REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No JR 837/2010

In the matter between:

FEMPOWER A DIVISION OF THE

WORKFORCE GROUP (PTY) LTD **Applicant**

and

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER JN MATSHEKGA NO **Second Respondent**

DANIELLE THERON **Third Respondent**

Heard: **9 January 2013**

Delivered: **2 March 2013**

Summary: **Employee dismissed for poor work performance. Commissioner disregarded evidence which was not contested by the employee. He found that dismissal was not appropriate sanction and procedures had not been followed by the employer. His award is one which a reasonable decision maker would not have made. Award set aside.**

JUDGMENT

SEEDAT, AJ

Background

[1] The third respondent (the employee) was employed by the applicant on 25 February 2008 in the position of a recruitment consultant.

[2] The applicant operates in the recruitment industry, predominantly serving major corporates. A recruitment consultant must have the ability to identify, usually through telesales, a potential client with recruitment needs. If a client has a vacancy, the recruitment consultant will initiate the recruitment process by looking for potential candidates and then drive a selection program through interviews and the compilation of curricula vitae.

[3] There was a practice at the applicant's workplace of daily morning meetings where demands, targets and instructions were discussed. At the time that the employee was appointed, the applicant was very active in the mining sector. The employee seemed to cope with this group of people but struggled with candidates from other disciplines.

[4] The crisis in the world markets had a significant impact on the mining industry which necessitated a shift to the recruitment and placement of other classes of candidates. It became apparent that the employee could not perform beyond the task of the placement of miners. It was not disputed that the employee 'could not adjust her personality to deal with the various candidates and used the same communication strategy with all candidates that she used with miners'. Notwithstanding attempts to train and assist her, the employee did not master the skill.

[5] In addition, the employee did not like calling on clients, did not develop a client base and her rate of curricula vitae referrals was below the branch average.

[6] On the 25 February 2009, Ms Nieman, the branch manager handed the employee a letter stating that they should meet the next day 'to discuss your overall work performance'.

[7] On 20 March 2009, Ms Nieman was instructed by her head office to terminate the applicant's services broadly because of her 'work performance in it (sic) entirety as well as the lack of improvement thereof'. Ms Nieman asked head office if she could reword the letter 'as she felt she could not destroy all the work that she did building the [employee's] confidence, guiding and assisting her in one day'. The changed letter now read:

> 'This letter serves to confirm our meeting earlier today as well as our previous meeting on the 26th February 2009 regarding your individual performance being recorded at a deficit for Fempower.
>
> Given the current recession and the global economic crisis, the Workforce has instructed divisions to cut costs.
>
> With this we have no alternative but to terminate your employment giving you one month's notice, your last day will be 30th April 2009.'

[8] The employee received this letter on Monday 23 March 2009 after a meeting with Ms Nieman. The employee then referred a dispute to the first respondent and an award written by the second respondent (the commissioner) was issued by the first respondent on 18 February 2010.

[9] These are facts that were all admitted by the employee in her answering affidavit.

Grounds of review

[10] The applicant relied on two grounds of review of the commissioner's award:

10.1 The commissioner did not comply with the requirement of an 'impartial adjudicator'.

10.2 The decision which the commissioner had made was not one which a reasonable decision could have made.

The nature of the dismissal

[11] In her answering affidavit, the employee kept asserting that her dismissal was a 'retrenchment' and not one for poor work performance. In the form 7.11

referring her dispute to the first respondent, the employee had crossed the block marked 'unknown' and not the adjacent block stating 'Operational Requirement (Retrenchment)'. There is no specific space for 'Poor Work Performance' on the form. In the pre-arbitration minutes, the employee, represented by an attorney, had agreed that the 'reason for the dismissal is alleged poor work performance'. The commissioner had made a finding on the fairness of a dismissal for poor work performance. Thus, the attempt by the employee to now categorise her dismissal as one for operational requirements is nothing short of mischievous.

Evaluation of the evidence in respect of the reason for the dismissal

[12] Assessing the evidence against item 9 of the Code of Good Practice: Dismissal in Schedule 8 to the Labour Relations Act 66 of 1995 (Schedule 8), the commissioner found that the employee was aware of the required performance standard and despite being given an opportunity to meet those standards, she had failed to do so. However, he concluded that dismissal was not the appropriate sanction because:

12.1 By changing the letter of 23 March 2009 there was a 'subliminal concession' by Ms Nieman that the employee 'could still improve her performance with further interventions'.

12.2 The evidence was that the employee did not perform more poorly than Dylan and Judy, her two colleagues, and the performance of the employee was not properly assessed.

12.3 The employee's poor performance can be attributable to the economic recession.

12.4 The sales figures for March 2009 for the employee show an improvement on those for February 2009 in comparison to Dylan and Judy, yet they were not dismissed.

12.5 The activity sheet for 16-20 March 2009 shows that she met the minimum total points she required.

[13] The findings of the commissioner are insidiously contradictory. Having concluded that the employee did not meet the required performance standard

despite being given a fair opportunity to meet that standard, he finds, in his assessment of sanction that her performance was not properly assessed and that the employee 'could still improve her performance with further interventions'. The employee in her answering affidavit admitted that she had not mastered the skill to deal with all the disciplines and that she did receive training and assistance. She further conceded that the sales figures may not reflect the 'falloffs'. A falloff is when a candidate is placed with a client but does not 'turn up for the job' or leaves the job within the first three months. The sales figures therefore could not be accurate.

[14] He then raises the effect of the recession on the employee's ability to do her work but forgets that earlier he had dismissed this argument saying that the employee had met her target only once prior to the effects of recession even being felt. The employee did not deny in her answering affidavit that Dylan contributed more to the applicant's active and proactive sales and that he was a better performer than the employee.

[15] Mr Venter for the employee argued that the commissioner's award fell 'within a band of reasonableness' as espoused by Van Niekerk J in *Southern Sun Hotel Interests (Pty) Ltd v CCMA and Others*.[1] It may be useful to contextualise this principle stated at para 17 of the judgment:

> 'In summary, s 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within a band of reasonableness, but does not preclude this court from scrutinizing the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, the result is nonetheless capable of justification.'

[1] (2010) 31 ILJ 452 (LC) at para 17.

The Labour Appeal Court in *Herholdt v Nedbank Ltd*[2] approved of this approach of Van Niekerk J and concluded.

> 'One of the duties of the commissioners is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. Commissioners who do not do so do not fairly adjudicate the issues and the resulting decision and award will be unreasonable. Whether or not an arbitration award decision or finding of a commissioner is reasonable must be determined objectively with due regard to all the evidence that was before him or her and what the issues were.'

The Constitutional Court in *CUSA v Tao Ying Metal Industries and Others*[3] reminded us.

> 'It is by now axiomatic that a commissioner is required to apply his or her mind to the issues properly before him or her. Failure to do so may result in the ensuing award being reviewed and set aside.'

[16] In dealing with the imposition of sanction the court in *Vodacom (Pty) Ltd v Byrne NO and Others*[4] said.

> 'In relation to sanction, a commissioner may not substitute what he or she considers to be an appropriate sanction for that imposed by the employer. The commissioner must consider a catalogue of factors, intended to achieve a balance between employer and employee interests, and to which a commissioner must give impartial consideration.'

[17] It was never suggested by the employee that alternatives, short of a dismissal, should have been considered by the applicant. Attempts were made to remedy her shortcomings over a protracted period and it was therefore not unreasonable for the applicant to terminate her services.

[18] By totally disregarding the evidence which had been admitted by the employee, the commissioner crafted an award that was inherently contradictory and therefore vulnerable to a review.

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[2] (2012) 33 ILJ 1789 (LAC) at para 39.
[3] (2008) 29 ILJ 2461 (CC) at para 76.
[4] (2012) 33 ILJ 2705 (LC) at para 12.

Evaluation of the evidence in respect of the fairness of the procedure

[19] The commissioner found that the applicant had fallen short in the following respects:

19.1 The applicant did not adduce any evidence of 'evaluating, instructions, trainings (sic), guidance or counselling that was specifically given or issued to the [employee] particularly between the period November 2008 and March 2009 when the [employee's] performance became concerning (sic)'.The employee was not given any warnings.

19.2 The employee was not given a hearing before her dismissal.

[20] The employee in her evidence admitted to a question posed to her by the commissioner that she knew she was not performing and went to Ms Nieman on a daily basis for her to try to help her meet the targets.

[21] There is no absolute requirement in law that the training and guidance of poor performing employees should be formally structured. This is obvious from the provisions of item 8 of Schedule 8 which only calls for an investigation before effecting a dismissal for poor work performance as compared to item 4 of Schedule 8 which sets out more detailed guidelines for dismissals in misconduct cases. The employee conceded that she was not meeting the required standard and continually sought help. The letter of 25 February 2009 informed the employee that there was a problem with her performance and it matters not whether a formal meeting was held or not. Ms Nieman did call the employee to a meeting before issuing her with the letter of termination of employment. On the commissioner's own findings, the employee was given an opportunity to meet the required performance standard which she failed to do. There was therefore no need for an intense counselling and evaluation session followed by a formal disciplinary enquiry.

[22] The commissioner misdirected himself by holding that the issuance of a warning and the holding of a hearing are a necessary prerequisite to terminating the services of an employee for unsatisfactory performance.

[23] Broadly, items 8(2) and 8(3) of Schedule 8 require the following:

23.1 The employer should conduct an investigation to establish the reasons for the poor performance;

23.2 The employer must give appropriate evaluation, instruction, training, guidance and counselling; and

23.3 The employer must give the employee a reasonable time to improve.

[24] Van Niekerk AJ (as he then was) in *Avril Elizabeth Home for the Mentally Handicapped v CCMA*[5] held.

> 'The balance struck by the LRA thus recognizes not only that managers are not experienced judicial officers, but also that workplace efficiencies should not be unduly impeded by onerous procedural requirements. It also recognizes that to require onerous workplace disciplinary procedures is inconsistent with a right to expeditious arbitration on merits.'

While this case dealt with misconduct hearings, there is no reason why a similar approach should not be adopted in respect of dismissals for poor work performance.

[25] The employee had been counselled. Her characterisation of the morning meetings as 'chit chat' is not supported by her own evidence. She did not ask for any specialised training. Her attempt to attribute the shortcomings in her performance to the 'global recession' is abysmally weak. I have to agree that the employee was not able to adjust to an environment that was rapidly changing because of the economic downturn. She resisted going out to find new clients while Dylan at least tried to do so. On the commissioner's own finding, the employee had been given a fair opportunity to meet the required standard and had failed to do so.

[26] The failure of the commissioner to take cognisance of these anomalies in the employee's evidence reveals a flaw in his assessment of the fairness of the dismissal. The commissioner ought to have regard in evaluating a dismissal for unsatisfactory performance, to what was fair to both the employer and the employee.[6] He did not comprehend that he had to take cognisance of all the

[5] (2006) 27 ILJ 1644 (LC) at 1652B.
[6] *Brolaz Projects (Pty) Ltd v CCMA and Others* (2008) 29 ILJ 2241 (LC) at para 30.

'totality of the circumstances of the case before him'.[7] The employee clearly struggled in meeting her targets and frivolously described the morning meetings as 'a nice chitchat with a cup of coffee and a cigarette'. She was aware that she 'was not performing well'.

[27] The conclusion reached by the commissioner, in my view, is not reasonable and accordingly does not meet the standard set out in *Sidumo and Others v Rustenburg Platinum Mines and Others*.[8] The award of the commissioner stands to be reviewed on the grounds that the commissioner ought to have found the dismissal of the employee to have been fair.

[28] The circumstances of this case do not merit an order for costs.

[29] In the circumstances, the following order is made:

1. The arbitration award of the commissioner issued under case number NWKD2395-09 dated 18 February 2010 is reviewed and set aside.
2. The arbitration award is substituted with an order that the dismissal of the employee by the applicant was not unfair.
3. There is no order as to costs.

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SEEDAT AJ

Acting Judge of the Labour Court

[7] *Chesteron Industries (Pty) Ltd v CCMA and Others* (2009) 30 ILJ 888 (LC) at para 15.
[8] (2007) 28 ILJ 2405 (CC) at para 110.

APPEARANCES

For the Applicant:	Advocate WJ Scholtz
Instructed by:	Attorneys Hunts Inc
For the Respondent:	Advocate F Venter
Instructed by:	Parsons Attorneys