Dunwell Property Services CC v Sibande & others
[2012] 2 BLLR 131 (LAC)

Division:	Labour Appeal Court, Johannesburg
Date:	15/09/2011
Case No:	**JA7/10**
Before:	B Waglay, Deputy Judge President, KS Ndlovu, Judge of Appeal and B Sandi, Acting Judge of Appeal

Appeal in terms of section 166 of the LRA

Dismissal – Illegal immigrant – Employee dismissed after employer informed that he was illegal immigrant and that deportation was pending and being warned by authorities of heavy fine if employee retained – Dismissal unfair, even if employer acted in good faith.

Dismissal remedies – Reinstatement – Order of reinstatement rules inappropriate because unfairly dismissed order made serious allegations against superiors during arbitration and review proceedings – Reinstatement order replaced with award of compensation.

Sections of the LRA considered:

Section 193(1)

Section 193(2)

Editor's Summary

The respondent employee, a manager of the appellant estate agency, was informed by letter that his contract had been terminated with immediate effect because the respondent had been informed that he was using a fraudulent identity document and that the Department of Home Affairs had obtained an order for his deportation. The employee was also told that if he could "sort the matter out", he could reapply for his position. The employee referred a dispute to the CCMA, claiming that his dismissal was procedurally and substantively unfair. The respondent commissioner ruled that the dismissal was for a fair reason, and that the appellant was not in the circumstances obliged to afford the employee a hearing. On review, the employee claimed that he was a South African citizen in possession of a valid identity document, which had been confiscated after his arrest by the department. The appellant contended that the department had grounds for a "reasonable suspicion" that the employee had obtained the confiscated birth certificate by fraudulent means, and that he was an illegal immigrant from Zimbabwe, and that it had decided to dismiss the employee after receiving a "stern warning" from a home affairs official that the company faced a heavy fine if it continued to employ him. The Labour Court dismissed these claims, ruled the dismissal unfair, and ordered the appellant to reinstate the employee with full retrospective effect.

The Court noted that the onus of proving the dismissal fair rested on the appellant. The employee had not been afforded a hearing before his dismissal. Furthermore, the reason given in the termination letter was that the department had obtained a deportation order, and the appellant had persisted with its claim that the employee was an illegal immigrant

before the arbitrator. This was incorrect. In a separate civil judgment on which the appellant had sought to rely, the High Court had merely indicated that the department had reasonable grounds for suspecting that the employee was an illegal immigrant. No deportation order had been issued. The appellant had also failed to refer to that part of the High Court's judgment which indicated that the department had failed to follow the required procedures after the employee's provisional work permit had expired. No deportation order could be issued until those procedures had been followed. While the appellant might have acted in good faith on information received from the department, this did not render the dismissal fair.

As to whether the remedy of full retrospective reinstatement was appropriate, the Court noted that none of the circumstances in section 193(1) of the LRA had been relied upon in the court *a quo*. However, when deciding whether reinstatement should be granted, the overriding question was fairness to both parties. The Court held that reinstatement was not appropriate because in the course of the proceedings the employee had made serious allegations of bad faith against his superiors. These allegations would have led to an irretrievable breakdown of the employment relationship.

The court *a quo*'s reinstatement order was set aside, and replaced with an order granting the employee compensation equivalent to 12 months' remuneration.

Judgment

Ndlovu JA:

Introduction

[1] This is an appeal against the judgment of the labour court (Molahlehi J) in terms of which the arbitration award ("the award") issued by the third respondent ("the commissioner") on 16 April 2004, was reviewed and set aside. The appeal served before us with the leave of the court below.

Factual background

[2] The first respondent, Morgan Sibande ("Sibande") was employed by Dunwell Property Services CC ("the appellant") since July 1999 as a manager but was dismissed on 23 June 2003. The letter of dismissal was addressed to Sibande by a company called Johannesburg Property Services (Pty) Ltd and it read thus:

> "We act as the Managing Agents of Dunwell Property Services (Pty) and hereby wish to formally advise that your employer has terminated your employment contract with immediate effect.
>
> 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.
>
> It is thus illegal for your employer to continue with your employment contract – in fact such action could result in a fine being levied against the company.
>
> In the event that you are able to sort this matter out with the Department of Home Affairs, you are welcome to re-apply for your position – provided that you can supply documentary proof that the Department accepts you as a legal citizen of the Republic of South Africa.

> In the meantime, kindly return your office keys, company funds accepted by you and the keys to your unit. Should you wish to continue the use of your flat, rental of R1600 plus electricity, water and levies will be charged."

[3] Sibande was unhappy with his dismissal and hence he referred an unfair dismissal dispute to the second respondent, the Commission for Conciliation Mediation and Arbitration.

The arbitration

[4] Upon attempts at conciliation having failed, the dispute was referred for arbitration before the commissioner who heard the parties on 5 April 2004. In terms of the award the commissioner declared that Sibande's dismissal was both substantively and procedurally fair, and dismissed his claim.

[5] In her concluding remarks the commissioner stated, among other things, as follows:

> "I, therefore, accept the respondent's (i.e. the appellant's) argument that the applicant (i.e. Sibande) was dismissed after it discovered that he was an illegal immigrant.
>
> It further transpired that the applicant has to date, despite the respondent's letter of the 24 June 2003 that he would only be taken back upon producing proof that he was a South African Citizen failed to do so . . .
>
> Furthermore, the applicant disputed that a disciplinary hearing was held for him 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.
>
> I would, therefore, state that I believe 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 that he might have committed but was declared an illegal immigrant."

The Labour Court

[6] Sibande was not satisfied with the outcome of the arbitration. He then brought the matter to the labour court for review in terms of section 145 of the Labour Relations Act,[1] ("the LRA") on the grounds that the award was "*materially and legally defective*" and that the commissioner "*completely misdirected herself*" and "*committed gross irregularity*" when she issued the award in favour of the appellant.

[7] He further averred that he was a South African citizen and not an illegal immigrant or prohibited person, as defined in the now repealed Aliens Control Act.[2] Indeed, it was common cause that at the time he was employed by the appellant, Sibande was the holder of a South African identity document bearing numbers 590802 **** *** issued by the

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Department of Home Affairs ("the Department") on 14 May 1993. However, when he was dismissed he was no longer in possession of the document, since it had been confiscated by the department's officials.

[8] A copy of the photograph page of his identity document and his birth certificate were produced, both of which reflected the Republic of South Africa as being the country of his birth. It was presumably on the basis of this identity document that the appellant accepted Sibande as being a South African citizen at the time that the appellant employed him.

[9] According to Sibande his dismissal was occasioned by some ulterior and malicious motive on the part of the appellant's director, Mr Toda, after the appellant had failed to pay Sibande the sum of R250 000 which Toda had previously promised that the appellant would pay Sibande as compensation and for future medical expenses in respect of injuries which Sibande had sustained after he was allegedly attacked and shot whilst on duty. He further alleged that when the appellant failed to fulfil its promise to pay him the compensation, Toda had then conspired with a Mr Chivose, the department's immigration official, to have Sibande deported out of the country on the ground that he was as an illegal immigrant from Zimbabwe.

[10] On the other hand, the appellant averred that Chivose brought to its attention a judgment delivered on 25 June 2003 by Stegmann J in the Johannesburg High Court, which involved Sibande. The judgment was a sequel to prior interdict proceedings instituted by Sibande in the high court against the Minister of Home Affairs. He had instituted that litigation after his incarceration on suspicion of being an illegal immigrant in terms of the Aliens Control Act. It was then that Sibande's identity document was also confiscated pending further investigation by immigration officials into his legal status in the republic.

[11] In the course of his judgment, Stegmann J made certain remarks and references in relation to allegations that Sibande was an illegal immigrant. As it will be shown hereafter, the appellant relied on Stegmann J's judgment as a ground to dismiss Sibande. I think it is, therefore, apposite to refer to the relevant passage in the judgment in this regard, where the learned Judge stated as follows:

> "As I understand the respondent's case (the respondent being the minister of home affairs), it was on the strength of these documents in the possession of the respondent, that the applicant's (Sibande's) identification document was issued. He has an identification document that is now in the possession of the respondent, having been confiscated from the applicant. It was produced in Court today. It was issued on 14 May 1993, not quite two months after the application for late registration of birth that I have referred to that was made on 24 March 1993. That document records the date of birth of the applicant as having been 2 August 1959, as alleged in the documents dated 24 March 1993 but it does not accord with the applicant's own testimony relating to his alleged birth at Orange Farm on 2 August 1950.
>
> The respondent has made enquiries about the applicant's claim to have been a returning member of Umkhonto we Sizwe and he reports, on a hearsay basis, that the information that he has obtained from the officials of Umkhonto we

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> Sizwe is that so far as they are concerned, the applicant's claim to have been a member of Umkhonto we Sizwe cannot be substantiated. The applicant has been asked to provide the particulars by which it would be easier to identify him, namely, some sort of secret code name by which the members of Umkhonto were apparently known to each other and to the organisation. The applicant has refused to disclose the code name that he had. He has also refused to state specifically where he went for his training, using the excuse that these are military secrets that may not be divulged.
>
> The result is that the respondent's enquiries, in an effort to establish whether or not there is truth in the applicant's claim to be a returning Umkhonto we Sizwe soldier, have not met with success. That fact adds to the suspicions entertained by the respondent of the applicant's situation.
>
> The respondent has further established that, over the past three or four years, the applicant has made numerous crossings at the Beit Bridge border, that is, between the Republic's northern border and its immediate neighbour to the north, being the Republic of Zimbabwe.
>
> In the light of what these investigations have shown, the respondent entertains the suspicion, which he submits is based upon reasonable grounds, that the applicant is in reality a Zimbabwean and that, when the Umkhonto we Sizwe soldiers were returning to this country in about 1993, he pretended to be one of them and came here. The respondent evidently suspects that the applicant got hold of the particulars of some genuine birth of a child in this country on 2 August 1959 and filled in the documents that aimed at identifying himself with that person, and by these fraudulent means has obtained the issue to himself of a South African identification document and a South African passport without being lawfully entitled to either of these documents . . .
>
> This Court could enquire into the question whether the suspicion entertained by the respondent's official is based on reasonable grounds or not . . . it seems to me, on the face of it, that the respondent's official has indeed shown that he does have reasonable grounds for suspicion that he is not abusing his powers . . .

> Once that is the situation, it seems to me that this Court has no power to interfere with the exercise of his powers."

[12] According to the appellant, Chivose issued a stern warning that if the appellant continued employing a prohibited foreigner (referring to Sibande) it was exposing itself to the risk of possible criminal prosecution and a heavy fine. As a result, the appellant summarily dismissed Sibande on 23 June 2003.

[13] The review application served before Molahlehi J who made an order in the following terms:

> "(i) The arbitration award issued by the second respondent on 16 of 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 23 June 2003 on terms and conditions no less favourable and with full benefits.
>
> (iv) There is no order as to costs".

The appeal

[14] Mr *Mosam*, for the appellant, conceded that the immigration officer ought to have followed the procedure envisaged in the Aliens Control Act (particularly section 9) which, if the appellant's version was correct, the immigration officer clearly did not follow. Counsel argued, however, that notwithstanding the immigration officer's failure in this respect, the court below simply ignored the *prima facie* findings of the high court (Stegmann J) that Sibande could indeed be an illegal immigrant. He further contended that the effect of the high court findings shifted the evidential burden to Sibande, as an employee, to convince the appellant, his employer, that he was a South African citizen.

[15] Counsel also conceded, correctly so in my view, that the commissioner misdirected herself in saying that Sibande was "declared an illegal immigrant" in terms of Stegmann J's judgment.

[16] Mr *Mphepya*, for Sibande, submitted that it was incumbent upon the appellant to conduct a proper investigation about the allegation that Sibande was an illegal immigrant. The only proper investigation would have been the holding of a misconduct enquiry against Sibande. Failure by the appellant to hold the misconduct enquiry rendered Sibande's dismissal procedurally unfair. Further, Sibande was dismissed on an allegation which was never proved. There was, therefore, also not a fair reason to have dismissed him.

Analysis and evaluation

[17] It is now settled law that the test for determining whether or not an arbitration award passes muster of judicial review, in terms of section 145 of the LRA, is to be found in the answer to the question: "Is the decision reached by the commissioner one that a reasonable decision maker could not reach?"[3]

[18] The appellant had to demonstrate on a balance of probabilities that its dismissal of Sibande was fair,[4] from both dimensions, procedurally and substantively.

[19] It was evident that no due process was followed prior to Sibande's dismissal. He was never brought before any disciplinary enquiry, charged with misconduct. He was merely informed of the dismissal. In this regard, the commissioner noted:

> "Mr Ken Watkins one of the directors of the (appellant) was given the mandate to inform (Sibande) about the reasons of his dismissal and he informed the latter about his dismissal in the presence of one of the security guards Mr Patrick Xulu."

[20] The meeting between Watkins and Sibande could never have served as a substitute for a disciplinary hearing. Therefore, the process followed by the appellant in this regard was completely flawed and irregular. It stands

> to reason, in the circumstances, that Sibande's dismissal was not effected in accordance to a fair procedure.

[21] Moreover, Sibande's dismissal letter stated that the reason thereof was that the appellant had 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".[5] This purported reason for Sibande's dismissal was reiterated by the appellant's representative during the arbitration hearing,[6] as

factually incorrect. Neither the court, in terms of Stegmann J's judgment or otherwise, nor the immigration officer concerned ever declared Sibande an illegal immigrant or prohibited person, as defined in the Aliens Control Act.

[22] Stegmann J only remarked that, on the face of it, the immigration officer had "*shown that he does have reasonable grounds for suspicion and that he* (the immigration officer) *is not abusing his powers*" in holding that Sibande was an illegal immigrant.

[23] Significantly, although Sibande lost his case in the High Court he was never declared an alien or illegal immigrant, nor did the High Court also issue a deportation order against him, as alleged on behalf of the appellant in his letter of dismissal. Further, an allegation in the same letter that Sibande was "*using a fraudulent identity document*" remained an allegation and not a proven fact. At the time of his employment by the appellant Sibande produced a *prima facie* good and valid South African identity document, which remained in his possession up to the moment that it was confiscated.

[24] If, on the information made available, the immigration officer was satisfied that Sibande was a prohibited person, then the immigration officer had the power in terms of section 9(1)(a) of the Aliens Control Act to declare him a prohibited person, which would then have triggered implementation of consequential measures against Sibande, as envisaged in the Aliens Control Act. This was not done.

[25] I also do note that the appellant seemed to have conveniently overlooked Stegmann J's further observation in the case, which clearly showed that the department did not do what it ought to have done. The learned Judge stated:

> "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 (provisional) permit he should make a decision on the question whether or not the applicant was a prohibited person. 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."[8]

[26] It was common cause that at the expiry of the provisional permit issued to Sibande no decision had been made by the immigration officer concerned on the question of whether or not Sibande was a prohibited person, as defined. In the circumstances, there was simply no legal basis, in my view, which justified any drastic measures to be taken against Sibande yet, including his deportation. Incidentally, a letter referenced ZJH/CON/24 dated 23 February 2004 from the Zimbabwean Consulate was produced, which confirmed that Sibande was not a Zimbabwean citizen.

[27] Whilst the appellant might probably have acted in good faith upon the information it received from the immigration officer concerning Sibande, the information did not, in my view, constitute a fair reason to justify his dismissal. Nor did the information constitute any proof that Sibande was declared an alien. It was also particularly significant to bear in mind that at the time that he was employed he held a proper and valid proof that he was a South African citizen.

[28] In my conclusion, Sibande's dismissal was both procedurally and substantively unfair and, to that extent, the appeal should fail.

Was the sanction of retrospective reinstatement appropriate?

[29] As stated, after reviewing and setting aside the award, the court below directed the appellant to reinstate Sibande "to the position he held immediately prior to his dismissal on 23 June 2003 on terms and conditions no less favourable and with full benefits". This aspect of the matter is governed by section 193 of the LRA which, to the extent relevant, provides:

> "(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may–
>
> (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;
>
> (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or
>
> (c) order the employer to pay compensation to the employee.
>
> (2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless–
>
> (a)

(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;

(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or

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(d) the dismissal is unfair only because the employer did not follow a fair procedure."

[30] Therefore, it followed that unless either or both conditions referred to in sections 193(2)(b) or (c) were present, the court below was obliged to issue an order reinstating Sibande to his employment with effect from any date which the court, in its discretion, would deem just and equitable but not earlier than the date of dismissal. Indeed, the constitutional court has reiterated that the primary statutory remedy in unfair dismissal disputes is aimed at placing an employee in the position he or she would have been but for the unfair dismissal.9

[31] It did not appear that the appellant canvassed (before the court below) the issue of why the reinstatement order should not be granted, in the event of Sibande's dismissal being found to be unfair. In order to determine whether or not an unfairly dismissed employee should be reinstated, as contemplated in section 193(2) of the LRA, the overriding consideration in the enquiry should be the underlying notion of fairness between the parties, rather than the legal onus, and that "[f]airness ought to be assessed objectively on the facts of each case bearing in mind that the core value of the LRA is security of employment".10 In *Billiton Aluminium*,11 the Constitutional Court stated:

> "The remedies awarded in terms of the provisions of section 193 of the LRA must be made in accordance with the approach set out in *Equity Aviation* (*supra*). That approach is based on underlying fairness to both employee and employer. It would introduce unwanted and unnecessary rigidity to saddle an inquiry into fairness with notions of a legal onus."12

[32] In any event, I am satisfied that the reinstatement question could still be resolved on the papers. I am of the view that, in the circumstances of this case, Sibande's continued employment relationship with the appellant would be intolerable and that it is, therefore, no longer reasonably practicable for him to be reinstated in the appellant's employ. I say this particularly for the reason that Sibande levelled some very serious and scandalous allegations against certain people in the top and lower management level of the appellant, including Toda and Khaile Ramoeletsi, the appellant's director and manager, respectively. In his letter dated 24 October 2003 addressed to the department, Sibande made the following claims:

32.1 That when he notified Toda about his injury on duty, the latter revealed to him that the appellant was not registered with the relevant authority of the Department of Labour and that, for that

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reason, it was not advisable to report the matter to that department for the purpose of the workmen's compensation claim.

32.2 That Toda had then made a promise to pay him the sum of R250 000 as compensation for his injury, which Toda, however, failed to fulfil.

32.3 That Toda had bribed Chivose (the department's immigration official) in order to protect the appellant's unlawful employment of Ramoeletsi who was an illegal immigrant from Lesotho.

[33] The allegation by Sibande of the appellant owing him R250 000 as described above, was repeated by him in his founding affidavit in support of the review application. Ironically, he had himself the following to say on his relationship with the appellant:

> "The relationship between myself and the third respondent (i.e. the appellant) had deteriorated in such a manner that the third respondent wanted to get rid of me, thus avoiding my R250 000 as compensation for injuries sustained whilst on duty."

[34] Hence, I am satisfied that the trust relationship between the appellant and Sibande had broken down completely and irretrievably. Therefore, the granting of the reinstatement order was, in my view, a misdirection on the part of the court below and it cannot stand. That being the case, Sibande should be entitled only to compensation.13

[35] To my mind, the circumstances surrounding Sibande's dismissal were such as to have violated any fair treatment to which an employee is entitled. Accordingly, I am of the view that the payment to Sibande of the maximum compensation prescribed by the LRA would be just and equitable.14 It was common cause that he earned R10 000 per month at the time of his dismissal.

The order

[36] In the event, the following order is made:

1. The appeal against orders (*i*) and (*ii*) of the court below is dismissed.
2. The appeal against order (*iii*) of the court below is upheld and that order is set aside and substituted with the following:

> "The third respondent is ordered to pay compensation to the applicant in the amount of R120 000 (one hundred and twenty thousand rand) being the amount equivalent of the applicant's 12 month's salary at the time of his dismissal (ie 12 x R10 000, 00 = R120 000".

3. The compensation referred to in (2) above must be paid by the appellant to Sibande within 40 (forty) days from the date of this order.
4. There is no order as to costs on appeal.

(Waglay DJP and Sandi AJA concurred in the judgment of Ndlovu JA.)

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For the applicant:

A Mosam instructed by Chiba-Jivan Incorporated

For the respondents:

KF Mphepya instructed by the Legal Aid Board

The following cases were referred to in the above judgment:

Billiton Aluminium SA Ltd t /a Hillside Aluminium v Khanyile & others [2010] 5 BLLR 465 (2010 (5) BCLR 422) (CC)	139
Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others [2008] 12 BLLR 1129 ((2008) 29 ILJ 2507) (CC)	139
Kroukam v SA Airlink (Pty) Ltd [2005] 12 BLLR 1172 (LAC)	139
Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others [2006] 11 BLLR 1021 (SCA)	139

Footnotes

1 Act 66 of 1995.
2 Act 96 of 1991. This Act was repealed by the Immigration Act 13 of 2002 which came into effect on 12 March 2003.
3 See *Sidumo v Rustenburg Platinum Mines* [2008] 11 BLLR 1021 (SCA).
4 S 192(2) of the LRA.
5 At 38 of the indexed record.
6 At 76 of the indexed record.
7 At 77 lines 18–20 of the indexed record.
8 At 54 of the indexed record.
9 *Equity Aviation Services* (*Pty*) *Ltd v Commission for Conciliation, Mediation and Arbitration & others* (2008) 29 ILJ 2507 and [2008] 12 BLLR 1129 (CC) at para 36.
10 *Equity Aviation*, above, at para 39.
11 *Billiton Aluminium SA Ltd t /a Hillside Aluminium v Khanyile & others* 2010 (5) BCLR 422 (CC) [also reported at [2010] 5 BLLR 465 (CC) – Ed].
12 *Billiton Aluminium*, above, at para 43. Compare: *Kroukam v SA Airlink* (Pty) Ltd [2005] 12 BLLR 1172 (LAC) at 1203 para 94 and *Rustenburg Platinum Mines Ltd* (*Rustenburg Section*) *v CCMA & others* [2006] 11 BLLR 1021 (SCA) at para 45.
13 S 193(1)(c) of the LRA.
14 S 194(1) of the LRA.