THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 1970/2018

In the matter between:

ROSINA DIRE Applicant

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION (CCMA) First Respondent

DAISY MANZANA Second Respondent

DAINFERN HOMEOWNERS ASSOCIATION AND COUNTRY CLUB Third Respondent

Heard: 17 August 2023

Delivered: 21 August 2023

(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 21 August 2023.)

JUDGMENT

VAN NIEKERK, J

[1] The applicant seeks to review and set aside an arbitration award issued by the second respondent (the arbitrator). In her award, the arbitrator held that the applicant's dismissal by the third respondent was fair.

[2] The applicant was employed as a receptionist by the third respondent. She was dismissed on 29 November 2017, after being found guilty of misconduct for fraud/theft, corrupt behaviour and behaviour that had brought the company's name into disrepute. The applicant disputed the fairness of her dismissal, and referred the dispute to the CCMA.

[3] The material facts as disclosed in the record and recorded in the award under review. The applicant was found guilty by the third respondent of theft/fraud because the applicant ordered food from the restaurant (which operates independently from the third respondent) without paying for her orders, these orders having been fraudulently delivered to the reception and hidden from the manager in the process. Mr Nkomo and Mr Ndlovu testified that they were requested to collect food from the griller, Dumisani, and further requested that the food be concealed from the manager when being delivered and that the person delivering the food should pretend that it is for a customer. Mr Ndlovu testified and the audio tapes presented for evidence confirmed, that the applicant ordered food directly from the kitchen, stating that she did not intend on paying but was stealing. Mr Nkomo testified further that Dumisani would send him to deliver the applicant's food whilst the order was not placed through the proper procedures, until he informed him that he does not want to get involved. The employees were allowed to order food from the kitchen (restaurant) but there was a process to follow whereby the order is placed through the waiter who enters the order into the system and the food has to be paid for, this process was known to the applicant. The applicant did not challenge any of the evidence presented, except for stating that the orders were made on behalf of her co-workers and the orders were paid on delivery.

[4] As I have indicated, the second charge brought against the applicant was communicating and/or socialising with the residents/tenants and accepting gifts from them. The arbitrator held that there was no substance to this charge and concluded:

> "it is the applicant's unchallenged evidence that she was not aware that it is unacceptable to socialise with tenants after hours and or accept gifts from them as the previous Manager did not raise concern when they socialised and or had drinks with tenants on the premises after hours. I was not presented with evidence about existence of a rule that prohibit employees from socialising with tenants. However, I noted that Ms Connold testified that she personally finds it unprofessional for the applicant to share with Chief and or tenants and to accept gifts without declaring them."

[5] However, in relation to the charge the applicant had received food fraudulently, the arbitrator concluded that the applicant was guilty of this misconduct.

[6] The applicant contends that the arbitrator committed various reviewable irregularities and thus reached a conclusion that a no reasonable decision maker could have reached. The applicant seeks to review and set aside the arbitrator's decision on the basis that the only reasonable conclusion, on a proper evaluation of the evidence, is that the applicant had not committed the misconduct with which she had been charged.

[7] In these circumstances, the applicant contends that the arbitrator failed to apply her mind to the evidence and to properly determine the probabilities and credibility of the witnesses in circumstances where her conduct constituted a gross irregularity and a misconception of the nature of the inquiry. The applicant contends that the arbitrator considered irrelevant evidence and disregarded relevant evidence, when she ignored the fact that the third respondent does not have a code of conduct on all the charges that the applicant was charged with and not allegedly being allowed to challenge evidence presented by the third respondent.

[8] In a matter such as the present, where the applicant relies on what are contended to be reviewable irregularities in the assessment of the evidence, the court must be cautious to ensure that the line between an appeal and a review is not crossed. In *Gold Fields Mining SA (Pty) Ltd v CCMA* [2014] 1 BLLR 20 (LAC)), the Labour Appeal Court noted that a review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each factor and then determine whether a failure by the arbitrator to deal with one or more factors amounted to a process related irregularity sufficient to set aside the award. The LAC has cautioned against adopting a piecemeal approach, since a review court must necessarily consider the totality of the available evidence (at paragraph 18 of the judgment). When an arbitrator fails to have regard to the material facts it is likely that he or she will arrive at a decision that is unreasonable. Similarly, where an arbitrator fails to follow proper process he or she will arrive at an unreasonable outcome. But, as the court emphasised, this is to be considered on a totality of the evidence and not on a fragmented, piecemeal analysis (at paragraph 21).

[9] To summarise: the threshold to be met by an applicant in a review application is one of reasonableness. The court is required to apply a two-stage test. The first stage is to determine the existence or otherwise of any error or irregularity on the part of the arbitrator. If the applicant is unable to establish any error or irregularity, that is the end of the enquiry. The second stage is one in which the review court must establish whether despite any retrievable irregularity, the award nonetheless falls with a band of decisions to which a reasonable decision – maker could come on the available material.

[10] To the extent that the applicant contends that no evidence was led to prove that she did not pay for food, this is simply not true. The arbitrator took into account the unchallenged evidence of Nkomo and Ndlovu that the applicant had requested them to collect food from Dumisani and either place it where it could not be seen by the manager or pretend that it was for a customer. Further, the arbitrator took into account the unchallenged evidence of Nkomo that he had delivered food to the applicant without the order being placed on

the system. Ndlovu's evidence was that she knew it was wrong to place an order directly with the kitchen staff, without having placed the order with a waiter and further, that the applicant had informed him that she intended to steal the food. The audio tapes (which were confirmed as correct by Ndlovu) confirmed this version. I fail to appreciate how it can be said that in these circumstances, the arbitrator failed properly to assess the evidence that served before her.

[11] In so far as the applicant submits that there was no evidence before the arbitrator that the employment relationship between her and the third respondent had broken down, it is trite that if an employee is found to have committed an act of dishonesty, especially in the form of theft and corrupt behaviour, that the breakdown in the trust relationship is self-evident, and that a penalty of dismissal is appropriate even for a first offence. The applicant demonstrated no remorse for her wrongdoing. The arbitrator had regard to the relevant factors in determining the appropriate sanction, and committed no reviewable irregularity in this regard.

[12] In so far as the applicant suggests that she failed to receive a fair hearing, the record indicates otherwise. The applicant's main complaint appears to be that the third respondent called the witnesses that she intended to call. There is no irregularity in this; the applicant was afforded a full opportunity to cross-examine all of the third respondent's witnesses and to call her own.

[13] In the absence of any reviewable irregularity in the arbitrator's assessment of the evidence, that grounds for review stands to be dismissed. Further, on an assessment of all of the evidence, the outcome of the arbitration proceeding, i.e. that on a balance of probabilities the third respondent had proved that the dismissal of the applicant was fair, falls within a range of decisions to which a reasonable decision-maker could come on the available evidence.

[14] Finally, in so far as costs are concerned, the court has a broad discretion in terms of section 162 to make an order for costs according to the requirements of the law and fairness. This court ordinarily does not make orders for costs against aggrieved employees who in good faith pursue legitimately filed

grievances against their employers. I would accept, in the applicant's favour, that this matter falls into that category and intend therefore to make no order as to costs.

I make the following order:

1. The application is dismissed.

André van Niekerk
Judge of the Labour Court of South Africa

Appearances:

For the applicant: Self

For the respondent: J Kent, Solomon Holmes Attorneys