



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not reportable

Case no: C699/09

In the matter between:

WESTCARE PHARMACY CC

Applicant

and

LESLIE ANN JULIUS

First Respondent

COMMISSION FOR CONCILIATION,

Second Respondent

MEDIATION AND ARBITRATION

NEAL CAHILL N.O.

Third Respondent

Heard: 30 July 2013

Delivered: 24 July 2013

Summary: Review of arbitration award. Grounds of review inconsistent with the facts. Award upheld.

JUDGMENT

HULLEY, AJ

Introduction

- [1] This is an application to review and set aside an arbitration award which was issued by the third respondent in favour of the first respondent on 4 August 2009.
- [2] The first respondent commenced employment with the applicant on approximately 28 April 2009. It is not entirely clear from the evidence although it may have been common cause that her employment was on a probationary period. For the purpose of this judgment I will assume that to be the case.
- [3] At any rate, her employment was terminated on 20 June 2009.
- [4] Arising out of the termination of her employment, the first respondent referred an unfair dismissal dispute to the second respondent. The matter was set down for conciliation – arbitration before the third respondent.

The arbitration award

- [5] Neither party was represented at the hearing and after the conclusion of the arbitration proceedings, the third respondent issued an award in favour of the first respondent on the following terms:

“27. I find in the circumstances that the Applicant’s [the First Respondent in *casu*] dismissal was both procedurally as well as substantively unfair.

28. The Respondent [the Applicant in the present matter] is ordered to pay the Applicant [the First Respondent] an amount of R14 289.00 by no later than the 31st August 2009...”

- [6] In arriving at the aforesaid conclusion, the third respondent reasoned as follows:

6.1 Schedule 8 to the Labour Relations Act, required a broad process of assessment to be followed by an employer when assessing a worker's performance.

6.2 The aforesaid requirement had two elements to it:

6.2.1 To create an acceptable framework within which to assess the worker's performance.

6.2.2 To offer total transparency to the worker as to the performance achieved at any given stage and to provide specifics as to exactly what was required of the worker.

6.2.3 "If" daily assessments were carried out at all, it was clear that the employee (the first respondent) was not provided with specifics regarding her standard operating requirements as there was never a clear indication of what was being assessed.

6.3 The applicant accordingly failed to "uphold the basic tenants" of Schedule 8 by failing to transparently carry out work performance assessments with specific aspects of her work being assessed.

[7] The third respondent accordingly concluded that the dismissal was substantively and procedurally unfair.

[8] Given that the first respondent declined reinstatement, the first respondent had to award compensation. He awarded compensation in the amount of R14 289.00 being the equivalent of three months' remuneration.

The grounds of review

[9] The applicant has in the present proceedings challenged the aforesaid award on the following bases (not necessarily in this order):

- 9.1 The first respondent knew by the end of the second week that she would not be offered a permanent position as her performance was unsatisfactory.
- 9.2 The first respondent had not been dismissed and the findings which flow from such conclusion made by the first respondent were wrong.
- 9.3 The third respondent “completely disregarded” the applicant’s evidence that the first respondent had been assessed on a daily basis, evidence which had not been challenged.
- 9.4 The third respondent ignored the fact that the first respondent had misrepresented her qualifications.
- 9.5 The first respondent accorded undue weight to irrelevant allegations regarding theft of monies from the applicant’s business.
- 9.6 It was “clear” that the first respondent was informed that she had failed to meet the required standards. It was not in dispute that the first respondent was not capable of performing her duties.
- 9.7 The arbitrator’s award of three months’ remuneration was “grossly unreasonable” under the circumstances. The circumstances referred to, as I understand the

founding affidavit, are the following:

- 9.7.1 The first respondent had required an extension of one month to her contract and was remunerated during that period.
- 9.7.2 The third respondent worked for a relatively short period, a period of two weeks, followed by a period of four weeks which was at her request.
- 9.7.3 The compensation which had been awarded was the equivalent of double the period she actually worked.

[10] Based upon the aforesaid, the applicant contended that no reasonable commissioner could have arrived at the conclusion which the third respondent did.

The factual background

[11] Mr West was the only witness called to testify on behalf of the applicant. Before I consider the content of his evidence, I should note that he failed to answer many questions directly, where he provided answers to questions, he did so frequently in vague and general terms, often making use of the nebulous “we” to describe what, at least in some instances, was clearly a reference to a person or people other himself. Indeed, the hearsay nature of his evidence is what had, perhaps, contributed to the vagueness of his answers. There may be another reason.

[12] Against that backdrop, I turn now to consider Mr West’s testimony.

The testimony of Mr West

[13] According to Mr West, the first respondent was employed as a “front shop assistant”. The precise nature of her duties was not provided in any coherent fashion and one has to trawl across the length and breadth of his evidence, both in chief and in cross-examination, to ascertain precisely what the nature of the first respondent’s functions were. What I gathered from Mr West’s evidence in chief is that the first respondent’s tasks entailed the following:

13.1 She had to assist with orders, especially those for the other pharmacy (it appears that there were two branches, one in Belhar and another located in Elsie’s River).¹

13.2 She was required to attend at the other pharmacy in order to check the stock at that pharmacy.² It appears that she would assist the other personnel at that pharmacy “to finish the stock”.³

13.3 She had to sell goods. She was, however, not permitted to sell “90% of the items without us [referring, presumably, to the management]”.⁴

[14] Under cross-examination, Mr West, mentioned the following additional tasks:

14.1 She had to go through the queues to assist people who had more substantial concerns and to remove them from the queues and offer them a seat.⁵

¹ Transcript: p.6, ll. 6 – 8

² Transcript: p.6, ll. 15 – 16

³ Transcript: p.6, ll. 20 – 21

⁴ Transcript: p.17, l. 3

⁵ Transcript: p.26, ll. 4 – 8

14.2 She had to collect fax orders and collect the stock pertaining to those orders.⁶

[15] It is unclear from the record whether the tasks of collecting fax orders and collecting the stock pertaining to those orders were the same as those referred to in sub-paragraphs 13.1 and 13.2 above.

[16] Mr West testified that the first respondent was provided with training as follows:

16.1 A person, identified as Ronelia, who was responsible for the stock, showed the first respondent how to prepare the stock for the fax orders.⁷

16.2 “They” (referring, presumably, to the first respondent and other front shop assistants) would be “taught what to sell or not, and how they handle the customers” and “we” would provide them with “instructions [on] what questions they must ask (the customers) before they ask us”.

[17] Mr West contended that “they” are provided with training “all the time”.⁸

[18] With regard to the first respondent’s performance, Mr West testified that:

18.1 Whenever stock had to be taken to the other pharmacy, the order was not completed or not properly completed.⁹
(It seems Mr West was himself responsible for taking

⁶ Transcript: p.27, ll. 6 – 11

⁷ Transcript: p.26, l19-p.27, l7

⁸ Transcript: p.16, l24-p.17, l3

⁹ Transcript: p.6, ll16-22

stock to the other pharmacy.)¹⁰

18.2 The sales of each person “in front” were down¹¹ and the sales figures were going down.¹²

[19] Mr West testified that after only one week, “we told her about the problems we had with her”.¹³ I will assume in favour of the applicant that the problems he informed the first respondent about were both problems referred to above.

[20] At any rate, according to Mr West, the first respondent “asked us to please stay on because she needed the work”¹⁴ He testified that she had indicated that her husband was out of work for a month.¹⁵

[21] Mr West testified that he then enquired from the first respondent about her prior work experience.¹⁶ I will deal later with that conversation and what allegedly transpired.

[22] Later in his testimony, Mr West stated that “we” wished to see if the first respondent could “do something else at the pharmacy”¹⁷ and that it was decided to keep her on for an additional month “out of our goodness of our heart”¹⁸

[23] Elsewhere, Mr West testified that the additional month which had been afforded to the first respondent was to determine “if there would be any major improvement or not”¹⁹ and that “after that period

¹⁰ Transcript: p.7, ll. 5-7

¹¹ Transcript: p.12, ll. 1-3

¹² Transcript: p.12, ll. 21-23

¹³ Transcript: p.7, ll. 14-15

¹⁴ Transcript: p.7, l. 20

¹⁵ Transcript: p.10, ll. 10-11; p. 9, ll. 24-25

¹⁶ Transcript: p.7, ll.19-22

¹⁷ Transcript: p.8, ll. 20-21

¹⁸ Transcript: p.10, ll. 20-21

¹⁹ Transcript: p.16, ll. 18-20

we have to decide”.²⁰

[24] Mr West testified that after a while “I could see no improvement or any reason to keep her”.²¹ The improvement he was referring to in its context, related to the poor sales figures.

[25] When asked how he had determined that the applicant’s performance was not up to scratch, Mr West gave a range of answers:

25.1 First, he testified that “I assessed everybody on a daily basis, they can perform well the last five years and if they start performing weakly, we speak to them on a regular basis.”²²

25.2 Secondly, he stated that “I get information from the people that gives her the work to do and knows what to do, they can tell me and I can assess her also. That’s how we can assess.”²³

25.3 Thirdly, he stated that “the people” who were “doing the work currently that she was helping them, also didn’t find her appropriate to do the job.”²⁴

25.4 Furthermore, “the people” who supervised her and “the people that works with her” apparently “all agree” that the employment of the first respondent was “not of any benefit to the company”.²⁵

²⁰ Transcript: p.16, l7

²¹ Transcript: p.12, ll5-6

²² Transcript: p.13, ll18-21

²³ Transcript: p.14, ll4-7

²⁴ Transcript: p.14, ll16-18

²⁵ Transcript: p.16, ll11-13

- [26] As a result of the aforesaid, the first respondent's services were ultimately terminated. I should mention that in his opening address Mr West stated that when terminating the first respondent's services, he informed her "we'll call her when we need her in the future".²⁶
- [27] Before dealing with the first respondent's evidence, I should outline a number of difficulties I have with Mr West's testimony.
- [28] First, other than the occasions when Mr West needed to "take the stock or send the stock" to the other stores, it is not clear that Mr West was himself involved in assessing the first respondent's performance. In some instances it is clear that he was not; he had, at best, merely received reports from others. Other than Ronelia, it is unclear who the people who performed the assessments were, what position they held, why they held the view that the first respondent was not performing adequately and what skills or qualifications they had to make such an assessment.
- [29] My concern with the evidence of Mr West is not merely that it constitutes hearsay evidence (I am mindful that the third respondent did not deal with the matter on that basis). My primary concern is that because of its hearsay character it is difficult to understand precisely what the nature and content of the complaints about the first respondent's performance was.
- [30] Secondly, it is apparent from what I have set out above that there are various aspects upon which Mr West's evidence is contradictory.

30.1 If one had regard to the weight of Mr West's testimony, it is clear that the thrust of his case was that the first respondent was simply not up to scratch and that she

²⁶ Transcript: p.4, l8

could simply not be kept on.

30.2 That being the case, it is difficult to understand Mr West's comment in the opening address that the applicant would contact the first respondent in the future if it needed her services.

30.3 I am mindful of the fact that such statement was made by Mr West in his opening address and was not given by him under oath. However, the fact that the statement was made by Mr West himself on the record, clearly means that it was intended to be taken into account. This was not the statement of a legal representative made during an opening address which was not adopted by a witness.

[31] Thirdly, and to exacerbate matters, Mr West has deposed to an affidavit in the proceedings before this Court in which, he has made factual allegations which are at odds with his testimony at the arbitration proceedings:

31.1 For instance, in paragraph 20 of his founding affidavit, Mr West stated that the first respondent "knew from the end of the second week of her employment that she would not be offered a permanent position as her performance during the probation period was not satisfactory".

31.2 As set out above, it was apparent from the evidence of Mr West that the purpose of affording the first respondent an additional month was (irrespective of whether she requested the extension or whether it was done *mero motu* by Mr West) to enable the applicant to

determine whether there was any improvement. Thus, if the first respondent was afforded an opportunity to improve, there could be no suggestion that the first respondent was aware by the end of the first or second week that her services would not continue (as opposed to the *possibility* that it would not continue) by the end of the six week period. (I am concerned at this stage only with the evidence of Mr West.)

31.3 In paragraph 26 of the founding affidavit, Mr West stated that the “third respondent” (which obviously ought to refer to the first respondent) “was never accused of stealing the money directly or indirectly and this factor was in no way a contributing factor to the applicant’s decision not to offer the first respondent permanent employment”.

31.4 As will be demonstrated below, it is apparent that the theft of certain money appeared to play a central role in the decision of the applicant to terminate the first respondent’s services. I am mindful that the arbitrator who dealt with the matter and had the opportunity to observe the witnesses, did not (despite assertions to the contrary by the applicant) take this into account in arriving at his conclusion. At this stage, however, my only point is that Mr West’s allegations in his affidavit are at odds with what transpired at the arbitration hearing.

[32] I turn now to consider the first respondent’s cross-examination of Mr West.

[33] The first respondent strenuously challenged Mr West’s contention

that she had been assessed in the first week of her employment.²⁷ In fact, she put forth a version which, if true, would severely undermine Mr West's assertions.

"When I asked you the second week already, and that was at the end of the second week I asked you, Mr West am I still doing fine, am I okay, because obviously I am worried. We got paid out of a white envelope and I didn't see that UIF or anything deducted, so I asked you and I asked you because I've got my ID with me, do you need my ID, I asked you that several times and why would you say in the first week you already assessed me, then in the second week, the end of the week I asked you if I am okay and you said I am fine, I don't have to worry, I don't have to have sleepless nights, you don't have a problem with me, that's what you said."

[34] To this Mr West responded as follows:

"Sorry Mr Cahill [the third respondent], that's a lie. After the first week she asked me that, if she was okay, because she was worried about it. I told her she must bring her ID in. Then she said that is good news. And I'm still waiting for her ID."

[35] The first sentence suggests that Mr West disputed the whole of the statement put to him. However, from the second sentence onwards, it is apparent that he in fact confirmed some of what the first respondent had put to him. It is clear from his response that there was a discussion which took place after the first week and that during such discussion the first respondent expressed anxiety about her future with the applicant. In response to her concerns Mr West informed the first respondent to bring her ID in. "Then", said Mr West, the first respondent said "that is good news".

[36] What is apparent from the aforesaid conversation is that Mr West

²⁷ Transcript: p.69, ll12-13

could not have informed the first respondent at that stage that he was dissatisfied with her performance. After all, she considered his request for her ID to be good news.

[37] Later the first respondent put the following to Mr West:

"I also want to know why you said that I didn't do the stock and stuff properly. You've explained yourself and you've said that I didn't do the stock properly, but I did my bit, I got the fax through and like you said I wasn't allowed at the back, so I couldn't do the ordering at the back by the phone. So his right hand did the ordering, because we weren't allowed to come to the back. But I got all the stuff – I wasn't allowed to take from the shelves, only the stuff that came in out the boxes..."²⁸

[38] Due to interventions on the part of the third respondent these questions were never ultimately answered by Mr West, but when asked what evidence he had for contending that she had not performed well, he responded as follows:

"I know you did your best, you tried your best, but when we needed to take the stock at a certain time, it wasn't ready."

[39] Mr West later testified that:

"With our standards of the employees in front, we have to train them too and tell them what they can do and how they can do it, otherwise we will not do very well in the company. And on that basis we show her on a daily basis what is right and wrong and how to do it. We can't just put her in front and then expect everything she must know. And number 1 was the stock that she had to do, number 2, we explained to her what she had to do with the customers."²⁹

²⁸ Transcript: p.22, ll13-21

²⁹ Transcript: p.25, ll17-24

- [40] What is apparent from the aforesaid is that the first respondent challenged the assertion that her performance was not up to standard and that she had been informed thereof.

The first respondent's evidence

- [41] When the first respondent testified, much of her focus was upon a theft which had apparently occurred when an amount of R300.00 went missing from the till. She suggested that the allegation of poor work performance was a mere ruse. In this regard, she testified that she had gone to collect her wages on 20 June 2009 and was told by Mr West that she need not return to work. She departed, but upon reflection was apparently dissatisfied with the lack of an explanation. She then returned to the Belhar pharmacy where she confronted Mr West. She testified that Mr West then informed her that the reason for her termination was poor work performance. In response to this, the first respondent stated:

“And I asked him why would he say it's because of poor work performance, why only after this theft incident. After two – three days he tells me its work performance. I said it doesn't sound right to me, why only then telling me that its poor work performance.”³⁰

- [42] Although the first respondent had, in a rather rambling fashion, attempted to cross-examine Mr West about the theft during his testimony, she failed to do it in a clear fashion and as a result, he had been unable under oath to deal with what she said.

- [43] However, Mr West's response to the testimony led by the first respondent gave credence to her suspicions. Commencing his cross-examination of the first respondent, Mr West stated that it was important that “the right thing should come out” and against this

³⁰ Transcript: p.32, ll2-6

backdrop then proceeded to cross-examine the first respondent with reference to the theft.³¹ The cross-examination proceeded as follows:

“When we took your blood pressure, it was very high. I asked you if you took the money or if you knew anything about it. Can you tell me if you know anything about it or not?”

[44] Later, Mr West suggested that the first respondent had nearly fainted because, according to him, of her fear of the theft being detected. Mr West then cross-examined the first respondent on the amount of money that she had used to pay for styling her hair at the hairdresser. He queried the fact that she had paid R145.00 for the hair-do when R150.00 had gone missing from the till.

[45] In response to a question as to why the first respondent was unable to work with the other personnel, the first respondent stated:

“You said I can’t work, your girls told you that they can’t work with me. I didn’t say they can’t work with me.”³²

[46] What is apparent from the cross-examination conducted by Mr West is that his focus was upon the theft.

Consideration of the evidence

[47] A Court is entitled to draw an inference as to the nature of a party’s defence or case based upon the line of cross-examination by such party’s counsel.³³ If that is so, the Court is all the more entitled to

³¹ Transcript: p.35, ll14-20

³² Transcript: p.38, ll17-19

³³ In *S v Mathlare* 2000 (2) SACR 515 (SCA) the defence counsel had cross-examined an expert in a manner which the Court considered to be consistent only with an acceptance by the defence that the blood samples analysed by the expert were indeed those of the accused, the complainant and the complainant’s child and therefore implied had been admitted by the defence. See also: *S v Boesak* 2001 (1) SA 912 (CC), at 923-925; *S v Magubane* 1975 (3) SA 288 (N).

draw an inference from a party's conduct where that party himself or herself conducts the cross-examination. (In this regard, I am alive to the fact that Mr West is not the applicant.)

- [48] Having regard to the evidence as it unfolded, it would have appeared to my mind that there was fairly strong evidence to suggest the true reason for the dismissal of the first respondent was Mr West's suspicion that she had pilfered money from the till and that the alleged poor performance was a mere ruse to justify the termination. If this was so, it would explain why Mr West was as vague as he had been in relation to his assessment of the first respondent's performance, the training that was provided and how he had dealt with her alleged non-performance.

The grounds of review

- [49] The first ground of review is that the third respondent ignored the applicant's evidence that the first respondent was aware from the beginning of the first week that she was on probation and was aware by the end of the second week, that she would not be offered a permanent position as her performance was not satisfactory. The allegation is made that the third respondent ignored this evidence despite the fact that it had never been challenged by the first respondent.

- [50] Factually, this ground of review is without merit.

- [51] As pointed out above, the first respondent denied that the applicant had wished to terminate her services after a week. She pointed out that after receiving her first wage advice she noticed that the applicant was not deducting UIF from her wages and accordingly was concerned that she would not be kept on. She approached Mr West and asked him if he was satisfied with her services. On her

version, Mr West assured her that he was happy with her performance. It is thus clear that on the first respondent's version, she could not have been aware from the end of the second week that her services would be terminated after an additional month.

- [52] That the first respondent was anxious about her tenure with the applicant was clear from her cross-examination of Mr West. However, her fear related to an inference that she had drawn from the failure of the applicant to deduct UIF. It had nothing to do with any statement made by Mr West, and certainly nothing to do with her acknowledged non-performance.
- [53] In any event, it is apparent from what I have set out above, that Mr West, on his own version, was ambivalent about whether the applicant was aware that her services would be terminated after an additional month. He himself testified that the purpose of granting the first respondent an additional month was in order to determine whether she would improve. Accordingly, on his version, the termination of her services after an additional month was not a *fait accompli* as suggested in this ground of review. If that be the case, why should the third respondent have found otherwise?
- [54] The second ground of review appears to be dependent upon some form of novation to the initial contract of employment. What the applicant appears to suggest is that because of the first respondent's poor performance, an agreement was reached in terms of which she would be employed for a period of one additional month whereafter the contract would terminate automatically.
- [55] With respect, there is simply no evidence on record to suggest that there was a novation to the original contract.
- [56] This ground of review is in any event, at odds with the assertion in

paragraph 15 of the founding affidavit that at the end of the additional month, the first respondent was paid out for her services and advised not to return to work the following week because “her extended probation period” had expired.

[57] The allegation that there was no evidence of a dismissal is with respect at odds with the evidence that was in fact tendered by Mr West at the arbitration hearing. What Mr West disputed in his opening statement was whether the dismissal was unfair. He stated it as follows:

“I don’t agree that it was a dismissal, as *an unfair* dismissal.”³⁴ (My emphasis)

[58] At least implicitly, what Mr West was asserting is that there was a dismissal, but disputed that it was an unfair dismissal. That stance was consistent with the evidence he later testified to.

[59] This ground of review must accordingly fail on the facts.

[60] The third ground of review is that the third respondent had completely disregarded the applicant’s testimony that the first respondent’s performance had been assessed on a daily basis, an allegation which, so says the applicant, was not challenged by the first respondent.

[61] With respect, I do not think that the evidence by Mr West that there were assessments on a daily basis can necessarily be said to relate to the applicant. As I pointed out previously, Mr West had the unfortunate habit of referring to “we” and “they”, without reference to specific people. As a result, his evidence that there were daily assessments appears, on a reading of the transcript, to relate in

³⁴ See Transcript: p.4, ll2-3

general terms to the assessment of *all* staff, rather than to his assessment of the first respondent specifically.

[62] In any event, it is not clear to my mind when considering Mr West's testimony in this regard, that he was necessarily referring to an assessment properly so called. What Mr West appeared to be referring to was the fact that he and some other unidentified person or persons would observe the applicant's performance and be in a position to determine whether it was up to scratch. Whether he called her in and afforded her the opportunity to explain her apparent shortcomings and to challenge the perceptions is not apparent from his evidence.

[63] The third respondent found, in this regard as follows:

"If 'daily assessments' were indeed carried out at all as averred by the Respondent (the applicant in this matter), it then becomes clear that such 'daily assessments' fail the second part of the test..."

[64] With respect, the third respondent was correct in raising doubt as to whether the daily assessments had indeed been carried out. On the testimony provided, it was certainly questionable.

[65] What is clear, however, is that the third respondent had not "completely disregarded" this evidence; he had considered it, but doubted its correctness. He nevertheless made a finding on the assumption that it might be correct.

[66] This ground of review must accordingly fail.

[67] The fourth ground of review is that the third respondent ignored the fact that the applicant had misrepresented her qualifications.

[68] Having regard to the transcript, it is not clear to my mind that Mr

West actually testified that the first respondent had misrepresented her qualifications.

[69] What Mr West testified to was the following:

69.1 After the passage of a week and the problems which the applicant was experiencing with the first respondent, she was approached and informed of the difficulties. She begged to be kept on:

“So we asked her about her other past work experiences, it wasn’t on her reference, or for three years’ experience at the one pharmacy. Then she told us about the week that she worked at the pharmacy down the road.”³⁵

69.2 Later, Mr West testified that:

“If she had good experience at other pharmacies, besides the one reference she gave us, then we know it would have been a good reference for her and then we can say okay, that’s good or not. Because half of our staff comes from that pharmacy that she worked and we know we get good people from that people [presumably the other pharmacy]. But she only worked there for one week and she had a fall out with the pharmacist there also.”³⁶

69.3 In response to a question regarding her CV, Mr West explained:

“She didn’t mention that she only worked there for one week. She mentioned that she had three years’

³⁵ See Transcript: p.7, ll22-25

³⁶ See Transcript: p. 9, ll15-21

experience, which didn't show on her job she did to us...

She mentioned that she had three months' - three years' experience at a big pharmacy before, that's why we took her on the first time, but her work in that first week didn't reflect that."³⁷

- [70] The first respondent did not challenge the assertion that she had claimed to have three years' work experience at a large pharmacy in her CV.
- [71] It is not clear from Mr West's testimony that he was challenging the correctness of what was contained in the first respondent's CV. Rather, he was calling into question her performance given that she had apparently had three years' experience. He suggested that her performance was not in keeping with a person who had worked in a large pharmacy for three years.
- [72] At best for the applicant, the testimony of Mr West is open to an interpretation that he intended to challenge the correctness of the first respondent's CV. But it is also open to the interpretation that he was merely questioning the first respondent's performance in light of the (accepted) fact that she had three years' experience in a large pharmacy.
- [73] To use the language of misrepresentation and fraud, which has found its way into the affidavits, is with respect an exaggeration of what Mr West had testified at the hearing.
- [74] If Mr West intended to allege that the first respondent did not have three years' experience at a large pharmacy or had not worked at a

³⁷ Transcript: p.10, ll9-17

large pharmacy, he ought to have articulated that clearly. He should then have presented the CV, drawn the attention of the arbitrator to the content thereof and led evidence to prove that in fact what was stated therein was false. He would ordinarily have done so by calling a manager or other staff member from the large pharmacy to prove that the first respondent had not worked there. Alternatively, he could have made the allegation that the first respondent had not worked at a large pharmacy and asked her directly whether she admitted (a) that her CV indicated that she had worked at a large pharmacy and (b) that her CV was incorrect in that respect.³⁸

- [75] That was not, however, what Mr West articulated.
- [76] In all the circumstances, I am satisfied that this ground of review must fail as well.
- [77] The fifth ground of review is that the third respondent accorded undue weight to the allegations regarding the theft of money from the applicant's business.
- [78] The award of the third respondent does not support this assertion at all. Whilst the third respondent mentioned the theft of the money, he does so only in the context of considering the first respondent's version; he does not do so in arriving at his conclusion or under his analysis of the evidence.
- [79] In my view, if any criticism is to be levelled at the third respondent's award, it is his *failure* to have regard to the theft of the monies. As previously noted, in my view, this was probably the reason for the termination of the first respondent's services. But this does not

³⁸ *All Pay Consolidated Investment Holdings (Pty) Ltd & Others v. The Chief Executive Officer of the South African Social Security Agency & Others* 2013 (4) SA 557 (SCA), at par's 4 – 5

redound to the advantage of the applicant.

[80] This ground of review must also fail on the facts.

[81] The sixth ground of review is that the first respondent had been informed on numerous occasions that she was not meeting the required performance standards and that it was clear that she knew what that standard was. It was, says the applicant, not in dispute that the first respondent was not capable of performing her duties.

[82] With respect, when regard is had to the transcript it was highly contentious whether the first respondent was incapable of performing her duties. As pointed out above, the first respondent maintained that in her view, her performance was satisfactory. To the extent that she was unable to perform certain duties (those being the duties which Mr West testified to at the arbitration hearing), she testified that it was because she was not permitted to go to the back of the store; it was not because she lacked the skills. Mr West's own evidence regarding the first respondent's performance was, as I have set out above, vague and unhelpful.

[83] Accordingly, this ground of review fails on the facts.

[84] The last ground of review relates to the amount awarded.

[85] The applicant contends that given the fact that the first respondent had been employed for only a week before it decided to terminate her services and that she was thereafter retained as an act of generosity for a further period of one month, the award of three months' salary was "grossly unreasonable". (By "grossly unreasonable" I imagine that the applicant contends that the award was so unreasonable that no reasonable Commissioner could have arrived at that amount.)

- [86] Of course, the very basis of this contention is dependent upon a finding that the applicant's services would have been terminated after a single week had it not been for the altruism of the applicant, an assertion which is not supported by the evidence. Although Mr West did make reference to the extension being an act of kindness, he also testified that she was afforded an additional month to see if she would improve.
- [87] What the third respondent found was, assuming that daily assessments of the applicant's performance had indeed been conducted (an issue which he questioned), no specific details thereof had been given to her regarding the standard operating requirements as there was never a clear indication of precisely what was being assessed.
- [88] If the arbitrator is to be criticised, it is that he relied largely upon Mr West's version (despite the fact that he questioned that version). If regard be had to the evidence as a whole, the first respondent's version was more plausible than that of Mr West. The arbitrator did not however seem to have any regard to the first respondent's version.
- [89] It is apparent that if there had been any clear guidelines on what it was that the first respondent was required to do and how to do it, Mr West failed to provide details of such guidelines. The arbitrator was accordingly entitled to come to the conclusion which he did in respect of the legal shortcomings of the applicant.
- [90] I am not satisfied on a conspectus of the evidence as a whole that the award of three months was so excessive that no reasonable arbitrator could have come to that conclusion. In this regard, it must be borne in mind that, on the findings made by the arbitrator, the first

respondent had been in the employ of the applicant for a period of approximately 1½ months without having been given proper training and proper guidance on how to perform her tasks. It was accordingly not clear that she was incapable of performing her tasks, and moreover, there was no indication that she had been afforded the opportunity to respond to the allegations against her.

[91] In any event, as I have outlined above, the weight of the evidence suggests that the alleged poor performance was a mere ruse. That the first respondent had only completed 1½ months was due to the unfair termination of her services by the applicant. Had I been the arbitrator I would probably have awarded compensation equivalent to approximately two months' remuneration. I do not, however, think that an award of three months' compensation was so unreasonable that no reasonable commissioner could have made such award.

[92] In all the circumstances, I am satisfied that the application stands to be dismissed.

[93] Both counsel appeared to accept that costs should follow the outcome. In my view, this is the preferred procedure.

The order

[94] In the circumstances I make an order in the following terms:

94.1 The application is dismissed.

94.2 The applicant shall pay the first respondent's costs.

94.3

Hulley, AJ
Acting Judge of the Labour Court

LABOUR COURT

Appearances:

For the Applicant: A. de Wet

Instructed by: Heyn & Partners Attorneys

For the First Respondent: L. Jacobs

of Bowman, Gilfillan Inc.

LABOUR COURT