THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 641/10

In the matter between:

Jacobus Daniel Visser	First Appellant
and	
Mopani District Municipality	First Respondent
SA Local Government Bargaining Council	Second Respondent
Fatima Cachalia N.O.	Third Respondent

Neutral citation: *Jacobus Visser v Mopani District Municipality* (641/10) [2011] ZASCA 248 (1 December 2011)

Coram: PONNAN, SNYDERS, LEACH, MAJIEDT JJA AND PETSE AJA

Heard: **10 November 2011**

Delivered: **1 December 2011**

Summary: Labour Relations Act 66 of 1995 – ss 145 and 193 – reinstatement after substantively and procedurally unfair dismissal – confirmed on review by the Labour Court – no warrant for the Labour Appeal Court to interfere

ORDER

On appeal from: The Labour Appeal Court (Davis, Tlaletsi JJA and Hendricks AJA):

1 The appeal is upheld with costs.

2 The order of the Labour Appeal Court is set aside and substituted with the following:

'The appeal is dismissed with costs.'

JUDGMENT

SNYDERS JA (Ponnan, Leach, Majiedt JJA and Petse AJA concurring)

[1] This is an appeal from the Labour Appeal Court (Davis, Tlaletsi JJA and Hendricks AJA), with special leave of this Court. The appellant is the former Regional Director Fire and Emergency Services in the employ of the first respondent, the Mopani District Municipality. The first respondent dismissed the appellant on 21 May 2004. In terms of the bargaining council agreement of the South African Local Government Bargaining Council, the second respondent, the dispute that arose from the appellant's dismissal was arbitrated by the third respondent. The third respondent found that the appellant's dismissal was procedurally and substantively unfair, and ordered his reinstatement in terms of s 193(1) of the Labour Relations Act 66 of 1995 (the LRA). The first respondent took this award on review to the Labour Court (the LC) in terms of s 145 of the LRA. The LC dismissed the application and with its leave the first respondent appealed the decision to the Labour Appeal Court (the LAC). As it is only the first respondent that is opposing the current proceedings, I shall continue to refer to it as the respondent, unless specifically otherwise stated.

[2] The issue in this matter falls within a very narrow compass which makes it

unnecessary to traverse all the facts. The appellant held the same position with the respondent's predecessor, the Northern District Council, as with the respondent, until 2000 when municipal restructuring occurred and the respondent succeeded the former council. During September 2003 the respondent transferred the appellant from Tzaneen, where he had been stationed until then, to Giyani. This transfer was to be governed by an agreement entered into under the auspices of the second respondent between the South African Local Government Association, the South African Municipal Workers' Union and the Independent Municipal and Allied Trade Union (IMATU). IMATU represented the appellant. The appellant accepted his transfer on condition that he receives a travel allowance for travel from Tzaneen to Giyani as he lived in Tzaneen and was unable to relocate to Giyani.

[3] For three months the appellant continued to receive a travel allowance from the respondent. After three months and a series of miscommunications and misconceptions, the respondent ceased payment of any travel allowance to the appellant, whereupon the appellant went back to Tzaneen and reported there for duty. No negotiations were entered into in terms of the bargaining council agreement in relation to the transfer and appellant's expressed need for an allowance. Despite some meetings the issue was never resolved and on 21 May 2004 the appellant was notified that his services had been terminated due to desertion. Thereafter some attempt was made to serve a notice on the appellant to attend a formal, belated, disciplinary hearing, this ultimately took place in the appellant's and IMATU's absence, and resulted in the dismissal being confirmed.

[4] In terms of the bargaining council agreement the parties then went to arbitration before the third respondent who, on 23 November 2004,found the appellant's dismissal to have been both procedurally and substantively unfair. She made an award setting aside the dismissal of the appellant, ordering his reinstatement, ordering the finalisation of his transfer within 30 days of his reinstatement and the payment of compensation for a period of two months.

[5] The respondent did not abide the arbitration award, but resorted to a review to the LC in terms of s 145, read with s 158(1)(*g*), of the LRA. The appellant applied simultaneously for the arbitration award to be made an order of the LC.

[6] Unless a defect is found to have occurred in the arbitration proceedings the LC is not at liberty to interfere with the award of the arbitrator. A defect occurs only in the limited circumstances set out in s 145(2):

'(*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 powers; or

(*b*) that an award has been improperly obtained.'[1]

[7] Having correctly reminded itself of the limited jurisdiction to interfere as circumscribed in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) the LC concluded that the decision reached by the arbitrator could not reasonably be labelled as one which a reasonable decision maker could not have reached. The LC made an order dismissing the review application with costs and confirmed the third respondent's award.

[8] The respondent remained disgruntled and with leave of the LC appealed against this decision to the LAC. On the merits of the appeal the court a quo came to the following conclusion:

'The approach which has to be adopted by this court, is not whether it would have found that the dismissal was justifiable, but whether, on the evidence which was placed before the [third] respondent, the [third] respondent comported herself in regard to the decision in a manner which was congruent with that of the reasonable decision maker. On any stretch of the test of reasonableness, in my view, there is no basis to overturn the decision of the [third] respondent, either on the grounds of substantive or procedural fairness, for reasons which I have already set out.'

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1 For a full summary of the nature of the test prescribed in s 145 see also *National Union of Mineworkers & another v Samancor Ltd (Tubatse Ferrochrome) & others* (2011) 32 ILJ 1618 (SCA) paras 5-7.

[9] Despite having applied the correct test in relation to the merits of the appeal the LAC then embarked on a surprising course in relation to the award that followed. Without faulting in any way whatsoever the award made by the third respondent, the LAC *mero motu* embarked on an investigation of factors subsequent to the award and made the following order:

'1 The appeal is dismissed insofar as the fairness of the dismissal of the [appellant] is concerned. It is upheld insofar as the remedy is concerned.

2 The order of the court *a quo* is therefore set aside and replaced with the following order:

> 2.1 The review application of [third] Respondent's decision to dismiss the [appellant] is dismissed with costs;
>
> 2.2 The arbitration award issued by the [third] Respondent on 23 November 2004, is altered so as to read as follows:
>
> The dismissal of the [appellant] is declared to be both substantively and procedurally unfair.
>
> The Respondent is ordered to pay the [appellant] an amount of compensation, being 12 months remuneration, calculated at the rate of the [appellant's] salary at the date of his dismissal. Such remuneration is to be paid to Mr Visser by 1 July 2010.

3 The costs incurred in making the arbitration award an order of [court], are awarded in favour of the [appellant].'

[10] When the LAC embarked on an investigation of facts that occurred subsequent to the award in relation to a determination of an appropriate remedy, it acted as if it was sitting as a tribunal of first instance and was therefore at large to impose such remedy as it deemed appropriate - which it was not. The LAC remained bound to the same test in relation to the remedy as to the merits of the appeal before it. As such the LAC misconceived the nature of its function, by imposing a remedy it regarded as appropriate in the circumstances having itself found that there was no 'defect' in the award made.

[11] Consequent upon a finding that the appellant's dismissal was substantively unfair, the appellant was entitled, in terms of s 193(1) to be reinstated. No facts were advanced at any stage during the proceedings that

met the requirements of s 193(2) and justified the refusal of his reinstatement.

[12] The factors that occupied the attention of the LAC arose only during the course of that hearing. It comprised two aspects. First, that it took six years for the matter to 'be finally resolved by this court'. Second, that the appellant 'did not want to go to Giyani'.

[13] There was no explanation before the LAC why the matter had taken six years to reach it, and the LAC was alive to that fact as it concluded that 'this court cannot come to any decision as to why it has taken six years for this dispute to finally be resolved in this court'. Apart from the fact that it was the respondent that persistently took the matter on appeal and failed, systemic delays have been known to occur. In *Shoprite Checkers (Pty) Ltd v CCMA & others* 2009 (3) SA 493 (SCA) para 33 this very aspect was dealt with as follows:

'It is true that the systemic failures referred to by Shoprite's counsel made life difficult for both parties. The delays in no way serve to detract from the correctness of Commissioner Mbha's reasoning. Nor do they bring the matter within the terms of s 145(2) of the LRA. It remains eminently reasonable. It should also be borne in mind that, by the time the matter came before the LAC, further systemic delays had impacted on both employer and employee. The answer is to eliminate systemic failure rather than punish either employers or employees unjustifiably. By interfering with the decision of the arbitrator, the LAC was therefore in effect substituting its discretion for that of the arbitrator. That it was not permitted to do.'

The LAC had no regard to this authority.

[14] In the absence of evidence about the cause of the delays and in the face of systemic delays, the LAC, assuming that it was entitled to interfere with the award made, should not have unjustly punished the employee – who was completely blameless – as it did.

[15] That brings me to the conclusion reached by the LAC that the appellant '[i]n substance . . . did not want to go to Giyani'. This conclusion is contrived. It seems only to have arisen in the LAC because of the fact that the appellant

reported for work in Tzaneen after the respondent stopped payment for his transport to Giyani. The conclusion is diametrically opposed to the third respondent's finding on the merits, as confirmed by the LC and the LAC. It is further contrary to the appellant's persistence in seeking reinstatement. Significantly, the arbitrator never made a finding in terms of s 192(2)(*a*) of the LRA, and the LC saw no grounds to and therefore did not interfere with the award of reinstatement. The evidence before the LAC does not support the factual conclusion that the appellant did not want to take up the position in Giyani. Thus there was no basis for the LAC to have resorted to s 193(2)(*c*) of the LRA. It explained its decision thus:

'. . . . it appears to me that this court should follow the approach which was prefigured in section 193(2)(c) of the LRA which is to ensure that the unfairness which was visited upon the [respondent] should be responded to by way of an award of compensation and that the matter should then be brought to finality.'

It seems that the LAC sought to arrive at an alternative remedy to that of the arbitrator and the LC. But it was sitting as a court of appeal in respect of a LC judgment. And it must be remembered that the LC had exercised its review – not appeal – power in respect of the arbitrator. Thus, given the provisions of the Act that I have already alluded to, the LAC was not simply at large to construct such alternative remedy as it saw fit, particularly when there was no proper factual foundation for it do so.

[16] The perceived need to respond to an 'unfairness which was visited upon the [respondent]' is not explained. It was the appellant that was unfairly dismissed. He was dismissed allegedly because of desertion. That to the knowledge of the officials in the employ of the first respondent who took and thereafter communicated the decision to the appellant, was false. He was then subjected to a review and appeal that were devoid of any merit. Despite that, the LAC saw fit to issue an order that advantaged the respondent at the expense of the appellant.

[17] All of the issues that arise in this appeal were dealt with by the Constitutional Court in *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile & others* [2010] 5 BLLR 465 (CC). The facts in that case gave rise to the constitutional issue whether systemic delays justify the development of a

constitutional duty to inquire into post-judgment facts on appeal or review in order to fashion an equitable remedy. The conclusions reached in *Billiton* apply to the facts and issues in this matter. It is apposite to quote extensively from that judgment:

'I now return to the argument at hand. It is that "systemic delays" justify the development of a constitutional duty for the Labour Appeal Court to initiate an inquiry of its own into post-judgment facts, even when the original order was justified on the facts at the time it was made and where no application to lead further evidence on appeal was made by any of the parties either. The answer to that contention must, in each instance where it is aired, be determined by an examination of the facts of the particular case. A similar kind or argument was raised, but rejected, in *Equity Aviation, supra* [*Equity Aviation Services (Pty) Ltd v Commission of Conciliation, Mediation and Arbitration & others* 2009 (2) BCLR 111; 2009 (1) SA 390 (CC)]. It needs to be rejected in the present case as well.

It is true that there were delays in this matter not attributable to the fault of the employer. But it is not these delays that caused the constitutional issue to arise only at this late stage of the proceedings. What primarily caused this issue to arise was the employer's failure to implement the reinstatement order after it was given. A secondary cause was its failure to raise the constitutional issue earlier, at least at the stage when the matter was heard in the Labour Appeal Court.

Any appeal process carries its own risk. In *Performing Arts Council of the Transvaal v Paper Printing Wood and Allied Workers Union & others* [1994 (2) SA 204 (A)], Goldstone JA stated, in relation to the previous Labour Relations Act, that:

> "Whether or not reinstatement is the appropriate relief, in my opinion, must be judged as at the time the matter came before the industrial court. If at that time it was appropriate, it would be unjust and illogical to allow delays caused by unsuccessful appeals to the Labour Appeal Court and to this Court to render reinstatement inappropriate. Where an order for reinstatement has been granted by the industrial court, an employer who appeals from such an order knowingly runs the risk of any prejudice which may be the consequence of delaying the implementation of the order."

The circumstances of this matter, however, go beyond the mere fact of that institutional risk. "Systemic delay" is often also caused by rich and powerful litigants who use their superior financial capabilities to take the review and appeal opportunities available to them to the very end in the hope of wearying out an opposing litigant who may be in a less advantageous financial position. Where that

does not eventuate the “appeal risk” is one way of dealing with this use (or abuse) of the legal system. In the present matter the employer eventually conceded that its dismissal of the employee was substantively unfair. As pointed out earlier in this judgment, that concession should also have entailed the recognition that reinstatement to the time of dismissal was the proper remedy. Objectively then, the employer should have realised at the time the second arbitration award was made that the reinstatement remedy was a proper one. It was only its own failure to appreciate that fact that set the review and appeal process in motion. Its own failure to raise the constitutional point it now advances, earlier, at the Labour Appeal Court hearing, merely compounded its own remissness. And, finally, things were not helped when even in argument before this Court the employer did not abandon its hope for an order of compensation rather than reinstatement.’[2]

[18] Had the LAC been heedful of those comments it could hardly have interfered in the manner it did or fashioned the order that it did.

[19] The respondent compounded the issue in this court not only by seeking confirmation of the order of the LAC, but seeking to place further evidence before us on affidavit. The effect of the evidence sought to be adduced was to seek to justify the order of the LAC on some alternative basis, namely by resort to evidence that was not available to the LAC when it made the order that it did. Put differently the respondent was now seeking at this late stage to rely on evidence extraneous the record to support the conclusion of the LAC. By this stage though the respondent had already had three bites at the proverbial cherry. The above quoted extract from *Billiton* more than adequately answers the substance of what the appellant seeks to do. In addition thereto, the respondent did not attempt to comply with any known rule of procedure for placing further evidence before this court at this late stage of the proceedings, but sought orally, from the bar, to introduce the evidence under the guise of ‘the inherent jurisdiction of this court’ and ‘on a basis of equity’. Those propositions merely have to be stated to be rejected. But even if one were to assume that there were no procedural hurdles in the way of the course suggested on behalf of the respondent, notions of fairness, as our courts have repeatedly emphasised, envisage fairness to both not just

2 Paras 49-52.

one of the parties to a dispute. It goes without saying that adopting the course suggested by the respondent will materially and substantially prejudice the appellant.

[20] There is no conceivable reason why costs should not follow the event.

1 The appeal is upheld with costs.

2 The order of the Labour Appeal Court is set aside and replaced with the following:

'The appeal is dismissed with costs'.

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S SNYDERS

Judge of Appeal

APPEARANCES:

For the First Appellant: M F Ackermann
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