THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 318/15

In the matter between**:**

SITHOLE, JOEL **Applicant**

and

METAL AND ENGINEERING INDUSTRIES BARGAINING **First Respondent**

JOSEPH MPHAPHULI *NO* **Second Respondent**

SPRAY SYSTEM SPECIALISTS (PTY) LTD **Third Respondent**

Heard: **16 November 2017**

Delivered: **24 November 2017**

Summary: **Review application – applicant dismissed because he did not have a work permit – arbitrator upheld the dismissal – arbitrator misconstrued the applicable legal principles – award reviewed and set aside.**

JUDGMENT

NKUTHA- NKONTWANA J

Introduction

[1] In this application the applicant seeks an order reviewing and setting aside the arbitration award delivered by the second respondent (the arbitrator) on 7 February 2012 under case number MEG44497. The second respondent found that the applicant was not dismissed as he had rendered himself unemployable by failing to secure a work permit. The third respondent was not present in court despite having been properly notified of the set down. As a result, the proceedings proceeded in its default.

[2] The applicant's main ground of review is that the arbitrator committed a reviewable irregularity by misconstruing the applicable legal principles.

Background facts

[3] The applicant is a Zambian national. He argued that he was dismissed because he had asked for protective clothing. He had been in the employ of the third respondent since 2009 initially as a gardener and subsequently as a general worker. He was earning R24.20 an hour at 40 hours per week.

[4] The third respondent asserted during the arbitration proceedings that on 8 September the applicant was given 3 days to sort out his work permit issues. He has been provided with relevant paperwork that would have assisted him to apply for the work permit. Instead of seeking a work permit, the applicant claimed unfair dismissal.

[5] According to the applicant, the department of Home Affairs refused to accept the letter he had been provided with but wanted more information. The third respondent refused to assist the applicant and told him to never come back.

[6] The applicant argued that he was not afforded an opportunity to state his case fully before the arbitrator as the arbitrator interrupted him when he was giving evidence.

Legal principles and analysis

[7] It is trite that the failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, before such an irregularity will result in the setting aside of the award, it must in addition, reveal a misconception of the true enquiry or result in the setting aside of the award or result in an unreasonable outcome.[1]

[8] In terms of section 38(1) of the Immigration Act[2] '…no person shall employ an illegal foreigner; a foreigner whose status does not authorise him or her to be employed by such person; or a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status'.

[9] In *Discovery Health Limited v Commission for Conciliation, Mediation and Arbitration and Others*,[3] the Court, dealing with a similar issue, had to determine, *inter alia*, whether the legislature intended that a contract of employment concluded in circumstances where any party to the agreement was in breach of the legislation is necessarily invalid. A thorough exposition of the law has been undertaken in *Discovery Health* and I do not wish to repeat, save to refer to the following relatable remarks:

> 'There is a sound policy reason for adopting a construction of s 38(1) that does not limit the right to fair labour practices. If s 38(1) were to render a contract of employment concluded with a foreign national who does not possess a work permit void, it is not difficult to imagine the inequitable consequences that might flow from a provision to that effect. An unscrupulous employer, prepared to risk criminal sanction under s 38, might employ a foreign national and at the end of the payment period, simply refuse to pay her the remuneration due, on the basis of the invalidity of the contract. In these circumstances, the employee

[1] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC)*; Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curia) [2013] 11 BLLR 1074 (SCA); Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*[2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at paras 14 to 16 and *Department of Education v Mofokeng Head of the Department of Education v Mofokeng* [2015] 1 BLLR 50 (LAC).
[2] No. 13, 2002.
[3] [2008] ZALC 24; [2008] 7 BLLR 633 (LC); (2008) 29 ILJ 1480 (LC) at para 54.

would be deprived of a remedy in contract, and if Discovery Health's contention is correct, she would be without a remedy in terms of labour legislation. The same employer might take advantage of an employee by requiring work to be performed in breach of the BCEA, for example, by requiring the employee to work hours in excess of the statutory maximum and by denying her the required time off and rights to annual leave, sick leave and family responsibility leave. It does not require much imagination to construct other examples of the abuse that might easily follow a conclusion to the effect that the legislature intended that contract be invalid where the employer party acted in breach of s 38(1) of the Act. This is particularly so when persons without the required authorisation accept work in circumstances where their life choices may be limited and where they are powerless (on account of their unauthorised engagement) to initiate any right of recourse against those who engage them.'

[10] As a final point, the Court stated that:

'a) The contract of employment concluded by Discovery Health and Lanzetta was not invalid, despite the fact that Lanzetta did not have a valid work permit to work for Discovery Health. For this reason, Lanzetta was an 'employee' as defined in s 213 of the LRA and entitled to refer the dispute concerning his unfair dismissal to the CCMA.

b) Even if the contract concluded between Discovery Health and Lanzetta was invalid only because Discovery Health was not permitted to employ him under s 38(1) of the Immigration Act, Lanzetta was nonetheless an 'employee' as defined by s 213 of the LRA because that definition is not dependent on a valid and enforceable contract of employment.'

[11] In this case, it is apparent from the transcribed record that the commissioner was overly fixated with the fact that the applicant did not have a work permit and as a result he failed to address a question that was raised for determination and to properly consider the relevant material facts placed before him. He ignored the applicant's evidence that he had been employed for about five years. That the issue of a work permit was raised for the first time after he had requested the protective clothing. That the third respondent refused to assist him with relevant documents that would have enabled him to

get a work permit. After the three days leave he had been given, the third respondent refused to allow him to work and he was told never to come back.

[12] In my view the applicant was indeed dismissed and the reason for his dismissal was his failure to secure a work permit despite his endeavours to secure one and the fact that the third respondent did not assist him. It is clear that the third respondent has been reaping the benefits of the applicant's employment without bothering about its legality for about five years.

[13] I accordingly align myself with the Court's findings in *Discovery Health*[4]. The breach of section 38(1) of the Immigration Act was never intended to shield employers who knowingly, as in this case, or unknowingly employ a person in breach of the provision from the legal consequences of terminating such a contract. Immigrant employees illicitly employed can vindicate their right to fair labour practice by availing themselves to the comprehensive machinery of the LRA.

[14] In line with *Discovery Health*[5], it is my view that the termination of the applicant's employment amounts to dismissal within the meaning of section 186(1)(a) of the LRA. Also, the facts alluded to above clearly show that the said dismissal was unfair.

Conclusion

[15] In all the circumstances, I find the commissioner to have misconceived the true nature of the enquiry in that he failed to address a question that was raised for determination and to properly consider the relevant material facts placed before him. The award accordingly stands to be reviewed and set aside for lack of reasonableness.

[4] *Supra.*
[5] *Supra.*

[16] In the interest of justice and in line with the tenet of this Court to be hesitant to remit a dispute back to the first respondent because of the resultant delays, I deem it appropriate not to remit this matter back to the first respondent. Having had the benefit of reading the record, pleadings and hearing of oral argument, I am in a position to deal with the matter conclusively. For all the reasons alluded to above, I find that the dismissal of the applicant was substantively and procedurally unfair.

[17] Since the applicant has no wish to be reinstated despite having secured an asylum permit which allows him to be employed legally, I now deal with compensation in terms of section 193(1)(c) of the LRA. I have considered the applicant's length of service and the manner in which he was dismissed in order to determine the appropriate sanction. I am of a view that a compensation equivalent to four months' salary is fair in the circumstances.

Costs

[18] Since the applicant appeared in person, the issue of costs does not arise.

[19] In the result, I make the following order.

Order

1. The arbitration award is reviewed and set aside and replaced with the following order:

   1.1 The dismissal of the applicant, Mr Sithole, is substantively and procedurally unfair.

   1.2 The third respondent, Spray System Specialist (Pty) Ltd, is ordered to pay the applicant, Mr Sithole, an amount equivalent to four month's wages at the time of dismissal; that is R15 680.00.

   1.3 The order in paragraph 1.2 must be effected within a month from the date of this judgment.

2. There is no order as to costs.

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P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicant:	Ms J Sithole, unrepresented
For the respondent:	No appearance for the respondent