**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA**

**HELD AT JOHANNESBURG** Case no: JA37/07

In the matter between:

**Cheryl Gaw Agencies CC** Appellant

and

**Smanga Toli N.O.** First Respondent

**Commission for Conciliation**

**Mediation and Arbitration** Second Respondent

**Ilza Brits** Third Respondent

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**JUDGMENT**

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<u>KRUGER AJA:</u>

[1] This is an appeal against the judgment of the Labour Court upholding an award by the first respondent that the dismissal of the third respondent was substantively unfair, and ordering the appellant to pay compensation of R64 000, equivalent to four months' salary. The two related questions which arise for decision in this case are first, the appropriateness of the sanction of dismissal in the circumstance and second the question

whether a reasonable arbitrator could have come to the conclusion which the first respondent reached.

[2] The third respondent was employed by Famoco (Pty) Ltd as a sales manager in a division trading as Network Field Marketing. She started working there on 1 September 1998. The appellant Close Corporation, of which Cheryl Gaw was a member, bought the Network Field Marketing division of Famoco (Pty) Ltd in February 2003, and that division was transferred to Cheryl Gaw Agencies CC as a going concern in March 2003. The third respondent was dismissed on 1 July 2005.

[3] The conduct of the third respondent complained of was the selling of a product called "Loose it", from October 2002 to January 2003, which was not sold on behalf of Network Field Marketing, and which the third respondent, as a sales manager, asked the sales representatives working under her if they would be interested to sell so as to make extra money.

[4] After the Close Corporation took over the business, Ms Gaw for the first time became aware of the third respondent's involvement in the sale of "Loose it" on 17 June 2005 when one of the employees, who resigned, Christelle Streal, told Gaw about the sales. One of the sales

representatives Monica Mare, who sold “Loose it” during that period, was merely counselled by Gaw, and given the position of “sales supervisor”.

[5] The third respondent received a notification to attend a disciplinary enquiry on a charge of misconduct: “gross dishonesty in that you conducted your own business in Network Field Marketing time in 2002-2003”. At the disciplinary enquiry she was convicted and the sanction was summary dismissal. The third respondent took the matter to the Commission for Conciliation, Mediation and Arbitration (“CCMA”) (second respondent) where the first respondent found the dismissal to be substantively unfair and ordered the appellant to pay four months’ salary (R 64 000) in compensation. The first respondent ordered the appellant to pay third respondent’s costs. The main findings of the first respondent were the following:

“This dismissal was unfair under the following reasons:

(1) I hold a strong opinion that Labour disputes have to be dealt with totally different from criminal matters. In criminal law a crime is punishable no matter the duration whereas in labour law is not necessarily the case.

(2) The applicant was harshly dealt with for a three year old offence, which was unfair and unreasonable.

(3) The offence occurred before the present management bought the respondent.

(4) The respondent suffered no prejudice or harm as a result of the applicant's conduct then, under the old employer. She never repeated the same offence with the new employer.

(5) If this offence was recent, I would have decided in favour of the respondent for numerous serious reasons".

[6] The appellant took the matter on review to the Labour Court. The Labour Court held that the conclusions of the first respondent were rationally connected to the evidence. The Labour Court set aside the costs order against the appellant made at the CCMA, but otherwise left the order made at the CCMA intact. The Labour Court ordered the appellant to pay the costs of the review.

[7] The appellant now appeals against the judgment of the Labour Court, with leave of that court. Mr Beaton on behalf of the appellant argues that the reasons advanced by the first respondent do not justify the conclusions drawn from them. He refers to three considerations which he submits led to the finding of the first respondent that the dismissal was unfair:

(a) The length of time between the conduct complained of and the dismissal - some two and a half years.

(b) The fact that there was different management at the time of dismissal (the Network Field Marketing Division was taken over by Cheryl Gaw Agencies CC).

(c) The fact that Apellant suffered no prejudice because the conduct occurred under the previous employer.

The appellant's case is that the reasons adduced by the first respondent do not justify the conclusions drawn, with reference to *Sidumo and Another* v *Rustenburg Platinum Mines (Pty) Ltd and Others* (2007) 28 ILJ 2405 (CC) paras [105]-[110].

[8] Mr Beaton contends, as to the delay, that the first respondent should have considered whether the delay was such as to render disciplinary proceedings and the resultant dismissal unfair with reference to the unreported judgment in *NUM and Another* v *CCMA and Others,* Case NO: JR 1896/06 of 22 February 2008. He submits that the circumstances of the delay were:

i. Applicant only became aware of the misconduct during June 2005.

ii. The third Respondent's conduct was deliberately kept from Appellant's member, Ms Gaw at third respondent's instance.

iii. Third respondent was aware that the practice of selling "other" products was wrong.

Mr Beaton submits that these factors were not properly considered, or given due weight, by the first respondent. This amounted to a failure on the part of the first respondent to consider the real issue, which is a reviewable irregularity (*SA Revenue Service* v *CCMA and Others* (2001) 22 ILJ 1680 (LC) par 32). Thus counsel submits that the award is tainted with gross irregularity or was a conclusion to which no arbitrator could reasonably have come.

[9] In response to Mr Beaton's contentions as to the time lapse, Mrs Anderson, for the third respondent, submits that it is insignificant that the appellant only became aware of the third respondent's conduct during June 2005. The first respondent correctly found it as a fact because it was common cause. Mrs Anderson points out that the time lapse is significant because it eliminates speculation about appellant's future conduct. Third respondent stopped with the sales when she heard that Gaw was taking over the business. Third respondent never repeated the same offence under the new employer. One now knows that she did not repeat that conduct for three years.

[10] The second criticism levelled against the award relates to the change in management. The finding of the first respondent was that one of the reasons why the dismissal was unfair was because "The offence occurred before the present management bought the respondent". Mr Beaton, for appellant, contends that this was a Section 197 take over, and the rights to dismiss were transferred to the new employer.

[11] Mrs Anderson points out that third respondent never took issue with the Appellant's right to have taken disciplinary action against her. In view of the concession of Mr Anderson that section 197 applies, it is not necessary to decide whether section 197 also grants rights to the employer. The third respondent's case was always that dismissal is not an appropriate sanction. On behalf of the third respondent the point is made that there was no evidence as to what the old employer's attitude would have been on the issue of the gravity of the offence, trust, and the appropriate sanction. No evidence was given on those topics. The duty to prove the fairness of the dismissal rests on the appellant. In the absence of evidence that the conduct would constitute a dismissible offence in relation to the old employer, fairness cannot be said to have been established by the appellant, either in terms of the consistent application of the rule by the old

employer or with reference to consistent application of dismissal for this type of transgression.

[12] With reference to the finding that there was no prejudice to the employer, Mr Beaton refers to *Sappi Novaboard* (*Pty*) *Ltd* v *Bolleurs* (1998) 19 ILJ 784 (LAC), especially par [9], where the Labour Appeal Court held that the earning of an undisclosed commission constituted conduct inconsistent with the fiduciary relationship, giving a valid reason to dismiss. Mrs Anderson correctly points out that the facts in *Sappi Novabord* (*supra*) are distinguishable. In *Sappi Novabord* the commission which the employee, an admitted attorney, took was directly linked to the performance of his duty to collect the monies owed by a debtor. He kept the commission and falsely reflected it as a fee earned as a lawyer (par [9]). In third respondent's case the monies earned were unconnected to any product of her employer, and the money was not taken from her employer. No prejudice to the employer was established.

[13] In assessing whether the dismissal was an appropriate sanction, in *Sidumo* (par [117]) it is stated that the absence of dishonesty is a significant factor in favour of the application of progressive discipline. The absence of losses is also a significant factor. The period of service

without having committed any transgressions (clean and lengthy service) is a significant factor (*Sidumo* par [117]). In this case the third respondent had seven years' service without even a written warning. No losses were suffered by the old or new employer. She never denied what she did. Because of the time lapse after the conduct, one knows that the risk of repetition was slight. These were all important factors against dismissal being an appropriate sanction. The first respondent was correct to take the time lapse into account as a factor in favour of the third respondent. As to the relevance of different management, the first respondent did not hold that the new management was barred from acting - it is however relevant that there was no evidence as to what the old employer's policy was. Regarding the lack of prejudice, the third respondent has established that the employer suffered no prejudice and it cannot be said to have been wrong for the first respondent to take that into account.

[14] The test to be applied, according to *Sidumo*, is whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The test is not limited to the question whether the decision is justifiable in relation to the reasons (*Sidumo* par [110] contrasting *Carephone* (*Pty*) *Ltd* v *Marcus NO and Others* 1999 (3) SA 304 (LAC); (1998) 19 ILJ 1425 (LAC)). Mr Beaton

concedes that the first respondent's finding is justifiable based on the evidence. That means that the first respondent's decision cannot be said to be one which a reasonable decision maker could not reach (*Sidumo* par [110]).

[15] On the evidence it cannot be said that the decision of the first respondent was one which a reasonable decision maker could not reach.

[16] The Appeal is dismissed with costs.

Kruger AJA

I agree
Khampepe ADJP

I agree
Tlaletsi AJA

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| Date of hearing | 11 September 2008 |
| Date of Judgment | 08 October 2008 |
| For the Appellant | Advocate Beaton<br>Instructed by: Fred Vogel Attorneys |
| For the Respondent | Mrs R Anderson (Attorney) |