

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

CASE NO: JR 2802-09

In the matter between

**NETWORK FIELD MARKETING
(PTY) LTD**

1st Applicant

and

K MNGEZANA N.O.

1st Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

2nd Respondent

DANIEL KGWADI

3rd Respondent

JUDGMENT

LAGRANGE, J

Introduction

- 1] The matter before the court is an application to review an arbitration award issued by the first respondent, a commissioner of the second respondent ('the CCMA') on 30 August 2009. The applicant also sought condonation for the late filing of its heads of argument which the third respondent did not persist in opposing. The four day lateness in filing heads was condoned.

Background

- 2] The third respondent, the former employee of the applicant, was dismissed on 25 November 2008. He held the position of a district manager at the time of his dismissal and also was a marketing representative. The employee was found guilty of three charges of misconduct, namely gross dishonesty, bringing the applicant company's name into disrepute and acting detrimentally to the employer-employee relationship.
- 3] The charges all stem from one incident involving a purported attempt by the employee to sell battery stock to a third party whereas that stock should have been used to provide free stock to existing retail customers of a client of the applicant. The client in question is a company, Procter & Gamble. Amongst other things it manufactures and sells Duracell batteries. The applicant markets the batteries to various retail outlets identified by the client, and Procter & Gamble supplies and sells the batteries to the retailers.
- 4] It was alleged that the employee had visited a former marketing contact, a Mr D Steinberg, previously employed at a Checkers store, at Steinberg's new business premises. Steinberg had recently left Checkers and was running his own retail outlet. Steinberg, who testified at the arbitration hearing, claimed that the employee had tried to sell him batteries and given him a handwritten quotation. He said he was suspicious about the employee's approach because he knew from past experience in dealing with him at Checkers that the applicant's marketing representatives did not sell products themselves. After obtaining the quotation, he phoned another battery supplier to find out the price they were asking for Duracell batteries.
- 5] It seems the supplier then contacted Procter & Gamble to complain about what it perceived to be marketing activity by the applicant which Procter & Gamble would not have permitted. Procter & Gamble in turn contacted the applicant to complain about the perceived attempt by the employee to approach a retailer which it had not identified as a potential customer.

The Award

- 6] In one respect the arbitration award is substantial. The arbitrator provides a relatively detailed summary of the evidence comprising the bulk of the densely typed 12 page award. The arbitrator then set out his evaluation of the evidence in a few terse paragraphs, as follows:

“113. The objective analysis of the evidence adduced by both parties’ witnesses indicates that the Applicant had not committed any serious misconduct that would warrant dismissal. The Respondent failed to prove that the Applicant had tried to sell free stock to David Steinberg. Steinberg was totally not a reliable witness.

114. He had testified that the Applicant had visited him in the morning around 10h00am, but when it was put to him under cross examination that the Applicant only visited him in the afternoon at 15h35, he said that was possible. The two times are totally different times and cannot be viewed as synonymous.

115. Furthermore, the Respondent failed to prove that the Applicant had committed any serious misconduct dismissible in law.

116. I therefore reject the testimony from both Respondents’ witnesses as baseless and without substance because both witnesses did not know what the time was when the Applicant visited Steinberg.

117. Furthermore, the Applicant’s actions would have only benefited the Respondent and not himself. He would not have been able to sell the free stock because as he said, the party that received it must acknowledge that it received the free stock.

118. I accept the Applicant’s testimony because he had been consistent in his evidence from the beginning to the end.”

- 7] In consequence of his findings the arbitrator then reinstated the applicant retrospectively to the date of his dismissal

Grounds of Review

- 8] Essentially, the applicant has raised three substantive grounds of review. Firstly, the applicant takes issue with the arbitrator's stated basis for his credibility finding against the applicant's two witnesses. The applicant is effectively arguing that conflicting evidence about the time the applicant visited Steinberg was an insufficient factual basis for disbelieving all the evidence of both witnesses.
- 9] Secondly, and related to the first ground, the applicant complains that the arbitrator failed to properly consider or take account of the evidence of its witnesses which ought to have been given more weight than the uncorroborated evidence of the employee.
- 10] Thirdly, the applicant contends that the arbitrator's finding that the employee's actions would in fact have benefitted the applicant and not the employee himself was without a factual basis. On the contrary, the applicant nearly lost its client Procter & Gamble in consequence of the employee's approach to Steinberg.
- 11] Mr Khoza, who represented the employee, argued that these criticisms were misplaced. The fact that the arbitrator mentioned the contradiction in the evidence about the time of the visit to Steinberg was merely illustrative and must be seen against his evaluation of the evidence as a whole. Secondly, it cannot be said the arbitrator did not take account of the evidence of the applicant's witnesses because he recorded it in great detail. On the third ground, he argued that the effect of the employee's actions might have been to obtain another retail supplier for the applicant's client.

Evaluation

- 12] The first two related grounds raised by the applicant are clearly the most significant criticisms of the award.

13] It is true, as Mr Khoza contended, that the arbitrator recounted the employer's evidence. It might even be said he did so in more detail than was necessary. Nevertheless, merely recounting the evidence of the parties, however comprehensively, simply gives us an indication of whether or not the arbitrator captured the evidence properly. In itself it does not inform the reader if he applied his mind to it analytically. It is a different matter if an arbitrator also comments on the evidence in the course of narrating it. That is not the case here: the only evaluative portion of the award which gives us any insight into how the arbitrator arrived at his factual findings is the extract quoted above.

14] All that can be gleaned from the arbitrator's evaluation is that -

14.1] He was satisfied on an "objective analysis of the evidence adduced by both parties" that the applicant had failed to prove that the employee was guilty of trying to sell free stock to Steinberg or that he was guilty of any misconduct warranting his dismissal.

14.2] He concluded Steinberg was a completely unreliable witness. The only reason he provides for this credibility finding is Steinberg's uncertainty about the time of day the employee came to see him.

14.3] Not only does he reject Steinberg's evidence for this reason, but he also dismisses Little's testimony in its entirety because he also did not know when the employee visited Steinberg.

14.4] He accepted the employee's evidence because it was consistent throughout.

15] What is immediately striking is the contrast between the length of the arbitrator's summary of the evidence and the brevity of his analysis. Secondly, much of the brief

‘analysis’ consists simply of conclusions with little or no support offered for them. Paragraphs 113 and 115 of the award stand out in this regard.

16] In the few instances where the arbitrator reveals his analysis what stands out is the boldness of his conclusions about the reliability of the witnesses, which he appears to base on the most slender factual foundation. He also does not tell us why an analysis of the conflicting evidence using a balance of probabilities could not have produced an outcome and why it was necessary to resort to making credibility findings to determine the matter.

17] As a general rule it is undesirable to rely on a credibility finding as the sole basis for assessing the probative value of evidence. Of course there are occasions when on the face of the record of a witnesses evidence, a witnesses’ testimony is so riddled with patent inconsistencies and contradictions that the unreliability of that testimony is glaringly obvious. Ordinarily though “... *findings of credibility cannot be judged in isolation, but require to be considered in the light of proven facts and the probabilities of the matter under consideration.*”¹

18] In ***Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others*** (2010) 31 ILJ 452, Van Niekerk J also took an arbitrator to task for the arbitrator’s one-dimensional approach to evaluating conflicting versions:

*“To resolve the factual controversy between Carstens and Nkunzi, the commissioner had to embark upon a balanced assessment of the credibility, reliability and probabilities associated with their respective versions. But the commissioner did nothing of the sort - and instead simply plumbed for Nkunzi's version. In the result, the award is bereft of any reason whatsoever for why Nkunzi 'was able to establish' her version on this score.”*²

(emphasis added)

¹ ***Santam Bpk v Biddulph*** 2004 (5) SA 586 (SCA) at 589, par [5].

² At 462, par [20]

19] The importance of relying on the record of a witnesses' evidence as the primary basis for making credibility findings has been recognized:

*'Of course, the judicial officer, who has sight of the witnesses and is able to assess their evidence from nearby, is the best person to gauge their demeanour. The record of such evidence, however, speaks for itself. If a witness is mendacious, contradictory or evasive, this will appear from the record. And if a judicial officer has justified criticism of a witness or of his or her evidence, the justification for such criticism will normally also appear from the record. Even more so will this be the case when a credibility finding is made against a particular witness. Although a Court of appeal is reluctant to interfere with credibility findings made by the court of first instance, it is not obliged to accept such findings if they should not appear to be justified.'*³

(emphasis added)

20] In this instance the arbitrator identified testimony on the record, which related to only one incidental question, as the basis for making sweeping credibility findings. Even that finding was unjustified on the evidence because it could hardly be characterized as an anomaly. Steinberg had initially testified that he thought the employee had come to his premises in the morning. Later he agreed it could have been in the afternoon. This is not a basis for finding that the entirety of a witnesses' evidence is unreliable: at best it is a finding that he was uncertain about that aspect of his evidence and his testimony could not be relied on in that respect. If all of his evidence had been like this then the reliability of his testimony as whole might be impugned, but uncertainty about a single detail could hardly be a basis for making a credibility finding against him.⁴

³ Van Zyl J, in the judgment in *Foodworld Stores Distribution Centre (Pty) Ltd and Others v Allie* [2002] 3 B All SA 200 (C) cited with approval by Navsa JA, in *Allie v Foodworld Stores Distribution Centre (Pty) Ltd & others* 2004 (2) SA 433 (SCA) 2004 (2) SA p433 at 442, par [38].

⁴ In this regard see *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 (SCA) at 979H-980A, and *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) at 589, par [5, both of which caution against making credibility findings in isolation without regard to the proven facts and probabilities of the matter.

21] Even if the uncertainty in Steinberg's evidence as to the timing of the employee's visit to his premises could be construed as an anomaly in his evidence, which it is not, that would not be sufficient to found a credibility finding.⁵

22] Lastly, in relation to the arbitrator's dismissal of Little's evidence on the same basis as his dismissal of Steinberg's evidence, the arbitrator did not even have any factual basis for making an adverse credibility finding, quite apart from whether such a factual basis could justify an adverse finding: Little did not testify about the time the applicant visited Steinberg at all, so there was no evidentiary basis for the arbitrator's adverse credibility finding against him.

23] It is possible that there might have been another basis for doubting the value of Little and Steinberg's evidence but if there was it did not form part of the arbitrator's reasoning in dismissing the credibility of Steinberg's testimony on the most slender basis and, in the case of Little, there was no factual basis at all. By excluding the applicant's evidence from serious consideration on this unwarranted basis, the arbitrator effectively denied the applicant a fair hearing which amounts to misconduct by the arbitrator in relation to his duties in terms of section 145(2)(a)(i) of the Labour Relations Act 66 of 1995. Quite apart from this, his bold findings on credibility are ones that no reasonable arbitrator would have made.

Conclusion

24] For the reasons set out above, I believe the arbitrator's award must be set aside. While the record is substantial, both parties were of the view that it would be preferable for the matter to be set down before another arbitrator for a fresh hearing. This might be a matter in which the court should substitute its own decision for that of the arbitrator, but as credibility has become such an issue, it seems that this might be an instance in which scope for a re-hearing should be allowed. However, in order to try and curtail the length of such further proceedings I see no reason why the current

⁵ See *President of the Republic of South Africa and others v South African Rugby Football Union and others* 2000 (1) SA 1 (CC) at 55, par [113].

record should not form part of those proceedings, subject to other evidence the parties may wish to lead.

Order

25] Accordingly, an order is made in the following terms -

25.1] The arbitration award of the first respondent is reviewed and set aside.

25.2] The matter is referred back to the second respondent which must appoint a senior commissioner other than the first respondent to re-hear the matter.

25.3] The commissioner re-hearing the matter shall decide the matter on the record of the arbitration before the first respondent, and such additional evidence as the parties may present.

25.4] No order is made as to costs.



ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of hearing: 9 February 2011

Date of judgment: 11 February 2011

Appearances:

For the applicant: Mr R Beaton SC, instructed by Vogel Malan Attorneys

For the respondent: Mr W Khoza of Retail and Allied Workers Union

LABOUR COURT