

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO. D200/98

In the matter between :

MBONISENI MSHIBE

Applicant

and

RAMA'S TRANSPORT /
BELMONT TRANSPORT

Respondent

JUDGEMENT

MLAMBO J:

[1] This is an application for review where the Applicants seek to set aside an award issued on 4 July 1997 by a commissioner ("Stillwell") of the Commission for Conciliation, Mediation and Arbitration ("the Commission").

[2] The second Applicant ("Mshibe") had an employment relationship with two entities Rama's Transport and Belmont Transport ("the Respondent"). These entities are in the transport business and they hired Mshibe to guard the premises where their vehicles were kept.

[3] At some stage of this employment relationship 24 boxes containing cooking oil

were stored at the premises guarded by Mshibe. It was later discovered that the contents of 23 of the boxes were missing. Mshibe was confronted about this whereafter he left the premises allegedly after being dismissed, a claim denied by the Respondent.

[4] Mshibe approached the Commission which failed at conciliation. The matter was then referred for arbitration. The arbitration proceedings were attended by Stillwell and both parties were represented. Stillwell crystallized the issue he had to decide as to whether Mshibe was dismissed and if so whether the dismissal was unfair and what relief to grant under the circumstances. After hearing evidence Stillwell concluded that Mshibe was not unfairly dismissed and dismissed his claim.

[5] As this is a review of arbitration proceedings conducted under the auspices of the Commission this Court is empowered to do so in terms of section 145 of the Labour Relations Act no. 66 of 1995 ("the Act"). In interpreting the provisions of section 145 the Labour Appeal Court has said :

"The constitutional imperatives for compulsory arbitration under the LRA are thus that the process must be fair and equitable; that the arbitrator must be impartial and unbiased; that the proceedings must be lawful and procedurally fair; that the reasons for the award must be given publicly and in writing; that the award must be justifiable in terms of those reasons; and that it must be consistent with the fundamental right to fair labour practices."

See CAREPHONE (PTY) LTD v MARCUS N.O. & OTHERS Case No. JA52/98

(unreported judgement of the Labour Appeal Court).

[6] Abdul Reheman, a trade union official who represented Mshibe during the

arbitration proceedings and in this Court signed the founding affidavit to the

application before me. This affidavit does not set out specific grounds on which the arbitration proceedings are sought to be reviewed and set aside. A careful reading of the affidavit reveals the following grounds :

- (a) there was no interpreter to translate Zulu to English;
- (b) Stillwell erred by ignoring the evidence of one Magamba Zulu;
- (c) Stillwell erred in stating that Mshibe did not request reinstatement;
- (d) Mshibe and his witnesses were truthful while the Respondent's witnesses were not.

[7] In his award Stillwell makes the point that one of the Respondent's witnesses (Mr

Rama senior) was not a good witness. Stillwell also found that there were a number of contradictions in the testimony of the Respondent's witnesses. After analysing the evidence and highlighting discrepancies in such testimony, Stillwell came to the conclusion that the discrepancies were on peripheral issues. He also found that Mr Rama senior was nervous when he testified and that he was hard of hearing. Stillwell further found that he gained the impression that Mr Rama senior had a fragile grasp of the issues as a result of his advanced age (73 years).

[8] Stillwell found that although Rama senior was an unsatisfactory witness his evidence was corroborated in a material way by the evidence of another witness, Singh. Citing some legal authority Stillwell decided that the mere fact that a witness was in some respect unsatisfactory is not sufficient ground to reject his evidence completely. Citing further authority Stillwell concluded that even if he were to reject Rama senior's evidence entirely, there was no reason to reject the evidence of the other witnesses whom his evidence was intended to corroborate.

[9] Stillwell then concluded that on a balance of probabilities the Respondent's case

was the more plausible. He cited the following instances:

- (i) The employee stated that he looked upon Mr Hargovan as his employer. He knew him to be the owner of the business.
- (ii) The employee always took instructions from Mr Hargovan and received payment of his wages from him. He never had reason to think that Mr Rama held any position of authority in the business.
- (iii) Even if Mr Rama had told the employee that he was dismissed, it is strange that the employee did not question his authority to do so,

particularly when he next met up with Mr Hargovan. By his own admission he did not even speak about his employment or the termination thereof.

- (iv) At the arbitration the employee was asked whether he wanted his job back. He said he did not. This was strange given the fact that there was nothing in his evidence which would suggest a serious breakdown of the relationship between himself and Mr Hargovan. It is, furthermore, consistent with the employer's case that he did not wish to work.

[10] It appears from the afore going that Stillwell applied his mind to all the evidence led by the parties. This is borne out by the fact that he was able to find corroboration where same existed and to reject unsatisfactory testimony where he found same to be so. He found it to be highly improbable for Mshibe to have accepted a dismissal by someone who, by his own admission, held no position of authority whatsoever over him. Moreover Stillwell found it to be very strange that after being dismissed by a stranger, Mshibe failed to raise this issue at all when he spoke to the person he acknowledged to be his employer. Stillwell found that this was the demeanour of a person who no longer wished to work.

[11] It is correct that Stillwell's award is silent on the evidence of Magamba Zulu. A reading of the founding affidavit reveals that the evidence of Magamba Zulu was irrelevant to the issues before him i.e. the incident leading to the alleged dismissal itself.

This evidence seems to be related to the circumstances of Mshibe's employment as a guard. Stillwell cannot therefore be faulted for ignoring this evidence entirely. The wisdom of hindsight however dictates that he should have stated his reasons for ignoring this evidence. This in itself, however, does not amount to a reviewable irregularity.

[12] As no Respondents filed any opposing papers, even after the Court ordered the Commission and / or Stillwell to file a record and or an explanatory affidavit, I must accept Reheman's allegation that there was no interpreter during the arbitration proceedings, to translate from Zulu to English. Reheman however also states that he was used to interpret during the proceedings. The founding affidavit however fails to disclose in what manner was the absence of an interpreter irregular. In fact I am not told in what manner was Mshibe prejudiced by such absence. Having read Reheman's affidavit and the award I do not get the impression that the absence of an interpreter led to the perpetration of an injustice. It appears that all parties understood and followed the proceedings. In hindsight however an interpreter should have been availed when requested. I am however, of the view that, in casu, this too does not vitiate the arbitration proceedings.

[13] It follows that I am not persuaded that any reviewable irregularity has been shown. One gets the feeling that Mshibe's complaint is that Stillwell's award is incorrect because he believed the Respondent's witnesses and not his. This is not an appeal but a review and therefore it is not incumbent on this Court to find the award to be incorrect. The award must be capable of justification in relation to the reasons given for it, and in casu I find the award to be so. I therefore DISMISS the application. I make no order as to costs.

MLAMBO J

JUDGE OF THE LABOUR COURT

DATES OF HEARING : 3 & 9 September 1998

DATE OF JUDGEMENT : 28 September 1998

FOR THE APPLICANT : Mr Abdul Reheman of Helping
Hand Trade Union

FOR THE RESPONDENTS : No appearance

This judgement is available on the internet at www.law.wits.ac.za/labourcrt