Not reportable

THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN

Case No: C470/2020

In the matter between:

WAYNE FABIAN STOFFELS	**Applicant**
and	
GUY BLOCH *(N.O.)*	**First Respondent**
DISPUTE RESOLUTION CENTRE	**Second Respondent**
BLUEDUST MOTOR HOLDINGS (PTY) LTD T/A VREDENDAL TOYOTA	**Third Respondent**

Date of Set Down: 14 April 2022

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 17 May 2022

Summary: (Review – incapacity and misconduct – dismissal – Application dismissed – more than sufficient evidence before the arbitrator to justify his findings – Previous warnings stand if not successfully contested)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an application to review and set aside an arbitration award in which the arbitrator found that the applicant's dismissal for poor work performance and alleged gross negligence or dereliction of duties was substantively fair. Procedural fairness was not an issue the arbitrator was required to decide.

[2] The applicant, Mr M Stoffels ('Stoffels' or 'the applicant'), had started work as a car salesman for the Third Respondent ('Bluedust') on 1 September 2018 and was dismissed on 29 May 2020. He had previous work experience as car salesman and it was common cause the applicant had been notably successful in his previous job. Essentially, Stoffels did not dispute his poor performance figures but claims that he was not given the necessary tools of the trade to achieve them.

[3] He was initially expected to achieve 8 car sales a month with a gross profit of R120,000. When Stoffels failed to achieve this, his target was reduced to 5 units a month. By December 2019 he had been issued with a second warning for not achieving that target because he was only achieving an average of 2 units a month. His target was then reduced even further to 3 vehicles per month, but he still did not meet this much reduced objective, which was less than 40 % of his original target. Other salespersons were achieving an average of 6 or 7 units per month. At the time Stoffels said he was struggling in the Vredendal area. The respondent offered him a sales job in Cape Town, where he had previously worked, but he turned that position down because it was not feasible for taking his children to school. The employer gave Stoffels an opportunity to run a showroom by himself which was a little distance away from the main premises in the belief that he might do better if he were responsible for the site. He complained about a lack of signage at the site and basic facilities for potential clients who might come to view vehicles. He also said the printer malfunctioned. The Principle Dealer (Toyota), Mr F Lochner ('Lochner') testified that the printer had been fixed and returned to Stoffels. It had been borrowed from him temporarily thereafter, but it was returned.

[4] In March 2020 he was issued with a final written warning having only sold one car per month in the preceding months of January and February.

[5] When it was necessary for sales personnel to work from home during the lockdown under the Covid regulations, the employer claimed that even though it had asked for the sales personnel if they had what they needed to conduct sales from home, the applicant never said that he had any difficulties. He had simply said he had a laptop and intermittent data. The employer was particularly unhappy about the fact that Stoffels had not responded to between 46% and 79% of the customer

inquiries received in the months prior to his dismissal. It was this failure to respond to customer inquiries which was the basis of the gross negligence/dereliction charge. A new English sales person managed to sell 10 new cars and 15 used ones in the first couple of months he worked for Bluedust in Vredendal.

[6] The arbitrator noted that the applicant had twelve years' experience in the industry and had acknowledged that if an employee failed to perform, after being given the proper training he could be dismissed. He also acknowledged that his targets had been dropped and did not dispute the sales figures of other staff. Further, Stoffels had conceded that if the landline at the showroom was down he could still contact clients by other means and that all sales leads did come through to his phone. His response to being told that it was not the employer's problem if he was struggling in the Vredendal area, was that they should not have hired him in the first place when he was working in Cape Town.

[7] The arbitrator found it improbable that the applicant would have told the employer that he could not work at home because he did not have the facilities. If he had it is more likely the employer would have applied for TERS benefits on his behalf on the basis that he could not work rather than paying him a salary without being able to make sales. Although Stoffels disputed the figures showing how few calls from customers he responded to, he did not provide any credible evidence to place the employer's figures in doubt. On the evidence, Stoffels knew how to operate the CMS system which captured customer inquiries and relayed them to sales persons. The employer had made allowance for the fact that he had to adjust to selling in the new community by means of the various accommodations it made including the substantial reduction in his sales targets.

[8] The arbitrator concluded that after the final written warning Stoffels' sales did not improve and during this time none of the alleged difficulties he claimed he had been having were applicable. The arbitrator accepted the previous warnings as valid, because he had not previously contested them. The arbitrator concluded that the employer had shown on a balance of probabilities that the applicant continued to underperform after the final written warning and had failed to follow customer leads as he should have by a considerable margin.

[9] In determining whether dismissal was appropriate the arbitrator took account of the fact that Stoffels had been subjected to progressive discipline and that adjustments had been made to his working conditions over a period of time, during which the employer had made various attempts to assist him. He had wrongly interpreted as measures which hindered him achieving targets. The arbitrator held that Stoffels could not blame Bluedust if he found more difficult to make sales in Vredendal than he had in Cape Town, because he had applied for the job in Vredendal. The employer could not be expected to continue employing underperforming salespersons indefinitely at some cost after giving him a more than reasonable opportunity to improve. He agreed with the employer that Stoffels had exaggerated the obstacles he faced.

Grounds of review and Evaluation

[10] The applicant drafted his own founding affidavit. I appreciate that Stoffels does not have a legal background, but essentially he complains that the arbitrator failed to understand that he was treated unfairly because he did not appreciate that he was not provided with all the tools he needed to perform properly and he had informed the company of his problems.

[11] He claims that the arbitrator misrepresented what he said in the arbitration hearing and twisted his words. No supplementary affidavit was filed.

[12] Strictly speaking, the first ground of review is really no different from an appeal that the decision was wrong. The second ground of review implies that the arbitrator in some way acted improperly by deliberately misconstruing or twisting the evidence in favour of the employer. If that complaint is correct, it would point to a serious irregularity and if it affected material issues in the case it might be enough to set the award aside.

[13] In relation to the first ground in order to succeed in challenging the factual conclusions of an arbitrator on review, it is necessary for the applicant to show that if the arbitrator had taken all the relevant evidence into account it is unavoidable the arbitrator would have reached a different conclusion. It is not enough for an applicant

attempting to set an award aside on grounds of faulty reasoning by the arbitrator in the assessment of facts to show that another arbitrator could have reached a different conclusion on the same evidence. The applicant had to demonstrate that the alternative conclusion is the only feasible one a reasonable arbitrator could have reached on what was before him or her. In *Head of Department of Education v Mofokeng & Others* (2015) 36 *ILJ* 2802 (LAC) the Labour Appeal Court put it thus:

> "[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination."
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> (Emphasis added)

[14] In his heads of argument the applicant went into some detail setting out again the obstacles he believed made it impossible for him to achieve his targets and

alleges that the arbitrator failed to properly consider or appreciate the extent of the difficulties he was facing. In short these related to the firm's alleged failure to address impediments to his performance, namely: poor client facilities at the showroom he was assigned to; the lack of a printer; lack of a computer and internet facility to operate from home during the Covid lockdown period, without which he could not follow up sales enquiries from the CMS leads system; and not moving him back to the main showroom after this was recommended at the hearing which led to his second warning. He claims the arbitrator failed to appreciate that the Bluedust's failure to rectify these problems coupled with his poor sales figures being mentioned in the presence of other sales persons progressively demoralised him and caused him to lose faith in his abilities.

[15] In its argument, Bluedust emphasised that the arbitrator did address Stoffels's argument that he simply lacked the tools to perform. It also emphasised that he had not challenged either of the written warnings he had been issued with nor had he contested the final written warning on 6 March 2020 issued for not achieving sale targets and insubordination for not coming to work on a Saturday as requested and in terms of his contract. Prior to that, in December 2019 Stoffels had been issued with a second written warning for only selling two vehicles even though his target sales had already been reduced to five. The respondent attempted to get his performance in line with what was expected began not long after his employment. Over the course of just over 12 months' his target sales were ultimately reduced from 8 vehicles per month to 3 per month. The arbitrator had implicitly found that assessing Stoffels's difficulties could only apply to the difficulties he allegedly encountered *after* the final written warning was issued. It is established law, that unless a previous warning has been successfully challenged and reversed, an arbitrator must accept it as valid. In this case Stoffels had accepted the previous warnings. In *Mining Power Transfer t/a Driveline Technologies v Marcus NO and Others* (JR732/2005) [2008] ZALCJHB 42 (5 March 2008) the Labour Court confirmed this approach:

> "In *Agbro Pty Ltd v Tempi* (1993) 2 LCD 24 (LAC) the court held that it was not entitled to enquire into the question as to whether the final warning (which had never been challenged and reversed) had been justified as this would

qualify or derogate from the finality of the warning. I am in respectful agreement. See also *Subroyen v Telkom (SA) Ltd (*2001) 22 *ILJ* 2509 (LC) at 2520A – 2521D, *Xaba V Everite Ltd* (1992) 1 LCD 265 (LC)."

[16] Even so, the arbitrator still considered the obstacles Stoffels had raised to him achieving an adequate level of performance. He also dealt with the employer's steps to alleviate them. By the time Stoffels was issued with a final written warning in March 2020 he was selling one vehicle per month. What Bluedust found particularly irksome was that Stoffels was not picking up customer enquiries directed to his phone via the CMS system. His response rate to enquiries logged on the system had deteriorated dramatically and progressively from not answering 46 % of calls in January 2020 to failing to answer 79 % of calls by April 2020. Moreover, all Stoffels needed to follow up these inquiries, which came to him automatically, was his phone.

[17] The applicant attempted to suggest that the employer had deliberately not assisted him. When it tried to relocate him to a Claremont branch in Cape Town where he had been successful in his previous employment he declined it because of his domestic commitments in Vredendal mentioned above. In argument in court the applicant even hinted that his race might have been the reason for the perceived lack of assistance he received. Obviously, if he felt that was the reason for what he perceived, he should have brought an unfair discrimination claim to the Labour Court. That was not even raised by him as an issue before the arbitrator.

[18] Having regard to the arbitrator's reasoning on the evidence before him, it was not implausible for him to have concluded that the employer had taken reasonable steps to rectify Stoffels's poor performance and to assist him in achieving less ambitious sales targets. It is patently obvious that the employer took steps to try and make sure Stoffels did not fail. It is incomprehensible why Bluedust would have employed Stoffels only to set him up for failure. On the strength of his previous achievements as a sales person in his former job, it is more likely it employed him in the hope he would be equally successful in Vredendal. If Bluedust had wanted him to fail, it would never have reduced his target sales to a figure that was over 60 % lower

than his original target. It could have simply insisted that he achieve the original target set for him.

[19] Having regard to the evidence before the arbitrator and the arbitrator's detailed reasons, this is not a case in which it can be said that the arbitrator failed to take account of relevant evidence and that failure resulted in him arriving at findings no reasonable arbitrator could have reached. Despite his impassioned address to the court, the applicant has failed to identify any material evidence the arbitrator ignored which would necessarily have led to a different outcome if he had taken it into account.

Order

[1] The review application is dismissed.

[2] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

Representatives

For the Applicant	In person
For the Third Respondent	L Bell of C&A Friedlander Inc.