA 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?”

In the court's 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.

In the light of the above, the Commissioner’s award stands to be reviewed.

