



Arbitration Award Rendered

Case Number: GAJB16029-23

Commissioner: Sandra Mathebula

Date of Award: 4-Oct-2023

In the **ARBITRATION** between

Jacques Louis Bruwer

(Union/Applicant)

and

NMS Africa (Pty) Ltd

(Respondent)

Union/Applicant's Self – Disemelo Ntsoane - Attorney
representative: _____

Respondent's representative: Nobuhle Masondo - Attorney

Details of Hearing and Representation

1. This is an arbitration award in the dispute between Mr. Jacques Louis Bruwer, the applicant and NMS Africa (Pty) Ltd, the respondent. The arbitration was heard over four (4) days; 11 and 29 August 2023 and on 13 and 14 September 2023 at the CCMA offices at 127 Fox Street in Johannesburg. The dispute was referred as a dismissal related to incapacity dispute in terms section 191(5)(a)(i) of the Labour Relations Act 66 of 1995 as amended (the LRA).
2. Both parties were present, and the applicant was represented by Ms. Disemelo Ntsoane, an attorney from Stegmann Attorneys while the respondent was represented by Ms. Nobuhle Masondo, an attorney from Mabaso Inc. The award is issued in terms of section 138(7) of the LRA. Testimony was given under oath and the process was digitally recorded.
3. I granted legal representation on the basis of the comparable ability of the parties, the complexity of the matter and in the interest of justice.

Issues to be decided

4. I am required to determine whether the dismissal of the applicant was procedurally and substantively fair. If not, I am required to determine the appropriate relief. The applicant sought reinstatement, alternatively compensation.

Background to the dispute

5. The respondent is a subsidiary of a global company based in China involved in selling crushing equipment for mines amongst other things. It employed the applicant on 03 January 2023 as a Sales Director for Africa Region. He was dismissed on 30 June 2023 for poor work performance at probation.
6. He referred a dispute to the CCMA challenging the dispute on 17 July 2023 and the matter was unsuccessfully conciliated 03 August 2023. The respondent had objected to con/arb, however, the matter related to a dismissal related to probation, as such, it had to arbitrated on the same day. Be that as it may, the parties agreed to deferrer the arbitration to 11 August 2023 as the respondent had to organize its witness who was based in China and also needed a Mandarin Interpreter. On 11 August 2023, the arbitration proceeded but was adjourned due to time constraints and it was agreed that it proceeds on 29 August 2023.

7. On 29 August 2023, the matter could still not be finalised and was again adjourned due to time constraints coupled with the voluminous evidence that still needed to be led and the number of witnesses. The CCMA subsequently scheduled the matter for a continuation of the arbitration on 13 and 14 September 2023 where it was finalised.
8. The applicant challenged both procedural and substantive fairness of his dismissal in that, he was not counselled or trained and was not provided with the tools of the trade. Furthermore, he was not informed before the termination that he was underperforming. He was also not afforded the opportunity to make presentations nor were means explored to assist him. He sought reinstatement or compensation.
9. The respondent's case on the other hand, was that the dismissal was fair in that there were valid reasons for dismissing the applicant. He was hired based on his CV and his promise to meet certain targets which he did not meet while on probation. Dismissal was also the appropriate sanction as he was paid to do nothing, he was given a longer period of probation but he did not deliver.

Survey of Evidence and Argument

10. Below is a summary of the submissions by both parties from which I have captured the relevant information that would allow me to make an informed decision. The applicant relied on his own testimony and a bundle of documents which I marked "A" while the respondent relied on the testimony of two witnesses; Ms. Meryl Fana, the Finance and Administration Manager and Mr. Haidong Liang, its Vice President who testified via TEAMS, and a bundle of documents which I marked "R". The proceedings were digitally recorded and testimony was given under oath. It was agreed that the parties would submit their closing arguments by no later than 21 September 2023, however, as at the time of this award, the respondent had not filed its closing arguments.

Respondent's case

1st Witness – Ms. Meryl Fana

11. She testified that the respondent usually restructured its business around October of every year. As such, in October 2022 discussions commenced and it was felt that the respondent needed to hire someone based in Africa, a local person to manage local clients as the current person was Chinese brought mainly Chinese business. It was felt that the Africa clientele needed someone who understood their culture. Recruitment agencies were approached and Mr. Bruwer was one of short listed candidates

as his CV indicated that he was familiar with the industry and had worked with their product before and had worked for their competitors which is what they were looking for.

12. Three rounds of interviews took place and Mr. Bruwer was impressive and was eventually the successful candidate. At the end of November 2022, Mr. Bruwer and the recruitment agency phoned to find out about his contract. When it was eventually sent to him, he was not happy with some clauses. Firstly, on remuneration as shown on clause 10.1 on page 14. The business has two products: capital sales and spares. He indicated that it would take him time to get capital sales but he eventually signed the contract on 27 December 2022.
13. In January 2023, he raised the salary issue again. The first contract was basic plus 1% commission as shown on page 28 of the respondent's bundle. He was also not happy with the restraint of trade and the end date of the contract. In March 2023, she gave him the revised contract with a monthly salary of R100 000, the probation period had changed as per clauses 4 and 5 to six months and the leave entitlement had also changed.
14. The applicant was employed on the basis that he would be the main person bringing new sales and maintaining existing clients. The CEO or his subordinates were supposed to give him the sales database, prices for clients and so forth. Annexure "A" on page 50 of the respondent's bundle contained his job description; Annexure "B" contained his remuneration package and annexure "C" had sales targets which indicated that in the six months of probation, order intake target was R24 574 000.00; revenue intake targets were set at R23 285 837.00 with a profit target of R2 028 583.00. This was signed off by the applicant and it showed that he understood what was expected of him. In the first few months, he had a meeting with an existing client but the talks did not go far. He had a meeting with staff proposing new targets. He also wanted to introduce a new tool for the sales team to eliminate administration but the system was expensive and at that time no money was coming in.
15. The applicant did not submit reports as required. For instance, on 09 January 2023, he was supposed to submit an overview of his forecast and plans for the future to be presented in a meeting of the Africa Region and he did not, Mr. Liang had to request him to send it as shown in the email on page 53 of bundle "R". Even then, he did not respond until late when the meeting had finished. In addition, every month, he was expected to submit sales reports but he did not. He did not submit the April 2023 report which was needed to prepare for the 2nd quarterly meeting and Mr. Sunny Lu had to ask him for it in an email dated 06 May 2023. He was also reminded on 09 May 2023 and to her knowledge, Mr. Sunny Lu never received that report because as at 15 May 2023, Mr. Liang sent him an email highlighting the

importance of reports in assisting a manager in understanding the business, reviewing it and it giving a clear vision of what was right or wrong.

16. Mr. Bruwer was also often late for meetings and sometimes missed them. On 16 January 2023, he missed a meeting with Mr. Liang as shown on page 64 of bundle "R" followed by his apology on page 65. He was also never in the office as expected, the last time she saw him was in February 2023 and again in March 2023 when Mr. Liang was in the country.
17. On 20 June 2023, HR sent Mr. Bruwer a performance review email where it compared his performance targets against what he had achieved in his six months of probation. It indicated that there was a huge gap between what he had achieved and the goals in the probation period. On 22 June 2023, a follow-up email terminating his employment was sent by HR and it was followed by a formal letter on 26 June 2023 contained on page 112 of bundle "R". Mr. Bruwer then requested to have a meeting with Mr. Liang which took place at the hotel lobby where Mr. Liang was staying. In the meeting, his performance was discussed and he was offered the Key Accounts Manager position which he ended up rejecting as the offer of a dealership was more attractive. He was told his probation contract was being terminated. On 26 June 2023, Mr. Bruwer acknowledged receipt of the termination letter but also indicated that he disputed the calculations.
18. It was Ms. Fana's testimony that, by June, one was expected to have made sales, if not, one needed to sell three (3) capital items to close the gap. It was her view that, an extension of the probationary period would not have assisted in improving the applicant's performance. In any case, he did not ask for an extension of the probationary period. Instead he was more focused on the dealership agreement. The respondent felt it could not continue with him as an employee based on how he was pursuing the dealership. He was constantly asking for financial reports dating back to 2020 which raised eyebrows with Head Office. They felt the trust relationship had been broken.
19. She felt she would not be able to work with the applicant as he was aggressive in his approach, he did not read emails and would sometimes ask for information which would be sent but he would persist. He also arrived late for meetings with the Vice President. Through employing him, the respondent had lost half a million in remuneration and he never delivered. He was employed with the hope that he would make business, instead sales have gone down, even during COVID they made profit. His main focus was supposed to be sales but he concentrated on fixing other departments. Currently, the business was being sustained by the Chinese group of sales.

20. In cross examination, Ms. Fana's version was that the position was initially for Regional Manager – Sales but was changed to Director as a result of the expansion and that his salary was increased because he was not happy with it and because of what he promised to deliver. She reiterated that the applicant was a non-performer as according to his contract sales constituted 90% while admin contributed 10% of his performance. She disputed that she did not know the applicant's targets and reiterated that, the applicant never submitted reports and his performance did not even come close to meeting the targets that were indicated in his sales targets in annexure "C".
21. The applicant's version was that he signed his revised contract in March 2023. Furthermore, he could not visit clients because he was not provided with the necessary resources. Reference was made to page 60 which showed that the applicant made 28 requests for money to enable him to travel to see clients which were approved by his line manager, Mr. Liang but were not paid by Ms. Fana. Ms. Fana's response was that the fact that he signed a revised contract in March did not stop him from bringing in new clients or visiting old clients to see if they could order more parts.
22. Furthermore, the 28 requests on page 60 do not indicate that 28 requests were made, the way the system worked was such that the applicant would initiate a request, and approve it as he had that authority, it would then move to the Vice President for approval, if Mr. Liang was not happy with the request, he would reject it and it would go back to the applicant and the whole process would start all over. At some point he was approved R5000.00 and later on R50 000.00 which was meant for him to travel to Clarens.
23. She also provided him with client names and their orders from their database to assist him in his work. She was not part of the meetings the applicant had with his line manager but she knew what was discussed as the applicant would share with the team after each meeting. She however knew when his salary changed because he had to load it into the system. It was her view that six months was enough time for one to raise capital sales. She also knew the respondent's revenue and that the applicant was supposed to double it as he was a local person as opposed to his predecessor who brought in more Chinese market.
24. It was put to Ms. Fana that the information contained on the excel spreadsheet on page 113 was not a true reflection of sales as it did not show sales that were made by the applicant. Ms. Fana responded that, the applicant's information was not there because he did not generate any sales. She conceded that the figures in the performance review contract did not correspond with her statement that the applicant did not make sales or with the document on page 113 and did not know how HR got to that

figure. However, she knew that those figures included Sakhile's sales as they fell under the applicant as he was Sales Director.

25. She knew the applicant did not submit reports because she would forward him emails from Mr. Sunny Li requesting for reports from the applicant. As seen on the email on page 65, he was even sent a template for a six months forecast of sales activity report. She was also not getting reports on a monthly basis as it was supposed to be on the 25th of each month. She disputed that the reminder email on page 86 only referred to the April 2023 report and referred to Mr. Liang's email of 15 May 2023 where he was explaining to Mr. Bruwer that timely reports were an important tool for a manager to understand the business, review business and to get a clear vision of what was right or wrong.
26. She was not sure why the applicant was offered a revised salary or the key accounts position if he was not making sales. When asked why she did not give financial statements to the applicant, she responded that, these were meant for the CEO and the applicant was a Director of a division, additionally, they had not been audited. He could be provided with other reports. In any case, he would have known what was going on if he was submitting sales reports. She also sent him information from 2022 in various formats as he had requested.
27. When it was put to her that the relationship was not broken down as the applicant was still offered a Key Accounts Manager position and a dealership, Ms. Fana responded that, after the termination of the applicant's contract, she was copied on their email communication and she could tell that the relationship had broken down, and based on his responses, there was no turning around for him as he had become aggressive. In addition to that, the respondent could not survive as it did not have any major contracts.
28. It was put to Ms. Fana that the email on page 91 of bundle "R" indicated that a deal with Tanzania had been clinched to which she responded that Mr. Bruwer had been promising this since January 2023 when he commenced employment. There was no proposal and it was the same client he had been telling them about in meetings. He never disclosed who the client was as required. He was given a loan of R50 000.00 to go to Tanzania, however, he never used it until it was deducted from his salary as it was company policy.
29. It was further put to the witness that in terms of the applicant's contract under probation, he was supposed to be counseled by his manager and only terminated on notice if the applicant was still not able to do the job. Her response was that she did not know if he was counsel was it could not have been

done by her. However, she recalled over the months when Mr. Bruwer would tell them he was in a meeting with Mr. Liang, his line manager who had told him he was not happy with his performance.

30. In re-examination, Ms. Fana confirmed that the sales report indicated that Mr. Bruwer was not performing and the emails sent by Sunny indicated to that effect. The applicant was also supposed to send reports to her but he did not. The Sales Director and Key Accounts Manager positions were different in that, the Key Accounts Manager position was lower and focused on specific clients. She was responsible for compiling the reports referred to and none of them showed that the applicant performed.
31. In addition to that, the applicant never raised any issues or concerns about reaching his targets. The only change in his revised contract was the salary and duration of the probation as he had promised a bigger thing and had indicated that he would take some time to get capital sales. In terms of the respondent's policy, if an employee takes a business loan, they were supposed to submit slips every month, failing which, the loan was deducted from their monthly salary. This was meant to account as the respondent was listed on the stock exchange and every three months' books needed to be submitted and therefore needed to be up-to-date.

Mr. Haidong Liang – Global Market General Manager

32. He testified that he first joined the respondent between 2018 – 2022 then rejoined in March 2023. He managed global market sales and had different regions under him including Africa. He knew the applicant when they were looking to recruit a local person to develop local business. They were looking for a Sales Director – Africa Region. He was part of the recruitment process. The applicant was part of five candidates and he had the experience they were looking for and his CV showed that he worked for their competition such as Sandvik where he was the Regional Sales Director for some countries; he was an Area Manager: Southern Africa for Metro, another good company and Weir Minerals and others. He stood out and even his business case was great as he outlined what he wanted to achieve, he knew where to develop and knew the customers. In addition, a colleague who knew the applicant and had worked with him recommended him.
33. They negotiated the details of his job and salary. He raised his package as he was going to be a Director after having consulted with the former Regional Director. He initially offered R60 000.00 but in March 2023, he offered him a full package after he had had a discussion with him where he had said he needed to be able to do sales and he felt he would not get much from the commission. As a Sales Director, he had a company car for short distances, R55 000.00 business loan for travelling to Africa and a new computer. He was given all the tools he needed to do his work.

34. He was concerned that he never travelled to Africa except once when he applied for the loan but he did not use the money for the purpose it was meant for. Mr. Bruwer had indicated that he knew clients in Africa but he did not travel, not even once did he approve his travel outside the country. In terms of his job description which both parties signed, he was responsible for the recruitment of customers, visiting customers and understanding their needs and so forth. He did not say he could not do the work but had questions which is why he came to South Africa to discuss and clarify things with him which was his job to support and assist him.
35. In terms of the sales targets contained in annexure "C" of page 51 in the six months of his probation, the target was R24 574.00 but the applicant had projected a higher amount, however, he maintained this amount. If he had reached his projected amount it would have meant, he had exceeded the target which is what they wanted. Initially, he did not want the probationary clause but he informed him it was company policy. They pitched the probationary period at 6 months as the position was senior.
36. Mr. Bruwer did not perform his duties in line with his job description. He did not visit customers or give them quotations; he had no marketing strategy for the African Region nor did he generate sales. Instead, he discussed the warehouse which he said was small and wanted to move offices, to which he told him to focus on generating sales for now as that was his priority.
37. He guaranteed him sales by April 2023. He did not come to the office often and he had to remind him about a report which was a basic thing for a sales person. Between April and May 2023, he had a conversation with him to improve his performance in relation to sales as they were sales oriented company.
38. When the applicant was appointed, they had a TEAMS meeting with the Africa team as orientation and he flew to Africa to meet with the applicant as he had a long list of issues and expectations which he addressed with him. The applicant asked for some training and based on the fact that his team was experienced and based on his background and experience, he felt he did not need training. The respondent's policy was that if one was travelling, they had to put in application for funds. He was not always in the office, instead he would come in, sign then leave. In June 2023, he came down to the office and did not find him whereas he was supposed to be in the office as he was not travelling. As a Director managing other people in the Africa Region, it was clear that if he could not manage himself, he could not manage other people. He also heard from other colleagues that he was normally out of the office.

39. He requested permission to buy the Sales Force, a system that was used to manage sales activities to enable him to manage his sales and that of the team in Africa. He agreed subject to approval by other stakeholders as it was not on the budget as reflected on page 71 of bundle "R". On 31 January 2023, Mr. Liang proposed payment options to the applicant as shown on page 69 of bundle "R". The software was just a communication tool which was not detrimental to the generation of sales and most companies did not use it. The applicant further made a request for him and his team to go for some training course called business financial modelling. His response was that the course seemed like a university education and they still needed to grow the business, make sales, increase number and get more people and once they had made profit, they could talk about it.
40. The applicant had promised that he had good clients in Tanzania and things would look good by the end of April which he had confirmed in an email. He expected timely monthly reports on sales forecasts but he never submitted and he apologised for it. He received a message from Mr. Sunny Li regarding the lack of reports which is why he sent him a message as show on page 80 and a reminder on page 88. Mr. Sunny Li sent him the message again on 12 May 2023 and the deadline of 11 May 2023 had passed. He could not remember if the applicant responded to Mr. Sunny Lu's email.
41. As a manager and Director in Africa, the applicant knew what was expected of him as he had performed the same type of work before, however, he contributed nothing which is why his contract was terminated. On 20 June 2023, HR sent him a letter terminating is contract which they copied him. HR got the figures contained in the performance review document from the finance department which was responsible for calculating statistics for each employee. The figures contained sales from existing customers and sales from other salespeople like Sakhile. Based on the figures, the applicant could not have made sales as he was not travelling or meeting clients. He had already gone past three months of probation but still did not make sales or improve.
42. After the letter of termination, they had a meeting at the hotel where he told him he was not happy with his work and that the contract was terminating. He asked for more time and said he had a contract that was coming in but he told him the decision was final based on the review. He proposed that he should consider a Key Accounts Manager position or a dealership which he said he was going to think about. The following day, he came back and said he wanted the dealership proposal. On 27 June 2023, Mr. Bruwer sent an email to him regarding the dealership to which he responded that he needed to first sign the termination letter. He did not guarantee him any position, he just wanted him to first sign the end of probation letter.

43. The following day, Mr. Bruwer sent him a threatening letter which he thought was aggressive and he responded immediately as per page 98 where he was withdrawing the Key Accounts Manager position and offer of a dealership. He had offered him the two options on the basis that he had said he had business connections that would bring in business. As his manager, he had seen how bad his performance was; he did not come to the office which showed a lack of work discipline, he claimed for home internet for nothing, and he did not visit customers or made sales. He did not think was a qualified salesperson. His probation was already extended by three months to six months, to that extent, they could not work with him. He made a lot of promises and they felt they could not work with him. He also did not know how to co-operate as he used the wrong method of coercing people to co-operate.
44. The respondent had lost revenue, market and time based on the applicant's failure to perform it now has to look for a replacement. He offered him the position of Key Accounts Manager as he had asked to extend his probation or a dealership. He told him to sign the ending of the probationary period contract first as the positions were not equal in status.
45. Mr. Liang was referred to an unnumbered document on bundle "A" which contained a profit and loss report. He explained that it showed sales figures including domestic and export and sales income. It has two types of customers; China and Africa (local) China contracts are signed in China and the equipment is sent to Africa. Africa refers to contracts reached in Africa. The document showed sales made locally by Sakhile through selling parts to some customers. There was zero contribution from the applicant. These amounts were expected in the previous year and by the time HR made their calculations it was already in July and the applicant had already left. Even if the sales in the report were the applicant's he would still have performed below his probationary targets.
46. From the first time, the applicant submitted that he had a big customer in Tanzania and said the proposed number was not a problem. However, by April, he realised the money he had promised was just verbal. He also never complained that the target was too high and he could not reach it or that he needed help. If he needed help from any department, he would jump in and assist him. After the meeting at the hotel, he told Meryl that they would end the probation contract and that the employee had requested for an extension and told him about his personal life, he then proposed the Key Accounts Manager position. The applicant used to work for the same companies he worked for and if one did not make sales, they were let go.

47. In cross-examination, Mr. Liang confirmed that the position was initial for Regional Sales Manager but was changed to Director as they wanted someone to manage the whole Africa Region and the title would give more definition to the position. The job entailed delivering sales by the applicant and by his team therefore it was not different from the Regional Sales Manager position except that it needed someone to manage the sales team. This was a new position after a restructuring where they realised that they needed a local to lead the local team as opposed to a Chinese person. The former team leader had Chinese customers and the new position focused on local customers. The applicant was selected because he had industry experience and had worked for their competitors. He also did a reference check and a former colleague of his whom he knew vouched for him as reliable and they felt he could use his client base to improve business.
48. He was part of the recruitment team from beginning to end and before he was selected, he presented a good business case and he liked him. His salary was increased after January 2023 when his title changed and he asked for a full package as he would not be earning commission and he was given. In his experience six months was adequate for one to prove that they could do the job and that was industry standard, in fact, all companies gave three months' probation. The applicant indicated that he had good business customers in Tanzania and he would go there with the product find out what their needs were and start from there. He had worked for big companies as shown in his CV.
49. The restraint of trade was only applicable after probation. The applicant was recruited to service existing customers and to look for new clients in Africa. He was provided with enough tools to do his work, gave him an allowance, paid for his cell phone and gave him a laptop as was company policy. The applicant was paid to perform all the duties contained in his job description. In his business plan, he did not give a breakdown of how he was going to achieve it. He simply gave a brief analysis in the interviews. He had to visit customers on a monthly basis, give proposals and find out their needs amongst other things, but he did not. He did not do most of them especially the most important ones. He could not even finish a basic job how much more other issues like management. There was no way he could deliver results if he could not visit customers. He was given a loan as he was expected to bring sales and not stay at home.
50. It was Mr. Liang's further version that, the respondent had a system that they used to make requests for claims if they wanted to visit. He never made applications to visit other countries where he said he had customers. From March, they discovered that he was not making sales because from January to march he was busy fighting for his contract, asking for increases which resulted in him travelling to South Africa to finalise his contract with him. he could not remember if he submitted reports but in March he had a

conversation with him when he requested to relocate the warehouse and he told him to focus on the sales as they were first priority.

51. It was put to him that the purpose of relocating the warehouse was to assist him to improve sales and that the meeting was not about his performance. His response was that the discussion was about improving his sales, explore solutions and suggestions therefore the office and warehouse moves were part of the suggestion and he told him to improve sales. He further responded that he increased his salary in March to afford him more time to improve his performance which is also why he increased the probation period to six months although he felt three months was enough as he was not a student who needed to be held by the hand, but a senior manager.
52. As a former Key Accounts Manager, his experience was enough for him to put effort in his work. he was supposed to train people as a manager and did not need to be trained as he had held senior positions in big companies and had already done the work in his previous companies.
53. With reference to the workflow process contained on pages 60 and 61, it was put to Mr. Liang that these were travel claims the applicant had submitted and he responded in the negative and explained that this was a reimbursement process showing the that the applicant submitted 25 claims and did not submit three. He disputed that the applicant made an application for travel claims but had previously applied for a loan of R50 000.00 which was later deducted from his salary as he had not used it as per finance processes. The applicant never made any travel applications to Tanzania, or any other African countries as promised.
54. Usually salespeople would visit customers at least three times a week but the applicant only made one travel claim. In terms of the reimbursement workflow process document on page 60, it was put to him that the applicant submitted 28 claims and none were paid. His response was that the form showed that some of the applications made may have come back because they were incorrect and had to be redone. It did not mean that the applicant had 28 travel claims, it could be one claim that has been doing a back and forth because was incorrect.
55. With reference to pages 73 and 74 of bundle "R", it was his version that the applicant asked for things that did not concern instead of generating sales. For example, he wanted Meryl to report to him; to which he had told him that he needed to make profit first then hire more people. In terms of the company structure, Merlyn reported to both the applicant and Head Office but the applicant confused his role and wanted the bank account, bidding managers, moving the warehouse and he always guided him

towards what was expected of him. He disputed that that the respondent could not give the applicant money to assist him generate sales and went further to state that the applicant had money to support him, he had two cars, R55 000.00 case and more stock in the warehouse to do his job. He promised to deliver good results and to make the sales even better. They had many video conferences to discuss ways of improving sales. His business plan had a higher target but the respondent decided to stick to their low target.

56. It was his version that the sales process could take weeks to months depending on the sales, be it capital or spares. Making sales also depended on a person's sales experience and the proposals one made. He explained that new customers were customers that already had the machinery but may be looking for spare parts and depending on your customer relationship one could get sales. The applicant also had a budget to recruit two sales people and some money to travel but he did not recruit nor travel. As shown in his email on page 74, the applicant wanted more people who had no bearing on his performance.

57. When asked if the applicant was counselled in line with clause 4.2 of page 18 of bundle "A", Mr. Liang responded that, this was done over a period of time when he told him the results were not good and that he needed to improve that was way there was a probationary period. When he joined the respondent, he was inducted twice, when he was introduced to everyone in the organization and when he came over to South Africa. The applicant had a lot of questions which he responded to one by one to make sure that he did his job. He also had contact with the technical Manager whom he could ask if he had questions.

58. He knew that the applicant was hardly in the office based on the information he received from Meryl and others in the office. He also knew the applicant did not travel because he did not put any requisitions. He reiterated that the applicant was hired because of his experience therefore there was no need for giving him training. Mr. Bruwer submitted reports to Mr. Sunny Li who would compile and submit a full report. He would also inform him if the applicant had not submitted. At some point he had to send him an email reminding him to submit. He missed submitting reports timeously on three occasions according to Mr. Sunny Li. As per pages 80 and 81 of bundle "R", the email was sent on 09 May 2023 to submit an April 2023 report and it was eventually submitted late.

59. With reference to page 100 which contained the performance review statistics, Mr. Liang's version was that the figures were sales made by Sakhile with no contribution from the applicant. The Key Accounts Manager position was discussed when he told the applicant that he was no continuing with probation

and when he asked for an extension as he had personal problems. He suggested it in that context but indicated that he must first terminate the probation contract. He withdrew the offer when the applicant sent him an email threatening to sue him. Mr. Bruwer did not argue that his performance was good, he accepted and asked for more time. He had promised to support him in the dealership but his follow-up email made him realise that he was not a person he could work with as he did not know how to co-operate.

60. He had a good working relationship with him but could not answer on his relationship with his colleagues. He explained that the reason he responded immediately to the applicant's email was because he was threatening to sue him and because his email implied a dealership agreement was on the cards.

61. Mr. Liang was referred to page 80 of bundle "A" which contained an email the applicant sent to Mr. Liang on 08 June 2023 where the applicant was requesting R35 000.00 for travelling to Tanzania for a possible business deal. His version was that he did not approve the loan as this was not the first email of its kind. He referred to pages 73 and 74 of bundle "R" in which the applicant had promised sales by end of April 2023. The money was deducted because he did not travel as per company policy. Over and above that, a decision had already been made not to confirm him. moreover, this was already in the sixth month of his probation and he had not made any effort to travel since January 2023. He arranged with HR that they have a meeting at the office but he did not report for duty and that is when they sent him a letter and he requested to meet with him at the hotel lobby. For the position he held, when he told him his sales were not looking good, something should have been triggered in him, if not, it meant he was not fit for the position.

62. In re-examination, Mr. Liang confirmed that the applicant did supervise the warehouse but he told him to concentrate on sales. He only went once with Sakhile to see a client and even that one visit did not improve sales. From the time he started working he was paid his full salary until he left as they did not want him to be sidetracked by money issues. He reiterated that the warehouse issue was not a priority and he told him as much.

63. He confirmed that the applicant always understood what was expected of him. He was in sales and needed money to travel and he was given the money but he never used it. He never had a problem with the targets and always promised to exceed the targets. He confirmed that one made sales by signing in customers through a contract but he never signed in any client. He confirmed that he had a budget allocated to him.

64. He reiterated that from the beginning he counselled the applicant, he gave him advise by redirecting him to sales when he concentrated on other things. He was very experienced in this job as he had been a Sales Director at Sandvik China and other companies. He had been in the industry for a long time and knew it very well as such, he believes the tools provided to the applicant were enough for him to do his work.
65. He further confirmed that Merlyn and another colleague told him that the applicant was never in the office but he did not address the issue with him as he was not one to follow people around. He also confirmed that he knew that he was not applying for travelling as he was the one that made the approvals. He reiterated that it was company policy that the sales guys take loans for travelling and if they do not travel, the money was deducted from their salaries and if they travelled, they made an application on the system with all the information for the trip and he would approve. Up to the time the applicant left, he never submitted the receipts for the R55 000.00 business loan he took.
66. Mr. Liang also confirmed that he did not approve the applicant's second loan application as he already knew he was not keeping him. His performance was monitored from January when there were no sales. Even if he had extended his probation, there was not going to be an improvement. The position wanted someone who was self-motivated from what he had seen, the applicant was not that person. He concentrated on other things other than sales. If he had generated at least half of the target, he may have considered keeping him but his contribution was zero. In April 2023, he made a commitment to bring sales by end of April but nothing happened.
67. Mr. Bruwer testified that he studied mining engineering, project management and other courses and had approximately 20 years of experience in the field. In 2018 he oversaw a company in Tanzania where he was the Country Manager and was given a budget which the employer at that time thought he would not manage but he more than doubled it in seven months. He was given whatever he asked for and was never questioned as he had to account at the end of the day. He also suggested to his then employer that he opens two more branches in Madagascar and Kenya and that freedom allowed him to achieve the target.
68. He responded to an advertisement for a Regional Manager Africa Sales on LinkedIn. However, the contract he signed on 27 December 2023 was for Regional Manager Sales – Sub-Sahara Africa. Mr. Powell Cao who was the Regional Manager Sales – Sub-Sahara informed him the was no longer part of

Africa and the applicant would look after it. On 31 December 2022, Mr. Liang phoned and informed him that the position had changed to Sales Director and he highlighted that he would announce it on the virtual platform.

69. The position was at a strategic level as told by Mr. Liang and his business plan covered everything. He identified ten companies in countries he had to visit. He also needed a Sales Force System to manage his clients properly as it was widely used in the industry. He wanted a locally designed NMS website so clients could be more at ease. There were four vacancies which he had to fill which included a finance person, Warehouse Manager, Logistics Manager as logistics was a nightmare and a sales person. Only two positions were budgeted for and when he tried recruiting, no one was interested as the salary was low. He also wanted to move offices as they were not easily accessible for clients and it was not of the standard of their competitors which was also confirmed by Mr. Liang. The warehouse was also not safe as there was no security.
70. He put up a monthly budget in his business plan and in monthly reports as shown in his job description on page 33 of bundle "A" which he was familiar with. His business plan was aligned to his job description and he was able to meet expectations and every month he submitted reports via "we transfer". He was measured as a branch – NMS Africa. He had one sales person (Sakhile), a Finance Manager and Shamila.
71. There was no hand over from his predecessor, Mr. Powell Cao despite his request to him and Mr. Liang for a hard drive to copy the strategy. He referred to an email from himself dated 09 January 2023 on pages 52 and 53 where he asked for the hard drive that Mr. Cia had been working on Africa for three years. He was of the view that it would have process time sheets and leads from which he could see competition analysis and that information was never provided. Mr. Powell Cao who occupied the position was appointed to Chinese Investment in Africa and both reported to Mr. Liang. He requested financial reports but was always questioned why he wanted them. When he asked for information he received it within a day or two in a non-user friendly format. He questioned spending. He also found that they had about 20 clients with 10 being active and about 4 or 5 of those being Chinese owned.
72. He was only provided with a laptop when he started with the respondent and he also did not get marketing material until in June. He referred to an email contained on page 59 which he sent to Mr. Liang indicating the need for a warehouse/inventory manager and the importance of having one as it helped him understand where they were as an organisation. They needed to assess what stock they had in order to speedily assist clients because as it was, they had to go through China to get prices

causing a delay which he did not want. Although this was not part of his job description, it would assist with sales to avoid writing off stock. In response, he got a client list and one process flow sheet for one client which was sent by Mr., Cia.

73. He communicated with a lot of clients and promised the client in Tanzania but he had a lot of others in different countries. He visited the Blyvoor Mine where sales were made and they received almost 3 million and he provided a lengthy report in which Sakhile was copied. He referred to the reimbursement process flow document on page 60 and explained that it showed the 25 claims he submitted through the approval cycle. He testified that they were for his business trips to Tanzania where the client had wanted him to come on site, they were approved by his line manager but not approved by Mr. Liang who told he him should wait until he got to South Africa. This was done in early May but the trip was not approved after having resubmitted four times.
74. He further referred to page 58 to an email he wrote to Mr. Liang where he promised to deliver by May as the client in Tanzania had promised and he needed to visit the client but it was rejected. It was his testimony that nothing in his business plan was agreed except the office relocation. Mr. Bruwer also referred to page 74 of bundle "R" where he listed things he need to assist him in his job and out of everything in the list, corporate branding clothing was approved. His loan request of R35 000.00 was not approved. Reference was also made to pages 71 and 72 of bundle "R" which contained an email from Loes Timermans dated 22 January 2023 regarding the Sales Force System he wanted to but to improve sales by keeping records of sales. It was approved but not delivered due to non-payment.
75. He also referred to his email to the Finance Manager dated 15 May 2023 contained on pages 83 and 84 of bundle "A" where he was requesting financial reports and he testified that he did not receive all the information he requested. He further referred to the profit and loss statement for the period 02 January to 25 May 2023 and submitted that the figures under cost of sales based on purchases were different from the figures that were provided by HR which is why he questioned them but he did not receive a response. Additionally, he had never seen the document contained on page 113 of bundle" R" and submitted that Sakhile submitted reports to him but finance would populate the information. He submitted that the document did not give a full reflection of accounts.
76. Regarding his remuneration, Mr. Bruwer testified that when he commenced employment he was paid R50 000.00 for three months and it was increased after Mr. Liang came to South Africa. He had raised the issue that he did not have money to pay for travel out of his pocket. The loan was approved by Mr. Liang and it was supposed to cover amongst other things visits to clients, fuel, the internet.

77. It was his testimony that his work did not require him to be in the office as he could work at anytime and anywhere. Furthermore, no complaints were raised. He submitted detailed reports although he was not requested to do so by his line manager, he did so out of his own volition. He was later told not to send such detailed reports. He communicated daily with Mr. Liang regarding work related issues and he did not raise any issues regarding his performance as such, he was under the impression that they were happy. It was only when he received the letter from HR that he became aware that his performance was not pleasing to the respondent.
78. He referred to the response he wrote to HR after receiving the letter of termination on page 100 of bundle "R" and testified that he believed he should have been measured as a team not as an individual because he also made sales as an individual but also made sure that his sales person was involved. before 22 June 2023, he was not aware that there were issues with his performance. As far as he knew, if an employee is not performing, the employee needs to be made aware and systems put in place to assist the employee. He was never notified that he was underperforming and clause 4.2 of his contract indicated that he should be counselled and the respondent did not comply with this clause. The termination of his probation was purely based on not making sales, not meeting targets.
79. He referred to the email from HR dated 22 June 2023 where they were terminating his probation contract and offering a Key Accounts Manager position with a probationary period of three months and submitted that his view was that if he was not performing, the respondent would not have offered him another contract. The new position was different work and more focused on specific clients. He had a discussion with Mr. Liang in his office and he offered him the Key Accounts Manager position and dealership position. He said he would talk to the legal department to put together a contract which he did. While waiting for the Key Accounts Manager position contract, he drafted the dealership contract. both positions were subsequently withdrawn as he said he was too aggressive. He drafted the dealership contract so that by the time Mr. Liang left for China, he would have signed the contract.
80. Mr. Bruwer further testified that he was never aggressive as mentioned by Mr. Liang's email on page 12 of bundle "A" where he was withdrawing both offers. His email was straight forward, and he did not threaten him and he had a great relationship with everyone although he had clashed with the Finance Manager but they had worked around that.
81. It was his submission that the respondent did not follow the correct procedure in terminating his services. He wanted his name to be restored and not to be humiliated. He could have taken the respondent to great heights but could not achieve it within such a short space of time. He believed in the

respondent's values but not on certain individuals and would go back. He sought reinstatement or compensation.

82. In cross examination, Mr. Bruwer's version was that he had worked in Ghana and Tanzania looking after eleven countries and he left because of family. He travelled and was away from home for a long time. With reference to Mr. Liang's proposed plan of payment for the Salesforce system his version was that the client accepted the proposal, he signed, and Mr. Liang did and he received an invoice which he submitted to the finance department but it was not paid. That was in March 2023, he renegotiated new terms and reported to Mr. Liang. With regards to the warehouse, it was his version that Mr. Liang gave the go ahead with the move, but nothing was communicated formally, only by email. He sent him the contract which he did not sign but asked him to leave it with him.
83. It was Mr. Bruwer's response that he achieved everything in his contract except compliance with local laws and regulations as he tried to get money to perform an audit but did not get approval. He also did not get approval for training He submitted monthly reports via "we transfer" as shown in his email of 09 January 2023 on page 53 where he was informing Mr. Liang that the document, he needed for the annual meeting was sent via "we transfer". He conceded that the April report was sent late because he was busy following up on payment by a client.
84. He got approval for two positions he needed to be filled with the promise of them being increased when he made sales. He approached people for the positions but could not get anyone because of the low remuneration which he communicated to Mr. Liang in an email dated 21 April 2023 and in his monthly reports. It was his further version that he requested information from Mr. Cao about existing and past client in an email of 09 January 2023 but he did not get the information which he mentioned in his monthly report and verbally communicated to Mr. Liang.
85. From a sales perspective, his version was that he need training on internal processes and financial reports and analyzing them in order to see what client revenue they had. he had a couple of hours with Meryl on how to approve on the system and was told he may not have access to all systems. He also needed coaching in order to be aware of what he was doing wrong. When he commenced employment on 03 January 2023, he had an orientation via skype and was taken through his contract. He however needed training to fast track internal processes, policies and procedures. He managed to deliver as per job description with a lot of effort.
86. Mr. Bruwer's further version was that, as a team they made sales of more than three million but it was not reflected in the report on page 113 but showed in the unmarked document of the applicant. and

individually, he made around 2.8 million from existing clients. It was put to him that the report showed amounts owed last year, not sales generated this year to which he responded that he did not agree because he knew that more sales than showed were made by other sales. He conceded that the team did not make target in terms of the contract and that targets were not an issue as they had a long discussion with Mr. Liang before he signed the amended contract in March 2023.

87. He confirmed that he submitted a total of 25 submissions for one claim as it was approved by himself four times. It was for car rental, fuel transport and the internet. It was deducted from his salary without being afforded the opportunity to submit receipts. He did not recall whether he said 4 or 5 because he made a lot of submissions. He confirmed that the claims were not approved for various reasons and agreed they were disbursement not applications.
88. It was Mr. Bruwer's further response that he applied for the business loan although he had no plan except for the fact that he could not pay for company expensed from his pocket because he was paid R50 000.00. He only got paid his full salary in March and he was then able to pay for business travel allowance, petrol, cell phone and the internet but he was not given the opportunity to submit receipts. He disputed that he had been given the money to go to Tanzania.
89. He confirmed that he sent an email to his manager outlining his frustration about money not being readily available making it difficult for him to make quick decisions. The warehouse and office did not move as written. Meryl did report to him, corporate gifts were approved after he begged for them and the only way to travel was through approval by the line manager through the system. he did not apply on the system for the trip to Tanzania but mentioned in in an email to Mr. Liang.
90. He did visit clients such as Barrick Group, Ghana and or as per page 80 of bundle "A". The headquarters of these companies were in Johannesburg. He reiterated that he did not know he was not performing until his meeting with Mr. Liang at the hotel lobby. He received the termination letter from HR on 22 June 2023 and another one from NMS South Africa confirming same. He was not notified that his contract would be terminated. He agreed with Mr. Liang that he would prepare the Key Accounts Manager position proposal while he prepares the dealership agreement. He only learnt for the first time that he was aggressive towards the dealership agreement. He needed to ensure that Mr. Liang did not leave South Africa before seeing the agreement.
91. He did not apply for Sales Director position but was told that Cao was moving to China for another position. Although he was not the Sales Director, Mr. Cao was the key person in the position which is

why he asked him for the information and he promised to provide it when he was in South Africa but he did not.

92. With reference to page 2 of the unmarked document of bundle "A" where he promised to meet and exceed budget and where he said he would have built a sales pipeline by the 4th month, he confirmed these were his sentiments but it was a private conversation between him and his agency.
93. With reference to the workflow process on page 61, he confirmed that he was the first person to approve as he was also a manager followed by Mr. Liang. He also confirmed that he occasionally got approvals, he once got for business kilometers and when he did not get, approval, re applied and even spoke to Mr. Liang. He confirmed that he received money for travel on 03 March 2023 when Mr. Liang came to South Africa before a client approved his trip and just when the client approved the trip, the money was clawed back. It was his further version that when he took the loan, going to Tanzania was part of the plan. When asked how long it took him to plan for a trip, his response was that, it depended on where one was going but could take a minimum of three weeks to plan although he could get a visa on arrival. He indicated that he got the loan after 03 March 2023. He was in communication with the clients in Tanzania but did not have the emails to show.
94. It was Mr. Bruwer's further version that the email on pages 75-77 that Mr. Liang sent to him on 21 April 2023 regarding the order intake for quarter by Africa where he was saying Africa needed to grow was a way of assisting him improve his performance. Nor did he see the reminder to submit a report as a form of assistance. He reiterated that he submitted late because he was following up on a defaulting client. He also did not see Mr. Liang's email about timely reports as a way of supporting him as this was the first time he submitted late. He disputed that he only focused on the warehouse and added that he also concentrated at the offices and branding. He went further to add that the warehouse issue was one of the cost saving initiatives which the respondent did not know as the respondent had the most stock globally and it was eating up revenue.
95. In re-examination, Mr. Bruwer confirmed that when he left Salesforce was still not fully operational as the Finance Manager did not approve because it was not in the budget. He would not approve even if his line manager had approved. As far as he was concerned, his performance was not based on his job description. There was no format for the report before and he would submit a detailed report until he was told not to make it too detailed. He confirmed that there were four vacancies but he was only offered two. He also confirmed that candidates did not accept positions as the remuneration package was little. He could not do anything if he did not have the necessary resources.

96. He reiterated that he was not inducted but orientated which means that he was only introduced as a new employee in the organisation and welcomed. He was also not trained on company policies. He did not have the opportunity to get to understand his team and motivate them, he did not get to understand his client base and their needs, instead, he was told to focus on sales when he asked for a team building exercise. He reiterated that his job was more on a strategic level such as moving offices and the warehouse to be at strategic positions on the freeway.
97. He confirmed that targets were not an issue, if only he could get the resources. He did not know that he could not ask for financials as he was not the CEO. He needed the financials to be up-to-date on the financial flow, financial wellbeing and he wanted to see what orders were coming in to assist him in planning and saving costs. According to his contract, performance was not centralised around sales. He reiterated that the process of going outside the country took a minimum of three weeks depending on where one was going as he first had to get a letter from the host company, submit bank statements for visa application which took about a week and then book accommodation.

Analysis of Evidence and Analysis

98. Section 188(1) of the LRA provides that, “a dismissal that is not automatically unfair is unfair if the employer fails to prove that the reason for the dismissal is a fair reason related to the employee’s conduct or capacity or based on the employer’s operational requirements; and that the dismissal was effected in accordance with a fair procedure”. Subsection (2) further provides that, “any person considering whether or not the dismissal was effected in accordance with a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this act”.
99. The applicant challenged both procedural and substantive fairness of his dismissal. Procedurally in that, no procedure was followed, he was surprised when he received a letter from HR that he was not performing whereas there had been no communication prior. Substantively, that no issues were raised about his performance, the only concerns raised related to his deliverables and he was not given the tools to perform his duties.
100. In terms of the Code of Good Practice: Dismissals on probation, “an employer may require a newly-hired employee to serve a period of probation before the appointment of the employee is confirmed. The purpose of probation is to give the employer an opportunity to evaluate the employee's performance before confirming the appointment. Probation should not be used for purposes not contemplated by this

Code to deprive employees of the status of permanent employment. For example, a practice of dismissing employees who complete their probation periods and replacing them with newly-hired employees, is not consistent with the purpose of probation and constitutes an unfair labour practice. The period of probation should be determined in advance and be of reasonable duration. The length of the probationary period should be determined with reference to the nature of the job and the time it takes to determine the employee's suitability for continued employment. e. During the probationary period, the employee's performance should be assessed. An employer should give an employee reasonable evaluation, instruction, training, guidance or counselling in order to allow the employee to render a satisfactory service. If the employer determines that the employee's performance is below standard, the employer should advise the employee of any aspects in which the employer considers the employee to be failing to meet the required performance standards. If the employer believes that the employee is incompetent, the employer should advise the employee of the respects in which the employee is not competent. The employer may either extend the probationary period or dismiss the employee after complying with sub items (g) or (h), as the case may be. g. The period of probation may only be extended for a reason that relates to the purpose of probation. The period of extension should not be disproportionate to the legitimate purpose that the employer seeks to achieve. h. An employer may only decide to dismiss an employee or extend the probationary period after the employer has invited the employee to make representations and has considered any representations made. A trade union representative or fellow employee may make the representations on behalf of the employee. i. If the employer decides to dismiss the employee or to extend the probationary period, the employer should advise the employee of his or her rights to refer the matter to a council having jurisdiction, or to the Commission. Any person making a decision about the fairness of a dismissal of an employee for poor work performance during or on expiry of the probationary period ought to accept reasons for dismissal that may be less compelling than would be the case in dismissals effected after the completion of the probationary period.

101. In this case the applicant was aware of the standard of performance that was expected of him as it was outlined in his contract of employment under probation and in his job description. In his own words, he did not have a problem with the targets. The probationary period was agreed upon although according to the undisputed version of Mr. Liang, the applicant wanted a shorter period. Although the applicant argued that he was not aware that he was not performing until he received the letter terminating his services, it is my view that, he was constantly reminded to generate sales as show by the evidence of the respondent through emails. He also believed that he would have achieved his targets had he been provided with the necessary tools of the trade.

102. In terms of the code, any person making a decision about the fairness of a dismissal of an employee for poor work performance during or on expiry of the probationary period ought to accept reasons for dismissal that may be less compelling than would be the case in dismissals effected after the completion of the probationary period.
103. Mr. Bruwer was still on probation and was a senior employee. It is trite law that, the standard as set by item 9 above which requires that the employer must instruct, guide and counsel an employee whose performance did not meet the required standards was less stringent when dealing with employees who occupied senior managerial positions. The courts have confirmed that these requirements may not apply in two cases: where the manager or senior employee whose knowledge and experience qualify him to judge for himself whether he is meeting the standards set by the employer and where the degree of professional skill which must be required is so high, and the potential consequences of the smallest departure from that high standard are so serious, that one failure to perform in accordance with those standards is enough to justify dismissal.”
104. It is common cause that the applicant did not meet his sales target in line with his probationary clause in his contract. It is further common cause that the applicant was a senior manager responsible for overseeing the Africa Region. He earned a salary commensurate with the position, was highly qualified and had extensive industry experience, having worked for big companies in the industry who were the respondent’s competition. He had also occupied a similar position before joining the respondent and he came highly recommended. Therefore, by virtue of his experience and qualifications, he ought to have been able to assess on his own that he was not meeting the performance standards.
105. This principle was further confirmed by the Labour Court in the matter of Boss Logistics v Phopi (2010) 31 ILJ 1644 (LC) where it was held that”the measure of instruction, counselling and guidance which an employer has to provide in order to enable an employee to meet the required standard of performance, is dependent on the level of seniority of the employee as well as the latter’s qualifications and experience. The ordinary requirements that an employer must instruct, guide and counsel an employee whose performance is poor, may not apply to a manager or senior employee whose knowledge and experience qualify him to judge whether he is meeting the required standards set by the employer”.
106. To that extent, I do not accept his argument that he was not counselled or trained or that he was not aware that there were performance issues until he received the letter of termination from the respondent. I agree with Mr. Liang that an email from him to the applicant that he should increase sales and being told to make sales his priority should have served as guidance to the applicant to look at his

performance. Mr. Bruwer did not demonstrate how the office and warehouse relocation had a bearing on him visiting local clients or travelling to African countries, and to Tanzania in particular where he had indicated he had a client base or local clients for that matter. He also did not demonstrate how having the tool he wanted was going to assist him in generating sales except to do away with manual system of recording sales.

107. Mr. Bruwer also confirmed that the Finance Manager provided him with the finance information he needed although according to him in formats that were not user-friendly. He also confirmed that Mr. Cao gave sent him only the process flow document. In his own testimony, Mr. Bruwer indicated that he requested permission to hire a warehouse/inventory manager whose importance was that it helped him understand where they were as an organisation. They needed to assess what stock they had in order to speedily assist clients because as it was, they had to go through China to get prices causing a delay which he did not want. Although this was not part of his job description, it would assist with sales to avoid writing off stock. This in my view supports Mr. Liang's argument that the applicant concentrated on things that were not priority.

108. It was argued on behalf of the applicant that he was not provided with the necessary tools to perform his duties. Reliance was placed on the Labour Appeal Court case of Palace Engineering (Pty) Ltd v Ngcobo & other (2014) 35 ILJ 1971 (LAC) where the court held that the evidence supported the arbitrator's finding that the employer's business was dependent on a number of factors and that the employee's performance was impacted on by a shortage of tools of the trade and support staff, as well as a shifting of the goalposts by the employer. The court held that the employee was not given proper support and his efforts were negatively impacted by poor administration. As regards the seniority of the employee, the court found that although senior employees are expected to know the standards that are expected of them and conform to those standards, this does not mean that an employer is relieved of the duty of providing proper resources to assist the employee in meeting the required standards".

109. In this case the applicant was provided with the tools of the trade, therefore this case study does not find application. He had access to a loan which he took but did not utilise for its intended purpose, instead, he kept it in his bank account until the respondent clawed it back. He did not explain why it took him five months to organize a trip to Tanzania after having taken a loan in March already. He was also provided with the financial information he needed and was given a list of the respondent's clients.

110. It was common cause that before the applicant received a letter of termination, he had a meeting with his line manager where the offer of a Key Accounts Manager position was offered together with an offer

of a dealership although both offers were removed from the table, however, it was apparent from the email communication and testimony that, the applicant was more interested in the dealership offer than the Key Accounts Manager position. It was argued by the applicant and on his behalf that if he was not performing why would the respondent offer him another position. This argument does not hold water because, the Key Accounts Manager position was a less senior position and as argued by the respondent, concentrated on specific clients.

111. I found the applicant to be an unreliable witness as his testimony had contradictions and inconsistencies. For instance, he argued that he was not afforded the opportunity to submit receipts to prove that he used the R55 000.00 loan for business purposes, however, as at the time of his dismissal, he still had not submitted the receipts despite his promise to do so in an email to Mr. Liang.
112. He also testified that he submitted 25 claims but in cross examination agreed with the respondent's 1st witness that he only submitted one claim which he resent a number of times because it kept not being approved because of some mistake or error. Furthermore, in cross-examination of the respondent's 1st witness on the issue of claims, the process Ms. Fana explained was disputed and it was argued that these were 25 separate claims which Ms. Fana did not approve. He also initially did not disclose that the first approver was himself as he had the powers to approve.
113. Mr. Bruwer did not produce proof of his communication with his clients in Tanzania where they approved the trip for which he sought a loan of R35 000.00. On the other hand, I found the testimony of the respondent's witnesses to be reliable. Their testimony corroborated, although there were inconsistencies and contradictions, for example, Mr. Liang initially said the applicant never submitted reports but in cross examination he said he did not remember if it was only three. On the same issue, Ms. Fana testified that the applicant did not submit reports at all. In my view, these were not detrimental to the respondent's case.
114. Having considered the testimony of the parties in its totality, I find that the respondent has discharged the onus to prove on a balance of probabilities that it dismissed the applicant for a valid reason and in accordance with a fair procedure. The applicant is therefore not entitled to the relief he sought. To that extent, I order as follows:

Award

1. The dismissal of the applicant, Mr. Jacques Louis Bruwer by NMS Africa (Pty) Ltd, the respondent was procedurally and substantively fair.
2. The applicant is not entitled to any relief.
3. The application is dismissed.
4. The CCMA is directed to close the file.

Thus, done and signed in Johannesburg on 04 October 2023.

Mathabela

Carera Mathabela
CCMA Commissioner.

APPROVED