REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO: JR 212/2008

In the matter between:
**BOSS LOGISTICS** Applicant 10
and
**ANDY AYIFHELI PHOPI** First Respondent
**COMMISSION FOR CONCILIATION, MEDIATION**
**AND ARBITRATION** Second Respondent
**COMMISSIONER T NSIBANYONI** Third Respondent
**JUDGMENT** 20

Applicant has brought an application for the review of an arbitration award delivered
by the third respondent, acting under the auspices of the second respondent, in a
dismissal dispute which was preferred by the first respondent.



In order for the applicant to succeed, this Court must be satisfied that the arbitration
award made by the third respondent was one which no reasonable Commissioner would have made on the evidence which was presented at the hearing (see *Sidumo*
*& Another v Rustenburg Platinum Mines Ltd & Others 2008 (2) SA 24 (CC) at 59 para*
*[110]* ).

The first respondent had been employed by TNT WORLDWIDE EXPRESS ('TNT'), a
company which operated as air freight couriers, as a Major Accounts Manager for a
period of approximately 3 years. During 2008 he actively sought employment with
the applicant by telephoning both the Applicant's Chief Executive Officer ('CEO') Mr 10
Andries Van Schalkwyk, and one of its directors, Mr Jan Janse Van Rensburg.
Eventually, the applicant was granted an interview with Mr Van Rensburg and the
applicant's Human Resources Manager, Mr Schalk Badenhorst.

The first respondent provided a detailed CV setting out his qualifications and experience. According to the CV, the position which he held at TNT entailed that he
was responsible for, inter alia, the compilation of sales plans detailing targeted corporate clients, making presentations of the product range to clients and performing a needs analysis, monitoring of recommended plans, sourcing and

securing new business, production of weekly reports and the drafting of financial 20
business plans with management.
The first respondent was employed by the applicant with effect from 1 May 2008 at
a salary of R27,500.00 per month, but only started work on 5 May 2008. In terms
of his employment contract, he would be on probation for a period of 6 months.

At the interview which the third applicant attended with Mr Van Rensburg and Mr Badenhorst, he led them to believe that he was an expert sales person and required
no training in sales, although he required knowledge of the applicant's product which
he was to sell. Indeed, in the words of Mr Van Rensburg '*he came across as an expert in logistics'*. On the strength of his apparent experience, the applicant offered the first respondent a position as Customer Relationship Manager. At the time when the first respondent was offered the aforesaid position, the applicant approached the matter on the basis that the first respondent required no training in
sales. As Mr Van Rensburg explained, the basic concept underpinning sales remains the same, irrespective of whether one sells toothpaste or tyres. The product 10
and the market change and the first respondent would accordingly have to acquire
knowledge of the latter aspects only.
According to Mr Van Rensburg, it was made very clear to the first respondent that
the position which was offered to him, was a management position and that it entailed responsibility for the development of new business, as well as the maintaining of current customer relationships. Given that the first respondent was
employed in a management position, he was expected to be a 'self-starter'. It was
accordingly expected that he would do his own homework and research, although
persons employed in the other departments such as finance, operations and the like, 20
were available to provide him with assistance and input. There were also a number
of other Customer Relationship Managers in the applicant's employ who could provide support and assistance to the extent that he required it. According to Mr Van
Rensburg, company support was in fact provided.

Shortly after he commenced employment as aforesaid, the first respondent was sent
to Zambia with the applicant's Operations Executive, Mr Van Niekerk, for a period of
approximately 3 days from 7 to 9 May 2008 in order that he could be exposed to the
applicant's business outside the borders of the country. During this trip, Mr Van Niekerk spent the better part of a day providing the first respondent with information
relating to rail transport, as it was evident to him that the first respondent did not
understand the rail business or how the railway systems work.
On the morning of 19 May 2008 the first respondent met with Mr Van Rensburg. During the course of this meeting, he showed Mr Van Rensburg certain 'leads' which 10
he had on his laptop computer. These consisted of company names and telephone
numbers as well as certain activities or strategies which he had planned. At no stage, however, did the first respondent provide a formal document reflecting any
leads which he had developed.
Mr Van Rensburg explained that leads, as far as he was concerned, consisted of much more than a list of names and telephone numbers which one could find in the
Yellow Pages telephone directory. So, for example, the client's background was required, as well as its type and area of operations and its need for logistical support.
The first respondent, on the other hand, appeared to hold the view that leads 20 referred to potential clients, because this is how it was done in the courier industry.
Indeed, Mr Van Rensburg acknowledged that there was such a misunderstanding and
that the first respondent tendered an apology in this regard.
The meeting on 19 May 2008 was concluded on the basis that the first respondent

would meet again with Mr Van Rensburg the following day and that his induction programme would be discussed.
On 26 May 2008 Mr Badenhorst sent an e-mail to Mr Bailey, outlining the applicant's
complaints about the first respondent's alleged lack of performance and the fact that

Mr Badenhorst had recommended dismissal on written notice. This e-mail appears
to have been precipitated by the fact that the CEO had allegedly found the first respondent sitting at his desk without any files or work on the desk. The CEO did not
testify, but Mr Van Rensburg tendered this hearsay evidence, which was not objected
to. Somewhat later that afternoon, a meeting was held between the first 10 respondent, Mr Badenhorst and another senior employee. At this meeting, the applicant presented the first respondent with a draft separation agreement in terms
whereof the first respondent's employment would terminate and he would be paid
two weeks' salary in lieu of notice. The first respondent declined the proposal set out
in the draft agreement.
The first respondent did not arrive for work the next day, i.e. 27 May 2008. He alleged that he had taken ill subsequent to the aforesaid meeting on 26 May 2008
and that he was admitted to hospital. It appeared to be common cause, however,
that the first respondent at no stage handed in a sick certificate or other proof that 20
he had been hospitalised, although he had sent a letter informing the applicant that
he was in hospital. When he returned to work on 2 June 2008, he found that his parking space was occupied by another person's vehicle and he found that his desk
had been taken. He was suspended pending the conducting of an investigation into
allegations of misconduct and on 3 June 2008 he was given notice of disciplinary

proceedings. He faced 3 charges which read as follows:
'*1. Gross Misconduct in that you misrepresented your experience & qualifications within the logistics industry at the job interview/s resulting in a breach of the trust relationship.*
*2. Gross Misconduct in that you failed and/or refused to disclose to the management prior to employment that you had to undergo a medical examination and you went to hospital.*
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*3. Poor Work Performance in that you are unable to attain the standards of performance required of the position for which you have been employed given your misrepresentation of experience within the logistics industry.'*

At the hearing before the CCMA, the applicant alleged that the first respondent had,
shortly after commencement of his employment, misrepresented to the H R Manager
that he had obtained approval from Mr Van Rensburg for a petrol card to be issued
to him in circumstances where no such approval had been obtained. No disciplinary
charges were, however, preferred against him in this regard. 20
The disciplinary enquiry commenced on 6 June 2008. The first respondent advised
that he had been unable to obtain representation and the enquiry was thereupon
postponed to 11 June 2008. On the latter date, the first respondent was still
unrepresented, but he agreed to continue with the hearing. Mr Bailey, chaired the

hearing. Although the first respondent well knew by that date that Mr Badenhorst
had sent the aforesaid e-mail to Mr Bailey, he raised no objection to Mr Bailey being
the chairman of the meeting, nor did he ask that Mr Bailey recuse himself.
First respondent pleaded not guilty to all of the charges, but Mr Bailey found him
guilty on charges 1 and 3 though he was acquitted in respect of charge 2. Mr Bailey
recommended dismissal effective Monday 16 June 2008, after the first respondent
had agreed that the employment relationship had broken down.
First respondent thereafter preferred an unfair dismissal dispute to the CCMA on the 10
grounds that his dismissal was procedurally and substantively unfair. He alleged,
inter alia, that the chairperson of the disciplinary enquiry had been biased because
he had been apprised of the first respondent's alleged lack of performance and the
applicant's desire to terminate his services by the e-mail referred to earlier. First
respondent further averred that he had at no stage presented himself as someone
who was an expert sales person who did not require training as such and denied that
he had been appointed to a senior, or management position.
First respondent, in addition, maintained that he had effectively only had two weeks
within which to prove himself at work by the time he was dismissed, that the 20

applicant knew full well that he required knowledge of, and training in, its product
and that it was unreasonable to expect of him to acquire such knowledge within such
a short period of time. First respondent further alleged that if he performed poorly,
the applicant ought to have afforded him counselling and training to equip him for
the sales portfolio, but that the applicant had instead denied him the opportunity to
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demonstrate that he was capable of performing well in the position. Moreover, the
first respondent alleged that he had never been given any performance standards
and that the very reason why a follow-up meeting was arranged with Mr Van Rensburg, was to work on his induction programme.
The Commissioner, in her award, made the following finding in relation to the alleged
bias of Mr Bailey:
'*What this e-mail indicates is that the respondent was telling Bailey on (*sic*) how this dispute is to be resolved and indeed the outcome reflects that. One* 10 *can therefore deduce from these events that the chairperson's decision was influenced by the respondent long before the disciplinary hearing was held on 06 June 2008. The chairperson of the disciplinary hearing was therefore bias* (sic)*, making the disciplinary hearing to be procedurally unfair.'*
Whilst it is certainly desirable that the chairperson of a disciplinary enquiry not have
any knowledge whatsoever of the alleged transgressions prior to commencement of
an enquiry, this is an ideal which often cannot be practically achieved. In the instant
case, the e-mail which was sent to Mr Bailey certainly served to outline the applicant's complaints about the first respondent's performance and the fact that the 20
applicant would seek his dismissal. This is the type of information which would ordinarily appear in any charge sheet. There is however, no indication that Mr Badenhorst, the CEO, Mr Van Rensburg or any other member of management attempted to influence Mr Bailey to determine the matter in the applicant's favour or
that Mr Bailey conducted himself in a manner where he was inclined to afford an
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unfair advantage to the applicant. Indications are that Mr Bailey exercised his mind

independently. Indeed, he acquitted the first respondent on one of the charges. The complaint around Mr Bailey's alleged bias was raised for the first time at the hearing before the CCMA and was founded on nothing other than his receipt of the
aforesaid e-mail communication. Before a finding of bias on the part of the chairperson can be sustained, there has to be evidence that bias existed. At the very
least, the first respondent would have to allege facts from which it could be inferred
that bias indeed existed. A bald allegation or suspicious conjecture is insufficient to
sustain such a serious allegation. There is no evidence on record to show that the 10
disciplinary enquiry was a sham. In these circumstances, it appears to me that no
reasonable Commissioner, exercising his/her mind adequately in evaluating the evidence, would come to a conclusion that the first respondent's disciplinary enquiry
was conducted in an unfair manner, because the chairperson was biased.
In regard to the first respondent's alleged poor work performance, the Commissioner
found that the first respondent was effectively given two weeks, or 10 working days,
to prove that he could perform to the required standard and that this was an unreasonably short period of time for any employee to prove him/herself. She also
found that if the applicant was of the view that the first respondent was not meeting 20
the required standard, processes had to be put into place to assist him and that this
had not been done. Consequently, the Commissioner found that the first respondent's dismissal was substantively unfair.
The period of time which is required in order to evaluate an employee's performance

would clearly depend on the circumstances of each case. There is no hard and fast
rule in this regard. In some instances, the employee's incapacity might only become
evident after the lapse of a considerable period of time, whilst in other instances it
might be evident within a few days. The standard of performance would, generally

speaking, be dependant upon the nature of the job and the complexity thereof, the
volume or ambit of the work that had to be mastered, the nature and complexity of
the employer's operations, the qualifications and experience of the employee, the
level of stress which is inherent in the position, the extent to which the employee is
required to exercise his/her own initiative and the extent of the training or induction
that may be required. The list is not exhaustive. In the final analysis, the employer 10
is pre-eminently the person who has to decide in each case what period of time is
reasonably required to evaluate the employee's performance. In my view, in the
absence of clear indications that the employer acted in bad faith, or that the
employer acted in a manner which was otherwise unfair to the employee, the Court
or a Commissioner ought not to second-guess the employer in this respect.
In the instant case, the first respondent's performance clearly failed to impress the
employer. Objectively speaking, the first respondent had failed to provide any
meaningful leads to Mr Van Rensburg despite his impressive CV and his professed
sales expertise. The evidence of Mr Badenhorst and Mr Van Rensburg as to the 20
manner in which the first respondent presented himself at the job interview was clear
and unequivocal. First respondent led them to believe that he was in a management
position, that he was thoroughly familiar with logistics, albeit in aviation, that he was
an expert in sales and that the only knowledge he lacked, was knowledge of the
applicant's particular product. It is clearly for these reasons that applicant appointed
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him to a management position. However, despite the allegations in his CV that he
had been responsible for '*putting together a sales plan detailing targeted corporate
clients …'*, the compilation of a recommended plan and '*compiling potential client
business background*' , he failed to present any meaningful leads to Mr Van Rensburg
by 19 May 2008.
The first respondent's conduct as aforesaid, in my view, is not indicative of sales

expertise or of an ability to work independently and first respondent's allegation that
he was used to referring to potential customers as 'leads' in his previous position, is
unconvincing. A potential customer can only be a person or entity who needs or 10
requires the service/product which he sells. It is accordingly implicit in the term
'lead' or 'potential customer' that, at the very least, he had to analyse whether or not
the 'lead' has any need or use for the applicant's product and how that product could
add value to the customer's business. All that the first respondent did was to
provide a list of names, telephone numbers and activities which he was intending to
pursue.
The effect of the evidence given by Mr Van Rensburg and Mr Badenhorst was that
the first respondent's performance revealed that he had over-stated the level of his
expertise and experience and this appears to be substantiated by the aforesaid 20
evidence. Mr Van Niekerk, the applicant's operations manager, also testified to the
fact that the first respondent gilded the lily. He gave evidence that the first
respondent initially gave the impression that he was knowledgeable about the
applicant's business and about logistics, but that it soon became apparent that he did
not even know the difference between a closed and an open wagon or how the

railway systems work.
Given that the first respondent did not appear to be competent to perform the job
he was hired to do, the next issue for determination is whether or not the applicant
ought to have counselled, guided, instructed and assisted him in an attempt to bring
his performance to the required standard.
If an applicant for a position misrepresents his experience and/or qualifications and
is appointed to a position on the basis of such a misrepresentation, there is, in my
view, no duty on the employer to provide such an employee with counselling, 10
training or assistance. An employee who misrepresents his/her qualifications or

experience is dishonest and is not entitled to be appointed to a position in the first
place. An employment relationship is based on mutual trust and deceit is incompatible with, as well as destructive of, trust. Moreover, if an employer would,
in such circumstances, be required to provide counselling, assistance and/or training
to the deceitful employee, it would mean that the employee would in fact be rewarded for his/her dishonesty or deceit while the employer would be penalised.
Moreover, the measure of instruction, counselling and guidance which an employer
has to provide in order to enable an employee to meet the required standard of 20
performance, is dependent on the level of seniority of the employee as well as the
latter's qualifications and experience. The ordinary requirements that an employer
must instruct, guide and counsel an employee whose performance is poor, may not
apply to a manager or senior employee whose knowledge and experience qualify him
to judge whether he is meeting the required standards set by the employer (see

*Somyo v Ross Poultry Breeders (Pty) ltd [1997] 7 BLLR 862 (LAC)* and *New Forest*
*Farming C C v Cachalia & Others (2003) 24 ILJ 1995 (LC) at 1999D-F* ).
The primary issues for determination in this regard are therefore whether or not the
first respondent was employed in a management or senior position and whether or
not he ought to have been able to determine for himself whether his performance
was up to the mark.
The evidence of Mr Van Rensburg as regards the seniority of the position was clear
and unequivocal. The first respondent's job title was that of Customer Relationship 10
Manager. He was obviously not appointed to a menial position and his salary was commensurate with a management position. The first respondent's bald denial that
he had a senior or management position, rings hollow in the face of these facts.
When regard is had to the first respondent's CV, it appears that he clearly knew what

a management position was. Not only does his CV stipulate that he had been employed as a Major Accounts Manager at TNT, but it spells out in considerable detail the responsibilities he supposedly carried in such a position. These responsibilities are clearly consistent with being part of management as opposed to
being merely a sales representative or clerk. If the first respondent had in fact been 20
a manager at TNT, he must clearly have been able to rate his own performance once
he started work at the applicant company. If he encountered any difficulties, he ought to have made this known and ought to have asked for assistance. In addition,
according to the evidence, applicant had a number of Customer Relationship Managers in its employ and it would presumably have been a relatively simple

exercise for the first respondent to measure his performance against theirs.
Given the aforesaid facts and circumstances which appear from the record of the proceedings, it appears to me that no reasonable Commissioner would have come
to the conclusion that the first respondent's dismissal was substantively unfair.
In coming to the decision I have arrived at in the matter, I have not placed any emphasis on the issue around the first respondent's alleged misrepresentation that
his application for a petrol card had been approved. The first respondent did not face any disciplinary charges in this regard and it would, in my view, accordingly be 10
unfair to hold that he ought to have been dismissed on the grounds that he made
such a misrepresentation. Such behaviour on the part of the first respondent does,
however, provide further evidence of the fact that he was less than forthright in his
dealings with the applicant. First respondent at no stage denied the incident around
the petrol card.
An important fact which appeared to escape the Commissioner altogether, was that
the first respondent admitted at the disciplinary enquiry that the employment relationship had broken down. In his answering affidavit before this Court the first
respondent, however, alleged that he was coerced into making such an admission. 20
According to the record of the hearing in the CCMA no such allegation had been

made at that time. The allegation to that effect in the answering affidavit is clearly
opportunistic and further demonstrates the first respondent's lack of respect for truth
and accuracy.
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On an overall conspectus of the evidence which was before the Commissioner at the
CCMA, no reasonable Commissioner could, in my view, have concluded that the first
respondent's dismissal had been procedurally or substantively unfair. It is accordingly clear that the Commissioner's Award falls to be reviewed and set aside.
The following Order is accordingly made:
1. The arbitration award issued by the Third Respondent on 21 September 2008 under case number GAJB 18175-08, is hereby reviewed and set aside.
2. The Second Respondent is directed to set the matter down for arbitration 10 before a Commissioner other than the Third Respondent.
3. The First Respondent is ordered to pay the Applicant's costs of suit as between party and party.

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A M DE SWARDT, A J 20
Date of Hearing: 20 January 2010
Date of Judgment: 22 January 2010
Applicant's Representative: Adv A Govender, instructed by Mr R Teixeira
of Bouwer Cardona Inc
First Respondent's Representative: Adv Leon Pretorius, instructed by Kevin Cross 30