IN THE LABOUR COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO. JR725/17

In the matter between

MEDI LOGISTICS (PTY) LTD **Applicant**

and

DIALE NTSOANE *N.O* **First Respondent**

COMMISSION FOR CONSILIATION MEDIATION

AND ARBITRATION **Second Respondent**

CHRISTIAAN JOHANNES DE-WET **Third Respondent**

Heard: **11 January 2019**

Delivered: **22 May 2019**

JUDGMENT

NTSHEBE, AJ

[1] This is a review application in terms of Section 145 of the Labour Relations Act[1] (LRA) for an order reviewing and setting aside the arbitration award issued by the first respondent in favour of the third respondent (De-Wet). The Applicant seeks an order that the award be replaced with an order that the dismissal of De-Wet was for a fair reason, alternatively remitting the matter to

[1]Act 66 of 1995 as amended.

the second respondent for a proper determination before a commissioner other than the first respondent.

Background facts

[2] De-Wet was employed by Medi Logistics as an E-Scripting Roll-Out consultant on a fixed-term contract from 1 September 2015 until 29 February 2016. E-Scripting is an electronic system wherein a medical doctor can issue and upload medical script for a patient online and in real time. This is aimed at ensuring that medicine is gathered and packaged for the patient to be collected or delivered without the patient having to visit the retail pharmacy. The fixed term contract was then renewed for a further period of six months.

[3] The applicant states that it started noticing that De-Wet was not visiting as many doctors as he used to before. As a result, the applicant studied the vehicle tracker reports of De-Wet's company issued vehicle.

[4] The reports showed that De-Wet was visiting his home at number 827 Vry Street at times when he was supposed to be working and would spend excessive periods of time there. He did so without any authorisation.

[5] As a result, De-Wet was charged on 27 May 2016 with gross dishonesty in that he went home during working hours during 1 February 2016 to 17 May 2016. This resulted in the company paying him a salary for time spent at home when he did not perform his duties and responsibilities.

[6] In the disciplinary hearing, De-Wet pleaded guilty to the charge and his employment was summarily terminated on 1 June 2016. He thereafter referred an unfair dismissal dispute to the second respondent which dispute was arbitrated by the first respondent.

[7] The arbitrator issued an award in which he found that De-Wet's dismissal was unfair and ordered his reinstatement as relief. He further ordered that De-wet

be paid compensation in the amount of R108, 000.00 (one hundred and eight thousand rand) which was compensation from the date of dismissal to date of the hearing.

[8] Unhappy with the award, the applicant instituted this review application. The first ground of review is that the commissioner failed to resolve material disputes of fact. It is stated that the arbitrator ignored De-wet's evidence which was contradictory to what he had stated during the disciplinary hearing when he pleaded guilty. In the disciplinary hearing he had pleaded guilty for the fact that he had gone home at number 827 Vry Street. However, during the arbitration, he denied that number 827 Vry Street was his home address. Instead he stated that these were the doctors' premises.

[9] In assessing this ground of review, regard must be had to the evidence that was before the arbitrator. I am of the view that whether or not the said address was De Wet's home address is immaterial. This is because De Wet was expected to see between 10 and 15 doctors per day and in terms of his version, he did. There was no evidence before the arbitrator that he did not visit the doctors. Furthermore, the evidence before the arbitrator was that there was no policy regulating the times when lunch should be taken. What is clear is that De Wet almost regulated his time according to his schedule and daily targets. There was nothing precluding him not to go home during working hours and how much time he should spend at home during the day. Therefore, he could not have been guilty of the charge. As a result, this ground for review is dismissed.

[10] Another ground for review is that the arbitrator refused the applicant's application for the matter to stand down for 60 minutes to allow a witness to come and testify on a point which it did not anticipate. The point related to the De-Wet's defence that he was at home during working hours as he needed time to prepare for the following day's work. This witness was going to dispute such evidence. The arbitrator refused the applicant an opportunity to call the witness and insisted that the matter needed to be finalised. However, the arbitrator in his award found that the third respondent's defence regarding the

preparation at home was possible and should therefore be issued with a warning for time keeping. This constituted an error in the conduct of proceedings by the arbitrator. Clearly the applicant had not anticipated that the De-Wet would change tact at the CCMA. No prejudice would have been suffered by De-Wet in standing the matter down for an hour to allow the witness to come and testify. For the arbitrator to refuse a party an opportunity to deal with something crucial and proceed to find against that party on the aspect he refused to allow them an opportunity to lead evidence, constitutes a reviewable irregularity.[2] Therefore, on that basis, the arbitration award falls to be reviewed and set aside. Ordinarily, this finding would have necessitated the matter being remitted back to the CCMA for hearing *de novo*. However, I do not believe that such is necessary under the circumstances. This is so because I have also had regard to another ground of review dealt with below.

[11] Another ground for review is that the arbitrator reinstated De-Wet in circumstances where, as at the dismissal date, 1 June 2016, his fixed term contract was about to come to an end. His fixed term contract had been extended from March 2016 to 31 July 2016. No evidence was led to indicate that his fixed term contract would have been extended. The arbitrator on the other hand reinstated De-Wet and ordered compensation in the amount of R108,000.00 equivalent to nine months remuneration.

[12] In the circumstances, it is my view that the relief awarded to De-Wet is neither just nor equitable in that it is in excess of the period which remained on his fixed term contract which was two months. He was earning R12,000.00 as at the date of his dismissal. In *Tshongweni v Ekurhuleni Metropolitan Municipality* [3] the applicant was engaged on a fixed term, and that as at the date of his dismissal, the contract had some nine months to run. The court, per Van Niekerk J, held that an award of compensation equivalent to what the applicant would have earned had he remained employed for the full period of five years was appropriate.

[2] See: *Dimbaza Foundries Ltd vs CCMA and Others* (1999) 20 ILJ 1163 (LC).
[3] [2010] 10 BLLR 1105 (LC)

[13] There is no legal basis for the arbitrator to have reinstated De Wet. Under the circumstances, he should have awarded compensation for the two remaining months in the contract of employment, i.e June and July 2016.

[14] In the premises, I make the following orders:

Order

1. The arbitration award is reviewed and set aside and replaced with an order that De Wet be compensated for the two remaining months in the contract of employment, that is, June and July 2016; and
2. There is no order as to costs.

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T. Ntshebe

Acting Judge of the Labour Court of South Africa