IN THE LABOUR COURT OF SOUTH AFRICA JOHANNESBURG

Not Reportable

Case no: JR 3251/2009

In the matter between:

IMPERIAL MOTOR HOLDINGS (PTY) LTD t/a

MERCEDES BENZ COMMERCIAL: EAST RAND **Applicant**

and

MOLETSANE, RUSSEL *N.O*. (cited in his capacity

as Arbitrator of the Motor Industry Bargaining Council) **First Respondent**

THE MOTOR INDUSTRY BARGAINING COUNCIL

(Dispute Resolution Centre) **Second Respondent**

MTSHALI, VELAPHI AMOS **Third Respondent**

Heard: **01 July 2014**

Delivered: **18 December 2015**

Summary: **Review application granted.**

JUDGMENT

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WATT-PRINGLE AJ

[1] This is an application to review and set aside an arbitration award handed down by the first respondent ("*the Commissioner*") on 13 November 2009. The award concerns the dismissal of the third respondent ("*the employee*") by the applicant ("*the company*") on 18 June 2008.

[2] The employee was employed by the company on 1 February 2000. At the time of his dismissal he was a parts salesman and his duties included the sale of motor vehicle spare parts to customers of the company. The substantive reason for the employee's dismissal was gross dishonesty relating to a certain invoice number 34389, referred to in some detail below.

[3] The relevant background to the employee's dismissal can be summarised as follows.

[4] One of the customers of the company dealt with by the employee was an entity known as Barotse Trading ("*Barotse*"), based in Kwa-Zulu Natal. Barotse was in the business of exporting spare parts for trucks to clients situated in neighbouring countries. Barotse never took possession of the parts which it had purchased as the arrangement was that an external courier company engaged by Barotse collected the spare parts and delivered them directly to Barotse's clients.

[5] Orders for Barotse were generated and processed as follows. The proprietor of Barotse, one Lester Davidoss, would request a quotation for spare parts by email. The quotation was prepared in the company's warehouse and despatched to Barotse. If Barotse accepted the quotation, an order was placed and an invoice generated by a parts salesman. The employee was a salesman who dealt with Barotse. After Barotse had paid via electronic fund transfer (EFT) Barotse would instruct the courier company to collect the order, as referred to above.

[6] The thrust of the complaint against the employee was that he was responsible for (or at least complicit in) a fraudulent transaction involving a loss to the

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company of R13 978.75. The evidence establishes the following in relation to the alleged fraud.

[7] On 28 February 2008 an order was placed by Barotse for spare parts to the total value of R44 343.25. Included in this invoice were two air filters which accounted for a total of R13 978.75 of the total invoice amount. Barotse duly paid the full amount of the invoice and the parts reflected therein were collected from the company in the usual manner.

[8] The employee on 14 May 2008 generated what is known as a WIP account under number 43489. This a necessary step prior to providing prices or quotations, generating invoices and dispatching stock. The WIP account in question was opened in respect of three sets of parts, namely a crank shaft, three injector nozzles and a set of bearings. Barotse was the customer identified in the WIP account. The screen shot of the entry (minus the crankshaft, which had been removed before the screenshot was taken) shows the bearing was priced at R1 257.20. The correct price was in fact R1 268.80. The relevance of this will appear below.

[9] Later on 14 May 2008, at 16h58, the employee generated a written estimate for the crank shaft in the same WIP account. There are a number of relevant factors arising from this conduct.

9.1 The first was that Barotse had not as per its usual procedure requested a quotation in respect of any of the parts recorded in WIP 43489. This raises the question as to why the employee raised this quotation at all, a question to which he failed to provide an answer.

9.2 The second is that the quotation which was generated was in respect of a "*Sprinter*" taxi and this does not fall within the range of parts purchased and sold by Barotse, which deals exclusively in truck parts.

9.3 The third is that this quotation was never in fact sent to Barotse.

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9.4 The fourth is that this conduct was an initial step in relation to a transaction which on the employee's version, was only initiated on behalf of Barotse on 21 May 2008.

[10] The company's system shows that the employee accessed the WIP 43489 account on several occasions between 14 and 21 May 2008. His purpose in doing so on so many occasions was never explained. This is significant in view of the fact that his activity on this WIP account most closely connects him to the fraud which was undoubtedly committed.

[11] On 16 May 2011 an employee in the warehouse, whose identity was not established, passed a credit note for R13 978.75 on the Barotse account for the two air filters sold to Barotse on 28 February 2008 and subsequently collected on Barotse's behalf, as referred to above. It was subsequently established that the parts in respect of which the credit was given were not returned to the company's warehouse.

[12] At 16h48 on 21 May 2008 the employee generated a tax invoice on WIP 43489 for the three injector nozzles and one bearing referred to above. Significantly, the bearing is however again reflected as R1257.20 instead of R1 268.80. The result of this error is that the total invoice precisely matches the amount of the credit note in Barotse's favour of R13 978.75. This appears calculated to ensure that Barotse never became aware of the credit note, as inevitably it would have done had there been an amount standing to its credit. It also facilitated the "*purchase*" of the items on the tax invoice without any further payment having to be made.

[13] The parts reflected in the aforementioned invoice of 21 May 2008 were collected on the same day allegedly by a courier company representing Barotse. It is common cause that the person who dealt with the "*courier company representative*" was the employee.

[14] On 22 May 2008 (upon enquiry by the company) Davidoss sent an email to the company stating that Barotse had not returned any purchased goods to the company, always placed its orders in writing and was perturbed about the fact

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that a credit note bearing its name should have been involved in an alleged fraud.

[15] The statement made by Barotse to the effect that it had not returned the parts constitutes hearsay. However, the authenticity of the email was not placed in dispute. The fact that Barotse did not claim a credit to which it would have been entitled had it in fact returned goods corroborates other evidence led via the company's witness Mr Blom that the spares referred to in the credit note were not to be found in the company's inventory. The email accordingly has probative value in relation to the issue of whether the credit note was legitimately issued. The evidence shows that it was not.

[16] On 26 May 2008 the employee attested to an affidavit which is included in the record. His version on affidavit was that on the afternoon of 21 May 2008 at about 16h00 he was approached by a man who identified himself as a representative of a courier company representing Barotse. The man was there to check prices on parts. This person had advised the employee that he had been there "*on Friday*" (apparently 16 May 2008) when he had brought certain parts back for a credit, but had been unable to find the employee and he had left again without being assisted. I understand this to mean that he had on that occasion left with the credit note but without having used the credit to purchase new parts. Upon enquiry, this person stated that he had insisted on dealing specifically with the employee, hence his decision to leave on Friday without having been assisted by another person. He had so insisted because he had seen the employee's name on the credit note and was aware that sales representatives work on commission.

[17] This person then gave the employee a chassis number for a Mercedes Benz Sprinter and requested a set of Conrad bearings and four injector nozzles with specified parts numbers. After the employee gave him the prices the man told him that he wanted only three nozzles "*for his mechanic told him he can only replace the three nozzles because he replaced the one on a previous service*". The employee stated that he then created WIP 43489 on the system. This despite the fact that the parts in question had been entered on the system by

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the employee as early as 14 May 2008 and prior to the date of the credit note, which was 16 May 2008.

[18] The employee stated that he then enquired as to how the man was going to pay for the parts and was told that he had received a credit note on Friday 16 March 2008 for parts which he brought back and that he would take the parts on that credit note. He showed the original credit note and a copy of an invoice with the paid stamp on it for an amount of R44 343.27. The employee thereupon assisted the man with the parts that he sought. He further claimed that he did not again access WIP 43489 after 17h00 on 21 March 2008.

[19] This version was in my view justifiably denounced by the employer as a fabrication on the part of the employee. The employee had cast an unknown person, supposedly as a representative of a courier company engaged by Barotse, as the purchaser of parts in Barotse's name. Even if the employee was not involved in issuing the credit note and even if he genuinely believed that the credit note had been legitimately issued to Barotse, it is highly unlikely that he would have handed over parts to a person, not known to him and purportedly representing a courier company which he was also unable to identify, utilising Barotse's credit.

[20] To his knowledge, the procedure leading to sales to Barotse was as described above. The employee would in this instance have had no prior request for a quotation from any person known to him to be authorised to represent Barotse, no written quotation and no confirmation from Barotse that the price verbally quoted on the spare parts "*sold*" that day were acceptable.

[21] It would furthermore be apparent to him that the parts were not truck parts as would invariably been the case had this been a genuine Barotse transaction.

[22] The fact that the employee quoted an incorrect amount for the bearing item, so that the total of the invoice perfectly matched the credit note, is a circumstance which cannot be put down to mere co-incidence. It directly implicates the employee in a scheme to defraud the employer to the tune of the amount in the credit note. A further fact irreconcilable with the employee's version in the

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affidavit that he had for the first time generated the WIP 43489 account on 21 May 2008, is that he had in fact done so on 14 May 2008. This clearly demonstrates that he and not Barotse or the man from the "*courier company*" initiated the transaction.

[23] On 9 June 2008, the employee was charged with gross dishonesty relating to invoice number 43489. The disciplinary hearing on 12 June 2008 resulted in a guilty verdict and a decision that he be dismissed. The decision was handed down on 18 June 2008. The employee filed a notice of appeal on 23 June 2008 in which he claimed as his only ground of appeal that the decision was too harsh. The company did not entertain the appeal as it was out of time. The period within which the employee was obliged to note an appeal was three days. He was in time if one excludes the Saturday following the date on which he delivered his notice, but out of time if one includes it. I will return to this issue in due course.

[24] On 29 September 2008 and in circumstances not necessary to canvass at this stage, the employee obtained a default award against the employer pursuant to which he had been awarded compensation of four months' salary. It appears that he did not in those proceedings seek reinstatement. That award was however rescinded and the arbitration proceedings before the Commissioner were subsequently commenced and ultimately finalised on 2 November 2009.

[25] Both procedural and substantive fairness were in issue before the Commissioner. The sole point on procedure was that the employee was not allowed to prosecute his appeal.

[26] The disciplinary outcome invited the employee to appeal within three working days. He did so on the fourth day if one includes Saturday in that computation. The company was open for business on Saturdays and sales personnel worked Saturdays, although not all worked every Saturday. The employee was not required to work that Saturday for the simple reason that he had been dismissed. The right to appeal a decision to dismiss does not suspend the dismissal. I see no difficulty in the employer regarding Saturday as a working day for purposes of the computation.

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[27] In this application to review and set aside the Commissioner's award dated 13 November 2009, the company essentially relies on three grounds. The first is grounded in the Constitutional Court's judgment in *Sidumo & Others v Rustenberg Platinum Mines Limited and Others* (2007) 12 BLLR 1097(CC), that the Commissioner reached a conclusion which no reasonable decision maker would make, having due regard to the evidence before him. The second arises from section 145(2)(i) and/or (ii) of the Labour Relations Act 66 of 1995 ("*the LRA*"), that the Commissioner's failure to take account of relevant evidence; his failure to appreciate the significance of the evidence before him or properly to analyse it in weighing the probabilities is such that he committed misconduct or that there were gross irregularities in the conduct of the arbitration . The third is that he exhibited bias, which would fall under section 145(2)(ii) – gross irregularity in the conduct of the arbitration.

[28] In my view there is much to be said for all three of the grounds advanced. The Commissioner's summary of the evidence given by Mr Bloem for the company and by the employee is perfunctory, in part inaccurate and fails to note all of the material facts referred to above. However more to the point is the Commissioner's failure properly to have weighed the probabilities arising from the evidence summarised above. Instead the Commissioner became fixated on parts of the evidence, sometimes incorrectly stated and he failed to pick up the thread of the company's case against the employee. I will deal with aspects of his piecemeal approach below.

[29] The Commissioner made a finding that the company had failed to prove that the credit note had not properly been issued on the basis that it had neither led admissible evidence that the spares referred to in the credit note had not been returned nor it had called the author of the email from Barotse to confirm the truth of the statement that Barotse had not returned the spares and was not aware of any credit note. He ruled Bloem's evidence that the warehouse had been checked to ascertain whether the spares referred to in the credit note had been returned as inadmissible hearsay. In fact Bloem testified that both he and the employee's supervisor one Malikihane had checked the warehouse and that the parts were nowhere to be found. The evidence was thus not hearsay and

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ought not to have been left out of account. I have referred to the probative value of the email from Barotse, above. These were pivotal findings on the part of the Commissioner.

[30] A further finding made by the Commissioner was that according to Bloem, the "*wrong*" that the employee committed was to create an invoice on 14 May 2008, in advance, given that the email from Barotse stated that they had never returned spare parts. He then referred to his earlier findings that the email dated 22 May 2008 from Barotse had been ruled inadmissible. What the Commissioner entirely failed to appreciate was the significance of the fact that the WIP account had been opened by the employee on 14 May 2008; that the credit note had been issued on 16 May 2008 and that the parts "*sold*" using the credit note, to the mystery courier representative, were amongst those referred to in the WIP account created prior to the credit note having being issued. In the absence of an explanation from the employee, this was damning evidence which entirely eluded the Commissioner.

[31] The Commissioner refused to take account of the proposition put to the employee that it was contrary to the manner in which courier companies' work, for a courier company representative to execute a purchase order on behalf of Barotse. The Commissioner ruled this as opinion evidence which could only be given by an expert. This ruling of the Commissioner is without merit. The employee was familiar with the manner in which Barotse conducted its business with the company and was familiar with the role of the courier companies representing it. A person in a position of the applicant could reasonably be asked to respond to such a proposition which is one of fact relating to everyday life particularly in the business in which the employee was engaged. As such it clearly did not constitute opinion, much less "*expert opinion*" requiring the evidence of an expert and the Commissioner was wrong in disregarding the improbability of the employee's version that he believed that he was dealing with a courier company representative acting on behalf of Barotse.

[32] The Commissioner made much of the fact that it was not shown that the employee had issued the (fraudulent) credit note. In my view nothing turns on

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this. Whether the employee issued the credit note or whether he acted in collusion with some other person whose identity has not been uncovered, the inference that he knowingly processed a transaction resulting in the illegitimate use of the credit note by a person whom he knew not to be a representative of Barotse, is in my view inescapable. All of the proved facts are consistent with this inference.

[33] It follows that in my view the Commissioner reached a conclusion on the evidence before him which no reasonable decision maker properly applying his mind to those facts could have reached.

[34] His failure to grasp what the material facts before him were and what inferences ought reasonably to be drawn from them and his failure even to undertake that analysis were such that in my view he also committed misconduct or irregularity within the meaning of these terms in section 145 of the LRA. In this regard I refer to the *dictum* of Murphy AJA in the matter of *Head of Department of Education v Mofokeng & Others* (2015) 36 ILJ 2802 (LAC) at paragraph 33:

> *'[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.*[12] *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.*[13] *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*

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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.'[14]" [Footnotes omitted]

[35] The Commissioner's finding on procedural fairness was equally flawed. He based his findings on a "*concession*" by Bloem that Saturday is an optional work day and a further concession that the employee was under suspension at the time. As pointed out above, the employee was not suspended, he had been dismissed. In any event, even if the Commissioner meant that the employee was not obliged to work on that Saturday by virtue of his dismissal, this logic would apply to all working days and could not reasonably be invoked to determine the question of whether the Saturday ought to be included or excluded from the computation.

[36] Simply put, the issue is not whether the employee would, but for his dismissal, have been required to work on that Saturday but rather whether in the parlance of the company Saturday was a working day. Since the company was open for business and its employees (or at least some of them) were required to render services on Saturday, it was in my view a working day.

[37] It also bears mention that there was no criticism levelled by the employee against the procedure followed which resulted in his dismissal following upon his disciplinary inquiry. It follows that it was common cause that the employee received a fair hearing prior to that decision and that is all that is statutorily required. Whilst I do not thereby suggest that an employee who is accorded the right to an appeal by his employer but who is wrongly prevented from exercising that right, would not be able to raise this as an issue pertaining to procedural fairness, at worst for the company in this case there was a *bona fide* difference of interpretation as to the meaning of "*working day*" and as I have found above, the company's conclusion is in my view the correct one. The Commissioner arrived at the wrong conclusion by asking himself the wrong question, namely: was the employee required to work on that Saturday?

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[38] On the question of bias it is apparent both from the record and from the Commissioner's award that there was a measure of personal animus between him and the company's legal representative in the arbitration. This may well give rise to a reasonable apprehension of bias on the part of the company, particularly when viewed in conjunction with the Commissioner's poor assessment of the facts and probabilities. In view of the conclusion which I have reached on the first two grounds of review I deem it unnecessary to deal with the issue of bias.

[39] This Court is at large, when it is in as good a position to make the finding which the Commissioner ought to have made, to substitute its decision for that of the Commissioner. This matter has a long history and it would not be in the interest of justice to order a hearing done over when this Court is by virtue of the record of evidence in as good a position to decide as the Commissioner was.

[40] I do not consider this an appropriate matter in which to order costs against the employee, who represented himself in this application.

[41] In the result I make the following order:

(a) The arbitration award of the first respondent dated 13 November 2009 is hereby reviewed and set aside.

(b) The award of the first respondent is substituted with the following order:

"*The application is dismissed.*"

CE Watt-Pringle AJ

APPEARANCES:

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FOR THE APPLICANT:	Mr S Snyman of Snyman Attorneys
FOR THE RESPONDENT:	In person

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