REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA 51/10

In the matter between:

SISONKE PARTNERSHIP	**Appellant**
T/A INTERNATIONAL HEALTHCARE DISTRIBUTORS	
and	
NATIONAL BARGAINING COUNCIL FO	**First Respondent**
THE CHEMICAL INDUSTRY	
COMMISIONER J MATHEBULA	**Second Respondent**
GORDENE STOCK	**Third Respondent**

Heard: **01 September 2011**

Delivered: **09 July 2013**

Summary: Labour Law – Review of arbitration award of the Commission for Conciliation Mediation and Arbitration – reliability of the Netstar tracking device - Commissioner correctly applying his mind to the evidence before him and not relying

LABOUR APPEAL COURT

entirely on letters – Labour Court Judgment upholding award upheld- Appeal dismissed with costs.

JUDGMENT

MOCUMIE AJA

[1] The appellant distributes pharmaceutical products on behalf of pharmaceutical companies. Ms Gordene Stock, the third respondent (Ms Stock) was in the employ of the appellant from January 2000 until her dismissal in 2005. This case arises from what is generally known as *"ghost calling"* i.e. the dishonest practice of a salesperson falsely reporting visits to customers. Ms Stock was dismissed for allegedly engaging in such conduct. She was however successful in persuading the second respondent (the Commissioner), in proceedings of the Commission for Conciliation, Mediation and Arbitration (CCMA), to rule that her dismissal was substantively unfair. The appellant instituted review proceedings in the Labour Court seeking to have the CCMA award set aside but the Labour Court dismissed the review application. The appellant now appeals with leave of the Labour Court to this Court against the whole judgment and order of the Labour Court.

[2] In terms of the arbitration award, the Commissioner held that the appellant's dismissal of Ms Stock was substantively unfair and awarded the employee R89 280, being six months' salary calculated at R14 880.00 per month.

[3] It is common cause that Ms Stock was employed as a Customer Liaison Officer (CLO) and reported to Ms Marieta Jaume ("Ms Jaume") a manager, until her dismissal. She was charged with five counts of misconduct in the internal disciplinary proceedings and was found guilty of two counts of making false reports. The disciplinary enquiry findings read as follows:

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

LABOUR APPEAL COURT

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 50186.

2. Breach of 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.'

[4] The duties of a CLO are "to build and maintain relationships with pharmacies as well as to deal with their queries and complaints". The CLO is also responsible for seeking to improve the sale of pharmaceutical products to pharmacies by the appellant. The appellant provided the CLO with a company vehicle to perform her duties.

[5] As part of her duties, Ms Stock, like other CLO's, was required to visit pharmacies daily. Such visits were to be recorded and submitted in a weekly report.

[6] Sometime during the course of its business, the appellant experienced a drop in orders, which concerned the appellant. The appellant took various steps to remedy the situation, including monitoring the daily activities of CLO's on a random basis as part of an audit process. To that extent it sought assistance from Netstar Tracing and Recovery Systems Company, a specialist company in the recovery of vehicles.

[7] The appellant entered into a contract with Netstar, which entailed that Netstar would place vehicle recovery/monitoring devices in the company motor vehicles used by CLO's, which devices were to be activated during working hours. The devices would monitor the whereabouts of CLO's during their daily schedules.

LABOUR APPEAL COURT

[8] On 5 August 2005, Ms Stock called on customers. She was accompanied by her manager, Ms Jaume, on what the appellant calls "co-calling"[1] which is undertaken every six weeks. Ms Stock submitted her weekly report between 9 and 10 August 2005 in which she recorded what she did during the week of 5 August. The appellant considered all other records. As a result of some discrepancies in the records for the week of 5 August the appellant observed, Ms Stock was confronted. She did not give a plausible explanation except to insist that she had visited all the pharmacies she had reported visiting on 5 August 2005 before leaving for Kwazulu-Natal on that day.

[9] At the arbitration the appellant led evidence of Ms Tracy Frank (Ms Frank) and Dr Conrad Walker (Dr Walker). Ms Frank testified that she had worked for eight and half years for the appellant. In 2005, she had two years in her current position, in the Corporate and National Clear Accounts section.

[10] She testified that during the period of August 2005 "she was conducting an audit analysis of CLO's nationally" to determine whether resources were adequately utilised and to review the fairness of the stipulated benchmarks for CLOs, which was eight (8) customer visits per day. Eight visits per day would require the CLO to work from 8h30 to 16h00.

[11] In her analysis, she noticed that the Netstar report showed that Ms Stock travelled to Pietermaritzburg, KwaZulu Natal, on 5 August and yet the weekly report reflected that she had visited nine clients as if she had worked for a full day, 8h30-16h00, that day. As she analysed the information, when comparing the weekly report and the Netstar report, the time frames and areas did not correspond.

[12] To check this, Ms Frank drove in her own car to the nine pharmacies between 15 and 22 August. She also met with a Mr Stouger of Netstar who drew a map of the route the employee was supposed to follow on her daily visits. She also contacted some of the pharmacies. Some confirmed that the employee visited them whilst others did not come back to her. Based on the map by Netstar and her own investigations she

[1] Co-calling means the employee is accompanied by her supervisor or manager during her or his customer visits to improve the employee's performance or take note of her or his performance during the visits.

LABOUR APPEAL COURT

came to the conclusion that it was not possible for Ms Stock to have visited the nine pharmacies she had reported to have visited on 5 August within the time she alleged.

[13] Dr Conrad Walker, the appellant's expert and Netstar Vehicle Recovery System developer testified that the vehicle Ms Stock was travelling in as she was visiting the various pharmacies on 5 August 2005 was tracked and monitored by Netstar by a device he had developed. He also testified that the device did not continually detect the vehicle's movement due to obstructions or lack of network in certain areas where the monitored vehicle was travelling or was stationed and that the tracking device could not trace the vehicle at some of the areas that it was common cause she visited that day.

[14] Ms Stock gave evidence herself and also led Ms Jaume as a witness during the arbitration. Ms Stock stated that on the morning of 5 August, she had waited at home for Ms Jaume to arrive. Ms Jaume arrived an hour late at 9h30, and she left her vehicle at her, Ms Stock's home. The two of them then travelled in her vehicle to the pharmacies she was accused of not having visited. She maintained that she did not use the routes the appellant expected her to use.She insisted on this even after the appellant conducted an inspection *in loco* and it emerged that she could not point out the exact route she followed. She also testified that she sought confirmation of her visits from all the pharmacists who gave her letters that the Commissioner accepted as part of the evidence. I will revert to this later in the judgment. The reason why she was dismissed, she alleged, was her association or friendship with Ms Jaume who, she said, the appellant wanted to 'get rid' of as a result of a case she had opened against one of the appellant's senior managers, referred to as principals.

[15] Ms Jaume, during the arbitration, confirmed that Ms Stock had not "ghost-called" on 5 August. As a manager, she said, she would not have allowed "ghost-calling" or at least would have disciplined Ms Stock if she had become aware that Ms Stock was "ghost-calling".

[16] The appellant submitted that Ms Stock ghost called on 5 August 2005 at two pharmacies based on the Netstar report and its own investigations. Ms Stock on the

LABOUR APPEAL COURT

other hand submitted that she did call on all the nine pharmacies allocated to her but used different routes to those the appellant expected her to have used that is why the Netstar vehicle recovery device could and did not pick her vehicle even at pharmacies she had visited but accused of not having visited.

[17] In considering the evidence of the appellant's key witness concerning the operation of the tracking device, Dr Walker, the Commissioner found that

> 'I am also not persuaded by the evidence of Mr Walker with regard to the accuracy of the tracking system used by the respondent [appellant].While Ms Anderson tried her utmost to prove otherwise through cross-examination she could offer nothing more than the creation of doubt that an obstacle could block the tracking device from picking up a signal in the applicant vehicle. Mr Walker had conceded to this…The 85% recovery rate left room for a margin of error, which Mr Walker attributed to corruption, thieves finding [the] device as well as the failure of the beacons…Even with the evidence 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 100metres apart the applicant could not have been picked up. He also conceded that the applicant could have used alternative routes since she was not picked up by the signpost at 6th and Goldman Streets. He also said it was unlikely in this case…I find it difficult to conclude that the tracking system was without flaws…'

[18] The Commissioner came to the conclusion that Ms Stock's dismissal was substantively unfair and ordered the payment of just and equitable compensation.

[19] Aggrieved by the Commissioner's award, the appellant launched an application to review and set aside the award principally on the following grounds:

(a) the Commissioner's finding that the appellant did not prove Stock's gross dishonesty was not rationally justifiable having regard to the evidence before him;

(b) the Commissioner's reliance on hearsay evidence was inappropriate;

LABOUR APPEAL COURT

(c) the Commissioner's finding, that the appellant had not proved that Stock had breached her duty to be true and faithful to the appellant in all dealings and transactions relating to its business and interests was irrational on the evidence.

[20] In dismissing the application for review and setting aside of the Commissioner's award, the Labour Court referred to section 145 of the Labour Relations Act 66 of 1995 (the LRA) and was conscious of the test laid down in the seminal judgment of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others.*[2] The Court understood that the essential question was whether the award was one that a reasonable decision-maker could reach. However, it accepted Ms Stock's version to be more probable and held that the Commissioner had applied his mind to the material facts before him and that his decision was reasonable.

[21] The Labour Court also concluded that it could not be said that the Commissioner did not apply his mind to the appropriateness of the sanction. It was of the view that the Commissioner took into account the years that Ms Stock had been in the appellant's employ. It was however common cause that Ms Stock was in the appellant's employ for five and a half years at the time of her dismissal and not one year as was found, erroneously, by the Labour Court.

[22] On appeal, the appellant's counsel submitted that the Commissioner's disregard of Dr Walker's evidence constituted an irregularity. It was submitted further that the fact that Dr Walker conceded that the tracking device could not detect Ms Stock's vehicle in certain areas was adequately explained in that Dr Walker gave a reason for every failure in the tracking process. The appellant also noted that some of the charges proffered against Ms Stock had been abandoned or were not pursued given the identified tracking failures. What remained clear from Dr Walker's evidence, argued appellant's counsel, was the fact that the tracking device did not confirm that Ms Stock had visited two hospitals, Lifemed and Lifecare she asserted she had. According to Dr Walker, which was also common cause between the parties, the two

[2] [2007] 12 BLLR 1097 (CC).

LABOUR APPEAL COURT

hospitals have a common entrance and the tracking device at that entrance was functioning properly on 5 August, yet the vehicle she was travelling in that day was not detected entering or leaving the premises of the two hospitals.

[23] Ms Stock's evidence during the arbitration was that, with regard to the two hospitals she is accused of not having visited, she walked into the premises and did not drive.

[24] Did the arbitrator fairly disregard evidence of the Netstar vehicle recovery device? The essence of Dr Walker's evidence, after a number of pointed concessions on the unreliability of the Netstar device with respect to the route(s) that Ms Stock took on 5 August as well as her failure to explain why the device did not detect her vehicle at the entrance to the two hospitals she's accused of not having visited is that, based on the fact that the device at this particular entrance was functioning properly, which was common cause between the parties, Ms Stock did not visit Lifemed and Lifecare hospitals. As indicated earlier on, these two hospitals, Lifemed and Lifecare, used one entrance as an entrance and exit point. Not only did the device did not detect her vehicle at these hospitals, so the appellant submitted, no one saw her and no one acknowledged her presence or corroborated her version. This cannot be correct because during arbitration, Ms Stock testified that at one of the hospital pharmacies she spoke to somebody but that person was busy and thus she could not spend more time with him after he indicated that much. Ms Jaume did not go into the pharmacy with her as she did at other pharmacies but remained in the vehicle in the parking area, answering her cell phone. At the second hospital pharmacy, she spoke to the person at the 'gate' as the hospital, the TB one, generally did not allow people in based on its policy on communicable diseases. However she got the information she required. She confirmed that she did not go into the premises of the two hospitals in her vehicle but walked from a parking area of a hospital she visited nearby the two hospitals. On this basis alone, there can be no merit in the appellant's submission that the Commissioner's consideration of Dr Walker's evidence was inappropriate.

[25] Should the corroborating hearsay letters from pharmacies have been admitted? As regards the Commissioner's reliance on "hearsay evidence", the appellant argued

LABOUR APPEAL COURT

that the Commissioner should not have admitted the letters from the pharmacists without the authenticity of such letters having been proven alternatively without the pharmacists having been called to testify. That on its own, the appellant argued, was an irregularity so gross that it made the decision of the Commissioner irregular and thus reviewable as contemplated in section 145(2)(a).

[26] The law applicable to the admission of hearsay evidence is encoded in section 3 of the Law of Evidence Amendment Act 45 of 1998 which states:

> '3(1) 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 or 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 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.'

[27] There is no absolute prohibition against the admission of hearsay evidence by a Commissioner in arbitration proceedings, which are meant to be swift and informal. The Labour Appeal Court considered section 3 of the Law of Evidence Amendment

LABOUR APPEAL COURT

Act in the *Southern Sun Hotels* (*Pty*) *Ltd* v *SA Commercial Catering & Allied Workers Union and Another,*[3] where Zondo AJP stated:

> 'Furthermore it must also be taken into account that, since the legislature intended hearsay evidence to be admitted in courts of law if to do so would be in the interest of justice, it is highly unlikely that the legislature would demand a higher test before hearsay evidence can be admitted by an administrative tribunal like the Industrial Court than the test to be applied by courts of law in the admission of hearsay evidence.'

[28] As aptly pointed out by Cele AJ in *Swiss South Africa* (*Pty) Ltd* v *Louw NO and Others,*[4]:

> 'Depending on the circumstances of each particular case, hearsay evidence may accordingly be admitted by an arbitrator in the proceedings held before him or her under the auspices of the CCMA. A further aid to the arbitrator in this regard lies in s138 of the Act. It provides:
>
> 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.'

[29] Section 138 of the LRA also requires an arbitrator to deal with a matter quickly and fairly with the least legal formalities, but with the obligation to deal with the substantial merits of the dispute. I cannot find fault in the manner in which the Commissioner dealt with this aspect. There is nothing that prohibited him from doing so in this case. In any event, he did not rely entirely on the letters produced by Ms Stock. He also relied on calls made to pharmacies by the appellant through Ms Frank, some either confirmed the visits and others did not respond. This is so, particularly taking into account that, ultimately the appellant's case was based on 'ghost calling' of only two hospitals which did not impact on the appellant's case at all, which was to a large extent reliant on Netstar's report. [30] Did the arbitrator properly assess the

[3] (2000) 21 ILJ 1315 (LAC) at para 28.See too *Edcon Ltd v Pillemer NO and Others* [2008] 5 BLLR 391 (LAC);*Foschini Group v Maidi and Others* [2010] 7 BLLR 689 (LAC).
[4] (2006) 27 ILJ 395 (LC) at 403 C-D par 43.

LABOUR APPEAL COURT

relevance of Ms Frank's evidence? The least that the Commissioner can be criticised on is his disregard of Ms Frank's evidence that she conducted her own investigations; compared Netstar's report [with all its shortcomings] to Ms Stock's own weekly report, travelled the same routes Ms Stock was supposed to have travelled on 5 August i.e. nine clients/accounts in seven areas; and found that the time taken did not correspond to what Ms Stock had set out in her report and thus she could not have visited all nine clients from 9h30 to at least 11h30 or 12h30, when Netstar detected her vehicle back at her premises and, in her own version, then left for Pietermaritzburg. If it is accepted as Ms Frank testified that each CLO spent seven and half to eight hours per day visiting clients, then logically Ms Stock could not have visited nine pharmacies and arrived in Pietermaritzburg by 18h00.

[31] The only remark the Commissioner made with regards to Ms Frank's evidence during the arbitration award is that

> '[t]he testimony of Ms T Frank was that the applicant had difficulty in recalling the route on the day of the disciplinary hearing.She also could not give this route on the day of the inspection in loco. It is strange that on the day of the arbitration she could recall the route she had taken, which is after the respondent had struggled to piece together what might have been her route. I find this conduct opportunistic and cannot make head or tail of it...'

[31] However that is not what the appeal is about. The gravamen of the appellant's submissions that,

> '(a) the Commissioner's finding that the appellant did not prove Stock's gross dishonesty was not rationally justifiable having regard to the evidence before him;
>
> (b) the Commissioner's reliance on hearsay evidence was inappropriate;
>
> (c) the Commissioner's finding, that the appellant had not proved that Stock had breached her duty to be true and faithful to the appellant in all dealings and transactions relating to its business and interests was irrational on the evidence.'

is not supported by the evidence which was before the Commissioner.

LABOUR APPEAL COURT

[32] In light of the conclusion I have come to above, I cannot find that the Commissioner's decision was not one a reasonable Commissioner could not make. Accordingly, the Labour Court did not err in its conclusion that the Commissioner's decision was reasonable and the appeal can therefore not succeed.

[33] The respondents have been successful there is no reason why costs should not follow suit.

[34] In the circumstances, I would dismiss the appeal and order that the award of the Commissioner be confirmed. Costs to follow suit.

_____

Mocumie AJA

[35] I have considered the judgment prepared by Mocumie AJA and whilst I agree with the conclusion she has arrived in, I prefer to state my reasons differently.

[36] Perhaps as a point of departure it must be stated that the commissioner considered all the evidence before him before issuing the award in favour of Stock. It is clear to me, contrary to the appellant's argument on appeal that the letters written by the pharmacists, confirming her attendance at their premises on the day she is alleged to have ghost called, played no pivotal role in the commissioner's reasoning. In this regard there is direct evidence that a certain Ms Frank, an employee of the appellant, telephoned the pharmacists Stock is alleged not to have visited. The evidence on record is to the effect that the pharmacists confirmed to Ms Frank that Stock had indeed visited them during the period in issue and that Jaume was with her.

[37] In any event the foundational reasoning of the commissioner focuses on the reliability of the Netstar device relied on by the appellant to track Stock's movements on the day in question. In this regard it is common cause that the device is not a vehicle tracking device but a recovery one. The appellant's expert confirmed that the device does not have satellite nor GPS capabilities and that it relied on radio waves

LABOUR APPEAL COURT

transmitted by receivers fitted on street light poles and buildings. The appellant's expert conceded that the functional capability of the device was influenced by buildings, large vehicles and other obstacles. Clearly this affected the reliability of the device, and the commissioner was alive to this reality.

[38] The commissioner's view of the unreliability of the device was fortified by the fact that the device did not pick up Stock when she visited certain pharmacies on the day in question which is common cause that she did. An example is Stock's visit to Station pharmacy which went undetected by the device. It is also common cause that there are at least two periods of 36 and 67 minutes when the device did not pick up Stock's movements.

[39] The commissioner can therefore not be faulted in reasoning that the Netstar device solely relied on by the appellant could not be relied on to show that Stock had made herself guilty of ghost calling. This, we should remind ourselves, discounts the role if any, of the letters from the pharmacists, which informs the appellant's hearsay complaint.

[40] In my view, the commissioner clearly considered all the material before him and arrived at a decision that a reasonable decision-maker would have arrived at. Based on these brief reasons, I agree that the appeal be dismissed with costs.

_____

Mlambo JP

I concur

_____

Sandi AJA

LABOUR APPEAL COURT

APPEARANCES:

FOR THE APPELLANT:	Cowen Harper Attorneys
FOR THE THIRD RESPONDENT:	Riki Anderson Attorneys

LABOUR APPEAL COURT