IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 1785/18

In the matter between:

NYARADZO TAGUZU **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

RICHARD HEATH *N.O.* **Second Respondent**

CHEFS WAREHOUSE AT MAISON ESTATE (PTY) LTD **Third Respondent**

Decided on the Papers.

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 27 June 2023**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and background:

[1] In this opposed application, the applicant seeks an order reviewing and setting aside the arbitration award issued by the second respondent (Commissioner), acting under the auspices of the first respondent, the Commission for Conciliation Mediation and Arbitration (CCMA). In the award, the Commissioner had dismissed the applicant's claim of an alleged unfair dismissal.

[2] The applicant was employed by the third respondent as a waitress with effect from November 2016. Her services were terminated on 20 February 2018 following a disciplinary enquiry into allegations of misconduct related to gross dishonesty. This related to her alleged failure to declare gratuities received from customers on 10 and 11 February 2018, in contravention of company policies.

[3] The applicant had referred a dispute to the CCMA and when it could not be resolved, it came before the Commissioner for arbitration where the following evidence was presented by and on behalf of the parties:

3.1 The third respondent had implemented a policy in December 2017 after consultation with all its staff, in terms of which all front waitrons would be required to disclose all cash gratuities received from customers. The purpose of the policy was for the third respondent to ensure that at least 25% of all gratuities were shared amongst all back house staff, who also contributed to patrons' service and diners' experience.

3.2 Mr Liam Tomlin, one of the owners of the third respondent, had testified regarding the rationale behind implementing the policy. The third respondent was taken over by Tomlin and his partners as a going concern in line with the provisions of section 197 of the Labour Relations Act[1] (LRA) and was thus not permitted to alter the terms and conditions of the employees. It was against this background that the policy was designed to ensure fairness amongst all staff members who contributed to the overall services of customers (including cleaners and gardeners). This policy according to Tomlin was in line with practice in other restaurants and did not benefit the third respondent in any way.

3.3 The policy according to Tomlin was implemented after consultations with all staff members in December 2017, who had in turn agreed by signing it. Tomlin had conceded that the applicant had however refused to sign the policy. He however contended that despite her resistance, the applicant had verbally undertaken to follow it. Her acceptance of the

[1] Act 66 of 1995, as amended.

policy was further demonstrated by her having indeed declared her gratuities on the same day that the policy was implemented.

3.4 Following investigations by the third respondent's part-time manager, Ms Nicholson, it was however discovered that between 10 and 11 February 2018, the applicant had not declared the gratuities she had received. Tomlin had then enquired from at least three customers, who had confirmed that they had all paid the applicant gratuities after their meals. Tomlin held the view that the applicant had acted dishonestly, and thus broke a trust relationship with the third respondent. He further contended that the applicant effectively stole from her fellow employees as the policy was intended to benefit all of them.

3.5 The evidence of Ms Carol Grassman was that on 10 January 2018, she and her husband dined at the third respondent where the applicant served them as their waitress. Grassman, who had conceded that she had a business relationship with the third respondent, was called as a witness and had testified that after she dined, she paid for the meals through a credit card, and gave the applicant an amount of R150. 00 as gratuity for her good services.

3.6 The applicant's response to the allegations was to deny them. She disputed that she had agreed to the policy as no proper consultations were held with her and contended that the policy was forced on her and other waitresses. She confirmed that she had refused to sign it and contended that Grassman fabricated her version as she never received any gratuity from her. In the same vein, she had conceded that she had at some point disclosed all gratuities received through what she referred to as an internal 'system'.

[4] The Commissioner having had regard to the evidence first considered the 'validity' and 'lawfulness' of the policy and concluded that proper consultations were held with all employees, in order not to infringe upon their rights and to further act in accordance with the terms of the transfer in terms of section 197 of the LRA. He concluded that the fact that the applicant refused to sign the

policy was not material nor did this refusal render the policy unlawful or invalid. The Commissioner concluded that if the applicant had concerns with the implementation of the policy, she ought to have referred a dispute to the CCMA.

[5] The Commissioner further concluded that the applicant had indeed breached company policy by failing to disclose the gratuities she had received from the customers. The Commissioner found the evidence of Grassman credible and probable that she had indeed paid the applicant gratuities He further considered the applicant's own concession that she had indeed at some point disclosed the gratuities. He however found that the applicant had failed to do so during the period alleged, and that as a result, the dismissal was substantively fair.

[6] The Commissioner further had regard to the appropriateness of the sanction of dismissal and concluded that despite the applicant having demonstrated to have been a good waitress after four years of service, her conduct was deceitful and dishonest, which rendered the employment relationship irretrievably broken down, particularly since she failed to show any contrition.

The grounds of review and evaluation:

[7] In seeking a review, the applicant's contention was that the Commissioner failed to apply his mind to the facts and thus reached an unfair and unreasonable decision; that he improperly determined the evidence; that his findings were not supported by the evidence; had abused and exceeded his powers; and had committed irregularities in the conduct of proceedings.

[8] The above contentions came about arising from how the Commissioner dealt with the credibility of the evidence of Grassman, and in particular the date and time on which the applicant was given a gratuity; the contention that Tomlin did not properly consult with the applicant prior to implementing the policy which had resulted in a change to her terms and conditions of employment; and further that the policy was invalid as a result of lack of proper consultations with the applicant.

[9] The test on review is trite. It is whether the decision reached by the commissioner is one that no reasonable decision-maker could have reached based on the available material[2]. In *Herholdt v Nedbank Ltd*[3] it was held that inasmuch as it was necessary to scrutinise the evidence presented before the commissioner for the purposes of determining whether the outcome was reasonable, courts should nevertheless guard against the setting aside of awards which do not coincide with their own opinion on the matter, and that an award shall only be susceptible to being set aside in circumstances where the outcome is entirely disconnected with the evidence, or where it is not supported by any evidence, and/or involves speculation on the part of the arbitrator.

[10] In assessing whether the Arbitrator committed errors of fact or failed to attach any weight or relevance to any particular facts, it was reiterated in *Nyathikazi v Public Health and Social Development Sectoral Bargaining Council and Other*[4] that;

> "After the decision in *Sidumo and another v Rustenburg Platinum Mines Ltd and another* 2008 (2) SA 24 CC and the further the explication in *Herholdt v Nedbank Limited* 2013 (6) SA 224 (SCA), it is clear that our law dictates that an award delivered by an arbitrator will only be considered to be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before him or her. A material error of fact and the particular weight to be attached to a particular fact may in and of itself not be sufficient to set aside the award but will only be done if the consequence thereof is to render the ultimate outcome unreasonable."

[11] In *Makuleni v Standard Bank of South Africa Ltd and Others*[5], it was held that the import of the remarks in *Head of Department of Education v Mofokeng & others* ;

> '…demands reflection in order to digest the essence of the exercise that a commissioner embarks upon. The court asked to review a decision of

[2] See *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at para 110.
[3] (2013) 34 ILJ 2795 (SCA) at para 13.
[4][2021] ZALAC 11; [2021] 8 BLLR 778 (LAC) at para 21.
[5] [2023] ZALAC 4; (2023) 44 ILJ 1005 (LAC); [2023] 4 BLLR 283 (LAC) (8 February 2023) at para [4]

> commissioner must not yield to the seductive power of a lucid argument that the result could be different. The luxury of indulging in that temptation is reserved for the court of appeal. At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only if the conclusion is untenable is a review and setting aside warranted'. (Internal citations omitted)

[12] Applying the above principles, an examination of the facts at arbitration proceedings clearly point to the applicant's version of events as being completely at odds with the probabilities that were properly and reasonably drawn by the Commissioner. Equally so, it must be concluded that the grounds of review advanced on behalf of the applicant in effect amount to an appeal, as each finding or remark of the Commissioner is subjected to scrutiny, when the real enquiry ought to be whether viewed holistically, the award fell within a band of reasonableness in the light of the relevant material before him.

[13] To the extent that the applicant disputed that Grassman paid her a gratuity and which it was alleged that she had failed to declare, the technique to be employed in resolving mutually destructive versions was set out in *Stellenbosch Farmers' Winery Group Ltd and Another V Martell Et Cie And Others*[6].

[6] 2003 (1) SA 11 (SCA) at para 5, where it was held;

> "On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction

[14] Against these principles, it cannot be disputed that the policy in question existed and that all the employees were consulted prior to its implementation. The fact that the applicant did not agree to the policy does not imply that he was not consulted. As I understood the third respondent's version, the applicant was the only employee that had refused to sign and accept it.

[15] That policy did not in any material respects, alter the applicant's terms and conditions of employment. It is not clear on what basis this contention was made. An employee cannot claim a change or variation to her terms and conditions of employment in a vacuum, without indicating where exactly in her own contract of employment these terms are specified. A gratuity from customers in a restaurant in circumstances where an employee is also paid a salary, cannot unless specified in a contract of employment, be a right or entitlement, unless of course specified in that contract. In any event, it was correctly pointed out on behalf of the third respondent that if indeed the applicant's terms and conditions were altered, she ought to have approached the CCMA with a dispute in that regard under the provisions of section 64(4), or section 186(2)(a) of the LRA.

[16] The policy in question after all the employees were consulted, was meant to benefit all of them, including the applicant. As attested to by Tomlin, the practice of sharing gratuities was standard in similar businesses, and clearly its purpose was noble to ensure fairness amongst all employees who put an effort into the third respondent's business. It therefore made sense that the applicant or any waiter/waitress, could not only be the beneficiary of a collective effort.

[17] Given the applicant's unreasonable resistance to the policy, her conduct in my view was not only self-serving, but equally bordered on greed. It was not clear from the evidence before the Commissioner whether despite the applicant's resistance to the policy, she had nevertheless benefitted from the general pool of gratuities during the period she had failed to make her own declarations. If indeed she did, it fortifies the conclusions that she was indeed greedy.

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and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[18] Furthermore, it needs to be said that notwithstanding the applicant's resistance to the policy, it ought to be accepted based on her own version, that she had at some point grudgingly declared some of her gratuities, even if through some 'system' that the third respondent was not aware of. It is therefore apparent that despite not having signed the policy, she verbally undertook as testified by to Tomlin that she would comply with it. It appears however, that she sought to comply with the policy, as and when it suited her.

[19] In the end, there was nothing invalid about the policy as the Commissioner had correctly found. This brings me to the question of the evidence of Grassman. The applicant sought to attack Grassman's credibility on a number of fronts which I do not deem necessary to outline. Principal amongst the applicant's denials was that she did not receive any gratuities from Grassman as the latter had testified. Much was made as to the timing of when such gratuities were made, and Grassman's credibility in the light of her business relationship with the third respondent.

[20] The Commissioner had correctly rejected the applicant's denials in circumstances where other witnesses at the disciplinary enquiry, had testified that indeed gratuities were paid to the applicant between 10 and 11 February 2018. As per the investigations by Nicolson, those gratuities were not declared. The fact that these witnesses did not testify before the Commissioner is neither here nor there, as it is trite that a commissioner during arbitration proceedings is obliged to have regard to the record of the disciplinary enquiry[7].

[21] The attacks on Grassman's credibility based on her association with the third respondent, or the fact that she confused the dates on which she had actually paid the applicant a gratuity, in my view amounts to a red herring, particularly in the light of the applicant's own evidence. She had as I understood from the transcribed record, conceded that she had served Grassman and other customers who had alleged that they paid her a gratuity, and clearly she too cannot profess to recall the details of each customer that she had served from

[7] *Palluci Home Depot (Pty) Ltd v Herskowits* [2015] 5 BLLR 484 (LAC).

whom she received any gratuities. Of importance however as already indicated, she had refused to comply with the policy, or had complied whenever it suited her. This in my view ought to be the end of the debate.

[22] In the end, the Commissioner's conclusions in regard to the appropriateness of the sanction were unassailable as well as all the findings made in regards to the fairness of the dismissal. There is no basis upon which it can be said that the outcome arrived at by the Commissioner was entirely disconnected with the evidence, or not supported by any evidence, and/or involved speculation on his part. It therefore ought to be concluded that upon a fair reading of the Commissioner's award in the context of the evidence before him, his conclusions clearly fall within a band of reasonableness.

[23] I have further had regard to the requirements of law and fairness in regards to an award of costs as sought by the third respondent. Inasmuch as I hold the view that the third respondent ought not have been burdened with the costs of having to defend against this ill-considered review, I however in the light of the applicant's circumstances, deem it appropriate that each party ought to be burdened with its own costs.

[24] Accordingly, the following order is made;

Order:

1. The applicant's application to review and set aside the arbitration award issued by the second respondent is dismissed.

2. Each party is to be burdened with its own costs.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

REPRESENTATION:

For the Applicant:	M M Mitti Attorneys.
For the Third Respondent:	Brundson & Dollie Attorneys.