

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR1544/06

In the matter between:

HYUNDAI / KIA MOTORS POLOKWANE Applicant

and

R VENTER N.O. First Respondent

**THE CENTRE FOR DISPUTE RESOLUTION
(MOTOR INDUSTRIES BARGAINING COUNCIL) Second Respondent**

ELLIK SCHUTTE Third Respondent

JUDGMENT

FRANCIS J

Introduction

1. The third respondent was employed by the applicant as a sales manager at its branch in Polokwane. After he was dismissed, he referred a dispute to the second respondent, the Centre for Dispute Resolution (the MEIBC) for conciliation and arbitration. He was reinstated in terms of an arbitration award dated 14 August 2003 made under case number NT136/03 by the first respondent (the arbitrator). He reported for work on 15 October 2003 as instructed by the applicant. He did not report for work on 16 October 2003 on the grounds that the applicant had not complied with the arbitration award which is disputed by the applicant.
2. The applicant brought an application for a declarator that in terms of the arbitration award

the third respondent was only entitled to reinstatement and remuneration up to and including 15 October 2003; he is not entitled to any remuneration as back pay from the applicant for the period 1 February 2003 to 1 April 2003; that the applicant will be in full compliance with the arbitration award upon payment to the third respondent of his monthly remuneration plus average commission at the time of his dismissal, for the period 1 February 2003 to 15 October 2003, less 30 days notice and the period between 1 February and 1 April 2003, which amounts to R33 000,00 alternatively R60 500,00, and payment of the third respondent's taxed costs on the Highest Magistrates Court scale.

- 3 The third respondent in its counter application is seeking a declarator that on a proper interpretation of the arbitration award the applicant did not reinstate him on 15 October 2003 in terms of the arbitration award and is therefore liable to pay him the sum of R6 000,00 per month in respect of his basic salary and R11 580,93 per month in respect of commission for the period 4 March 2003 to date of reinstatement. Further that the applicant is liable to him in the sum of R2 023 518,00 in the event of the applicant not reinstating him, alternatively, if he is not reinstated that the applicant is liable to pay him the sum of R616 336,00. The third respondent also sought urgent interim relief pending the final adjudication of the application and counter application that the applicant pay him the sum of R66 699,00.

The background facts

4. The third respondent was employed by the applicant as a sales manager at its Polokwane branch in June 2000. He was dismissed by the applicant on 4 February 2003 with effect from 4 March 2003. He declared a dispute and referred it to MEIBC for conciliation and arbitration. On 14 August 2003 the arbitrator found that his dismissal on 4 March 2003

was substantively unfair and ordered the applicant to reinstate him with retrospective effect from date of his dismissal on the same terms and conditions of employment before his dismissal. The third respondent had to calculate the average commission that he would have earned from the date of his dismissal to the date of his reinstatement based on the average monthly sales figures from 1 August 2002 to 1 August 2003. He had to report for employment within three working days of receipt of the arbitration award. The applicant had to pay him costs on the highest Magistrate's Court scale.

5. On 26 August 2003 the third respondent's former attorney requested the National Employers Forum to inform him in which branch he had to take up employment from 27 August 2003. On 26 September 2003 the applicant filed an application to review and set aside the arbitration award. In a letter dated 6 October 2003 to the third respondent's attorneys, the applicant instructed the third respondent to report for work at the applicant's Makhado branch on 13 October 2003. The Polokwane branch where he had worked had closed down. Should he fail to do so, he would be considered and accepted to have abandoned his employment. On 9 October 2003 the third respondent's attorney responded to the letter of 6 October 2003 and stated that the third respondent would accept reinstatement on condition that he would be remunerated fully from the date of the reinstatement order by the arbitrator. Further that he would not be subjected to any form of discrimination during employment pending the outcome of the review application. The applicant was to give reasons why Makhado was the only place to take up reinstatement as the third respondent had settled in Gauteng. The applicant responded to the letter on 13 October 2003 and stated that the third respondent was employed only for the applicant's operations in the then Northern province (now Limpopo) and that he was

instructed to report for duty on 15 October 2003.

6. Pursuant to the letters dated 6, 9 and 13 October 2003, the third respondent reported for work to the dealer principal, Glassberg at the applicant's Intercity Delta branch in Makhado on 15 October 2003. He worked the whole day and did not return to work on 16 October 2003. The third respondent said that when he reported for work on 15 October 2003 he found to his bitter disappointment that he was not appointed on the same terms and conditions of employment that was in force before his dismissal. He then told IG van Niekerk, the financial manager on 16 October 2003 that he could not continue to work on the terms presented to him by Glassberg when van Niekerk agreed that the commission structure and terms of employment did not then correspond to that which he had at the time of his dismissal. The applicant denied that the third respondent ever spoke to van Niekerk about his commission and contended that the conditions of employment were the same.
7. On 12 November 2003, the applicant received a letter from the third respondent's attorneys, stating that the third respondent had elected not to continue with the arrangement, due to an alleged breach of the terms and conditions of employment by the applicant. He used to get 9% commission on the sales of used motor vehicles and was told that the commission was now going to be calculated on a sliding scale depending on the budget with 3,8% being the maximum percentage that he could achieve. This was contrary to the applicant's undertaking referred to in its letter dated 13 October 2003. The third respondent also raised the issue of his relocation to Gauteng. The applicant responded with a letter dated 13 November 2003 and stated that the third respondent had

abandoned his employment with effect from 15 October 2003 and disputed any change to the terms and conditions of his employment. He clearly had no intention of resuming his duties. He was informed that all of these facts would be placed before the review court.

8. On 4 August 2004 the third respondent applied to make the arbitration award an order of court in terms of section 158(1)(c) of the Labour Relations Act 66 of 1995 (the Act). The review application was dismissed on 28 October 2005 and the award was made an order of court in terms of section 158(1)(c) of the Act. The applicant sought leave to appeal, which leave to appeal was dismissed on 28 November 2005.
9. In a letter dated 1 December 2005 the third respondent's attorneys asked when he could take up his position at the applicant, alternatively that they meet to discuss the finalisation of the settlement of the matter. On 12 December 2005 the applicant filed a petition to the Labour Appeal Court for leave to appeal. The applicant responded in a letter dated 19 January 2006 stating that reinstatement was out of the question but would consider a financial settlement. In a letter dated 14 February 2006 the third respondent's attorneys stated that his total salary was R18 402.10, including the average commission. This amount was disputed by the applicant in a letter dated 28 March 2006. The applicant's petition was refused on 30 March 2006. In a letter dated 5 May 2006, the third respondent's attorneys demanded payment of all the amounts due to the third respondent in respect of the initial arbitration award. The amount claimed was R1.5 million as stated in a letter dated 6 June 2006.
10. The applicant then brought this application on 29 June 2006 which was opposed by the

third respondent. The third respondent has also filed a counter review application.

11. In a letter dated 27 October 2006, the applicant offered the third respondent the position of sales representative at their Germiston branch in Gauteng at R5 000.00 per month basic plus commission, alternatively he was instructed to report for work at Makhado. The third respondent responded on 6 November 2006 and rejected the proposals and stated that he was prepared to take up employment on the basis laid down in the arbitration award. On 14 November 2006, the applicant's attorneys responded and repeated that as a settlement offer, the third respondent could accept a position in Germiston plus R52 000.00 or a cash offer of R100 000.00. If he was not willing to settle, the third respondent would have to report for duty at Makhado. On 17 November 2006, the third respondent's attorneys responded stating that the declarator application had to go on. On 24 November 2006, the third respondent was instructed to report for work at Makhado before 1 December 2006, in terms of the reinstatement award in the arbitration award. The third respondent has not attempted to report for work in Makhado.
12. On 7 December 2006 this Court, after the third respondent brought an urgent application, ordered the applicant to make interim payment of R60 500,00 within seven days and to pay the costs on an attorney and client scale. The amount was paid by the applicant.

The parties contentions

13. The applicant contended that the applicant has complied with the terms and conditions of employment contained in the arbitration award. The third respondent was employed as a sales manager at the Polokwane branch at a basic salary of R6 000.00 per month plus

commission on a sliding scale. As sales manager, the third respondent focused on the sales of used vehicles. He was employed in Limpopo. He discharged his duties in that province. It was significant that the third respondent did not dispute that he was employed for the Limpopo Province in any of the letters from his attorneys. He had stated in his answering affidavit that he had relocated to Johannesburg for medical treatment and it was against this background that he sought to be reinstated in Gauteng. The applicant was well able to offer him employment on the same terms and conditions of employment in Gauteng, because the applicant had branches there and since the third respondent was residing in Gauteng since February 2003. What is clear is that even before determination of this matter on 14 August 2003, the third respondent on his own version had been residing in Gauteng since February 2003. He relocated to Gauteng for his personal considerations long before he was reinstated.

14. The applicant contended that reinstatement on the same terms and conditions is precisely what it means. It simply means that the *status quo ante* the dismissal is restored. The third respondent was reinstated as a sales manager focusing on used vehicles in Polokwane in Limpopo. Since the Polokwane branch was closed, the applicant was entitled to place the third respondent for duty at the Makhado branch, which was closest to the Polokwane. The third respondent would, on his own version have received an additional fuel allowance of R200 per week to compensate for travel from Polokwane to Makhado. Had the third respondent not been dismissed on 1 February 2003, the Polokwane branch would still have closed. The third respondent would still have moved to Makhado and would have travelled from Polokwane to Makhado and be compensated for this as was the case with effect from 15 October 2003.

15. The applicant contended that the third respondent could not simply refuse to work on 16 October 2003. He had other remedies at his disposal instead of refusing to work. After he had relocated permanently to Gauteng in February 2003, he had no intention of returning to work for the applicant. The third respondent clearly thought that the applicant was bluffing when he was required to report at Makhado. The third respondent called the bluff, and it was found not to be a bluff. The third respondent then reneged on the agreement. He did not tender his service. He is therefore not entitled to reinstatement at the applicant in terms of the award of the commissioner.

16. The applicant contended that the third respondent had no intention of procuring alternative employment and was seeking to retire at the expense and costs of the applicant. Upon receiving the third respondent's answering affidavit, and reading his contentions that he was now permanently residing in Gauteng and had no source of income or work, and in essence relying on charity, the applicant decided to offer the third respondent employment in Gauteng, alternatively he was instructed to report for work at Makhado. The third respondent rejected the proposal and said that he was willing to take up employment in terms of the basis laid down in the arbitration award. He did not specify what taking up employment on the basis laid down in the arbitration award meant. This according to the applicant meant reporting for duty at Makhado which the third respondent has not done or tendered to do. The applicant's attorneys reiterated the above position and made it clear that as a settlement offer, the third respondent could accept a position in Germiston plus R52 000.00 or a cash offer of R100 000.00. If he was not willing to settle, the third respondent would have to report for duty at Makhado. The third respondent's attorneys responded indicating that the current application had to

proceed. Whilst the third respondent was of course entitled to reject the settlement proposals, no attempt was made by the third respondent to report for work at Makhado which the third respondent was not entitled to reject. Finally on 24 November 2006, the third respondent was instructed to report for work at Makhado before 1 December 2006, in terms of the reinstatement award in the arbitration award. The third respondent has not attempted to report for work in Makhado.

17. The third respondent contended that the applicant since the arbitration award on 14 August 2003 has consistently tried to bulldoze or railroad him into a position of accepting less favourable terms than provided for in the arbitration award even after it was made an order of court on 28 October 2005. This is evident from the array of court procedures stubbornly resisting the arbitration award in that it was at all relevant times clear that he was not permanently disabled although his injuries may be permanent and correspondence the applicant embarked upon. The applicant had on each occasion instructed him to report for work and has failed to reveal on what precise terms he would be reinstated. The applicant has all along set up insubstantial technicalities and playing games blindfolding itself to the arbitration award made an order of Court.
18. The third respondent contended that the arbitration award did not state that he had to be reinstated in Makhado. He was later offered a position of sales representative at the Germiston branch which was rejected as the terms of reinstatement offered were regarded as a flagrant contempt of the said court order. What was significant is that the applicant has shown by its said offer that the third respondent's position at the date of his unfair dismissal could reasonably have been created in its branches in Gauteng. The applicant

has further shown that for more than three years it acted spitefully and resentfully by not acceding to third respondent's request to be reinstated in the Gauteng area. The applicant lost sight of the fact that the third respondent was compelled to settle in Gauteng following on his substantially unfair dismissal. The applicant had instructed the third respondent to work at Makhado without affording him a fair consultation before the applicant took the decision. The purpose of the requirement of prior consultation is to ensure that the ultimate decision is genuinely justifiable for operational requirements. The function of the court is not to second-guess the business efficacy of the employer's ultimate decision, but to learn whether that decision is genuine. Reinstatement in the Gauteng area would be according to fairness and justice as "Justice is not served by the court putting on blinkers".

The issues

19. The issue to be decided is whether the applicant has reinstated the third respondent on 15 October 2003 and what amount of back pay or otherwise is payable to him. If it is found that the third respondent was reinstated on 15 October 2003 and was paid his back pay, it will not become necessary to consider the third respondent's counter application. The amount that this court ordered the applicant to pay to the third respondent in the urgent application was in respect of the commission and back pay up to the 15 October 2003.

Did the applicant reinstate the third respondent on 15 October 2003?

20. The crux of the matter is whether the applicant has complied with the arbitration award which was to reinstate the third respondent in his previous position with no loss of benefits. It must be borne in mind that the sum of R60 500.00 was paid to the third respondent which represents the basic salary and the commission that the applicant

agreed was owing to the third respondent. The commissioner did not quantify the commission that the applicant owed the third respondent. The third respondent should have referred this issue to the commissioner to deal with after he could not resolve it with the applicant.

21. It is trite that the filing of a review application does not stay the enforcement of an award unlike appeals. The applicant was not happy with the arbitration award and decided to take it on review. It pointed out to the third respondent that it would in the interim reinstate him and the issue of back pay and commission would be left for the review court to decide. Should the applicant's review application succeed, the third respondent would have to leave employment and should it fail, he would remain in employment.

22. Reinstatement on the same terms and conditions means that the employee must be placed, as far as it is possible, in the position that he or she would have been in had he or she not been dismissed. See *CEPPWAWU & Another v Glass & Aluminium 2000 CC* (2002) 23 ILJ 695 (LAC); *Food & Allied Workers Union v General Food Industries Ltd* (2002) 23 ILJ 1808 (LC) and *Chemical Workers Industrial Union v Price's Candles (SA)(Pty) Ltd* (1994) 15 ILJ 857 (IC) at 865. This means that in terms of the arbitration award, the third respondent had to be placed back as a sales manager at the applicant's Polokwane branch as if he were not dismissed on 1 February 2003. The third respondent was employed in Limpopo at the time of his dismissal and should therefore have been employed there. He could not have been reinstated at the Polokwane branch since it had closed down. He should have raised this issue with the commissioner about being allowed to be reinstated in a different province but could not as a matter of right have insisted to be employed in

Gauteng. He could only do so if the applicant was agreeable to this. He had moved to Gauteng for treatment at Millpark Hospital which was before his dismissal. The treatment would have been for the period 1 February 2003 to 1 April 2003. He was employed for the Limpopo Province and simply refused, despite being instructed to work at Makhado to do so. He was going to receive a fuel allowance of R200 per week to compensate him for travelling from Polokwane that was closer to Makhado.

23. The arbitrator made the following order in his arbitration award:

23.1 The applicant was ordered to reinstate the third respondent with retrospective effect from the date of his dismissal on the same terms and conditions of employment that existed before his dismissal.

23.2 The composition of his average which the third respondent would have earned from the date of his dismissal to the date of his reinstatement must be based on the average monthly sales figures over the period 1 August 2002 to 1 August 2003.

23.3 The third respondent must report for employment within three working days from receipt of the arbitration award.

23.4 The applicant is ordered to pay the third respondent's cost of the arbitration proceedings which must be taxed in terms of the highest Magistrate's cost scale.

24. There cannot be a real dispute about whether the applicant reinstated the third respondent.

He was at the time employed in Limpopo and would still discharge his duties in the same province but at a different branch. He did not dispute in any of his correspondence that he was employed for the Limpopo Province. It is clear from correspondence that the third respondent was instructed to report for work at Makhado on 15 October 2003, which he did. He was employed as a sales manager and was going to resume employment as a sales manager. As a sales manager, he had focused on the sales of used vehicles. He was going to earn the same basic salary of R6 000.00 per month. This is not in dispute. It is common cause that the third respondent was earning a commission. The arbitrator did not state what the exact amount of commission is that he was earning. The arbitrator did not quantify the amount that he was going to receive as arrear commission. When he was reinstated, he was told that he would be earning commission. This was on a sliding scale. He was not happy with this. The third respondent was now going to be reporting to the general manager and he was not happy with this. There were now going to be two sales managers.

25. I agree with the applicant's contentions that the proposal by the applicant to the third respondent to commence work on 15 October 2003, was in clear and unequivocal terms. These terms were confirmed in writing before the third respondent reported for work on 15 October 2003. The first term was that his reinstatement would be pending the review application being proceeded with, and subject to the final determination of the review. This was interim relief and the third respondent agreed with it. The second term was that the third respondent had to report for duty Makhado. The third respondent agreed to this and did report for work in Makhado. The third term was that the issue of back pay would be determined as part of the determination of the review application. The third

respondent agreed to this and reported for work on such basis. The fourth term was that the applicant would not be in any way responsible for the fact that the third respondent relocated to Gauteng, and would not be responsible for any payment relating to such relocation and him reporting for work. The final term was that it would be on the same terms and conditions of employment of the third respondent. The applicant undertook that this would be the case. The third respondent then reported for work but alleged that the conditions of employment were different. The applicant disagreed and said that there was a factual dispute between the parties about this. This however does not detract from the fact that the applicant undertook, and was clearly bound by such undertaking and that the terms and conditions of employment would be the same. He therefore reported for work on the above terms, and worked a full day on 15 October 2003 on such terms.

- 26 The third respondent was instructed on several occasions to report for work after the review application was dismissed. He simply refused to do so and sought compensation. He stated that he was prepared to be reinstated in terms of the arbitration award but simply did not arrive at work when he was instructed to do so. He was more interested in a financial settlement. Settlement negotiations failed and this application was filed on 29 June 2006. In his answering affidavit, he does not tender services, but demanded compensation of some R2 million until his retirement. Upon receiving the third respondent's answering affidavit, the applicant decided to offer him employment in Gauteng. He was offered the position of a sales representative at the Germiston branch in Gauteng, at R5 500,00 per month basic plus commission on 27 October 2006. Alternatively he was again instructed to report for work at Makhado. The proposals were rejected by the third respondent on 6 November 2006 and showed his willingness to take

up employment in the basis laid down in the arbitration award. He did not state what taking up employment on the basis laid down in the arbitration award means. The applicant views this to mean that it can only mean reporting for duty at Makhado, which he has not done or tendered to do.

27. I am of the view that the third respondent was not entitled simply to leave his employment on 16 October 2003. As stated above, the applicant had undertaken that the conditions of employment would remain the same. The fact that he had to report to a general manager was clearly not a change to his terms and conditions of employment. It does not detract from the fact that he was reinstated as a sales manager. As for the commission, it appears from the evidence that the Makhado branch was much bigger than the Polokwane branch. His earning potential was greater. He should have waited for his commission payment to decide whether his earnings as he had before would be the same or similar. Even if the commission then was not the same, the third respondent could not simply leave. He could not as a matter of law, withdraw his services because the applicant may have made changes to his commission structure, which is what happened. He should in my view have declared a dispute about his commission. He had other legitimate avenues open to him if he discovered that his commission had been reduced. He could either have lodged a grievance or lodged a dispute at the CCMA in terms of an unfair labour practice dispute or even lodged a breach of contract claim with this Court in terms of section 77 of the Basic Conditions of Employment Act. He could simply not leave.

28. The third respondent was opportunistic. He was driven by greed and saw this case as an

opportunity to become a millionaire without having to work. He should have remained in employment on 15 October 2003 after he was reinstated. He should then have challenged any non compliance with the arbitration award whilst he remained in employment. He did not so and it appears that he was a victim of poor advice. He was ill advised. Had he remained in employment he would not have suffered the financial woes that he is currently suffering from. He has brought the financial woes on himself. He was clearly not interested in working in Limpopo and saw this as an opportunity to become a millionaire rather than tendering to work at Makhado.

29. The application stands to be granted. It follows that the third respondent's counter application stands to be dismissed.

30. I do not believe that this is a matter where costs should follow the result.

31. In the circumstances I make the following order:

31.1 It is declared that the third respondent is not entitled to any reinstatement in terms of the arbitrator arbitration award dated 14 August 2003 which was made an order of Court on 28 October 2005;

31.2 It is declared that the third respondent is not entitled to any further compensation or back pay in terms of the arbitration award dated 14 August 2003 which was made an order of Court on 28 October 2005.

31.3 It is declared that the applicant has complied in full with the arbitrator's arbitration award dated 14 August 2003 which was made an order of court on 28 October 2005.

31.4 The third respondent's counter application is dismissed.

31.5 The applicant is to pay the third respondent's costs in terms of the arbitrator's award.

31.6 There is no order as to costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : ATTORNEY S SNYMAN

FOR THE RESPONDENT : P STIPP INSTRUCTED SHAPIRO & SHAPIRO
INC

DATE OF JUDGMENT : 3 JULY 2008