IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NUMBER: JR2724/07

REPORTABLE

In the matter between:

ZILWA CLEANING AND GARDENING SERVICES CC Applicant

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION First Respondent

JACKSON MTHUKWANE Second Respondent

SATAWU obo S MATAMBELA Third Respondent

JUDGMENT

LE ROUX, AJ:

1 The applicant in this matter conducts the business of providing cleaning services to the owners or occupiers of buildings. Ms Matambela, whose dismissal forms the subject matter of these proceedings, was employed by the applicant as a cleaner. She worked at the Merino Building in Pretoria in respect of which the applicant had a cleaning contract. She was dismissed on 27 November 2006 for various reasons, including absence from work and for

being insubordinate. She challenged the fairness of her dismissal and referred a dispute to the first respondent.

2 The arbitration that resulted from this referral was conducted by the second respondent. He found that the dismissal had been substantively and procedurally unfair. The applicant now seeks to have this award reviewed and set aside.

3 When this matter was originally called on 17 February 2009 there was no representation on behalf of the applicant. I stood the matter down for a period and it was called again. There was still no representation. After hearing submissions from Ms Craven, who appeared for the third respondent, I then decided to proceed with the matter. Ms Craven then submitted argument. When she had completed her submissions I indicated that I would consider the matter and give judgment later that day.

4 Shortly thereafter I was informed that a Mr Zilwa had approached my associate and asked what the status of this case was. It then became apparent that Mr Zilwa, who is the owner of the applicant, had been waiting in another court for the matter to be called in that court. He had lodged a separate application in this matter in terms of which he challenged the right of the South African Transport and Allied Workers Union (SATAWU) to represent Ms Matambela in this matter. He was under the impression that both matters would be heard together in that court.

5 Because I had not yet given judgment I came to the conclusion that I could proceed with the matter and finalise it. Both parties agreed to this approach and the matter was argued again before me. The issue of representation was

not proceeded with. Certain procedural points raised by the third respondent relating to the submission of the record were also not proceeded with.

6 Mr Zilwa is not legally trained and has very little knowledge of what the nature of review proceedings is and how they must be proceeded with. It was therefore very difficult to address the merits of this matter. He clearly regarded the process as one akin to appeal. I read the pleadings submitted by him and could not discern any clear ground for review on which he was relying. His arguments were far from coherent on the matter. Nevertheless, he did submit heads of argument which clarified the applicant's approach. The factual and legal issues in this regard eventually emerged.

7 It is necessary to provide a brief overview of the evidence submitted at the arbitration.

8 The main witness for the applicant at the arbitration was Mr Zilwa. The most relevant aspects of his testimony were as follows:

8.1 on 7 November 2006 Ms Matambela was absent from work;

8.2 on her return to work on 8 November 2006 she was asked by Mr Zilwa to account for her absence. She indicated that she had taken her child to see a medical practitioner. She was requested to provide a medical certificate but she had merely indicated that she would rather not be paid for the day of her absence;

8.3 on 10 November 2006 a further meeting took place between Mr Zilwa and Ms Matambela. At this meeting he informed her of the fact that she would be required to attend a disciplinary enquiry on 24 November

2006. This arose from her absence from work on 7 November 2006. He asked Ms Matambela to sign for the receipt of the written notification of the hearing but she had refused to do so. He then lodged a further charge of refusing to obey an instruction against her. This additional charge was handwritten on the original document setting out the first charge. She was not given a copy of the document because she refused to accept it. She was then suspended without pay and informed of the hearing. This was done verbally;

8.4 the disciplinary hearing took place on 24 November 2006. He chaired the hearing. Ms Matambela had been arrogant, uncooperative and unapologetic. She had refused to answer questions put to her;

8.5 Ms Matambela was dismissed on 27 November 2006. The reasons for the dismissal were set out in a letter addressed to Ms Matambela by him. This letter was read into the record by Mr Zilwa. In this letter Ms Matambela is found guilty of insubordination and absence from work. Other issues referred to include that she was "in contempt of the hearing", that she was "blasphemous", that she requested permission to sleep on duty, that she took tea breaks at the wrong time and another instance of unauthorised absence from work. He admitted that the letter contained the grounds for the dismissal of Ms Matambela. He insisted that the reasons given for dismissal were fair reasons. He was cross examined on how the grounds of absence from work and insubordination corresponded with the applicant's disciplinary code. He accepted that a first incident of this type of misconduct would not

generally have justified dismissal but defended the decision to dismiss on the basis of Ms Matambela's conduct during the enquiry;

8.6 he also pointed out that the contract for the cleaning of the building where Ms Matambela had worked had expired. Her employment would have come to an end on the expiry of that contract;

8.7 he also insisted that he had not been biased in any matter, despite it being put to him that he had been involved in the drafting of the charges and had also been chairman of the hearing.

9 A Mr Noluzuko Zibaya, a supervisor employed by the applicant, also gave evidence. His evidence supported Mr Zilwa's evidence as to what occurred on 8 November 2006.

10 Ms Matambela also gave evidence. The relevant parts of her testimony are as follows:

10.1 she admitted that she had been absent on 7 November 2006 and stated that this was because of the illness of her child;

10.2 on 10 November 2006 she was called to Mr Zilwa's office. She was asked why she had been absent from work on 7 November 2006. She produced a copy of a medical certificate. The original had been given to her supervisor on 8 November 2006. Mr Zilwa then demanded the original and she asked him for time to obtain it. She admitted that she had suggested that an amount be deducted from her salary;

10.3 at this meeting she was informed of her suspension and of the proposed disciplinary hearing. This was done orally;

10.4 during the course of the hearing she explained that she had been absent because of the illness of her child. She produced the original medical certificate;

10.5 Mr Zilwa had bullied her and did not want to listen to anything she said. He had been harsh.

11 The second respondent found that the dismissal was substantively and procedurally unfair. As far as procedural fairness is concerned he found that Ms Matambela had been ambushed and that there had been bias. Mr Zilwa had been involved in the incidents that led to the disciplinary charges and had chaired the hearing. As far as substantive fairness is concerned he pointed out that the applicant's own disciplinary code indicated that dismissal was not the appropriate sanction in these circumstances. She was also dismissed for reasons totally unrelated to the charges that she had faced.

12 He then issued the following order:

> *"6.1 The dismissal of the applicant Sina Matambela, was procedurally and substantively unfair.*
>
> *6.2 The respondent, Zilwa Cleaning Services CC is ordered to reinstate the applicant, Sina Matambela on the same terms and conditions as those that prevailed at the time of her dismissal, within 14 calendar days of the respondent receiving this award.*
>
> *6.3 The respondent, Zilwa Cleaning Services CC is further ordered to pay the applicant, Sina Matambela, compensation for the*

period she would have been paid from 27 November 2007 to date of reinstatement, within 14 calendar days of the responding receiving this award.

6.4 The respondent is further ordered to pay to the applicant her salary during the period of suspension without pay from 10 November 2006 to 27 November 2007 calculated as follows: R64-00 (daily rate) x 12 (days suspended) = R768-00.

I make no order as to costs."

13 The order is unhappily formulated. It seems clear that the order reflected in paragraph 6.3 was meant to be an order that the applicant pay Ms Matambela **her salary** for the period 27 November **2006** until her reinstatement. Similarly the date of 27 November 2007 as reflected in paragraph 6.4 should actually be 27 November 2006. Neither the applicant nor the second respondent referred to this. I will return to this order again later.

14 The founding affidavit does not formulate any grounds for review. The same applies to a replying affidavit submitted later. However, the main ground for review appears to be the argument that there was no evidence on which the second respondent could have based his finding of an unfair dismissal. (This ground can conceivably be discerned from the applicant's pleadings.)

15 I have considered the award in the light of the evidence as reflected in the transcript of the recording of the arbitration proceedings. I am of the opinion that there was evidence available to reasonably justify the second

respondent's finding of substantive and procedural unfairness (See *Karen Beef (Pty) Ltd v Bovane NO & Others [2008] 8 BLLR 766 (LC)* and the decision of Ngcobo J in *Sidumo & Others v Rustenburg Platinum Mines Ltd and Another [2007] 12 BLLR 1097 (CC) at 268.)* In any event, and especially as far as substantive fairness is concerned, these findings can largely be justified on the basis of the letter dated 27 November 2006 which was submitted by the applicant as evidence at the arbitration hearing. There is also no defect as envisaged in section 145 of the Labour Relations Act, 66 of 1995 ("the Act").

16 However, the remedies granted by the second respondent do require further consideration.

17 The first point that was raised during argument is that Ms Matambela was reinstated, despite the fact that there was evidence to the effect that the contract to clean the Merino Building had terminated and that the contracts of employment of the employees employed on this work had been terminated.

18 The second respondent does deal with this issue to some extent. He refers to the decision of the Labour Appeal Court in *Kroukam v SA Airlink (2005) 26 ILJ 2153 (LAC)* and accepts that this decision is authority for the view that reinstatement is the preferred remedy. He also refers to the dictum of Zondo JP to the effect that, if none of the circumstances set out in section 193(2) of the Act are present, reinstatement must be granted. He then finds that he has no discretion and that he must reinstate Ms Matambela. The problem with this approach is that the second respondent does not consider, as he is required to do, whether or not one of the circumstances set out in section 193(2) of the Act were present. Given the fact that evidence was lead that the contract for

the cleaning of the Merino Building had expired he was required to consider whether reinstatement was, for example, practicable. The mere fact that the contract in respect of which Ms Matambela had been employed had expired does not, of course, mean that reinstatement should not be granted. She could perhaps have been employed on another contract. However, this issue was simply not considered. The second respondent failed to apply his mind to a relevant statutory provision and failed to consider relevant facts.

19 Ms Craven argued that it was not open for the applicant to raise this point in argument as it was not raised with in the founding affidavit or the replying affidavit.

20 In *CUSA v Tao Ying Metal Industries & others [2009] 1 BLLR 1 (CC)(at 67)* the following is stated:

> *[67] …. Subject to what is stated in the following paragraph, the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not on its own raise issues which were not raised by the party who seeks to review an arbitral award. There is much to be said for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about. In particular, the LRA specifies the grounds upon which arbitral awards may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not on appeal raise a new ground of review. To permit a party to do so may very well undermine the objective of the LRA to have labour disputes resolved as speedily as possible.*

> *[68] These principles are, however, subject to one qualification. Where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law is, a court is not only entitled, but is in fact also obliged, mero motu, to raise the point of law and require the parties to deal therewith. Otherwise, the result would be a decision premised on an incorrect application of the law. That would infringe the principle of legality."*

21 In my opinion the second respondent proceeded on the basis of wrong perception of what the law is in this regard and the proviso formulated in the second paragraph of the above excerpt applies. I should also add that this complaint was raised in a document referred to in the founding affidavit.

22 Unfortunately, this is not the end of the matter. Paragraph 6.3 of the order then requires the applicant to pay Ms Matambela "compensation for the period that she would have been paid from 27 November 2007 until the date of reinstatement". (As indicated earlier, the reference to 27 November 2007 is an error. It should be a reference to 27 November 2006, the date on which Ms Matambela was dismissed.) In ordering both reinstatement and the payment of compensation, the second respondent erred and exceeded his powers. Section 193(1) of the Act makes it clear that compensation and reinstatement are mutually exclusive remedies. See also *Equity Aviation Services (Pty) Ltd v CCMA & Others [2008] 12 BLLR 1129 (CC) at 41-42.* It might well be that what the second respondent sought to achieve was, in fact, full retrospective

reinstatement. Unfortunately the way in which he went about it is not permitted in law. (I should add that although this issue was not raised in the applicant's pleadings this is an error envisaged in the excerpt from the *Tao Ying* decision provided above and I am required to deal with it.)

23 Finally, there is the fourth part of the award set out in paragraph 6.4. Here the applicant is ordered to pay Ms Matambela her salary for the period of her suspension without pay. (Once again the reference to 27 November 2007 is an error. It must be 27 November 2006.) Why such an order is made is not motivated. It seems clear, however, that this is based on the assumption that it was unlawful or unfair to have suspended Ms Matambela without pay. The problem with this approach, however, is that a dispute of this nature was never referred to the third respondent. The form LRA 7.11 in which the dispute is referred to arbitration only alleges an unfair dismissal dispute. The form LRA 7.13 requesting arbitration also only refers to an unfair dismissal.

24 The fact that Ms Matambela was suspended was referred to during the arbitration but the merits or otherwise of this suspension are not dealt with in any detail. Neither does the award deal with this – it simply makes the order referred to. On this basis I am of the opinion that the second respondent did not have the jurisdiction to consider the issue or the power to make such an order. I am mindful of the fact that an overly technical approach to disputes referred to the third respondent should not be taken. Nevertheless, it is not too much to have expected Ms Matambela to have complied with the far from onerous procedural requirement of actually referring an unfair labour practice dispute to the third respondent, especially when she was represented by her union and where her union referred the unfair dismissal dispute on her behalf.

25 In summary, I therefore find that in deciding to reinstate Ms Matambela without considering the provisions of section 193(2) and the possible implications of the fact that the Merino Building contract had been cancelled the second respondent did not apply his mind to the relevant facts and the applicable legal principles. He therefore committed a gross irregularity and exceeded his powers as envisaged in section 145 of the Act. In doing so he also came to a decision to which a reasonable commissioner could not come. *Sidumo & Another v Rustenburg Platinum Mine Ltd & Others [2007] 12 BLLR 1097 (CC)* at paragraphs 110 et seq and 258 et seq). This aspect of the award set out in paragraph 6.2 of the award must therefore be set aside. I come to the same conclusions with in respect of the finding that compensation should be awarded together with reinstatement (paragraph 6.3 of the award) and that compensation should be awarded in respect of the suspension without pay (paragraph 6.4 of the award).

MY ORDER IS AS FOLLOWS:

The award of the second respondent is reviewed and set aside only to the extent that the remedies granted in terms of paragraphs 6.2 to 6.4 of the award are set aside.

The matter is referred back to the second respondent for the consideration of what the appropriate remedy for the unfair dismissal of Ms Matambela should be.

I do not think that costs should be awarded in this case.

LE ROUX AJ

APPEARANCES

For the applicant:	Mr Zilwa
For the respondent:	Ms Craven
Date of judgment:	07 May 2009