IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH **CASE NO: P255/01**

In the matter between:

SUN COURIERS (PTY) LTD Applicant

and

CCMA First Respondent

LE ROUX, F N O Second Respondent

ROBINSON, A N Third Respondent

JUDGMENT

JAMMY AJ

Until his dismissal by the Applicant on 29 February 2000, confirmed in an appeal hearing on 14 March 2000, the Third Respondent, to whom for convenience I shall henceforth refer as “Robinson” had been employed by the Applicant as a sales executive for a period of some eight years.

The charge against him, in a disciplinary hearing on 23 February 2000 was couched in the following terms:

"Failure to perform your work in accordance with the standards and criteria set by the company. The company expects sales representatives to achieve a minimum of 80% of their annual Circle of Champion Target. You achieved 72% of your target for the 1999/2000 financial year, which is below the required minimum standard set by the company".

Employees of the company are subject to a "Code of Conduct", failure to comply with which renders them subject to a number of possible sanctions which are determined with regard to the gravity and circumstances of the breach. It is common cause that amongst the infractions categorised as serious and constituting dismissible offences thereunder, is one classified as follows:

"Unsatisfactory performance or failure to perform your work in accordance with the standards and criteria as set by the company."

Contesting both the substantive and procedural fairness of his dismissal, Robinson invoked the dispute resolution procedures prescribed in the Labour Relations Act 1995, conciliation pursuant thereto failed and the matter proceeded to arbitration before the Second Respondent on 8 January 2001. Evidence was heard from Robinson and from certain Greg Saffy, at that time the Applicant's Durban branch manager. The Second Respondent called for and was furnished with comparative sales figures relating to Robinson and another sales executive, a certain Ms Stringer for the relevant period. His award was in due course handed down on 16 February 2001 and in the result his finding was that the Robinson's dismissal, whilst procedurally fair, was substantively unfair. Robinson was reinstated in the Applicant's employ with retrospective effect to the date of his dismissal, 29 February 2000 together with an order for the payment of the remuneration and benefits which he would have earned and received in the interim period.

It is an order reviewing and setting aside that arbitration award which the Applicant seeks in these proceedings. The Second Respondent, it submits, "committed a gross irregularity in the conduct of the arbitration proceedings and/or exceeded his powers as contemplated in Section 145(2) of the Act". That dereliction, it is alleged, is twofold. In the first instance, it is alleged,

"… the Commissioner failed to properly conceptualise the reason for Robinson's dismissal and

thus confused issues applicable to dismissals for incapacity in the form of poor work performance (which was the reason for Robinson's dismissal) with issues applicable to dismissals for misconduct."

Secondly -

"The Commissioner's approach and his findings in regard to the reasonableness of (Robinson's) performance standard are unjustifiable."

The first of those grounds, it is contended, is sourced in the fact that the Second Respondent confused issues applicable to dismissals for incapacity (in the form of poor work performance) and misconduct. That confusion, the Applicant submits, is evidenced by what the Second Respondent considered to be "a significant aspect relevant to the Applicant's assessment of Robinson's performance". There was, he found, no evidence to show that Robinson had "neglected his duties". Saffy, on the other hand, had gained a "favourable impression" of Robinson's work in his dealings with him. There was no evidence of any "general dereliction of duty" or of a "slack attitude" on Robinson's part and the quality of his work could not be directly measured solely on the basis of his sales figures.

Concluding that "the ultimate question is whether the evidence shows that (Robinson's) target was a reasonable one … in which case (his) failure to reach the target must be held to be the result of poor work performance", the Second Respondent determined that the Applicant had not discharged its "duty to prove this point". On that issue, he concluded -

"The evidence in respect of (Robinson's) performance and the reasonableness of the target that he was required to achieve is inconclusive and contains a number of important variables and uncertainties, to the extent that I am of the view that the Respondent has not proved its case on a balance of probabilities. I am mindful of the fact that it is not an easy task for an employer to prove poor work performance in relation to a position such as that of a sales executive. It seems quite natural to rely on a seemingly objective criterium (*sic*) such as sales figures. To adduce evidence to show that a sales executive did not make a concerted effort to secure new business may well be difficult. However the fact that it is difficult for a litigant to prove a particular point in

dispute does not relieve that litigant of the duty to prove the point."

The Second Respondent then proceeded to consider whether the target that Robinson was set for the year in question "was one that a properly performing sales executive should have achieved". Robinson's unchanged target over the preceding four years and the fact that he had exceeded that target in the year immediately passed, was discounted by him. What needed to be sought therefore was an explanation for his failure to reach the target during the year in question. Reference was made to Robinson's argument that market conditions during that period were unfavourable and that it was unfair to compare his performance to that of Ms Stringer, who had exceeded her target during the corresponding period for the reason that her achievement was to the major extent accounted for by one single customer – a fact which the Applicant argued was indicative of sound strategy on her part.

In what presents as a comprehensive analysis of these factors, the Second Respondent then concluded that "there was no evidence of any general dereliction of duty or a slack attitude on the part of (Robinson) towards existing clients, and nor was there any "reason to think that (Robinson) was someone who was always on the verge of discipline or dismissal for poor performance."

. The Applicant's challenge to that determination is premised on the Code of Good Practice contained in Schedule 8 to the Act and in which, it is submitted, a clear distinction is drawn between dismissals for misconduct and dismissals for incapacity which, in turn, can be constituted either by poor work performance or by ill-health or injury.

. Referring to commentaries on the concept in two articles, –

Grogan: "Cracking the Code" – The Code of Good Practice: Dismissal (1997) 13(6) <u>Employment Law</u> 118

Le Roux and Van Niekerk: <u>The South African Law of Unfair Dismissal</u>

The Applicant emphasises the distinction between misconduct, described by Grogan as "improper behaviour over which the employee has control" and incapacity, which Le Roux and Van Niekerk

define as “behavioural conduct which is not intentional or which is not negligent”.

. The Second Respondent’s enquiry therefore, into whether or not Robinson was guilty of neglecting his duties or a dereliction of duty or whether he evidenced a slack attitude or failed to make a concerted effort to secure a new business cannot, the Applicant argues, be reconciled with an enquiry into what is in effect a “no fault” dismissal, where culpability is not an issue. Enquiries into those factors bear no rational connection to the reason for Robinson’s dismissal, it is argued. That dismissal, as was submitted to the Second Respondent in the course of the arbitration, “relates to performance and, in particular, the inability of the employee to generate new business”. Robinson was dismissed, the Second Respondent was told, because “he did not possess the physical, mental or attitudinal wherewithal – through no fault of his own – to perform his duties properly.” As has already been indicated, the Second Respondent concluded that however difficult it may be “to show that a sales executive did not make a concerted effort to secure new business”, that fact did not relieve the Applicant of its duty to establish that factor as an indication of his incapacity. What the Second Respondent erroneously sought to investigate in that context therefore, the Applicant argues, was some form of blameworthy conduct on Robinson’s part in his failure to secure new business and thereby meet his target. In fact, culpability is not and could not have been validly an issue in the enquiry.

. Citing in support of this contention, a plethora of case authority, Mr Myburgh, representing the Applicant, categorised the Second Respondent’s approach variously as a material and serious error of law, as a gross irregularity in his failure to have regard to established legal principles and to properly apply his mind to the facts or the law and as a misconception of his functions.

See, inter alia: County Fair Foods (Pty) Ltd v CCMA and Others (1999)20ILJ 1701(LAC)

Toyota South Africa Motors (Pty) Ltd v Radebe and Others (2000) 3BLLR 243(LAC)

. In the result and assessed against the common law test of review enunciated by the Appellate Division (as it then was) in

Johannesburg Stock Exchange v Witatersrand Nigel Limited 1998(3) SA132(A),

the award, it is submitted, cannot stand. The approach of the Commissioner is not justifiable in that it cannot be "sustained by the facts and the applicable law".

"Where there is an error of reasoning and a misunderstanding of the law, then it is highly likely, and in this case it has been shown to be the case, that the award will not be a justifiable one".

Metcash Trading (Pty) Ltd v Sithole N O and Others (unreported, Case No. J1079/97)

. The simple fact, in the end result, was that Robinson was dismissed as a consequence of a negative assessment of his performance when measured against a standard determined by management policy. Comprehensive evidence was submitted to the Second Respondent regarding the structuring of that policy and the setting of that standard, reference being made *inter alia* to its empirical determination in relation to each individual sales person, the recognised and accepted performance standard for sales executives (80% of their targets), the continuous monitoring of their sales performance throughout the year, and the process of counselling which was undisputedly established in the course of evidence to have been applied on a quarterly basis as far as Robinson was concerned. The Applicant's evidence that Robinson was on each occasion informed of his inadequate performance, reminded of the standard that he was required to meet, offered assistance and warned of the possible dismissal consequences of his failure to achieve it, was in essence not disputed.

. The Second Respondent's concern as to the reasonableness of the performance standard set by the Applicant, was also misplaced, Mr Myburgh argued. Employers are entitled to set performance standards and unless shown to be patently irrational or unrealistic, courts will be slow to interfere with them. The required standard in this instance was entirely valid and in holding to the contrary, the Second Respondent disregarded material facts bearing upon that issue. Robinson's target, for instance, had not been increased for four years, he had reached 126% of that target the previous year and Ms Stringer, had attained 113% of the same target – one requiring an achievement of only 80% to be satisfied. Robinson, the evidence before the Second Respondent had shown, never questioned that requirement, never recorded any opposition to the threat of his dismissal conveyed in the course

of the counselling sessions and their confirmatory letters to him and manifestly, in that context, must have considered the target to be reasonable.

. In his opposition to this application, Robinson, who conducted his own case and must be commended on his studious and researched approach to this litigation, seeks to emphasise the often judicially analysed difference between appeal and review, arguing that in effect, the Applicant's attack on the award in fact bears the characteristics of the former. Referring to

Pharmaceutical Manufacturers Association of South Africa and Another v President of the Republic of South Africa and Others 2000(3) BCLR241(CC)

and the Labour Appeal Court Case of

Adcock Ingram Critical Care v Commission for Conciliation Mediation and Arbitration and Others (2001) 22ILJ(LAC),

Robinson argues that the present matter falls squarely within the ambit of those decisions. This is not a question, he emphasises (as have the courts in numerous quoted authorities) of whether another court might come to a different conclusion.

"Accordingly, once a reviewing court is satisfied that the tribunal has applied its mind, it will not interfere with the result even if it would have come to a different conclusion. The best demonstration of applying one's mind is whether the outcome can be sustained by the facts found and the law applied. The emphasis is on the range of reasonable outcomes, not the correct one".

. Whilst that principle has become trite in its application in review proceedings in these courts, I have concluded, on a careful assessment of the submissions by both parties, that it does not assist the Third Respondent in this matter. Whilst the Applicant's submissions do not suggest, and indeed in my opinion do not appear to seek to suggest, that the Second Respondent did not apply his mind to the evidential material before him, the contention that, from the tenor of his award, he manifestly

misconstrued the gravaman of the issue before him, thereby evidencing a confused approach to the concepts of incapacity and misconduct, appears to me to be a sound one. The substantive unfairness found by him to have been established in the Applicant's conduct was premised on tests which would have been applicable to misconduct and which bore no relevance to Robinson's undisputed failure to have achieved a targeted level of performance set for him and others in similar capacities within the company, in its own domestic Code of Conduct, inherent in its employment contract. Precedent for that target was well established and its reasonableness not questioned.

. I am left in no doubt, from the evidence presented in the arbitration, that the guidelines in cases of dismissal for poor work performance as set out in Schedule 8 to the Labour Relations Act 1995, were more than adequately observed by the Applicant in its dealings with Robinson and in the result, and when regard is had to the principle now well-established in a line of cases in the Labour Appeal Court, that every award made in arbitration proceedings conducted by Commissioners acting under the auspices of the First Respondent, must be justifiable in relation to the evidential material before them, I have concluded that, on any objective analysis, and for the reasons that I have traversed, that cannot be said to be the case in this instance.

. In the context therefore of the relief which the Applicant seeks in its notice of motion, the order that I make is the following:

The arbitration award dated 16 February 2001 issued by the Second Respondent under the First Respondent's Case No. EC18574, is reviewed and set aside;

The dispute between the Applicant and the Third Respondent is referred back to the First Respondent to be arbitrated *de novo* before a Commissioner other than the Second Respondent;

3 The Third Respondent is to pay the Applicant's costs.

_____

B M JAMMY
Acting Judge of the Labour Court

28 November 2001

Representation:

cants:

yburgh instructed by Linde Dorrington & Kirchmann

dent