IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Reportable

CASE NO: JR2766/07

In the matter between:

THE SISONKE PARTNERSHIP t/a INTERNATIONAL

HEALTHCARE DISTRIBUTORS **Applicant**

and

NATIONAL BARGAINING

COUNCIL FOR CHEMICAL INDUSTRY **1st Respondent**

JOHNNY MATHEBULA N.O. **2nd Respondent**

GORDENESTOCK **3rd Respondent**

Judgment

Molahlehi J

Introduction

[1] This is an application for the reviewing and setting aside of the arbitration award made by the second respondent (the arbitrator) on the 2nd October 2007, under case number GPCHEM2158. In terms of

the arbitration award the arbitrator found the dismissal of the third respondent (the employee) to be unfair and awarded compensation in the amount of R89 280. 00.

Background facts

[2] The applicant was involved in the distribution of pharmaceutical products on behalf of other pharmaceutical companies. The employee who was as employed as customer liaison officer was dismissed for misconduct concerning dishonesty. One of the duties of the employees was to record her daily visits to the various chemists and submit a weekly report on her activities. In performing this function the employee used the applicant's car which was fitted with a Netstar tracking device.

[3] The evidence of the witnesses who testified during the arbitration hearing is summarized by the arbitrator in his arbitration award. The summary has not been disputed by the parties and therefore I will not repeat that evidence in this judgment.

[4] The employee was charge with 5 (five) offenses of misconduct concerning dishonesty. She was found guilty of two charges which read as follows:

"1. Breach of the company's disciplinary code and procedure – clause 8.2 - Other offences – gross 'dishonesty;

In that you knowingly reported having called on the following Customers on the 5th of August 2005 when in fact you did not .- Highway Farm see fine 01289; Corry Farm 534382.- Lifecare Pharmaceutical Store 515268; Lifemed Hospital Complex Dispensary 515019 and Mark Herson Pharmacy 501861.

Breach of the employment contract – clause 6. "Duties of employee":

"6.6 Be true and faithful to the company in all dealings and transactions relating to its business and interests. "

In that you were deliberately dishonest in your reporting of the customers visited by yourself on the 5th of August 2005. "

[5] The employee was essentially accused of falsely recording in her report that she visited certain pharmacies. The practice of falsely recording visits which never took place is referred to as "*ghost calling*" and is according to the applicant a dismissal offence.

[6] The case of the applicant during the arbitration hearing was that the employee was on the 5th August 2005, supposed to visit certain specific pharmacies. She was on that day accompanied by her supervisor, Ms Jaume (Jaume), in order to conduct an exercise known as "co-calling". On that day the employee, according to the applicant, only visited Medix Pharmacy and Medicine Depot, Transmed Florida/Apteker and Station Pharmacy.

[7] The chairperson of the disciplinary hearing found the employee guilty as charged and reasoned that it was clear that the employee never travelled to the chemists that she claimed to have visited because that was not supported by the data taken from the tracking system. The decision was based on the fact that the report did not indicate that the car which was driven by the employee entered the areas monitored by the beacons set by the Netstar. In this respect the chairperson of the disciplinary hearing found that it was without question that the beacons would have tracked the vehicle had such vehicle completed the routes which lead to the chemists which the employee claims to have visited.

[8] The case of the employee during the arbitration hearing was that she had visited all the chemists which appear in her report. In this respect

she contended that on the day in question she travelled with Jaume her supervisor to the various chemists reflected in her report. She set out the various chemists she visited on that day in carrying out her task. The details of the chemists she visited are set out in the arbitrator's arbitration award and will not be repeated in this judgment.

Grounds for review

[9] The grounds upon which the applicant seeks to have the arbitration award reviewed and set aside are set out in its founding affidavit in the following term:

> *3.1 The Second Respondent's finding that the Applicant did not prove to the Third Respondent's gross dishonesty was not rationally justifiable having regard to the evidence before him,*
>
> *3.2 Second Respondent's reliance on hearsay evidence constitutes misconduct;*
>
> *3.3 Second Respondent's finding that the Applicant did not prove that the Third Respondent's breach of her duty to be true and faithful to the Applicant in all dealings and transactions relating to its business and interests was*

irrational on the evidence before him and the decision ultimately reached."

[10] In relation to the route which the third respondent claimed to have taken on the day in question, the applicant's complaint is that the arbitrator failed to give proper consideration to the inspection in *loco*, whose purpose was to contrast the route the third respondent claimed to have followed and that which is reflected in the Netstar report.

[11] In this respect the applicant argued that the distance travelled during the in spection in *loco* indicates that the third respondent would have taken much longer time to travel and thus it would not have been possible to have visited all the pharmacists in the time she stated in her testimony.

[12] The other complaint by the applicant is that the arbitrator failed to ascribe proper weight to the fact that the third respondent refused to provide the route she allegedly travelled prior to giving her testimony.

[13] In relation to the testimony of the expert witness Dr Walker, the applicant contended that the arbitrator failed to comprehend that testimony. The essence of the testimony of Walker was as follows:

- The car in which the third respondent was traveling in on the day in question was equipped with a vehicle beacon unit

VBU which is able to detect a signpost within the radius of 100 meters

- The information from the signpost is stored in the vehicle beacon unit and transmits every second a message containing the identity of the vehicle, the identity of the signpost and the elapsed time.
- If a bus or metal object were to block the signal, it would be only temporary as the bus and the vehicle would move apart and the car, as long as it is within 100m, would then pick up the signpost.
- That their current recovery rate was 85% however, this varies from week to week and month to month according to a number of factors.
- The reasons for the loss of vehicles are primarily due to either fraud or thieves immobilizing the device and that less than 5% are due to device failure or system failure.
- That he had no doubt as to the accuracy of the report that the signposts were working on the particular day based on the test record of a day or two before.

[14] In explaining why the vehicle was not picked up near Goldman and Third Street, near the pharmacy which was not disputed the third respondent did visit, Dr Walker (at page 233 of the record) stated the following:

> *"At certain spots you might have some cancellation signal or blocking or whatever and then you just move a short distance away and suddenly it works. I think we have all experienced it with a cell phone where you can get signal on the spot here and you move over to the wind and its fine vice versa. Now if you are in a moving vehicle and the signal is being repeated every second then it was extremely likely that you will have the many blocks along the route. So at some point along the route you will very likely get that signal will picked up."*

[15] The applicant contended that on the evidence presented it was improbable that the third respondent visited the Life Health Complex as there was only one point of entrance into the complex which had a sign post.

[16] In relation to the letters of the pharmacists which the third respondent submitted in support of her defense that she did visit the chemists in question, the applicant contended that that constituted inadmissible

hearsay evidence. The applicant contended that there was no basis for the admission of such hearsay evidence by the arbitrator. The applicant contended that the contents of the letters were hearsay evidence because it did not admit them during the arbitration hearing and also because the third respondent did not proof the authenticity thereof. The applicant further contended that the arbitration award was reviewable because the arbitrator placed reliance in his decision on those inadmissible letters and consequently prejudiced it.

The arbitrator's arbitration award

[17] The arbitrator in his evaluation of the facts and the evidence considered the evidence which was before him and came to the conclusion, as he did, that the dismissal of the third respondent was unfair. In considering the evidence of the key witness of the applicant, concerning the operation of the Netstar system the arbitrator found that there was; "*doubt that an obstacle could block the tracking device from picking up the signal in the applicant's (the third respondent) vehicle"* and further that, "*the 85% recovery rate left room for margin of error . . ."* The arbitrator went further in this respect to say:

> *"24 Even with the evidence of Mr Walker, cross examination by Ms Anderson yielded some concessions on his part.*

He could not explain why the applicant was not picked up at Goldman and Third Streets. He agreed that in vast areas more than 100 metres apart the applicant could not have been picked up. He also conceded that the applicant could have used an alternative route since she was not picked up by the signpost at 6th and Goldman Streets. He also said that it was unlikely but possible for a bus to block a signal. I was not certain as to why he said it was unlikely in this case, he did not elaborate. Furthermore, while it was not disputed that she visited station pharmacy, Mr Walker indicated that there were no signposts in that vicinity. The applicant had also revealed that she had visited Dischem at corner Ontdekkers and Brown yet there was no record of this. This assertion was not disputed. Instead Mr Harper, in his cross examination suggested that it she had failed to report this to which she answered it was not an official visit. I personally was not satisfied by Mr Walker's answer who intimated she could have been picked up by another signpost. Reference was made to page 46 bundle B as to

how the applicant could leave Johannesburg at 13h25 and be at Villiers at 14h23. His response was that he did not know the driving habits of the applicant. Based on the responses he gave, I find it difficult to conclude that the tracking system is without flaws".

[18] It was largely on the basis of the above and the letters received from the pharmacists that the arbitrator came to the conclusion that the dismissal of the third respondent was unfair and ordered compensation.

The law relating to reviews

[19] The test for determining whether or not the Court should interfere with an arbitration award was set out in *Sidumo & another v Rustenburg Platinum Mines Ltd & others (2007) 28 ILJ 2405 (CC).* The Constitutional Court in that case held that an arbitration award can be reviewed on the basis of unreasonableness. An arbitration award is reviewable if it has been shown that it is unreasonable for lack of compliance with the standard of a reasonable decision-maker. The enquiry in this respect entails determining whether the decision that is a subject of the review is one which a reasonable decision maker could not reach.

Evaluation.

[20] The case of the applicant, as I understand it, is based on the proposition that the Nestar system can prove if a vehicle entered or was in an area, hundred meters radius of the signpost. The case of the applicant is further that except in instance of fraud and limited technical problems the system is efficient and accurate. It is apparent from the map drawn by the applicant that the vehicle in question was sometimes registered by more than one sign post at the same time.

[21] There are instances where the evidence indicates that the third respondent’s vehicle was not picked up by the system although it cannot be disputed that the vehicle did enter that particular area. In fact the applicant does not dispute that in certain instances the system did not pick up the third respondent's vehicle when she visited certain chemists.

[22] Dr Walker conceded that there are two periods of thirty six (36) and sixty seven (67) minutes when the system did not pick up the third respondent’s vehicle. He did not dispute that the third respondent could during those periods have visited some of the pharmacists.

[23] The evidence regarding the visit by the third respondent to the Station Pharmacy points to the possible inaccuracy in the tracking device. The

computer print out which was presented indicates that the applicant worked on the Station Pharmacy computer at 10:56.23 on that particular day. When comparing this undisputed evidence with that of the Nestar report there is clearly a discrepancy in that the third respondent did visit that pharmacy but her car was not picked by the Nestar. The Station Pharmacy is near Mark Herson Pharmacy. According, to the inspection in loco the Station and Mark Herson Pharmacies are situated around the corner to each other.

[24] In my view the above analysis indicates very clearly that the applicant had failed to discharge its onus of showing that the third respondent did not visit the two pharmacies. Accordingly and consequently the commissioner cannot be faulted when he found that he had, "*difficulty to conclude that the tracking system is without flaws.*"

[25] In this respect the commissioner cannot in my view be criticised for failing to apply the rules of evidence in particular as concerning the probabilities. The commissioner in this instance was, as a trier of facts was faced with two conflicting versions. The version of applicant was that the third respondent misrepresented the truth when she reported that she visited the pharmacists in question and sought to show that she did not by relying mainly on the Netstar report. The third

respondent on the other hand persisted with her assertion that she visited those pharmacists. In applying his mind to the evidence before him the commissioner clearly came to the conclusion that the applicant has failed to show on the balance of probabilities that the third respondent did not visit the pharmacist in question.

[26] In my view the commissioner in evaluating the probabilities adopted the correct approach which is in line with the jurisprudence of our law. In general in resolving conflicting versions the commissioner as a trier of facts has to make a finding on credibility of witnesses, their reliability and probabilities. And more importantly what the trier of facts has to do according to *Stellenbosch Farmers Winery Group Ltd and Another v Martell and Others 2003 (1) SA 11* at paragraph 5, is to determine whether or not the "*party burdened with the onus of proof has succeeded in discharging it.*"

[27] The commissioner in the present instance in his analysis identified internal contradictions in the version of the applicant in particular in relation to the testimony of Dr Walker. The commissioner found that the testimony of Dr Walker, in relation to the accuracy of the tracking system was unreliable and could therefore not be used as proof that

the third respondent did not visit the pharmacists she reported to have visited.

Hearsay evidence

[28] The hearsay evidence in our law is governed by the provisions of section 3(1) of the Law of Evidence Amendment Act 45 of 1988 (LEAA) which provides that hearsay evidence shall not be admitted as evidence, unless the party against whom such is to be adduced agrees to its admission-, the person upon whose credibility the probative value of the evidence depends testifies or

> *"(c) the court having regard to -*
>
> *(i) the nature of the proceedings,*
>
> *(ii) the nature of the evidence:*
>
> *(iii) the purpose for which the evidence is tendered-,*
>
> *(iv) the probative value of the evidence-,*
>
> *(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends-,*
>
> *(vi) any prejudice to a party which the admission of such evidence might entail-, and*

(vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice"

[29] It is trite that arbitration proceedings are covered by the provisions of the LEAA. See *Southern Sun Hotels (Pty) Ltd v SA Commercial Catering & Allied Workers Union & another (2000) 21 ILJ 1315 (LAC) and (Swiss South Africa (Pty) Ltd v Louw NO & others (2006) 27 ILJ 395 (LC) [2006] 4 BLLR 373 (LC).*

[30] The applicant's complaint, as indicated above, is that the arbitrator accepted and used hearsay evidence in arriving at his conclusion that the dismissal of the third respondent was unfair. This complaint centres around the fact that the arbitrator accepted as evidence the letters from the pharmacists who confirmed in letters that the third respondent did visit them. The applicant contended that the pharmacists who wrote the confirmatory letters were not called to testify and therefore the contents of the letters amounted to hearsay evidence.

[31] In my view the arbitrator cannot be faulted for the approach he adopted in dealing with the evidence of the letters from the

pharmacist, if regard is had to the nature of the proceedings, the nature of the evidence and the purpose for which it was tendered, including its probative value. The approach which was adopted by the arbitrator has to be understood in the context where the evidence in the letters was used to support and confirm the version of the applicant that she, certainly, did visit those pharmacists. The letters also confirm the evidence of a transcript of the telephone conversation by one of the applicant's managers with the pharmacists. The telephone calls were made by the manager to confirm whether or not the third respondent visited those pharmacists. The letters confirm the contents of the telephone transcription that the third respondent did visit the pharmacists in question.

[32] If for any reasons, it could be said that the approach adopted by the arbitrator was irregular, I do not believe in the circumstances of this case, it can be said that it was irregular to the extent of materially prejudicing the applicant. In other words if the irregularity exist at all it would not affect the ultimate finding of the commissioner that the dismissal was unfair. In this respect the other reason which is not so apparent from the commissioner's reasons is the appropriateness of the sanction imposed by the applicant. It is however apparent from the

evidence canvassed that the commissioner was aware of this aspect of fairness. In this respect the commissioner says that the third respondent had been with the applicant for a period exceeding twenty years and that history is underlined by a clean disciplinary record. In line with the decision in *Fidelity Cash Management Service v CCMA & others [2008] 3 BLLR (LAC),* the length of service and a clean disciplinary record over such a long period is one of those reasons that does emerge from evaluation of the fairness of the dismissal and is one of the reasons that this Court has to take into account in evaluating whether or not interference with the arbitrator's award is warranted in the circumstances of this case. This approach is summarized in the editor's summery in later case as follows:

> *"After Sidumo, a reviewing court is free to have regard to all the evidence that was properly before the commissioner, and to sustain an award if that evidence supported the conclusion, even if it was not stated."*

[33] It is thus my view that for the above reason also there is no basis in law for this Court to interfere with the arbitrator's arbitration award.

[34] The commissioner can also not be faulted for not requiring any of the parties to call the pharmacists to testify about the letters. The approach adopted by the arbitrator is in line with wider powers given to him by

the provisions of section 138 of the Labour Relations Act 66 of 1995 (LRA). Section 138 of the LRA provides that:

> "*The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly but must deal with the substantial merits of the dispute with the minimum of legal formalities.*"

Conclusion

[35] In the light of the above evaluation I am of the view that the applicant has failed to make out a case warranting interference by this court with the arbitrator's award. Accordingly the application to review and set aside the arbitration award stands to fail. I see no reason in law and fairness why costs should not follow the results.

[36] In the premises the application to review the arbitration award issued under case GPCHEM 215A dated 2nd October 2007 is dismissed with costs.

Molahlehi J

Date of Hearing: 20 September 2009

Date of Judgment: 26 March 2010

Appearances

For the Applicant: Adv Ashley Cook

Instructed by: Cowan Harper Attorney

For the Respondent: Mr R Anderson

Instructed by: Riki Anderson Attorneys