

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN DURBAN**

Case No. D724/09

In the matter between:

**CMH LUXURY MOTORS (UMHLANGA)
(PTY) LTD t/a AUTO UMHLANGA**

Applicant

And

SUNGAREE PATHER N.O

First Respondent

DISPUTE RESOLUTION CENTRE

MOTOR INDUSTRIES BARGAINING COUNCIL

Second Respondent

ABDOOL KADER MALEK RASSOOL

Third Respondent

JUDGMENT

GUSH, J.

1. The applicant seeks an order reviewing, correcting and/or setting aside the arbitration award made by the first respondent on the 20 August 2009. The first respondent found that the dismissal by the applicant of the third respondent was substantively unfair and ordered the applicant to reinstate the third respondent.

2. On 2 October 2008 the respondent appeared before a disciplinary enquiry where he was charged with gross negligence. The third respondent pleaded guilty to the charge and was, at the conclusion of the enquiry on 6 October 2008 was dismissed.
3. The first respondent concluded in her award that the third respondent's misconduct could not be regarded as a serious enough to have warranted dismissal. Whilst the parties were at idem that the crisp issue before the court was to determine whether the misconduct committed by the third respondent was so gross as to warrant the sanction of dismissal, the question to be determined on review is whether:

*"Whether the award is one that a reasonable decision maker could arrive at considering the material placed before him."*¹
4. The applicant had employed the third respondent in 2004 and had promoted the third respondent to the position of used vehicle sales manager in May 2008.
5. On 11 July 2008 the applicant's chief executive officer sent a memorandum to the applicants senior managers, including the third respondent (who was an F&I manager) , which inter alia recorded the following:

"Used Cars/ Processes/Responsibilities
[F & I managers] are expected, and it is their responsibility ... to ensure the group policies and processes are followed...

¹ Edcon Ltd v Pillemer NO & others[2010] 1 BLLR 1 (SCA) at p9 Para 15

Unfortunately we have had several instances where a gross misreporting or lack of discipline in following procedures and policies have led to major losses, or allowed fraud to be committed. ... People in these key positions must accept the responsibility for their actions or lack thereof.

I would like to highlight several issues. This is a high-risk area of the business and it is vital that all the procedures followed ... Natis documents must be kept under lock and key, under the accountant's control. The Natis document proves ownership of the vehicle. It is vital that no outsider ever has access. If they did, they would be able to fraudulently transfer ownership to themselves or to a third party. The Natis, car description should exactly match the invoice to ourselves. Exotic cars must be treated with extreme care. We have a recent example, when by adding 'CSL' to 'BMW M3', the value was fraudulently increased by R550,000.00 ... Once a policy document is issued staff are expected to implement it immediately. Franchise directors and managers, and most particularly franchise accounts and F&I area managers, must ensure that their staff are implementing the policies"

6. On 18 August 2008 the applicant's chief executive officer addressed a further memorandum to inter-alia the third respondent (F & I managers). This memorandum stated:

"I would just like to reiterate and remind all dealers of company policy re the sale of used cars to traders. Neither the car nor the Natis papers must be released until the cash is cleared through our bank account. Natis documents must be kept under lock and key and under no circumstances can they be released without full payment. On no account must they be "lent" to anyone. ...

Please be careful. Don't take any chances. Make sure that your accountant has effective control of the Natis documents and the use of

balance or weekly when stop taken. The security of the documents cannot be left in the hands of a relatively junior stock clerk."

7. On the 19 August 2008 the third respondent forwarded the memorandum of the 18th August, to his subordinates with the following instruction:

"This is one of the many rules that we have to follow. Read the attachment and understand what we as management need to achieve to make your job easy."

8. On 28 August 2008 the third respondent sought and obtained authority sell a vehicle to a Mark Misdorp. On 30 August 2008 Misdorp asked the third respondent if he could borrow the vehicle's logbook (Natis documents) in order to prove to another dealer that the car had been paid for.
9. Remarkably, despite the memoranda of 11 July and 18 August 2008 which contained a specific instruction not to release Natis documents and the third respondents own email of the 19 August, the third respondent (a mere ten days later) agreed to lend the vehicle's logbook (Natis documents) to Misdorp. Misdorp undertook to return the documents to the third respondent later that day. Whilst in possession of the Natis documents however Misdorp perpetrated the exact same fraud that the applicant's CEO had warned of in his memorandum of the 11th July.

10. As a result of his actions the third respondent was charged with “gross negligence”. His supervisor advised him that the charge of misconduct involved the *“release of the logbook and, you know, this is company procedure”* At the disciplinary enquiry the third respondent pleaded guilty to gross negligence being the misconduct with which he was charged, was found guilty and dismissed.
11. It is abundantly clear that the third respondent had instructed his attorney who represented him at the arbitration that the memoranda had not been addressed to him and that he had first become aware of the contents thereof at the disciplinary enquiry and accordingly this was the explanation offered. At no stage did the third respondent deal directly with the admitted fact that he had disregarded a direct instruction. The third respondent dealt with the memoranda as follows in the opening statement made at the arbitration and during his evidence in chief:
- 11.1. *“these are not letters addressed to the applicant. These are letters which were raised during the course of the disciplinary enquiry addressed, inter-alia, to the dealer principal.”*²
- 11.2. *“Could you tell Madam Commissioner why it was put to Mr Ellis that you have no recollection of seeing those e-mails prior to you being called in for an enquiry or suspension? --- Madam Commissioner, on that basis, we get approximately about 150 e-mails a day. ... When we come in, I go through them, I see if it needs to go to the sale staff, i send it off*

² Record page 1B

immediately... I don't deny seeing any e-mails, but honestly not could not recall it.”³

12. It is highly improbable and certainly inconceivable that the third respondent, who was the newly promoted sales manager, would not have recalled having received and having read and remembered the contents of the emails particularly given their content and relevance to his responsibilities, and that he had specifically forwarded the email of the 18 August to his staff admonishing them to read and understand the contents.

13. It is clear from the record that the misconduct the applicant complained of was that the third respondent had released the Natis documents in the face of the specific instructions issued by the applicant's CEO viz:

13.1. *“[F & I managers] are expected, and it is their responsibility ... to ensure the group policies and processes are followed... we have had several instances where ... lack of discipline in following procedures and policies have ... allowed fraud to be committed. ... People in these key positions must accept the responsibility for the actions or lack thereof.”;*

13.2. *“... it is vital that all the procedures followed ... Natis documents must be kept under lock and key, under the accountant's control. ... It is vital that no outsider ever has access;*

13.3. *F&I area managers, must ensure that their staff are implementing the policies”;*

³ Record page 77

13.4. *“Neither the car nor the Natis papers must be released until the cash is cleared through our bank account. Natis documents must be kept under lock and key and under no circumstances can they be released without full payment. On no account must they be “lent” to anyone. ... Please be careful. Don't take any chances.”*

14. In the award the first respondent correctly records:

“at issue was whether the applicant ‘was aware, or could reasonably be expected to have been aware’ (item 7 of schedule 8 - Code of Good Practice: Dismissal) of the memorandum dated 18 August 2008, issued by the CEO of the [applicant's] parent company in which it is expressly forbidden that the Natis documents (or the vehicle) be released ‘until the cash is cleared through our bank account’”⁴

15. The parties spent much time during the arbitration dealing the circumstances surrounding the identity of the purchaser the background to the transaction and what transpired thereafter. It is therefore possibly not surprising that the first respondent, too, placed much emphasis on these aspects of the matter apparently losing sight of the misconduct for which the third respondent was dismissed, and the “issue” referred to in para 14 above.

16. The first respondent simply fails to properly address this issue. The first respondent correctly records that the act of releasing the Natis documents contrary company policy could be considered to reckless (particularly so given the evidence of the applicant's memoranda). She continues however to then record that regard must be had to the

⁴ Award pleadings bundle page 35

circumstances surrounding the transaction with Misdorp. This is despite the fact that none of these circumstances are relevant to the misconduct which involved a blatant disregard for an express instruction. The third respondent did not argue that he had disregarded the instruction because of these circumstances. The third respondent's explanation was that he was not aware or could not recall the rule or procedure. The circumstances which the first respondent found to relevant were:

- 16.1. the sound business relationship between the applicant and Misdorp senior;
 - 16.2. that the applicant had improved the deal the sale;
 - 16.3. that the applicant would have earned a profit of R40,000 on the deal;
 - 16.4. that 'Bob' of Hooper motors had telephoned the third respondent for confirmation that Misdorp had purchased the vehicle;
 - 16.5. that the third respondent was a victim of the fraud; and
 - 16.6. the damage was minimal.
17. Taking those circumstances into account the first respondent then concluded that the third respondent's conduct which she initially described as reckless (the "*applicants act in releasing*" [the documents]) could "*best be described as an exercise of managerial discretion*"⁵

⁵ Award page 38

18. It is on the strength of those circumstances set out in paragraph 15 above and the conclusion that it was an exercise of managerial discretion, that the first respondent found that the fact that the third respondent had released documents contrary to the direct and specific instructions from the CEO could not be regarded as serious enough to have warranted dismissal.
19. The first respondent found that not only was the sanction of dismissal too harsh and therefore unfair but that whilst a sanction of a written warning would have sufficed because of the third respondent's emotional suffering it was not necessary to impose any alternative sanction.
20. The first respondent's conclusions and logic suggest that the first respondent completely misunderstood the nature of the misconduct and in particular the gravity thereof. The suggestion that the third respondent was exercising his "managerial discretion" is startling especially in the light of having found that releasing the Natis documents was reckless. The first respondent fails to consider or evaluate the contents of the memoranda which in no way at all offer any delegated discretion in the handling of Natis documents. The rule set out therein is unequivocal. The actions of the third respondent were in direct contravention of a specific instruction given by the applicant to its sales staff. It is particularly noteworthy that at no stage in his evidence did the third respondent suggest that he was

exercising what he regarded as his managerial discretion, nor does he offer an explanation for disregarding the policy

21. In its founding affidavit the applicant avers that the first respondent's award is reviewable inter alia because she:

21.1. Misconceived the nature of the enquiry; and

21.2. Failed to apply her mind to the evidence properly before her;

and accordingly the first respondent's award is reviewable and should be set aside. I agree.

22. In considering whether the award is reviewable I am mindful of the judgement of Zondo JP in *Fidelity Cash Management Service v CCMA*⁶ in which he said:

"It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the court feels that it would have arrived at a different decision or finding than that reached by the commissioner. When that happens, the court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act given primarily to the commissioner and that the system would never work if the court would interfere with every decision or award of the CCMA simply because it, that is the court, would have dealt with the matter differently."

⁶ (2008) 29 ILJ 964 (LAC) paras [98] – [100]

23. Despite that and for the reasons set out above I am satisfied that the award is not one that a reasonable arbitrator could have arrived at considering the evidence placed before her and that accordingly it should be set aside. The applicant asked that the award of the first respondent be substituted with an order that the dismissal of the third respondent was both procedurally and substantively fair, alternatively that the matter be referred back to the second respondent to be considered afresh. I do not believe that any purpose will be served by referring the matter back to the second respondents as the relevant facts are all canvassed in the pleadings and the record.
24. As far as costs are concerned both parties argued that costs should follow the result and I see no reason why that should not apply.
25. In the circumstances i make the following order:
- 25.1. The arbitration award made by the first respondent on the 20 August 2009 and case reference MIDB 4880 is reviewed and set aside and replaced with an order that the dismissal of the third respondent was both procedurally and substantively fair.
- 25.2. The third respondent is ordered to pay the applicants costs.

Date of hearing : 17 February 2011

Date of judgment : 7 March 2011

APPEARANCES

For the applicants : Adv M D C Smithers SC

Instructed by : MacGregor Erasmus Attorneys

Third respondent : Adv P Schumann

Instructed by : Brett Purdon Attorneys