IN THE LABOUR COURT OF SOUTH AFRICA

Held in Johannesburg

Case No J971/98

In the matter between

Price Busters Brick Company (Pty) Ltd	Applicant
and	
C. S. Mbileni	First Respondent
J. C. Davel	Second Respondent

JUDGEMENT

ZONDO J:

[1] This is a review application which has been brought by Price Busters Company (Pty) Limited for the purpose of setting aside an arbitration award made by the first respondent, a commissioner of the CCMA, to the effect that the dismissal of the second respondent, a person formerly employed by the applicant as an area manager, was unfair and ordering the applicant to pay certain

compensation to the second respondent.

[2] The facts in this matter are not complicated. They can briefly be stated as follows. The second respondent was employed by the applicant in 1995. Towards the end of 1996 or early in 1997 he was promoted to the position of area manager. Although the first three or so months thereafter appear not to have generated any complaint about the second respondent's performance, thereafter the depots which fell under the second respondent's control made various losses. Certain meetings were held between the applicant's managing director, Mr Malherbe, and the second respondent in attempts to improve the situation but by the 23rd June 1997 these had not yielded any good results. At that point Mr Malherbe addressed a letter to the second respondent.

[3] The letter which Mr Malherbe addressed to the second respondent on the 23rd June 1997 reads thus :-

"Beste Chris

Re <u>Winsgewerdheid : Price Busers - Nelspruit</u>

Ons vele besprekings oor bogenoemde saak verwys.

Die winsgewendheid van Price Busters - Nelspruit is 'n probleem vir die maatskappy. In 1996 moes on 'n diefstal van meer as R30 000 absorbeer en afskryf. Ten spyte van 'n R53 000 lening en jou inisiatiewe mey die vestiging

van ander depots is ‘n opgehoopte verlies van meer as R30 000 vir die 5 maande tot mei 1997 gemaak. Waar daar ‘n moontlikheid van versagtende omstandighede gedurende die eerste paar maande tydens die verstiging die depots en in April tydens jou wittebroodsvakansie kon wees, is daar geen verskoning vir die verlies in Mei 1997 nie. Wat nog meer kommerwekkend is, is dat mei-maand se verlies van R12881 Pricde Buster - Nelspruit se grootste verlies hierdie jaar is en dat daar geen merkbare verbetering in winste besig is om plaas te vind nie.

In ‘n verdere poging om jou by te staan gaan ons op 14 Julie 1997 of enige dag daarna besluit of daar voldoende verbetering in winsgewendheid is. Hierdie datum is spesifiek gekies om jou die voordeel van die 5-weke-maand van Julie te gee. Indien daar nie voldoende verbetering is nie, moet aanvaar word dat jy nie die spesifieke bevoegdheid vir die pos het nie en sal diensbeeindiging oorweeg word.

Gee asseblief ook ernstige aandag aan die tydige en volledige inhandiging van finansiele syfers en bestuurstatistiek voor die doeldatums soos ooreengekom tydens ons Price Buster - bestuursvergadering op 13 Maart 1997 en die regstelling van probleme per aangehegde oudit-verslag.

Indien enige verdere inligting of hulp benodig word, kontak asseblief vir my of Ernest van Niekerk by die hoofkantoor.

Groete

J. A. Malherbe

Bestuurende Direkteur".

[4] It was clear from the letter of the 23rd June 1997 that the second respondent was being given the last opportunity to demonstrate that he could turn the situation around and that, if he failed to do so, he was running the risk of dismissal. The situation did not improve. Another meeting was held on the 25th July 1997. On the 31st July 1997 the second respondent was given notice of his dismissal which was to take effect from the end of August 1997. He was to serve his notice period. The dismissal was for poor performance.

[5] There is a dispute about what was discussed at some of the meetings but, in my view, the matter can be disposed of on the papers without it having to be referred to oral evidence. In fact neither party asked that it be referred to oral evidence. In a subsequent unfair dismissal dispute which was arbitrated by the first respondent under the auspices of the CCMA, the first respondent found that the applicant had demonstrated that there was a fair reason for the dismissal of the second respondent for poor performance. Although in his answering affidavit, the second respondent complains about this finding, he has not brought a counter -

application to review it and have it set aside. Accordingly this matter must be decided on the basis that that finding stands. However, the first respondent did not stop at that finding. He went further and found that the applicant had not followed a fair procedure in dismissing the second respondent and that this rendered the dismissal procedurally unfair. It is this finding together with the consequential order for the payment of compensation that is the subject of this review application.

[6] The gist of the applicant's complaint is that the said finding is the result of a gross irregularity committed by the first respondent in ignoring evidence which demonstrated that the dismissal was procedurally fair. Of course, the second respondent contends the contrary and says that finding by the commissioner was fully justified. In these circumstances it would therefore be necessary to have regard to the record of the evidence that was before the first respondent in order to determine whether such evidence as there was before him justified such finding. Unfortunately no record has been filed by the first respondent. The parties also do not appear to have made any effort to let the Court have agreed material containing all the evidence that was before the first respondent. The applicant attached to its founding affidavits various documents which had been admitted in the arbitration.

[7] The starting point in considering the finding made by the first respondent is to have regard to the reasons given for such finding by the first respondent. The only**"reason"** which the first respondent gives in his award in support of his

finding that the applicant did not follow a fair procedure is that the applicant **"failed to implement schedule 8 item 8(3)(4) as contemplated by the Act".** The first respondent did not state in what respect the applicant had failed to implement those provisions. Item 8(3) and (4) of schedule 8 to the Act provide as follows :-

"(3) The procedure leading to the dismissal should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider other ways, short of dismissal, to remedy the matter.

(4) In the process, the employee should have the right to be heard and to be assisted by a trade union representative or a fellow employee".

[8] A reading of the first respondent's own award does not reveal in the summary of the evidence as well as the arguments presented by the parties that it was part of the second respondent's complaint about the dismissal that the applicant had not made an **"investigation to establish the reasons for the unsatisfactory performance"** of the second respondent which is what the first part of item 8(3) relates to. In those circumstances it seems to me that in saying the applicant did not implement the provisions of item 8(3), the first respondent probably meant the last part of those provisions. The last part of item 8(3) requires the employer to have considered other ways, short of dismissal, **to remedy the matter"**.

[9] However, in case I am wrong in interpreting the first respondent's award in the manner I have with regard to its reference to item 8(3), let me determine what

evidence there was tending to show that the applicant did investigate the reasons for the unsatisfactory performance. The applicant's Mr Malherbe says in his affidavit that the evidence and documents he presented at the arbitration flowed from the investigation he had conducted into the poor performance of the second respondent. He says he conducted various counselling meetings with the second respondent to make him aware of his unsatisfactory performance, that he should improve his performance and that he could face dismissal. He says he discovered during his investigation that the reason for the second respondent's poor performance was his **"inability to reach and maintain the applicant's performance standards".**

[10] The second respondent disputes the allegation that there was an investigation into the reason for poor performance on his part. I think the second respondent probably has in mind a formal investigation and yet there is no allegation made by the applicant that the investigation referred to by Mr Malherbe was necessarily a formal investigation. It was clear from the papers that the issue of the losses which were being suffered by the area under the second respondent were discussed at various meetings. Quite clearly it is inconceivable that such losses would be discussed as often as they were without the reason for the losses being determined. Mr Malherbe has stated that he established through such investigation that the second respondent's poor performance flowed from his inability to meet the performance standards of the applicant. I now turn to the second part of item 8(3) of schedule 8.

[11] The second part of item 8(3) of schedule 8 is to the effect, as I have indicated above, that before an employee can be dismissed for poor work performance, the employer should have considered other ways short of dismissal to remedy the matter. If the first respondent's finding meant that the applicant did not consider other ways short of dismissal, that is, in my view, a finding which very obviously runs contrary to the evidence which was before the first respondent. The evidence that was before the first respondent established clearly that the applicant considered a request made by the second respondent for a transfer to his previous position. The second respondent's own evidence is also to this effect although the second respondent emphasises in this regard the fact that the applicant did not agree to transfer him. That no agreement was reached is of no significance when the question is whether or not the provisions of item 8(3) were implemented because all the last part of item 8(3) requires is that other ways must have been considered.

[12] In the light of this there could have been no basis for the first respondent to have found that the applicant dismissed the second respondent without considering other ways (short of dismissal) of remedying the problem. Accordingly such finding would, in my view, constitute a gross irregularity. Indeed the **"reasoning"** given for the finding bears no connection at all with the material that was before the commissioner.

[13] In so far as the first respondent's finding must be understood to be to the effect that the second respondent was dismissed without having been afforded the

opportunity to be heard, such a finding would also be contrary to the evidence. The right to be heard does not necessarily have to be a formal hearing. An opportunity to be heard does not necessarily entail a forum which will have all the trappings of a trial in a court of law. In the context of a dismissal, an opportunity to be heard entails, where it is not a formal inquiry, notice that dismissal or disciplinary action is being contemplated against the employee and affording the employee concerned an opportunity to make representations which are then considered in a bona fide manner.

[14] In this case meetings were held about the losses suffered. Ultimately the applicant sent a letter to the second respondent dated 23 June 1997 in which it was made clear that it was contemplated that the second respondent could well face dismissal if he did not improve his performance. He was given about five weeks to improve. Whether or not that period was enough for the second respondent to improve is not in issue for the purpose of this review. What would be in issue is whether that was compliance with the *audi alteram partem* rule. In my view the second respondent did have during that period an opportunity to make representations why it was wrong to think he was to blame for the losses and why it would be unfair to dismiss him if no improvement occurred within the given time. He failed to use that opportunity. Accordingly the finding, if there be one, that he was not heard is completely without foundation.

[15] It was common cause between the parties that it was never the second respondent's complaint that he was denied union representation and in so far as

the first respondent's decision may have been based on that as well partly, that would have been an error on the first respondent's part.

[16] In the light of the above I am of the opinion that the first respondent committed a gross irregularity in finding that the dismissal was procedurally unfair and that such a finding justifies interference by this Court.

[17] In the premises the finding made by the first respondent that the dismissal of the second respondent by the applicant was unfair is hereby reviewed and set aside as is the order that the applicant pays compensation to the second respondent. The second respondent is to pay the applicant's costs.

R. M. M. ZONDO

Judge : Labour Court of SA.

Date of Argument : 23 September 1998

Date of Judgement : 28 October 1998

For the Applicant : Mr J. J. Coetsee

Instructed by : Stemmett & Coetsee Attorneys

For the Second Respondent : Mr R. Spoor

Instructed by : Ntuli Noble & Spoor