IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Case no: JA31/01

In the matter between:

MANHATTAN MOTORS TRUST **APPELLANT**

and

MSH ABDULLA **RESPONDENT**

JUDGMENT

COMRIE AJA:

1. The appellant trust carries on business in Pretoria as a dealer in used motor cars. The trustees and proprietors are Mr Noormahomed and his wife. From April 1995 the trust employed the respondent as a salesman and later as a senior salesman or sales manager. He was recommended by Mr Amod, a brother in law to Noormahomed, as a mechanic. He was taken on as such, but was rapidly transformed into a successful salesman. Amod, himself an experienced salesman, left the business in 1995 to pursue other interests. The business prospered and in August 1999 Amod re - joined it as a salesman. Notwithstanding the introduction in 1995, and his prior experience, Amod was regarded as junior to respondent.

2. The employment relationship between the appellant and the respondent came to an end on 15 December 1999. The respondent (as applicant in the Labour Court) claimed that on that day Noormahomed terminated his employment for operational reasons, but did so without having regard to the provisions of s.189 of the Labour Relations Act 66 of 1995. The respondent accordingly contended that his dismissal was unfair, and he claimed compensation.

3. The appellant denied any dismissal. It averred that the respondent become disgruntled by inter alia the success achieved by the recently re - appointed Amod; that the respondent told Noormahomed to choose between him and Amod; and that when Noormahomed declined to make that choice, the respondent 'walked out on his job".

4. After hearing evidence the trial Court (Maleka AJ) accepted the respondent's version on a balance of probabilities. It found that the respondent had been dismissed by the appellant; that such dismissal was for operational reasons; and that the dismissal was unfair for want of any compliance with s.189. Compensation was awarded. There was no order as to costs.

5. The appellant appeals with leave granted by the Court a quo. It may be noted that the notice of appeal does not attack the quantum of compensation which was awarded, a position which was confirmed by counsel for the appellant during argument. There is an appeal and a cross - appeal with regard to costs.

6. Four witnesses testified at the trial They were the respondent and his witness Mr Ramanani, who testified about a conversation which took place on 12 November 1999 in the evening at the respondent's home; and for the appllent, Noormahomed and Amod. All four witnesses were found by the trial Court to be:

> " credible. They impressed me as being honest. Where necessary they made relevant concessions during their evidence. They testified logically and their evidence did not manifest any demonstrable attempt to mislead me or to embellish their versions. I therefore find that these witnesses were credible and therefore rejected criticism levelled by Mr Coetzee against the [respondent's] credibility. In my judgment such criticism ..... is unfounded".

The Court accordingly held that the case had to be resolved " on the assessment of the probabilities". As I have said already, it was held that the probabilities favoured the respondent's version.

7. With regard to the termination of the respondent's employment and the reason therefor, the issues were entirely factual. The normal rules pertaining to appeals on fact are therefore applicable, namely: that the trial Court's findings of fact and credibility are presumed to be correct; and that these findings will only be disturbed on appeal if there is a material misdirection or if they are clearly wrong. **Toyota South Africa Motors (Pty) Ltd v Radebe and Others [2000] 3 BLLR 243 (LAC)** at para 39. The trial Courts' conclusions resting on its assessment of the

probabilities, are themselves findings of fact and subject to the aforegoing rules on appeal. On these factual issues it was common cause that the respondent employee bore the onus of proving his dismissal on a balance of probabilities in terms of s.192(1).

8. I turn to consider the facts. At the outset one observes an irony not unprecedented in litigation. The respondent's evidence disclosed little or no cogent reason for the appellant to have dismissed him. On the other hand Noormahomed's evidence, supplemented by that of Amod, did disclose a reason for the dismissal, even though the appellant claimed that the respondent resigned. The trial Court had to make the best it could of this situation; so too must we on appeal. The clue to the case in my view is that the appellant was a family owned business. It was common cause in the evidence: firstly, that the respondent was a successful salesman; and secondly, that on his return to the business in August 1999, Amod succeeded as well, especially in the sale of smaller vehicles. The respondent handled the larger, more expensive models. The respondent maintained that after Amod's return all went well, and in particular that he had a good relationship with Amod. The respondent admitted to some hypertension brought on, it would seem, by his duties as chairman of the body corporate of Himalaya Heights, the residential complex where he lived. This led to occasional absences from work. Also, he did not take paid leave. But, he said, these matters did not adversely affect his performance in the workplace where, indeed, he concluded many sales and was favoured by the finance houses. Moreover, in November 1999, Noormahomed promoted him to sales manager or senior sales manager. It was then that he was informed that Noormahomed would be undertaking a three week pilgrimage to Mecca from 18 December 1999. The

respondent was to be left in charge of the business. He stated that he was not given an increase in salary at that point. Yet out of the blue, on the morning of 15 December 1999, three days before his departure for Mecca, Noormahomed (according to the respondent) arrived at work and told him that his services were no longer needed.

9. Noormahomed and Amod painted a different picture. They testified that after Amod's successful return to the business, the respondent become demotivated, perhaps out of jealousy or anxiety. He continually squabbled and bickered with Amod, and would not help him. Amod stated that their relationship soured. Himalaya Heights was taking its toll on the respondent, whose sickness and absenteeism began to take on worrisome proportions. By November Noormahomed had decided on the pilgrimage to Mecca. There was sufficient concern on Noormahomed's point to warrant a visit to the respondent at his home after mosque in the evening of Friday 12 November 1999. It was a deputation of three consisting of Noormahomed, Amod and Noormahomed's young son, who seems to have worked part - time for his parents. What precipitated the meeting, according to the appellant's witnesses, was the fact that the respondent had not returned to work after prayers or lunch that afternoon, and had given the keys to the premises to Amod with the message that he would not be coming back to work. This part of the story was not squarely canvassed with the respondent in cross - examination. It was clearly designed to lend credence to the appellant's version of what happened later on 15 December. It was so central to the appellant's case that I cannot credit that cross - examination was omitted inadvertently. I am disposed to accept that it was a false afterthought.

10. Nevertheless the Friday evening meeting is highly significant in my opinion. It was on the face of it a remarkable event. Noormahomed and the respondent did not socialise outside of the business context. Yet at a relatively late hour, on a Friday, Noormahomed led a deputation of three to call on the appellant at his home. As far as I can make out there was no prior invitation or arrangement. On Noormahomed's mind, it seems clear, was his impending absence and who would look after the "shop" while he was away. He testified - and here I believe him as a matter of probability - that he tried to motivate the respondent. He disclosed the planned pilgrimage to Mecca; he promoted the respondent and gave him a substantial salary increase; and told him that he would be in charge. The fact of the visit, and its attendant circumstances, demonstrates serious concern on the part of Noormahemed and his perception that there was a real problem.

11. According to the appellant's witnesses, the respondent did not improve after 12 November. His attitude, sickness and absenteeism persisted. He was eventually only paid for five days' work in December. The problem did not resolve itself.

12. Noormahomed suggested that the respondent opportunistically timed his ultimatum, three days before the departure for Mecca, as a means of getting rid of a rival in the form of Amod. I think this is unlikely. Amod was the brother in law; he was experienced in the trade; and on his return to the business in August 1999, he was successful. In these circumstances the respondent could not realistically have entertained the idea that

Noormahomed would fire Amod, even with Mecca looming. It is far more likely in my view that Noormahomed reasoned to himself: "I cannot responsibly leave Abdulla in charge of the business during my absence. It is too risky. Abdulla must go, and Amod must take over". It may be noted, in passing, that Amod was appointed senior sales manager in about August 2000.

13. There are two other features which point strongly in the same direction. In the first place annual bonuses were normally paid in mid - December. Amod, who had only worked part of the year, received a bonus soon after 15 December. The respondent was entitled to expect a bonus as well. Despite suggestions to the contrary, I am satisfied that the respondent was not financially flush. I find improbable that in addition to putting his job in jeopardy, the respondent would have been prepared to forego the imminent bonus. Secondly, when he was eventually paid, the respondent received severance pay calculated according to his years of service. He would not have been entitled to such pay had he resigned voluntarily. Noormahomed's explanation for the severance pay was that he relied on his book keeper or accountant, to whom he relayed the facts. It may be that the accountant was insufficiently apprised of the labour law, in which event I would expect him to have directed appropriate enquiry to those better informed than he. However, the accountant was not called as a witness to confirm his instructions from Noormahomed or to explain the ostensible error away. As I see it, the accountant was an obvious and necessary witness to be called for the appellant. There was no indication that he was unavailable to testify. The inference which I would draw, from the failure to call the accountant, is that he would not have

corroborated Noormahomed. The further inference is that Noormahomed reported to his accountant that he had to let the respondent go for sound business reasons (which were construed as operational reasons).

14. Other points were advanced in evidence and by Mr Boda (for appellant) and Mr Koekomoer (for the respondent)in the comprehensive heads of argument which each of them filed. I consider these points to be of lesser weight than those which I have emphasised. My conclusion on all the evidence is that there is a marked and substantial preponderance of probabilities in favour of the respondent's version that he was dismissed. That balance is sufficient to persuade me that the appellant's version - the resignation - is false. It follows that in my judgment the Court a quo did not err in reaching the same conclusion, albeit for somewhat different reasons. It matters not at this stage whether the grounds for the dismissal were correctly classified as operational reasons: the Labour Court admittedly had jurisdiction and the quantum of compensation is not under attack on appeal.

15. The costs. The legal representatives were agreed that the costs of the appeal should follow the result. With regard to costs in the Court below, Maleka AJ furnished no reasons for not awarding them. From the recorded argument it appears that Mr Boda's predecessor submitted that costs should not be awarded either way. In response to a contrary submission by Mr Koekomoer, the learned Judge observed:

> "No, this court does [not] want to discourage litigants to advance their case or their defence simply because of the aspect of costs. I

mean it is quite clear that I can only order costs when there is some element of vexatious or [bad faith?] on the part of the litigant".

If that reflected the learned Judge's eventual reasoning, he was in error. The discretion regarding costs is far wider than that, and includes fairness among other considerations. See Landman and Van Niekerk: Practice in the Labour Courts, at A - 61. In my view the outcome of the trial and the dictates of fairness indicate that the respondent should have been awarded his trial costs.

16. I would accordingly dismiss the appeal and uphold the cross - appeal. I would make the following order:

1. The appeal is dismissed with costs, including the costs of the application for leave to appeal;

2. The cross - appeal succeeds. Paragraph (c) of the order granted by the Court a quo is set aside and replaced by:

"(c) The Respondent is to pay the costs of suit".

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R.G. Comrie
Acting Judge of Appeal

I agree.

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C.R. Nicholson
Judge of Appeal

I agree.

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M.T.R. Mogoeng
Judge of Appeal

Appearance:

For the Appellant: Adv. F.A. Boda

Instructed by: R. Ebrahim & Associates, Pretoria
For the Respondent: Mr W. Koekomoer of William Koekomoer Attorneys, Pretoria
Date of hearing: 10 May 2002
Date of judgment: 11 July 2002