

In the Labour Court
Held at Johannesburg

Case Number: J555/99

In the matter between:

METROFILE (PTY) LTD

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First

Respondent

LEBEA JN, NO

Second Respondent

PAPER PRINTING WOOD AND ALLIED WORKERS UNION

Third

Respondent

BOYD C

Fourth

Respondent

JUDGEMENT

PILLAY AJ

[1] This is an application in terms of section 158(1)(g) of the Labour Relations Act No. 66 of 1995 ("the LRA") for the review and setting aside of the award of the Second Respondent and certain consequential relief.

[2] The Second Respondent had ruled *in limine* at arbitration that certain tape recordings and transcripts were admissible as evidence. For convenience I refer to them as transcripts "A" and "B". The contents of these transcripts which were admitted by the Third and Fourth Respondents read as follows:

2.1 Transcript "A"

"(Zachariah Matsela, Clive Boyd)

...Preamble...

ZM Alright, shall we get down to the real stuff now?

CB O.K.

"ZM: The thing is that, the thing is that I've brought my nephew here for a job interview, so he hasn't...so he hasn't had any experience in job relations, so the thing is that you must say that he was at RSM, and that you were his manager.

CB: Ok .

ZM So his name is Thabelo Mofokeng...

CB Thabelo, O.K.

ZM Just in case when they say...they phone you, that's all.

CB What did you say he did again?

ZM He was just an assistant cataloguer.

CB Ya, O.K., assistant cataloguing.

ZM O.K.

CB And how long was he working here?

ZM More than 6 months, from '95 to '96.

CB Why did he leave?

ZM Oh, he went back to school.

CB Oh, he went back to school.

ZM O.K."

2.2 Transcript "B"

“(Bernadette Lawson, Clive Boyd, Themba Buthelezi)

Waiting for Themba to pick up the phone, BL and CB in CB's office...

BL Did you give a written thing, did you give a written...in writing? Then

deny it.”

[3] The Second Respondent found that the dismissal was procedurally and substantially unfair and ordered the reinstatement of the Applicant with seven months back pay.

[4] In his award the Second Respondent purported to set out “the full transcript” of the tape recordings. However, he omitted very crucial parts from the transcript “A”, viz:

“ZM: The thing is that, the thing is that I’ve brought my nephew here for a job interview, so he hasn’t...so he hasn’t had any experience in job relations, so the thing is that you must say that he was at RSM, and that you were his manager.

CB: Ok ...”

He also misquoted transcript “B” by substituting the words “when does it” for “Then deny it.”

[5] From a reading of transcript “A”, particularly the part omitted by the Second Respondent, there can be no other inference but that the Fourth Respondent was being improperly propositioned to confirm that one Thabelo Mofokeng, the nephew of Zachariah Matsela, the caller, who had not had any work experience, had been employed by the Applicant as an assistant cataloguer for more than six months. It is also evident that the Fourth Respondent had agreed to be party to such dishonesty.

[6] The Third and Fourth Respondents had contended that the transcripts were incomplete. However, they had not elaborated on what was omitted. Nor did they provide any explanation for the contents which they had admitted. The Fourth Respondent had offered no reasonable explanation other than to say (apparently)¹ that he could not recall the context of the conversation.

¹A transcript of the arbitration was not part of the record of this application.

[7] The Second Respondent's failure to cite the transcripts fully and accurately manifested a deliberate disregard of material evidence. That is a clear case of misconduct contemplated in section 145(2)(a)(i) of the LRA. The Second Respondent's conclusion that the transcripts did not prove that the Fourth Respondent conspired to furnish work references for Mofokeng was therefore not justified.

[8] Furthermore, having ruled that the tape recordings and transcripts were admissible, the Second Respondent found himself in the dilemma of having to decide how to deal with the evidence. He confused the authenticity of the transcripts which should have been relevant to deciding their admissibility, with the weight to attach to them. He ignored completely the fact that the contents of the transcripts had been admitted. By refusing to attach weight to uncontested evidence, the Second Respondent committed a gross irregularity as contemplate in section 145(2)(a)(ii) of the LRA.

[9] The second leg of the Applicant's argument dealt with the Second Respondent's finding that a telephonic discussion between Mr Strydom, a witness for the Applicant at the arbitration, and the Fourth Respondent, during which the latter was alleged to have given a reference for Mofokeng, had not taken place. The Second Respondent had come to this conclusion because the Applicant bore the onus of proof and there was a lack of clarity about Strydom's evidence which he found was uncorroborated.

[10] For reasons best known to the Second Respondent, he was "amazed" about the delay from 17 December 1997, the date that Strydom testified the conversation with the Fourth Respondent had occurred, to 20 January 1998 when Mofokeng's contract of employment was signed.

[11] The Second Respondent also drew an adverse inference from Strydom's testimony that he was not aware that employee's telephones were being bugged. This inference appears to be without justification.

[12] *Prima facie*, the Second Respondent's finding that there was no corroboration for Strydom's evidence, because a transcript of his conversation was not made, also seems to be wrong.

[13] The preference for Strydom's evidence to that of the Fourth Respondent's in view of the latter's admission of the contents of the tapes is also startling.

[14] However, in the absence of a transcript the court is not in a position to decide whether the Second Respondent's treatment of the evidence necessarily renders the award reviewable.

[15] In the absence of a transcript of the arbitration, the court also has difficulty in assessing the Second Respondent's conclusion about the procedural fairness of the dispute. However, even if I accept, as I do for the sake of finalising the matter, the conclusion that there was procedural unfairness, this is not a case where the Fourth Respondent should have been awarded any compensation. He was a senior employee holding a position of trust. He has offered no explanation for the contents of the transcripts of the telephonic discussions.

[16] As the Fourth Respondent was dishonest, his dismissal was substantively fair. There is therefore no need to refer the matter back to the CCMA.

[16] Irrespective of whether the test in **Carephone (Pty) Ltd v Marcus NO & Others** [1998] 12 BLLR 1191 (LAC) and **County Fair Foods (Pty) Ltd v CCMA & Others** [1999] 20 ILJ 1701 (LAC) is used or the narrow test in **Shoprite Checkers (Pty) Ltd v A Ramdaw & Others** (2000) 21 ILJ 1232 (LC) is relied upon. The award must be set aside.

An order in the following terms is granted:-

1. The arbitration award dated 6 January 1999, handed down by the Second Respondent, is reviewed and corrected as follows "the dismissal of the Fourth Respondent was substantially fair."
2. The Third and Fourth Respondents are to pay the costs jointly and severally, the one paying the other to be absolved.

In addition I make the following order:

1. The application in terms of section 158(1)(c) of the LRA is dismissed with no order as to costs.

D PILLAY

ACTING JUDGE

For the Applicant:

Advocate Loader

Instructed by Petersen, Hertog & Associates

For the Third and Fourth Respondents

Advocate B Vally

Instructed by Cheadle Thompson & Haysom