

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN**

CASE NO: C266/2009

In the matter between:

MULTISOL SA (PTY) LIMITED

Applicant

and

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER DAVID WILSON N.O.

Second Respondent

JULIEN HENDRICK LOUW

Third Respondent

JUDGMENT

Introduction

1. This is an application to review and set aside the Commissioner's arbitration award dated 16 March 2009 under the auspices of the First Respondent in which the Second Respondent (the Commissioner) found that the Third Respondent (Mr Louw) was not guilty of a breach of a fiduciary duty. He accordingly held that Mr Louw had been unfairly dismissed and required the Applicant to pay him eight months' remuneration as compensation for a substantively unfair dismissal.
2. There are three bundles of documents. The first is the bundle with the pleadings, referred to as A with its page numbers. The second contains the CCMA documents and is referred to as B with its page numbers. The

third contains the transcript of the arbitration hearing and is referred to as C with its page numbers. A paragraph or line number will follow the reference in each case.

Outline of the facts

3. The Applicant conducts the business of an importer and distributor of lubricant products for the motor and engineering industry. Mr Louw was employed as its lubricant sales and development manager. He was previously the managing director of Tradefirm 100 (Pty) Ltd, which held the distribution rights for the products of Petro Canada. After the liquidation of Tradefirm, the distribution rights were transferred to Canada Oil Sales (Pty) Ltd, a company of which his wife (Mrs Louw) was a director and he was a consultant.
4. Canada Oil Sales was subsequently bought by the Applicant, which, as a result obtained the distribution rights for Petro Canada products. Mrs Louw undertook not to compete with the company for a period of two years from the date of transfer of the shares in the Canada Oils and the Applicant continued to operate Tradefirm (in liquidation) under the trading name of Multilube.
5. When the Applicant bought Canada Oil Sales in August 2007 it had no stock. The stock belonged to Petro Canada and Tradefirm. The Applicant was in the process of acquiring Petro Canada's stock and uplifting it from its warehouse in Cape Town. There was uncertainty surrounding the extent and ownership of the stock and accordingly the negotiations for its acquisition and upliftment were protracted. The original stock list did not include wire rope dressing and OG-O grease. A revised list did.
6. The Tradefirm stock was donated to Mrs Louw. That stock included wire rope dressing and OG-O grease. It had been donated in accordance with Petro Canada's policy to hand over product that had reached its sell-by date at no cost provided that it was sold on without any warranty. A

product waiver was issued which included seven drums of wire rope dressing, of which five were subsequently given to Mrs Louw.

7. Multilube received a request for stock from a company called All Bearings on behalf of a shipping company. A Mr Lee from All Bearings and a Ms Fisher, a sales representative for Multilube visited the shipping company on 5 February 2008 and ascertained that the order was for wire rope dressing and OG-O grease. After speaking to Mr Shearon, a manager, a reduced price was offered because the stock was past its sell-by date and sold without guarantee. The shipping company accepted the offer and placed an order with Mr Lee who in turn placed the order with Multilube on 6 February 2008. The shipping company and its agent All Bearings were, however, insistent on early delivery. Ms Fisher had promised that it would be delivered by 8 February on the advice of Mr Shearon. The order was transmitted to Ms Cronje, a telesales employee, for processing.
8. Mr Shearon, who was also the father of Mrs Louw, telephoned Mr Louw on 6 February while he was with his family on a skiing holiday. Mr Louw did not take the call but instead passed it on to his wife. Mr Shearon asked about the wire rope dressing and grease and was told that the stock belonged to her. She told him that if he needed the stock he was welcome to it, meaning that he could uplift it and sell it on behalf of Multilube.
9. On 11 February 2008, in a meeting with Mr Bell, Mr Shearon raised the issue of supplying the stock to All Bearings. Mr Bell responded that he was in the process of moving the stock to a new warehouse and they would sort it out when the stock arrived there. Mr Louw testified that he told Mr Bell at that meeting (he was back from his holiday) that the stock belonged to his wife. Mr Bell insisted that all the stock was to be moved and that the client must wait a week. Mr Bell denied the conversation and Mr Shearon did not give evidence. This is one of the major factual disputes in the matter.

10. In the meantime Ms Fisher was receiving many phone calls from an irate Mr Lee who was 'very angry' at the delay. She kept promising delivery as soon as possible.
11. On 20 February 2008 Mr Louw received a telephone call from Mr Shearon who was in Swaziland. He wanted to know what was happening with the supply and delivery of the stock ordered by All Bearings. Mr Louw then testified that he asked Mr Bell what was happening concerning the stock and that he (Mr Bell) snapped back to the effect that it was being dealt with. Mr Bell does not recall the conversation or his behaviour.
12. On 20 February 2008 Mr Shearon advised Ms Fisher on their way back from Swaziland that the stock had been released and that Mrs Louw was sending the stock to the client. Ms Fisher asked him who should invoice the sale and Mr Shearon said that Mrs Louw should. On 21 February 2008 Ms Fisher sent an email to Mrs Louw with the delivery address and the quoted prices.
13. On 21 February, Ms Cronje, who had processed the order, was advised by Mr Lee that Mrs Louw had phoned him to inform him that the stocks would be released that day. She then sent an email to Mr Louw saying that she was confused. This email was also sent to Mr Bell. Mr Louw testified that he had no knowledge of his wife's involvement in the supply and the delivery of the stock until receipt of this email. This is another major factual dispute in this matter.
14. That night Mr Louw raised the issue with his wife and was informed that she had been asked to release the stock, supply it and have it delivered to the customer. He recognised that this was irregular and requested his wife to leave the matter as it stood and that he would sort it out. By this he meant to regularise the transaction, which included addressing the issue of invoicing.

15. Mr Louw testified that although he intended to raise the issue he did not have the opportunity to do so face to face because Mr Bell was absent on 22 February 2008 and he was in Johannesburg the following week until 29 February 2008.

16. On 27 February 2008 Mrs Louw received an email from Ms Fisher instructing her to invoice the customer directly. She had backdated the order on the basis of the prices from the order which had been forwarded to her by Ms Fisher. Mr Louw testified that he had no knowledge of this instruction from Ms Fisher or that his wife had given effect to that instruction by invoicing the customer directly.

17. On 29 February 2008 Mr Bell confronted Mr Louw with the invoice sent to the customer by his wife and suspended him pending a disciplinary enquiry. He was charged with a number of instances of misconduct, only one of which is relevant to this review:

‘Were part[y] to / aware of the procuring of the sale of competitive product namely Wire Rope Dressing and Peerless Grease to a third party, All Bearings. This was done through the instrumentality of your wife, who (to your knowledge) has a restraint of trade with the company’¹

18. The disciplinary enquiry was chaired by an independent person. The findings of the disciplinary enquiry were the following:

‘Mr Louw, as sales manager for the stock in contention, and as head of the sales division, had a clear duty to take whatever action necessary to resolve the problem with the delivery of stock to All Bearings. However, Mr Louw took no action at all in this matter, except to finally approve the sale of the stock to All Bearings by a competitor company, on the grounds that this would keep the customer happy. There were, to my mind, many other possibilities which could have been explored to prevent this happening, including if necessary buying

¹ B190.

the required stock elsewhere and selling it to All Bearings at a loss, but Mr Louw chose not to consider any alternatives at all and merely stood above the matter until confronted by the company.²

He was accordingly dismissed.

19. Mr Louw appealed against his dismissal but was advised to refer any dispute he might have to the First Respondent. The matter was duly conciliated and referred to arbitration. The arbitration hearing was held on 27 and 28 October 2008 and 02 and 03 March 2009. Both the Applicant and Mr Louw were legally represented at the hearing.

Outline of the Commissioner's award

20. The Commissioner handed down his award with a detailed record of the evidence and careful analysis of the case. His findings may be summarised as follows:

- 20.1. The finding of the chairperson of the disciplinary hearing that Mr Louw was a party to the sale was factually incorrect on the basis that this was conceded by Mr Bell and there was no evidence before him that he took any part in approving the sale.
- 20.2. There was no evidence to suggest that Mr Louw was aware of his wife's involvement in the transaction prior to being informed of it in the email from Ms Cronje on 21 February.
- 20.3. There was no evidence to contradict Mr Louw's version that after receiving that email, he questioned his wife and learnt that she had arranged to have the products delivered. He told her to leave matters as they were and that he would sort it out, ie regularise the transaction.

² B207

- 20.4. Mr Louw did not raise the issue with Mr Bell from 22 February to 29 February 2008. The failure to bring the matter to the attention of Mr Bell was explained by their respective absences from office; Mr Louw's justified assessment that the matter was no longer urgent (the product was in the process of being delivered to the customer); and that he had told his wife to 'leave the matter there' until he sorted it out (not being aware that his wife had been subsequently asked to invoice the sale and had done so).
- 20.5. An employee of Multilube, a Ms Fisher, sent an email on behalf of Multilube to Mr Louw's wife requesting her to send an invoice for the product directly to the customer.
- 20.6. On the probabilities, he finds that the most likely explanation is that in order to appease its customer, employees at Multilube, tried to source the product through Mr Louw's wife. An employee of Multilube had authorised her to invoice the client directly and that Mr Louw, discovering what had happened and intending to set the matter right, had not got around to doing so before being confronted by Mr Bell on 29 February 2008.
- 20.7. Accordingly he was satisfied that Mr Louw was not guilty of being party to the sale; or in breach of a fiduciary duty by failing to alert Mr Bell of the fact that his wife was selling competing products to a customer of the Applicant.
- 20.8. Mr Louw was awarded eight months' remuneration in the sum of R366 666.64.

Application to review

21. In the application to review and to set aside the arbitration award Mr Bell, the managing director of the Applicant, deposed to the founding affidavit. In that affidavit he states that Mr Louw held a senior managerial position

with the Applicant and that he owed a fiduciary duty to it which included not placing himself in a position in which his own interests would conflict with those of his employer, for example by engaging in undisclosed dealings with a business owned by his wife.

22. The grounds of review are contained in Mr Bell's founding affidavit, his supplementary affidavit and the Applicant's Heads of Argument.

Founding affidavit

First ground of review

23. The first ground³ of review was that the Commissioner did not apply his mind to this important aspect of the case, in particular failing to appreciate that secret trading conducted by Mr Louw's wife to his knowledge constituted good grounds for dismissal and that he failed to appreciate the rule as a strict one which allowed little room for exception.⁴

24. The Commissioner's analysis from paras 107 through to 124 of his award⁵ reveals that this was what he considered to be the central aspect of the case before him. In his conclusion in para 124, he concludes that there was no breach of a fiduciary duty because he found that Mr Louw was not aware of a conflict of interest because he believed his wife was merely assisting the Applicant by making her product available; that he was not aware of the instruction from Multilube to his wife to invoice the customer directly; and that he had intended to regularise the transaction but had not had the opportunity to do so. In para 120 the issue is taken on directly. He accepts that Mr Louw is in a fiduciary relationship but finds that there was no evidence that Mr Louw acted against the Applicant's interests. He then sets out the reasons for that factual conclusion. This ground is accordingly without merit.

³ A10 para 20

⁴ A10 at paras 20 and 21

⁵ A24

25. Under the same ground of review it is claimed that the Commissioner failed to appreciate that secret trading conducted by Mr Louw's wife to his knowledge constituted good grounds for dismissal. The Commissioner finds that the transaction engaged in by Mr Louw's wife was not secret because the request to supply and deliver the product and to invoice the customer emanated directly from a manager and employee of Multilube. The Commissioner, after a careful analysis of the evidence, found that Mr Louw was not aware of the transaction as at 21 February or that his wife had invoiced the client directly, until he was confronted with the invoice on 29 February.

26. Under the same general head it is alleged that the Commissioner failed to appreciate that the rule was a strict one allowing little room for exception. It is not clear which rule is being referred to. If it is the rule that an employee should not place himself in a position where his own interests conflict with those of his employer such as engaging in undisclosed dealings with a business owned by his wife, then as a matter of fact, the arbitrator finds that he did not engage in dealings with a business owned by his wife. Mr Louw's failure to disclose is explained in para 114 which sets out a rational and persuasive explanation why Mr Louw did not raise the matter with Mr Bell from 22 February to 29 February 2008 – all based on evidence before him.

Second ground of review

27. The second ground of review⁶ is that despite the evidence before the Commissioner pointing 'clearly and inexorably' to Mr Louw having committed serious misconduct that had completely eroded the trust relationship between Mr Louw and his employer and that this was the only 'logical, rational and reasonable conclusion to which a Commissioner hearing the matter could have come', the Commissioner had held otherwise.

⁶ A19 para 52

28. This, Mr Bell claims, is substantiated by the fact that the Commissioner concluded that Mr Louw's dismissal was substantively unfair because, inter alia, he held that there had been no sale as a result of Mrs Louw's cancellation of the invoice⁷. This, Mr Bell claims, was so unreasonable that no reasonable Commissioner could have come to that conclusion.
29. The Commissioner records in para 107 of his award that the chairperson of the disciplinary enquiry made a factually incorrect finding that Mr Louw had approved the sale of the stock. He came to this conclusion on the basis of a concession made by Mr Bell and the fact that no evidence of Mr Louw's complicity in the sale had been placed before him. It is in this context that the Commissioner states that 'there was no evidence before me that the Applicant took any part in approving the "sale" (which was ultimately not a sale as no charge was levied on the customer)'.
30. Whatever the legal status of the transaction was, it is irrelevant to the point being made by the Commissioner, namely that Mr Louw did not 'approve' the transaction, whether a sale or not. To the extent that his conclusion that Mr Louw's dismissal was substantively unfair as a result, the issue concerned his *participation* in the transaction rather than its legal status. Accordingly, even if it is an error of law, it does not affect the rationality of his finding.

Third ground of review

31. Mr Bell contends that the Commissioner's assessment of the probabilities was 'so out of kilter with the evidence before him and the reality of the matter that no reasonable commissioner could have concluded similarly'⁸. In support of this Mr Bell claims that it was highly improbable that Mr Louw and his wife did not discuss the transaction before 21 February and thereafter because: they were married to each other; had previously worked in the same business together; and that they were on holiday when her father phoned about the matter. Mr Bell insists that the

⁷ A19 paras 54-5; and A79-80 paras 35-37.

⁸ A19 para 57

probabilities were overwhelming that there were extensive discussions between them because the matter required urgent attention and the matter was not being dealt with appropriately.

32. Although their personal and previous working relationship may ground such an inference, the Commissioner considered the issue and found that given the circumstances and the testimony of both Mr Louw and Mrs Louw, that such an inference was unwarranted⁹. That is a reasonable assessment to make even if there is a more probable version, which is what Mr Bell claims. But the assessment of the probabilities of the different versions is the subject matter for an appeal – it is not the subject matter for review. All that is required in a review is to determine whether the decision-maker has taken account of the evidence (which includes the inferences to be drawn from the facts) and drawn a reasoned and reasonable conclusion based on that evidence. In this respect, he has.

33. Mr Bell, in his founding affidavit at paras 29 to 50, constitutes his assessment of the probabilities of the Mr Louw's version and his credibility. In order to transform what is in effect grounds of appeal into grounds for review, Mr Bell states that this assessment of the probabilities leads 'clearly and inexorably to [Mr Louw] having committed serious misconduct' and that this was 'the only logical rational and reasonable conclusion to which a Commissioner hearing the matter could have come'.¹⁰ It is abundantly clear from the Commissioner's careful analysis of the evidence in paras 107 to 125 that there is another probable version based on the evidence before him. That version in a nutshell is-

33.1. Mr Louw testified that he was not aware of his wife's involvement prior to 21 February 2008.

33.2. The Commissioner accepted Mr Louw's evidence that his involvement prior to that date was to assist his father-in-law Mr

⁹ A21 para 65

¹⁰ A19 paras 52, 56

Shearon to get stock released for a client and that he discussed the issue with Mr Bell on 11 February 2008.

- 33.3. Mr Louw testified that he and Mr Shearon met with Mr Bell on 11 February 2008 when the issue of supplying the stock to the customer was discussed and that the issue of Mrs Louw's ownership of the stock was raised. Mr Bell initially denied that the issue had been raised with him on 11 February but upon being presented with an email in which he acknowledged that the issue had been raised, he admitted that it may have taken place.
- 33.4. Mr Louw testified that he again raised the issue of supplying the stock to the customer with Mr Bell on 20 February 2008. Mr Shearon had telephoned the Applicant to find out what progress has been made. When this was raised by Mr Louw, Mr Bell became angry and snapped at him. Mr Bell did not recall the conversation or his conduct.
- 33.5. Mr Bell testified that he overheard a telephone conversation on 21 February between Mr Louw and a third person during which Mr Louw said that 'Danita is sticking her nose in and sending emails'. Mr Louw denied making the statement and said the call was from Mr Shearon. The Commissioner concluded that a half-heard conversation did not provide any concrete evidence that Mr Louw was involved in or aware of the transaction.
- 33.6. Mr Louw testified that after speaking to his wife on 21 February 2008, he told her to leave matters and that he would sort them out.
- 33.7. Mr Louw testified as to the reasons why he did not raise the issue with Mr Bell. The respective absences of Mr Bell and Mr Louw were uncontested. The commissioner considered his explanation, that the matter was not urgent because the stock had been delivered, as justifiable. The commissioner believed Mr Louw when he said that he intended to raise the matter at the first opportunity that he had to meet face to face.

33.8. Mr Louw testified that he was not aware that his wife had invoiced the client directly. The implication that Mr Louw knew of the transaction and the invoicing because they were married was considered by the commissioner and rejected.

33.9. Accordingly the failure to bring the matter to Mr Bell's attention between 22 and 29 February 2008 did not amount to a breach of the fiduciary relationship grounding a substantively fair dismissal.

34. It is accordingly abundantly clear that Mr Bell's assessment of the evidence and his opinion of his own credibility were not the only logical, rational and reasonable conclusions to which a Commissioner hearing the matter could have come.

Supplementary affidavit

35. The grounds in the founding affidavit were supplemented (and often repeated) in Mr Bell's supplementary affidavit. Apart from the general claims made, detailed grounds were advanced that evidence was disregarded, that irrelevant evidence was considered, that undue weight was given to evidence in the face of contradictory evidence, that objectively read the award revealed bias on the part of the Commissioner, that the Commissioner failed to appreciate the fiduciary duties owed by Mr Louw to the company and to properly quantify the quantum of compensation.¹¹

36. It is important to note that the grounds relating to bias and quantum are raised for the first time in a supplementary affidavit despite the fact that the evidence tendered in respect of both are drawn ex facie the award itself.

¹¹ A76-77 paras 22-29.

37. Each of the grounds of review raised in the supplementary affidavit not dealt with under the grounds cited in the founding affidavit is dealt with under this head.

Mr Louw's role in the sale

38. In paragraph 30 to 34 of the Applicant's Supplementary affidavit, an additional ground is raised, namely that the Commissioner selectively quoted from the report of the disciplinary enquiry. In paragraph 107 of the award, the Commissioner quotes from the findings in the report. The report reads as follows (the italicised portion of which is the part quoted by the Commissioner):

'Mr Louw, as sales manager for the stock in contention, and as head of the sales division, had a clear duty to take whatever action necessary to resolve the problem with the delivery of the stock to All Bearings. However *Mr Louw took no action at all in the matter, except to finally approve the sale of the stock to All Bearings by a competitor company, on the grounds that this would keep the customer happy.* There were to my mind many other possibilities which could have been explored to prevent this happening, including if necessary buying the required stock elsewhere and selling it to All Bearings at a loss, but Mr Louw chose not to consider any alternatives at all and merely stood above the matter until confronted by the company'.¹²

39. The complaint is that report's finding went beyond just a finding that Mr Louw had approved of the sale but also of his 'repeated failure' to exercise his responsibilities as sales manager before the delivery of the stock and not simply the finding. The Commissioner was dealing with the limited point that that part of the finding dealing with Mr Louw's approval of the sale was incorrect. The other finding namely the failure to take steps to regularise the matter is the subject of the rest of the Commissioner's analysis on the merits. There is accordingly no merit in this ground of review.

¹² B207.

Mr Louw's management decision

40. The complaint is that the Commissioner selectively refers to the outcome of the disciplinary proceedings in the chairperson's report (and accordingly implicitly admits the report) but does not give consideration to the report in its entirety, in particular the finding that Mr Louw stated he had made a management decision to get the stock to the customer no matter where it came from. But this statement was specifically denied by Mr Louw at the hearing¹³ and specifically recorded by the Commissioner in his award.¹⁴

41. A similar criticism concerning the Commissioner's approach to the report of the disciplinary enquiry is to be found in the Applicant's Heads of Argument¹⁵ - a criticism that the applicant characterizes as a gross irregularity. While the Commissioner disallowed the chairperson's report of the internal disciplinary hearing, the Commissioner is accused of selectively quoting from the report in respect of the chairperson's finding that Mr Louw was a party to the sale.¹⁶ But the arbitrator deals with the issue of the admissibility of the disciplinary proceedings in his award.¹⁷ He states that the chairperson of the proceedings recommended the dismissal on the basis of the evidence reflected in the minutes. These minutes were not accepted by Mr Louw as being an accurate reflection of the evidence led at the hearing and the chairperson was not called to verify the minutes. He then goes on to say that there are a number of significant differences between what is reflected in the minutes and Mr Louw's testimony in the arbitration. In the absence of other evidence, he accepted his evidence as it was tendered in the arbitration. The claim that he disallowed the report and accordingly could not rely on the chairperson's finding is unfounded.

¹³ C382-386.

¹⁴ A44 at para 117 of the Commissioner's award.

¹⁵ Applicant's Heads of Argument at para 139.1 to 139.4

¹⁶ At para 107 at B41.

¹⁷ A44 at para 117.

Mrs Louw's breach of the sale of business agreement

42. The claim is made that the Commissioner disavows a crucial aspect of the case by holding that the issue is not whether Mrs Louw acted in breach of her agreement but whether Mr Louw's conduct warranted dismissal.¹⁸ I am at a loss to understand the point being made other than that Mr Louw should have been more careful given the restraint and his fiduciary duties. The criticism is premised on the breach of the restraint in a context in which Multilube itself approached her to supply, then deliver and then invoice the customer. It is also premised on Mr Louw's knowledge of what Mrs Louw was doing both before 21 February and thereafter. It is an unfounded criticism.

Mr Bell's alleged lack of credibility

43. This criticism concerns the fact that Mr Bell could not recall 'snapping' at Mr Louw on 20 February 2008 and that this was recorded by the Commissioner as 'once again Mr Bell could not recall this happening'. Mr Bell takes umbrage at the insinuation that he was selective in his recall of events and that his credibility was put in doubt.

44. It is important to note that this was not the first time that Mr Bell could not recall a conversation with Mr Louw or its content. Mr Bell initially denied that the issue of Mrs Louw's ownership of the stock was raised by Mr Louw on 11 February 2008. In a subsequent email Mr Bell acknowledged that this was brought to his attention by the Applicant around that time. There was other email evidence that suggested that Mr Bell had the conversation to which Mr Louw testified.

45. The Commissioner's finding that Mr Bell was not an impressive witness is not based solely on the fact that Mr Bell initially denied that Mr Louw had brought his wife's claim of ownership of stock to his attention but then

¹⁸ A 41 at para 108.

admitted that he had acknowledged this in the email at later stage. It was also based on other findings, which were not challenged.

46. There is no reason to interfere with the Commissioner's finding that Mr Bell was not an impressive witness.

Mr Louw's telephone conversation with Danita

47. This 'ground' is an attack on the Commissioner's finding that he disregarded Mr Bell's evidence that he overheard Mr Louw telling someone that 'Danita is sticking her nose in and sending emails' in a telephone conversation. Mr Louw denied having said this. In the face of a contested fact without surrounding evidence or corroboration in support of one version over the other, it is not unreasonable for the Commissioner to conclude that this allegation was not proved.

Mrs Louw's role

48. This attack turns on the Commissioner's finding that Mrs Louw was entitled to believe that Ms Fisher was authorised to request her to invoice the customer directly.¹⁹ The Applicant claims that Mrs Louw knew that Ms Fisher was in a junior position and did not have the power to authorise her to invoice the customer directly. This claim is based, despite Mrs Louw's denial, on the testimony of Mr Louw who testified that she knew of Ms Fisher's junior position. But assuming that she knew of Ms Fisher's junior position, that assumption does not mean that she did not have authority to do so. Mr Bell claims that she did not have such authority because he did not give it and Mr Louw denies giving it and accordingly Mrs Louw was not entitled to assume that it was authorised. But that conclusion is only valid if Mrs Louw knew that the only two persons who had authority to authorise Ms Fisher did not do so.

¹⁹ A43 para 115.

Mr Shearon should have been called as a witness

49. Mr Bell contends that an adverse inference should have been drawn on Mr Louw's failure to call Mr Shearon. In his award, the Commissioner submits as an aside that Mr Shearon did not testify because of divided loyalties.²⁰ Given that his failure to testify was not raised by the Applicant at the hearing, it can hardly be expected that the Commissioner should draw an adverse inference.

Bias

50. There are a number of findings that Mr Bell contends constitute bias on the part of the Commissioner. The *first finding* is that the Applicant's decision to lay a disciplinary charge against Mr Louw was 'influenced by the somewhat confrontational correspondence that passed between himself and Mr Louw and saw this as an opportunity to rid himself of Mr Louw without having to go through the protracted process of performance counselling'.²¹ Mr Bell regards this statement as an attack on him and therefore evidence of the Commissioner's support for Mr Louw and a 'complete disregard' for the Applicant's contentions.

51. The Commissioner's finding does not indicate who is to blame for the confrontation – just that the exchange was confrontational and that influenced Mr Bell to press charges against Mr Louw. That Mr Bell was the innocent interlocutor in the exchange, as he claims, only makes the Commissioner's point more cogent.

52. The second finding of alleged bias is the finding that 'Mr Louw would have been foolish indeed to become involved for a very small profit...'.²² This finding Mr Bell contends is another example of 'gross unreasonableness' because 'it entirely disregards the real motive for his involvement – a desire to show me [Mr Bell] up and embarrass me, giving vent and

²⁰ A43 at para 115.

²¹ A44 at para 117.

²² A44 at para 18.

expression to his hurt feelings as a result of the performance consultations which had been initiated by me as a result of his poor performance'. But this is one inference among several that may be drawn from the exchange of correspondence and the evidence given by both Mr Bell and Mr Louw. The Commissioner comes to a different conclusion on the basis of that evidence. The mere fact that there may be a different conclusion drawn from the evidence tendered does not on its own render the Commissioner coming down on one side as bias.

53. The third finding of alleged bias is the Commissioner's finding that Mr Bell was not an impressive witness.²³ The claim is made that this finding was mainly based on Mr Bell's refusing to meet with Mrs Louw to discuss why she had supplied, delivered and invoiced the stock. That is not an entirely accurate reflection of the Commissioner's finding. His conclusion was also based on Mr Bell's denial of the conversation on 11 February, which was later recanted in face of a fax acknowledging that he had discussed the issue with Mr Louw around that time.

54. Mr Bell seeks to justify his refusal to meet with Mrs Louw on the grounds that the complaint was against Mr Louw and not Mrs Louw – a stance that appears to stand in contradiction to other stances taken by the Applicant concerning Mrs Louw's role in the events. A further justification advanced in the affidavit is that it was inappropriate to speak to Mrs Louw for two reasons: she was not an employee and he had strained relations with her arising from financial claims she had made. Those justifications were not raised when she was pertinently asked why he refused to meet her. Mr Bell's response was that the reason for not meeting her was that he 'was still 'in the process of discovery and I wanted to get our facts together before meeting Tania [Mrs Louw]'.²⁴ No other justification is offered on the record when the issue of the refusal to meet is raised.²⁵

²³ A118 at paras 208-215.

²⁴ C117 lines 11-13.

²⁵ C139 and 151.

Monetary value of the transaction

55. The Commissioner is criticised for finding that the value of the transaction (R3904.93) and any profit arising from it was small. Mr Bell claims that no factual basis was laid for such a finding. It is not unreasonable for the Commissioner to take judicial notice of the fact that even if the whole sum was profit, that the profit was small and, accordingly no inducement for Mr Louw to breach his fiduciary duty towards the Applicant.

Quantum

56. The claim is that the sum of compensation is unreasonable because it does not take into account that he had only worked for the Applicant for 8 months and that it did not take into account any monies earned in Dubai.

57. It is evident from the award that his assessment of quantum was based on the fact that he was unemployed for four months and that because of the restraint of trade agreement was forced to work overseas causing him considerable financial hardship and emotional hardship due to an enforced separation from his family. The evidence on which this was based was not contested. This ground is unfounded.

Remaining grounds of review

58. A number of attacks levelled at the Commissioner's award are repetitions of what is contained in the founding affidavit. Many of them are dealt with in the course of the analysis of the grounds raised in the Applicant's Founding Affidavit and its Heads of Argument. These concern Mr Louw's knowledge of the delivery²⁶, Mr Louw's failure to sort things out²⁷, Mr Louw's knowledge of the invoice²⁸, Mr Louw's knowledge of the transaction prior to 21 February 2008²⁹, Mr Louw's improbable explanation for failing to take action³⁰, Mr Louw's alleged lack of knowledge of the

²⁶ A81-2 paras 42-49.

²⁷ A83-4 paras 50 – 59.

²⁸ A85-6 paras 60 – 69.

²⁹ A91-93 paras 85 – 97.

³⁰ A95-97 paras 107 – 113.

transaction³¹, Mr Louw's conduct between 22-29 February³² and the Clear breach of fiduciary duty³³.

Applicant's Heads of Argument

59. In the Applicant's heads of argument the specific grounds of review are detailed at great length.³⁴ Those that have been traversed above are not dealt with.

Elements of the misconduct proved

60. The Applicant contends that there were five elements to the misconduct and that all of them on Mr Louw's evidence alone were proved. The elements are:

- 60.1. Was Mr Louw aware that his wife had sold products ordered from Multilube to All Bearings?
- 60.2. Was his wife's conduct wrongful?
- 60.3. If the answer to both the questions was yes, did Mr Louw as an executive employee of the company and the head of its sales division have a fiduciary duty to inform the company of this?
- 60.4. If yes, did Mr Louw fail to inform the company of this?
- 60.5. If yes, was dismissal an appropriate penalty for such conduct, The Applicant then contends that there was compelling evidence before the Commissioner based solely on Mr Louw's testimony to prove that he was aware of the transaction between his wife and the customer and that he undertook to sort out the regular transaction and that for a period of eight days did nothing to resolve the matter.³⁵

61. There is one element that is significantly not included in this list, namely *the reason for the failure* to inform the company or take steps to regularise the transaction, which is, of course, the basis on which the arbitrator finally decides the issue.

³¹ A98-100 paras 114 – 120.

³² A100-105 paras 121 – 141.

³³ A121 para 221 – 241.

³⁴ Applicant's heads of argument paras 25-155.

³⁵ Applicant's heads of argument paras 25-32.

62. *Was he aware?* The Commissioner finds that Mr Louw only became aware of his wife having supplied the product on 21 February 2008. He finds that Mr Louw only became aware that his wife had invoiced the customer on the 29 February 2008 when he was confronted with the invoice by Mr Bell. His finding is that at no stage did Mr Louw know that Mrs Louw had sold the stock. That finding is based on the evidence of Mr and Mrs Louw and the fact that there was no evidence to contradict it. But what Mr Louw was aware of was that the supply and delivery of the stock by his wife needed to be regularised on 21 February 2010.

63. *Was her conduct unlawful?* The evidence was that it was employees of the Applicant who requested Mr Louw's wife to supply, and then deliver the stock to the customer and finally to invoice the customer directly. Although this question is not dealt with directly in the award, the Commissioner's view is evident when he finds that Mr Louw's wife was entitled to believe that the Applicant had approved the invoicing of the customer.³⁶ It is a reasonable conclusion to draw from the evidence presented to him.

64. *Did Mr Louw have a fiduciary duty?* The arbitrator accepted that Mr Louw, as a senior employee, had a fiduciary duty towards the Applicant not to act against its interests³⁷. Given that the fiduciary duty can only be triggered by the awareness of a conflict of interests, the Commissioner finds that the fiduciary duty to regularise the transactions arose only on 21 February when he learnt of his wife's supply and delivery of the product to the customer. Given that the Commissioner found that he was not aware of the fact that his wife had been requested to invoice the customer directly and had indeed done so, no fiduciary duty arose in respect of the invoicing until he learnt of it.

³⁶ B43 para 155

³⁷ B35 para 120

65. *Did Mr Louw inform the company?* There was no dispute that Mr Louw did not raise that his wife's delivery of the product to the customer between 21 and 29 February nor took steps to regularise the transaction once he learnt of her role on 21 February.

66. *Did Mr Louw have a good reason for not informing the company or take steps to regularise the transaction?* The critical finding in the judgment is set out in para 114 in which the Commissioner takes account of the evidence before him – the respective absences of Messrs Bell and Louw, the lack of urgency and Mr Louw's statement that he intended to raise the issue and regularise the transaction but wanted to do so person to person. These findings are based on evidence on record and are reasonable conclusions to draw from that evidence.

67. *Whether dismissal was an inappropriate penalty?* Given his findings that Mr Louw was not aware of his wife's involvement prior to 21 February, that he had a reasonable explanation for not regularising the transaction immediately and that he did not know that his wife had invoiced the customer directly until he met with Mr Bell on 29 February, the Commissioner concluded that the dismissal was in these circumstances substantively unfair – a reasonable conclusion based on his findings.

Material factors ignored

68. The Applicant claims that the 'Commissioner *entirely* ignored Mr Louw's admitted failure to take any action after he became aware of the fact that his wife had sent the goods to All Bearings'. But the Commissioner did not ignore the failure to take action, he considered it and accepted Mr Louw's explanation that it was not urgent, that he intended to do so but did not have the opportunity to do so face to face until 29 February 2008. Far from 'entirely ignoring' the failure, he considered it in para 114 of his award.³⁸

³⁸ B33.

Gross error of law

69. The Applicant claims that the Commissioner committed a gross error of law when he stated that there was no sale of the product because no charge had ultimately been levied. This statement is made in a particular context. Firstly Mr Louw had been dismissed as a result of one of the findings made by the chairman of the disciplinary hearing namely that he was party to the sale of the stock to All Bearings. The relevant portion of his analysis reads:

‘The findings of the Chairman of the disciplinary hearing seem to be that he was indeed party to the sale, the findings state: “Mr. Louw took no action at all in this matter, except to finally approve the sale of the stock to Allbearings by a competitor company, on the grounds that this would keep the customer happy”. This finding would appear to be factually incorrect; certainly there was no evidence before me that Multisol took any part in approving that “sale” (which was ultimately not a sale as no charge was levied on the customer)’.

70. Firstly, the statement concerning the status of the sale has no bearing on the thrust of his finding that Mr Louw was not a party to the sale. There was no evidence before him that the Applicant took any part in approving the sale. Moreover Mr Bell himself conceded that Mr Louw was not party to the sale. The status of the transaction did not affect the cogency of his finding that on this ground; Mr Louw was not guilty of this particular misconduct. It is a distortion of the Commissioner’s reasoning to accuse him of concluding that because there was no sale there was no misconduct.³⁹

Bias and misconstruing a material ground

71. The Applicant also claims that the Commissioner’s findings that there was no sale is ‘one of many examples’ of the Commissioner assisting Mr Louw

³⁹ The Applicant’s heads of argument para 36.

by providing him with ‘exculpatory grounds’. Again, in context, the Commissioner’s view of the status of the transaction does not affect the substance of his finding that the Mr Louw was not party to the transaction whatever its status might have been. It has no exculpatory effect.

72. The Commissioner is then accused of misconstruing a materially irrelevant factor and failing to infer from Mr Louw’s wife subsequently deciding not to collect the money due to her as proof of knowledge that the transaction was in breach of her restraint. The arbitrator does not misconstrue a materially relevant factor. It does not appear to play any role in his assessment of her actions. What appears to influence him is the trivial nature of the amount at stake and that she received instructions from the Applicant’s employees to supply, deliver and then invoice the products.⁴⁰

Ignoring materially relevant evidence

73. In paragraphs 41 through to 55 of its Heads of Argument the Applicant lists an extensive series of inferences that the Commissioner should have drawn in respect of what transpired between Mr Louw and his wife on 21 February 2008 and the inference to be drawn from the fact that Mr Louw’s wife generated the invoice. But the Commissioner considered the personal nature of the relationship and declined to make the inference that the Applicant presses for. Instead he relied on the uncontested evidence that employees of the Applicant instructed Mr Louw’s wife to invoice the customer directly. Although the Applicant seeks to play this down by referring to it as an “implausible suggestion”, the email from Ms Fisher requests her to do so⁴¹.

74. Issue is also made that Mr Louw’s wife said that the goods were of no use to her. The Applicant seeks to imply from this that either R3904.93 to be earned from the transaction had some benefit for her or that she wished to show the Applicant up and embarrass Mr Bell to punish him for the performance enquiry he had launched against Mr Louw. But these are

⁴⁰ B35 (para 120 in the award)

⁴¹ B274.

inferences that may be drawn but they do not constitute grounds to review a Commissioner who declines to draw them.

Ignoring the evidence of Mr Bell in favour of the improbable and inconsistent evidence of Mr Louw

75. The first inconsistency⁴² claimed is that Mr Louw stated that Mr Shearon had asked him who the stock belonged to on 11 February 2008 and that he had informed him that the stock belonged to his wife's company. This the Applicant considers 'peculiar' because Mrs Louw testified that Shearon (her father) had called her on 6 February 2008 in Switzerland and that she had told him that the stock belonged to her. It may amount to an inconsistency but hardly one amounting to a gross irregularity. It is also worth noting that this inconsistency was never put to Mr Louw at the hearing.

76. The next inconsistency claimed is that Mrs Louw had told Mr Shearon that he was welcome to uplift the stock and by that she meant that he could sell it on behalf of Multilube. Mr Louw testified that when he raised the issue of the stock with Mr Bell on 11 February he had been told by Mr Bell that he (Mr Bell) was moving the stock and sorting it out. In the light of this, the Applicant 'wonders' why Mr Louw permitted his wife to take part in the transaction. There is no inconsistency given the Commissioner's finding that Mr Louw was not aware of his wife's involvement until 21 February 2008. Having learnt of the supply and delivery of the product then, he had told his wife that he would sort it out. He only learnt of his wife's invoicing of the product when he was confronted with it on 29 February 2008.

77. The next inconsistency claimed is Mr Louw's failure to respond to an e-mail from Danita Cronje in which she raises the fact that his wife is releasing the stock. Given his own evidence that Mr Bell had told him that he, Mr Bell, was attending to it, the Applicant claims that this failure to

⁴² Multisol's heads of argument para 56.

advise her of that fact is an inconsistency. There is little substance to this. It is consistent with Mr Louw's version of the facts (which the Commissioner accepts) – having learnt of his wife's involvement in the email, he raised it with her first and having done so, decided to sort it out with Mr Bell, the managing director, rather than with Ms Cronje, a junior employee.

78. The next claimed inconsistency is that Mr Louw explained that when he told his wife that he would 'sort it out' he wanted to ensure that the invoice went to the correct destination. This, the Applicant says is 'strange' given that Mr Louw had been told that Mr Bell was sorting the matter out.⁴³ This is not an inconsistency. Mr Bell was 'sorting out' the clearance of the stock for supply to the customer. Mr Louw was 'sorting out' his wife's involvement in the supply and delivery of the product. They were different species of 'sorting out'.

79. The next inconsistency claimed is that it is 'strange in the extreme' that Mr Louw was only made aware of the e-mail allegedly instructing his wife to invoice the goods after the disciplinary hearing on 10 March 2008. I do not know what the import of this criticism is. It may be strange but other than an attack on the authenticity of the emails, it does not affect the cogency of the arbitrator's reasoning. This too was never put to Mr or Mrs Louw.

Inconsistencies regarding the failure to report the irregularity

80. In a rambling and repetitive account of the evidence relating to the period between 21 February to 29 February 2008, the Applicant criticizes Mr Louw's evidence in a number of respects, none of which constitute grounds for review.⁴⁴

81. The criticisms all centre on Mr Louw's failure to respond to Ms Cronje's email or to take steps to regularise the transaction with Mr Bell during the that period. But the Commissioner specifically addressed this. His

⁴³ Applicant's Heads of Argument at para 76.

⁴⁴ Applicant's Heads of Argument at paras 85 to 135.

reasoning was based on evidence before him to the effect that Mr Louw intended to regularise the transaction but wanted to do so face to face with Mr Bell and that one or other of them was absent from the office during that period – all reasonable conclusions to draw from the evidence before him.

82. It is also important to note that although the Applicant claims that Mr Bell 'was kept in the dark', the email from Ms Cronje was also emailed to Mr Bell on the 21 February.

83. The Commissioner is criticized for 'ignoring' Mr Louw's testimony in response to a question as to why he did not inform Mr Bell of the situation after receiving the e-mail from Ms Cronje. That testimony is to the effect that he had bigger things on his mind, that he did not have to explain anything to him, and that he assumed that Mr Bell knew of the situation.⁴⁵ This, the Applicant claims, would have justified a finding by the Commissioner that the relationship between Mr Bell and the third respondent had broken down irretrievably and that Mr Bell had good cause not to trust him. Since the charge was the failure to raise the issue of his wife's involvement in the transaction, it is hard to understand why it was necessary for the Commissioner to make such a finding – the third respondent was not seeking reinstatement.

84. The Commissioner is criticized for failing to make a finding that Mr Louw was not an impressive witness because of his response 'I suppose so' to a proposition put to him that all he needed to do to resolve the matter was to inform Ms Cronje or Mr Bell what he had found out from his wife. Quite why that should constitute grounds for attacking his credibility is hard to fathom. It is consistent with his testimony to the effect that he considered the transaction to be irregular and that he intended to regularise it in a face to face meeting with Mr Bell.

⁴⁵ Transcript C369 at lines 1-2

85. The Commissioner is criticized for failing to apply his mind to the matter before him because, in the face of 'undisputed facts', he considers Mr Louw's conduct as acceptable. The so-called 'undisputed facts' are described as follows:

- 85.1. he knew on 21 February that his wife's company had sent stock ordered from Multilube to the customer;
- 85.2. he was aware that the transaction was irregular and needed to be dealt with;
- 85.3. he was told by Mr Bell on 11 February and on 20 February that Mr Bell was dealing with the problem of the stock;
- 85.4. he was aware that Ms Cronje was waiting for an answer;
- 85.5. he had told his wife not to do anything as he would deal with the matter, and particularly the issue of invoicing, but she went ahead and invoiced anyway.
- 85.6. he took no steps to deal with the matter until confronted with the fact of the invoice from his wife.

86. Firstly, it is not correct to state that Mr Louw told his wife not to invoice on 21 February. His testimony was that he told her to 'leave it there' and that he would 'sort it out'. When pressed as to what he meant by sorting it out, he said 'dealing with the invoicing problem'. He never explicitly said that she should not invoice and it is disingenuous to then suggest that Mr Louw's wife went ahead and invoiced anyway.

87. Secondly, these so called undisputed facts fail to take into account the following: that it was employees of the Applicant that asked Mrs Louw to supply and then deliver the products and then to invoice the customer; and that the arbitrator accepted the reasons advanced by Mr Louw for not taking the steps to deal with the matter over the eight days, namely their respective absences; his desire to meet face to face; and the lack of urgency given that the product was being delivered. Taking these facts into account, it cannot be said that the Commissioner failed to apply his mind to the matter before him.

88. The Applicant then criticizes the plausibility of Mr Louw's reasons for failing to take steps to regularise the matter with Mr Bell and in the process the Commissioner's acceptance of those reasons. The Commissioner accepted Mr Louw's statement that he had intended to raise the matter on 22 February 2008 and, given Mr Bell's absence that day and his absence thereafter, when next they met. He accepted that Mr Louw's belief that the meeting should be face to face. He accepted that the matter was not that urgent given that the product had been delivered (and that he was unaware that his wife had invoiced the customer directly). It cannot be said that his acceptance of these reasons as plausible explanations based on the circumstances surrounding the transaction and the evidence led that his acceptance of these reasons was 'totally unreasonable'.

89. Much is made of the Commissioner's conclusion in para 124 of the award, namely:

'To sum up, I am satisfied that the applicant [Mr Louw] was not guilty of the charge against him (even as orally amended by Mr Bell during the arbitration hearing) of being aware that his wife was selling/had sold competing products to a customer of the respondents and of failing to alert the respondents to this.'

90. The Commissioner is criticized for being 'totally unreasonable' in coming to this conclusion because Mr Louw knew from 21 February that his wife was 'selling' the product. But that is not correct. The evidence was that Mr Louw only learnt of the supply and delivery of the product by his wife on 21 February. At that stage she had supplied and taken steps to deliver the product but had not invoiced it. The email from Ms Cronje does not speak of a sale but only that Mr Louw's wife informed her that the 'Petro-Canada Stocks will be released today'.

91. Neither the testimony of Mr Louw nor his wife suggest that at the stage they discussed it for the first time on 21 February that the supply and delivery of the product constituted a sale at the hands of Mr Louw's wife. Indeed her evidence is to the contrary namely that she did not send an

invoice together with the product, as she would normally have done. Since Mr Louw did not know of the instruction from Ms Fisher to invoice directly or that his wife subsequently invoiced the customer in accordance with that instruction, it cannot be said that Mr Louw knew of the sale until he was confronted with the invoice on 29 February.

92. The Commissioner is then criticized for his conclusion that Mr Louw ‘was not aware of a situation that would have represented a conflict of interest... he therefore had no fiduciary duty to disclose anything further to the respondent’. The applicant contends that because Mr Louw regarded the transaction as irregular, it was improbable that he would not have been aware of a serious potential conflict of interest given that the goods were ordered from Multilube, that Mr Bell was sourcing them and that his wife was restrained from competing with Multilube. But again, once the supply and the delivery was taking place, the only issue was to regularize the transactions, which included the appropriate invoicing of the transaction. Without knowledge of the email from Ms Fisher instructing his wife to invoice directly and his wife’s subsequent invoice, the Commissioner’s assessment of Mr Louw’s knowledge at the time is based on the evidence before him and constitutes a reasonable conclusion to be drawn from the conspectus of the facts.

93. The Commissioner is then criticized for describing Mr Louw’s fiduciary duty in the circumstances of the case namely, that by virtue of his position he ‘would have a duty to ensure that proper procedures were followed in regularizing the transaction, it was his intention to do so but he had insufficient opportunity to do so before being confronted by Mr Bell’⁴⁶. This is attacked on the ground that, given the near instant nature of modern communications, Mr Louw did not inform Mr Bell of the transaction and the steps he proposed taking. Again, the answer to this criticism is Mr Louw’s evidence that he considered it best to do so face to face. The Commissioner’s acceptance of that evidence is a legitimate conclusion to

⁴⁶ B46 at para 124.

draw from the facts before him taking into account what Mr Louw knew at the time.

94. The Commissioner is accused of bias because he argues that ‘while it may be so that Louw was in a fiduciary relationship with the respondent, there is no evidence that applicant acted against the interests of the respondents in any way’. The applicant contends that the opening clause ‘*While it may be so...*’ is an example of the arbitrator’s bias because of its tentative nature. In context, the statement is in response to the Applicant’s contention that Mr Louw was in a fiduciary relationship and had a duty to protect the interests of the Applicant. The thrust of the arbitrator’s statement is that although there may be a fiduciary relationship, there was no evidence of a conflict of interest. This is not evidence of bias but it is the proverbial scraping the bottom of the review barrel.

Disregarding the probabilities

95. The Applicant then criticizes the Commissioner for failing ‘to critically analyse the evidence of [Mr Louw] *in any manner* – there was no testing of the evidence of [Mr Louw] against the probabilities, nor was his credibility considered, there was no weighing up of Louw’s evidence against that of the applicant in *any manner*’ (the emphasis is mine). Despite claiming that the Commissioner failed to critically analyse Mr Louw’s evidence in any manner, only an example is given of this failure.

96. Mr Louw testified that he only became aware of the issue concerning the stock on 11 February. He had however received a telephone call from his father-in-law on 6 February. When he saw who the caller was, he passed the phone to his wife and went skiing with a friend. He testified that his daughter had complained that he spent too much time on holiday dealing with business and he had agreed with her that he would not do so on this trip.

97. The Applicant analyses this testimony by questioning why he had a cell phone at all on holiday or why he had it on international roaming or if he

needed it for emergencies on the slopes, why it was not switched off. The questions only have to be asked in order to demonstrate that the obvious answers do not affect the probabilities of his promise to his daughter one jot. Cell phones are not only used for business. There are many non-business reasons why someone may have his phone on and on roaming. In any event, even if he did promise his daughter not work on holiday, given his position to completely cut himself off from the Applicant would be problematic. Not any of these questions were put to Mr Louw at the hearing.

98. The Applicant then proceeds to question why Mr Louw passes the phone on to his wife without enquiring what the call was about? Again, is it that improbable that once he sees or hears that it is his father in law who is on the phone, he passes it on to his wife? The call may well have been personal. Again there seems to be no need to assess the probabilities unless called upon to do so.

99. The next set of questions in paragraph 137.3 of the Applicant's Heads assume that Mr Louw is aware of the content of the telephone call and accordingly not part of a probability assessment as to his passing the phone call onto his wife.

100. The Applicant states that this analysis is but one example of Mr Louw's evidence, which, if such an analysis had been done by the Commissioner, would have cast serious doubt on the truth of his testimony and on his credibility. Firstly, the Applicant relies on this example only. Secondly, there is nothing on the face of Mr Louw's testimony that would require an interrogation of this nature. These questions were not put to Mr Louw. Thirdly, the analysis conducted by the applicant does not lead to any doubt on the truth of Mr Louw's testimony or on his credibility.

Gross error of law

101. The Applicant claims that the Commissioner made a gross error of law in his finding that there was no evidence that Mr Louw 'took any part in

approving the 'sale' (which was ultimately no sale as no charge was levied)'. I have dealt with this ground of review already. Suffice to say that if it was an error it was one without any consequence for the arbitrator's principal findings.

Material evidence disregarded

102. Various allegations of disregarded pieces of evidence are recorded in the Applicant's Heads of Argument but without any comment as to their effect on the reasoning and sometimes without any reference making it particularly difficult to locate in the transcript or record. I am unable to understand the statement made in para 139.7 of the Heads of Argument and how it impacts on the Commissioner's reasoning. In para 139.8 the statement is made that the Commissioner's statement on a number of occasions that Mr Bell was 'unable to dispute' certain evidence put forward by Mr Louw suggested that this inability supported his finding that Mr Bell was an unimpressive witness. Quite what this has to do with the disregarding of material evidence is difficult to comprehend. But even on its own terms it is just not logical. The inability to contest evidence is more often than not a matter of credibility but of a lack of evidence to the contrary.

103. In para 29 of the Award the Commissioner summarizes Mr Bell's testimony to the effect that he stated that he could not dispute that Mr Louw wanted to inform him of the delivery at the sales meeting on 22 February 2008. This, the Applicant claims is not supported by Mr Bell's testimony in which Mr Bell, when asked whether he could dispute Mr Louw's intentions to raise the issue on the 22nd, he replied that Mr Louw had a full week to bring it to his attention and he had made no effort to do so and accordingly in his view this did not indicate a proactive stance on the part of Mr Louw⁴⁷. Although he does not state it, it is clear that he can only contest Mr Louw's intention by implication from his failure to raise the issue after 22 February 2008 – an implication, which the Commissioner rejects in favour of Mr Louw's explanation.

⁴⁷ Transcript C147 at line 14.

104. In paragraph 31 of his award, the Commissioner records that Mr Bell 'could not dispute' that Mr Shearon had telephoned Mr Louw on 20 February 'to find out what was happening with the stock' and that the third respondent had spoken to Bell about this. The summary goes on to state that Mr Bell said that he did not recall the conversation or his conduct at the time (Mr Louw testified that Mr Bell had snapped at Mr Louw and went red in the face, stating that whereabouts of the stock was not Mr Louw's concern). The Applicant claims that Mr Bell did dispute the conversation between him and Mr Louw on 20 February and that his statement that he did not recall the conversation or his conduct at the time was 'simply Mr Bell's understated way of disagreeing'⁴⁸ with what was put to him. In the final analysis, if one does not recall something, one cannot contest it and there is just no basis for the gloss that the Applicant seeks to place on Mr Bell's words or that the failure to place such a gloss constitutes a ground of review.

Contradictions in third respondent's evidence

105. In his testimony, Mr Louw confirmed that he had said 'Get the stock to All Bearings no matter where it came from' in the disciplinary hearing. In the chairperson's disciplinary report this statement was in the context of his having made a management decision to get stock no matter where it came from to keep the customer happy. Under cross-examination Mr Louw explained that the reference to the management decision was in relation to whom the stock belonged to rather than getting the stock to the customer. This explanation was made within the context of his disputing the veracity of the chairperson's minutes of the hearing, which were never proved. It follows that in these circumstances, the Commissioner was quite correct in his finding that in the absence of proof of what was said in the disciplinary hearing, Mr Louw's version must stand.

⁴⁸ Applicant's Heads of Argument para139.14.

Conclusion

106. It follows from this analysis of the Applicant's grounds of review that they are unfounded. The application is accordingly dismissed with costs, including the costs of counsel.

CHEADLE AJ

Date of Hearing : 17 March 2010

Date of Judgment : 30 November 2010

Appearances

For the Applicant : Adv R Stelzner

Instructed by : David Woolfrey Attorneys

For the Respondent : Adv G Elliott

Instructed by : Maserumule Inc