Reportable

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH

CASE NO.P394/09

In the matter between

PERNOD RICARD SOUTH AFRICA (PTY) L TD	Applicant
and	
COMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	1st Respondent
COMMISSIONER MANGISI MRWEBI	2nd Respondent
MICHAEL ROMEO	3rd Respondent

JUDGMENT

BHOOLA J:

Introduction

[1] This is an application in terms of section 145(2) (a) of the Labour Relations Act 66 of 1995 ("the Act"), in which the applicant seeks an order that the award dated 13 July 2009 issued by second respondent under the auspices of first respondent be reviewed and set aside, and/or substituted, and/or referred back to the first respondent. The third respondent opposes the application.

Evidence of the Third Respondent

[2] The third respondent was employed as a sales representative by the applicant in East London for about five years prior to his dismissal on 16 October 2008 for poor work performance. In his evidence he described his contractual duties as comprising *inter alia*, calling on customers, confirming orders, opening new accounts

and visiting customers at their bottle stores and restaurants. He testified that until the appointment of Thami Manona in 2006 he had been solely responsible for the East London and Border region ("the region") and had been praised by his then manager, Karen Erasmus, for his work. He denied that assembling merchandise displays was one of his core functions but admitted that he often assisted with this. He worked largely without direct supervision and was expected to display a reasonable degree of self management.

[3] He alleged that his dismissal was the culmination of a longstanding attempt on the part of the applicant to get rid of him, which began when he refused to have a tracker installed in his vehicle and sought legal representation (which led to settlement of the dispute). As a result of this incident he was threatened with retrenchment which the applicant claimed arose from operational needs but which he alleges arose from his having to fetch his daughter from school following his wife's acceptance of employment in another town.

[4] He attributed his non-performance to disruption caused by managerial staff change. He testified that in 2008 he reported to Manona, and following this to a manager called Pauline (who resigned within 6 months) and thereafter to Jared Clark.

[5] He met Hannes Basson, the new off-consumption manager for the Coastal Region for the first time when Basson visited East London with Clark on 22 August 2008. They accompanied him on his visits to the warehouse and to his customers. He observed that they were not happy with the display of the applicant's products at these stores. He received a warning for, among others, the failure to set up displays, which he considered as part of the merchandising function and which fell under the jurisdiction of the Port Elizabeth office.

[6] Although he admitted that product promotions were part of his duties, he claimed that he lacked the necessary budget and tools to attend to this. He admitted having sent a claim form to the Port Elizabeth office in this regard. The week after receipt of a written warning he had arranged a product display at a store (Prestons), because he had obtained the necessary authorisation from Basson. He failed to

arrange other promotions because he did not receive the necessary approval from Basson. He submitted weekly reports and succeeded in meeting his weekly targets. He also arranged for listings of new products at various customers, but found it difficult to open new accounts since customers preferred to buy from bottle stores where they could get all their requirements. He was summoned to another meeting with Basson two weeks after their first meeting when he received a final written warning for poor work performance, negligence and insubordination. A number of authorisation forms were only signed by Basson and Erasmus on the day he received his final warning, and he was then able to proceed to set up displays but his final warning then set new targets. It was only at this stage that he was able to build product displays, having been provided with a bakkie which had previously only been for use of the Port Elizabeth office. He felt aggrieved because he thought he had improved significantly. He lodged an appeal which was unsuccessful.

[7] His evidence was that he had not been counselled and that each time he interacted with Basson it was for the purpose of warnings being issued. He had received no meaningful assistance with his work performance. He had no knowledge of the performance standards Basson claimed he was not adhering to. The first time he was told that he was not meeting his targets was when he received a notice to attend a disciplinary enquiry scheduled for 10 October 2008. Under cross examination he denied that his poor work performance could be attributed to his lack of interest in the applicant and the fact that he had actively been seeking alternative employment. He maintained that with the necessary logistical support he would have excelled in his work. Up until Basson's visit no problems had been expressed with his performance, and he was therefore surprised by Basson's complaints. He had also received no communication from Basson between the first warning and the final written warning, but conceded that Erasmus had on occasion counselled him and assisted him in meeting performance standards.

Evidence of the Applicant

[8] Basson's evidence was that, as a component of his duties as a sales representative the third respondent was required to service existing clients, source and secure new clients, promote its products via store based promotions, and

facilitate and manage the displays of its products in various outlets and even to assemble such displays if a merchandiser was not available. In addition he had administrative duties which involved, among others, submitting reports to the Port Elizabeth office.

[9] Basson testified that following his appointment and accompanied by Clark, he visited the third respondent on 20 August 2008 and asked to be taken on a visit to his *"top stores".* It became apparent to him that the third respondent was *"tardy and manifestly uncaring"* in the execution of his duties. This first inspection resulted in a written warning being issued to third respondent three days later (on 23 August 2008). The warning contained guidelines and targets for improved performance and required him to report weekly on progress. He was provided with a bakkie to enable him to transport and set up big promotional displays, as this had not been necessary for his displays till then as they had not involved large scale materials. On a second visit to East London two weeks later (on 9 September 2008) he found little or no progress and met with the third respondent to discuss his concerns, following which he issued him with a final written warning. He later arranged for a further investigation visit by the applicant's trade marketing manager, who similarly recorded his dissatisfaction with the third respondent's performance. The third respondent was given notice of a final counselling meeting, which was held on 10 October 2008 and culminated in his dismissal. Manona, who had also received a final written warning for poor work performance and whose counselling meeting had been scheduled to take place that morning prior to the third respondent's, had resigned the previous day.

Grounds of review

[10] The first main ground of review is that the commissioner misapplied himself and/or committed gross irregularities in that he failed to have regard to the evidence that was led in its totality. In particular he ignored material evidence that was largely unchallenged, resulting in a one-sided award. He failed to properly, rationally and justifiably apply his mind to the facts or the law applicable and misapplied himself and committed gross irregularities in reaching a decision that was not one that a reasonable decision maker could have reached. Accordingly, he exceeded his

powers under the Act. Secondly, he failed to afford the applicant a fair and proper hearing and to properly conduct the arbitration proceedings. Thirdly, he incorrectly recorded the third respondent's salary as R8000.00 per month instead of R6000.00, which had an impact on the back pay he awarded.

[11] The commissioner was obliged to consider the totality of evidence presented to him in reaching his conclusion. That he failed to do so appears from his finding that no evidence was led that the applicant had conducted an investigation into the third respondent's incapacity or that he had been afforded a fair opportunity to meet the new performance standards set for him in August 2008. He accordingly found the dismissal of the third respondent to have been substantively and procedurally unfair and ordered the applicant to reinstate him with back pay equivalent to seven month's salary. His conclusion was as follows :

> *"…there is no evidence by the respondent that there was any reasonable and objective assessment conducted by it on the state of the applicant's incapacity..in the circumstances I find the respondent has also failed to prove, on a balance of probabilities, that the applicant's dismissal was also procedurally fair."*

[12] In finding that no investigation was conducted into the third respondent's poor performance he accepted the third respondent's evidence that he was not counselled at all by Basson but that their interaction was limited to warnings being issued. On the basis of this he concludes that *"there is no evidence by the respondent that there was any reasonable and objective assessment conducted by it (the respondent) on the state of the applicant's incapacity. The evidence before me is that Mr Basson on two occasions arrived in East London and not being satisfied with the state of affairs; he issued the applicant with two written warnings. On both these occasions he set the applicant with new targets. There is no evidence that the respondent conducted the investigation to establish the reasons for the unsatisfactory performance. All that is before me is evidence that on each visit Mr Basson would leave the applicant with a warning".*

[13] Indeed the award ignores Basson's evidence that he asked to be taken to the third respondent's *"top stores",* i.e. the ones which he would have been proud to

show off, and was distressed with what he saw. Although he acknowledged that the region (the Border region) for which the third respondent was responsible did not have a merchandiser, he said it was understood that merchandising was the responsibility of every salesperson. He also engaged with Manona and the third respondent in order to establish what the problems were that were contributing to their lack of performance when he summoned them to the first meeting. They made excuses about previous managers and lack of support, and he set targets for them which he felt were fair and were in fact 40% lower than that of other employees, taking into account the economic difficulties in the region. He informed them they had *carte blanche* to use any of the promotional materials stored in the warehouse and were to contact him if they had any problems. When he returned to the area in September there was no significant improvement and the third respondent had made very little progress to meet the new targets, which led him to issue a final written warning. He obtained an assessment from a colleague whose feedback confirmed the lack of progress in meeting targets. As a result a disciplinary hearing was convened. Over a period of more than a month the third respondent had not shown any improvement. The final warning was for precisely the same lack of performance that had warranted the first warning notwithstanding further investigation and counselling, as well as the third respondent's concerns about lack of tools and resources being addressed. The performance standards were again agreed with third respondent and incorporated into the final written warning but had limited effect on his performance.

[14] Basson's evidence regarding the third respondent's performance was that his delivery on his targets was 0% in some aspects; his performance was the worst he had ever seen in five years in the liquor trade; and that the standard in East London was way below the normal standard of performance at the applicant's stores nationally. He testified that the third respondent was an intelligent and senior employee who had been employed for five years; he worked mostly unsupervised and was expected to follow up on his own requests for authorisation if there was no response since this was a component of his administrative duties. He testified further that other employees were able to secure displays in stores where they had no relationship with the customer and that many of these had been secured since the third respondent's dismissal targets. In fact, since then the targets for the region had

been met.

[15] The commissioner found that new performance standards were imposed and were brought to the third respondent's attention for the first time on 23 August 2008. Having been informed of these, the employer was required, prior to dismissing for incapacity to counsel the employee and give him a reasonable chance to correct his performance. In the absence of such correction the employer was required at the very least to contemplate alternatives. Following on this he finds that the third respondent was not given a fair opportunity to meet the standards. In the context of the evidence of the applicant's witnesses about the setting of targets and guidelines following an investigation into his performance, the commissioner found as follows :

> *"The respondent failed to provide evidence that the applicant was given a fair opportunity to meet the standard. As indicated earlier on, the applicant was not provided with sufficient tools to create an enabling environment that would assist him in meeting the required targets. In the circumstances, I find that the respondent has failed to prove that the dismissal of the applicant was substantively fair."*

And further :

> *"The applicant further testified that with regard to new accounts it was difficult for him to open these because there were many outlets opening and the restaurants preferred buying direct from the liquor stores for the convenience of one-stop shopping (i.e. getting all beverages under one roof)."*

Analysis of evidence and submissions

[16] The commissioner correctly set out the law relating to poor work performance, i.e. that employer is entitled to set standards for performance and to hold employees accountable, failing which they face disciplinary action including dismissal. He then identified the requirements of procedural fairness as set out in Item 9 of the Code of Good Practice : Dismissal ("the Code") which requires consideration of whether the employer conducted a factual investigation into the alleged failure to meet performance standards; whether the employee was aware of the standard or could reasonably have been expected to have been aware; whether the employee was given a fair opportunity to meet the standards and lastly whether dismissal was an

appropriate sanction. He further enjoined the employer to have regard to *inter alia* the prevailing circumstances, including the business cycle, market / area characteristics, lack of support structures, lack of product, the prevailing economic climate and so on. He reinforced that the mere non-attainment of performance targets alone was insufficient to prove poor work performance, and that the employer was required, during performance counselling meetings or disciplinary hearings to determine the cause of the non-attainment of performance standards. Where these are attributable to external factors or reasons beyond the employee's control, a dismissal or any other form of disciplinary action would be viewed as unfair. He then proceeded to accept the third respondent's evidence that his incapacity could be attributed to factors, including the depressed economic climate, outside his control.

[17] The commissioner took no account of the fact that the third respondent did not dispute that the specific reduced targets expected of him were expressly set out in the written warnings and communicated to him. Nor was his evidence that he did not understand what was expected of him. His evidence, on the contrary was that he had insufficient tools and resources to perform in that the requisitions he sent to the Port Elizabeth office were not signed and returned; his calls were not answered; he found it difficult to sign new accounts; he had no bakkie; and Basson had "an attitude" towards him. At no stage did he explain to Basson what his difficulties were or even challenge the nature of the tasks or the targets that were set. Basson's evidence was that all salespersons had targets which were set nationwide but he set lower targets for the third respondent and Manona taking into account the specific circumstances in the region. They had received training and counselling and knew what they were expected to do to achieve their targets. Moreover, their targets were not sales driven but consisted of more measurable objectives which included running product promotions, setting up displays in stores, offering clients gifts and promotions, and getting new products *"listed"* among the goods carried in stores. Basson's evidence was that : *"..what we do is focus on the objective things. So in other words things that can be measured. Now the measurable things was (sic) simply not being done. The only thing that was being done consistently and very well by Michael was calling on his customers…But that is not the job and the job is to make, have an impact at the customer. To promote our brands. To do merchandising. To do elements that – to do these things which would deliver us*

growth and sales".

[18] In regard to tools of trade there was no evidence that during the period of August to October 2008 the third respondent had raised this as an impediment to his performance. Indeed Basson testified that he made promotional material and other tools of trade available, including a merchandising bakkie, which was only necessary to install large promotional displays and which were uncommon. Notwithstanding this uncontested evidence the commissioner accepted the third respondent's evidence that he was unable to conduct promotional activities because of "*lack of budget and lack of a bakkie which was based in Port Elizabeth".* Moreover, the absence of any reference in his award to whether the performance standards were fair or reasonable would imply that he accepted that they were, but accepted the third respondent's version that he was unable to meet them due to factors outside his control. The third respondent, and this crucial evidence seems to have fallen by the wayside, did not dispute his lack of performance, or his knowledge of the standards expected of him and in respect of which he fell short. His defence was that he was unable to perform as a result of lack of a bakkie and a budget for promotions. He further admitted that in response to Basson's concerns about his performance he did take action, and this was dealt with by the commissioner as follows :

> *"The applicant had further testified that at some stage he had sent an email to Ms Mitsi enquiring about the availability of the budget. This was met with no response. He also filled the requisition and sent same to Ms Mitsi. There was no response to this again."* It needs hardly be said that in the circumstances this was mediocre performance to say the least.

[19] In regard to budget it is incomprehensible that the commissioner accepted that sending one email and filling in one requisition form without following up was sufficient proof that the third respondent's poor work performance was justified. This would imply that an employee is not expected to be proactive in meeting his contractual obligations to his employer, but can simply sit back passively. Indeed if the requisitions were so pertinent to his performance then that would in fact have prompted proactive follow up action on his part, particularly given the pending disciplinary process. The sword over his head, to use his counsel's words, if indeed he realised that it was a real threat instead of a mere spectre – should have spurred

him into action instead of prolonging his malaise. This would imply the possibility that the budget was not as essential to performance of his functions as he seeks to make out. Indeed his explanation for the lack of access to the warehouse was also shown in rebuttal to be spurious. In fact, as was Basson's evidence, he did everything possible to evade responsibility for his own inaction. Faced with clearly dissatisfied new manager being taken, not on a sightseeing tour but on an inspection of top stores which was obviously a performance assessment, he responds by applying for a day's leave because his DSTV is being installed. He does not seek to salvage the situation and his job by impressing the new manager with his performance or seeking another opportunity to show him better performing stores. This is not the conduct of an employee concerned about how his performance is being viewed and reflects a rather nonchalant attitude to his work (which he appears to have conceded in his interaction with Basson and which the latter recorded as his admitted demotivation). If indeed the inspection of stores and visit to the region as well as the follow up inspections were not objective assessments of performance then it boggles the mind what their real purpose was.

[20] What is of significance, as Basson testified, is that the commissioner inexplicably failed to consider the common cause fact that Basson "*never got the indication from Michael that he doesn't understand what he needs to do. That was what was confusing about this whole thing*". Moreover, no mention is made in the award of the relevance of the evidence of Karen Erasmus, who was the third respondent's manager on-consumption for the coastal region at the time. The very least the commissioner is expected to do is to say in the award that her evidence was taken into account but rejected. Erasmus's evidence, which was not disputed, was that the third respondent had received training, that she had counselled him but that despite this he had been the least performing sales representative. He did not receive a bonus or salary increase during the period he was reporting to her because of his lack of performance, and he had been informed of this. She also testified that the third respondent had a negative attitude, did the bare minimum, continually played the victim, and was bad mouthing the applicant and had for a while been seeking alternative employment. Although it was removed as a formal charge, Basson testified that the third respondent had dishonestly reported his display and listing targets. These facts do not appear to have featured in the analysis of evidence

conducted by the commissioner let alone the conclusion he reached.

[21] Mr Crisp, for the third respondent, submitted that in essence disciplinary hearings are about whether employees have breached their contracts of employment and whether they are fit for continued employment : *De Beers Consolidated Mines Ltd v CCMA & others* [2000] 9 BLLR 995 (LAC). The Act requires the employer to prove no more than that the employee was dismissed for a fair reason. Although little evidence was led by the applicant on the terms of the employment contract and the extent to which the third respondent failed to perform his contractual duties, the evidence did establish that the performance issues raised by Basson were not incorporated into the employee's contract of employment, alternatively did not form a core contractual duty. In other words, his contract of employment did not contemplate his dismissal on the grounds of the performance standards raised by Basson. Furthermore, the evidence before the commissioner was that the third respondent had made advances in attempting to achieve the targets prescribed by Basson, and had indeed provided weekly reports to the administrator in Port Elizabeth as instructed. This was not considered sufficient progress by Basson who was at pains to point out that the employee did not fit the entrepreneurial culture of the applicant. This he submitted did not constitute a valid and fair reason for the dismissal. In my view this submission has to be considered in the light of the third respondent's concession that promotions and product displays formed part of his core duties, and that although merchandising did not, he had often agreed to assist with this given the circumstances in the region.

[22] The approach to be adopted by a reviewing court as stated in *Woolworths (Pty) Ltd v CCMA & others* [2010] 5 BLLR (LC) citing *Relyant Retail Limited t/a Beares Furnishers v Commission for Conciliation, Mediation and Arbitration and others* [2009] JOL 24327 (LC) at [20], was held to entail the following in considering whether a commissioner committed a gross irregularity or failed to apply his or her mind : *"a determination as to whether or not the complaining party was accorded a full and fair hearing by the commissioner. A fair and full hearing entails a determination of all the issues which were placed before the arbitrator during the arbitration proceedings. The inquiry in this respect focuses on the method or conduct of the decision-maker and does not concern itself with the correctness of the*

decision reached by the arbitrator (see Sidumo at 1179A-C and 1180A-C). There is however authority that it is not every irregularity that would constitute gross irregularity".

And further at [21] : *"….the duty of the court in review is to determine whether the conclusion reached by the commissioner has its support in substantial and credible evidence including consideration and appreciation of the issues arising from the dispute and the facts".*

[23] In reaching his conclusion the commissioner clearly disregarded material and substantial evidence that provided the factual context in which the dismissal of the third respondent occurred. It is trite following *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC) that this constitutes a gross irregularity and a misdirection that warrants setting aside of the award without regard to the additional grounds of review. The obligations of a commissioner are to have regard to the totality of the facts to prevent a decision being based on a piecemeal approach to the evidence. Although a commissioner is not required to provide detailed reasons, and the authorities indicate that even where such reasons are deficient they withstand scrutiny if other justifiable reasons are apparent from the record. However, these reasons should still emanate from a consideration of the *full* record. It follows that where evidence that is largely unchallenged is not mentioned at all, it raises the question of whether indeed that evidence featured in the decision-making process. The very least that can be expected of a commissioner fulfilling his functions under the Act is a statement that the employer's evidence was rejected and for what reason. This is not so *in casu*. Apart from the fact that the commissioner appears to treat Basson's evidence as though it was non-existent, he failed to provide one iota of an explanation for his rejection of the applicant's version in its entirety. He makes no reference to weighing the evidence on the probabilities and concluding in the third respondent's favour on this basis. In fact we are left in the dark as to why he preferred the applicant's version on the probabilities. Having said this I am mindful of the fact that this court's task is not to determine the matter on the basis of what this Court or another decision maker would have done – the test is whether *this* commissioner made a decision that was one that could have been made by a reasonable decision-maker on the evidence before him. Applying this test in the context of the above analysis must mean that the award cannot pass muster. It

is simply not an award that could have been made by a reasonable decision maker applying his mind fully and fairly to all the material evidence led before him on behalf of both the employer and the employee. The finding therefore, that the dismissal was substantively unfair is reviewed and set aside.

[24] In regard to procedural fairness it would appear from the record that the disciplinary enquiry was punctuated by a series of unfortunate procedural irregularities. The commissioner focused extensively on this issue in the proceedings and much of the defects were common cause. The third respondent was not represented at his disciplinary hearing. Manona had resigned the previous day and could no longer represent him since the process was internal and his request for legal representation was refused. Basson's evidence, as recorded by the commissioner in the award, was that Manona was at the disciplinary enquiry in his capacity as representative of the third respondent, but he wondered why Manona did not intervene at all. Furthermore, it was common cause that the third respondent was not given the opportunity to cross examine Erasmus, whose evidence was led via teleconference. Basson conceded moreover, that the first inspection occurred without informing him that it could result in a disciplinary process (be it formal or informal) and of his right to representation. He admitted that on his second visit when he issued the final written warning he again acted without prior notification or advising the third respondent of his natural justice rights. Moreover, he conceded that he had acted without regard to the applicant's Disciplinary Code and Procedure and apparently without having sought advice on the process from the Human Resources manager. In these circumstances it is indisputable that the third *audi alteram partem* rule was breached.

[25] I do not consider it necessary to rule on the second and third main grounds of review save to state that it is evident from the record that a number of gross procedural irregularities were committed at the arbitration, not limited to the decision to allow the third respondent legal representation. There is no indication from the record that the applicant too sought an opportunity to secure legal representation in order to level the playing field. The reason given by the commissioner i.e. that "incapacity dismissals are not as easy for a lay person" would apply equally to the applicant. This being said it must have occurred to the commissioner that an inequity

could result from his ruling and he ought in the interests of fairness in my view have proferred a similar opportunity to be legally represented to the applicant. Mr. Meyer, an obviously astute attorney, secured a further advantage by presenting the employee's version first, resulting in the employer having to rebut the evidence. In my view prejudiced the applicant in the conduct of its case and resulted in denial of a fair trial. This is clearly grossly irregular.

Order

[26] In the premises, I make the following order:

1. *The finding that the dismissal was substantively unfair is reviewed and set aside and substituted with an order that the third respondent's dismissal was substantively fair;*
2. *The finding that the dismissal was procedurally unfair is upheld;*
3. *The award of reinstatement and seven months' back pay is set aside and substituted with an award of compensation in the sum equivalent to seven months' pay for the procedural unfairness of the dismissal;*
4. *There is no order as to costs.*

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BHOOLA J
JUDGE OF THE LABOUR COURT

DATE OF HEARING : 9 November 2010
DATE OF JUDGMENT : 10 December 2010
APPEARANCE:
For the Applicant : Adv O H Crisp instructed by Enzo Meyers Attorneys
For the Third Respondent : Mr B Guy, Maserumule Inc