

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO:D 628/07

Not Reportable

In the matter between:

BOXER SUPERSTORES (PTY) LIMITED

Applicant

And

COMMISSIONER ARNAUSE MOHLALA N.O

First Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

SIMON LESIBA MAHLANGU

Third Respondent

JUDGMENT

Conradie AJ

1. In this matter the Applicant seeks an order reviewing, correcting or setting aside the award handed down by the First Respondent on 16 July 2007 under case number MP 2554-04.

In Limine

2. The matter is opposed by the Third Respondent who also questions the Applicant's decision to launch this matter in the Durban Labour Court as opposed to the Johannesburg Labour Court which he submits is the more

appropriate court in so far as his circumstances and those surrounding his employment and termination thereof are concerned.

3. Mr Brandmuller, who appeared on behalf of the Third Respondent, indicated however that the Third Respondent did not seek to have the matter stayed in this court and referred to the Johannesburg Labour Court if I expressed a view that the matter ought to be heard in the latter court.
4. I am not inclined to express a view on an issue in circumstances where a party to proceedings in this court is not seriously pursuing that issue. It is not the role of this court to express a view in the abstract so to speak.

The Review

5. For purposes of the judgment that I give now I do not propose to traverse all of the background to the dispute.
6. In this matter the First Respondent found in favour of the Third Respondent after rejecting the evidence of the Applicants' two witnesses – Mbatha and Nhlapho.
7. The rejection of Mbatha and Nhlapho's evidence was premised on an alleged contradiction between the evidence of Mbatha at the disciplinary enquiry and at the arbitration, and a contention by the First Respondent

that Nhlapo's evidence was rehearsed and read "*like a work of imagination.*" This was based on the belief of the First Respondent that Nhlapo could never have witnessed the truck driver telephoning his company, who in turn called the head office, who in turn called the Branch Manager, as Nhlapo was in the premises and could not see the truck drivers outside. Secondly, the First Respondent contended that the evidence had been that Mbatha had been contacted by the Regional Manager, not the Branch Manager.

8. In this regard it was never put to Mbatha in cross-examination by the Third respondent what it is he was alleged to have said precisely at the internal disciplinary enquiry. No exact wording was given to Mbatha to comment on. The extract recorded in paragraph 37 of the arbitration award, appears to be an extract from the minutes of the internal disciplinary enquiry. The Applicant submits that this is taken out of context and does not bear testament to the conclusions sought to be reached by the First Respondent. Mbatha was never given the opportunity from the extract in question, to answer whether or not his version was that the Third Respondent had stated only one truck at a time, *alternatively*, that he would receive trucks on a first come first serve basis.
9. Mbatha certainly denied the general allegation in the arbitration hearing before the First Respondent, that he had changed his version. Neither the

First Respondent nor the Third Respondent put the extract in question or any part of the minutes to Mbatha, for him to comment on. It appears that the First Respondent unilaterally extracted a portion of the minutes. There is no way of ascertaining from such extract what Mbatha's evidence was in chief, and under cross-examination. There is no basis on which the First Respondent could have reasonably reached the conclusions which he did based on the extract in question and where such was not put to Mbatha in cross examination by the First or Third Respondent.

10. This in itself is a reviewable irregularity and the Award falls to be set on this basis alone, particularly given the reliance placed on this inconsistency by the First Respondent in reaching his conclusion.

11. As far as the evidence of Nhlapo is concerned, I am of the view that there is no basis on which the First Respondent could conclude that his evidence was rehearsed and *"read like a work of imagination."*

12. Nhlapo had no reason to lie and I accept that his evidence was in any event corroborated by the Third Respondent himself.

13. I am therefore of the view that the evidence of both the Applicant's witnesses and the contradiction in the Third Respondent's evidence itself could not lead a reasonable decision maker to conclude that the dismissal was unfair.

14. In this matter, based on my acceptance of the evidence of the two witnesses for the Applicant, I am of the view that I am able to substitute my decision for that of the Third Respondent. I am of the view that the Third Respondent was guilty of the allegation made against him by the Applicant. In light of the numerous instances in which he had been disciplined and counselled in respect of the same and similar incidents I am also of the view that the sanction of dismissal imposed by the employer was appropriate in the circumstances.

15. In the circumstances, I make the following order:

15.1 The First Respondent's award under case number MP2554-04 is hereby reviewed and set aside.

15.2 The award is to be substituted with the following order:

"The dismissal of the Applicant Simon Lesiba Mahlangu, by the Respondent, Boxer Superstores (Pty) Ltd, was fair."

15.3 No order as to costs.

Conradie AJ

Date of Hearing: 10 December 2009

Date of Judgment: 11 December 2009

Appearances:

For the Applicant: Adv C A Nel – Macgregor Erasmus

For the Respondent: A P Brandmuller – Brandmullers Attorneys