THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JR2519/21

In the matter between:

HOLLYWOOD SPORTSBROOK GAUTENG **Applicant**

and

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

COMMISSIONER LONDEKA SOSIBO **Second Respondent**

LIRONTSO JACQUELINE MOKOENA **Third Respondent**

Heard: 8 December 2023
Date Delivered: **7 April 2024**

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date and time for hand-down is deemed to be 09 April 2024

Summary: Employee assisting credit bets to be placed in the workplace. No duty to report the misconduct based on doctrine of derivative misconduct. Being accomplice to the misconduct is a competent verdict. Employee an accomplice. Employee's conduct constitutes dishonesty. High premium placed on honesty in the workplace. Award reviewable and set aside.

JUDGMENT

SAVANT, AJ

Introduction

[1] This is an unopposed application in terms of section 145 of the Labour Relations Act[1] (LRA). The applicant seeks to review and set aside an arbitration award under case number GAVL3546-20, dated 15 October 2021 (award), issued by the second respondent (commissioner)[2] under the auspices of the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA).

Background

[2] The applicant is a licensed betting business in terms of the applicable gambling legislation.

[3] On 26 October 2020, the applicant proffered the following allegations of misconduct against the third respondent, Ms Lirontso Jacqueline Mokoena (employee):[3]

> "Gross misconduct in that it was discovered on the 1st September 2020 that you failed to act in the best interest of the company by not reporting your team member who had printed top up vouchers without payment on your terminal, with your login details which resulted in a shortage.
>
> Gross misconduct in that it was discovered on the 1st September 2020 that you failed to act in the best interest of the company by not reporting your team member who was taking credit bets.

[1] No. 66 of 1995, as amended.
[2] Unless the context indicates otherwise, the second respondent will be referred to as "commissioner".
[3] Unless the context indicates otherwise, the third respondent will be referred to as "employee".

Gross misconduct in that it was discovered that on the 1st September 2020 that you failed to act in the best interest of the company by not reporting your fellow team member who was gambling on duty".

[4] On 28 October 2020, the applicant convened a disciplinary hearing against the employee. The applicant found the employee guilty of the above first 2 allegations of misconduct. On 30 October 2020, the applicant dismissed the employee.

[5] The employee subsequently challenged the fairness of her dismissal at the CCMA. The commissioner found her dismissal to be procedurally fair but substantively unfair. The commissioner ordered the applicant to reinstate the employee but limited her backpay to 12 weeks, having found that the employee did not "entirely have clean hands".

Arbitration proceedings

[6] The applicant led the evidence of two witnesses, namely Ms Loraine Shabalala (Shabalala), an area manager and Ms Moeketsi Ndlovu, a senior team leader. The employee testified and led the evidence of Ms Charrel Mathope (Mathope), a fellow mobile clerk and Ms Sibongile Makhoba (Makhoba), a betting clerk.

[7] I do not intend to deal in detail with the evidence that was led at the arbitration proceedings but merely provide a summary of the salient aspects thereof.

[8] The employee disputed the existence of the workplace rules that informed the basis of the misconduct against her. The applicant led evidence with reference to its disciplinary code to establish a duty on employees to report misconduct and which also made it clear that credit bets, whether for customers or personal gain are prohibited (and carries a dismissal sanction).

[9] The applicant also led evidence as follows:

9.1. It provides training to its employees twice a year in respect of its disciplinary code and regularly cautions employees against taking credit bets.

9.2. With reference to video footage, it demonstrated that the employee permitted a fellow employee, a “Margaret” to print a bet (ticket) using the employee’s terminal. Margaret then took the ticket and walked away. According to the applicant’s testimony, this constituted a credit bet as there was no exchange for cash when the ticket was printed. The employee can also be seen looking at a mobile phone (presumably her mobile phone), before handing it over to Makhoba, who was within her close proximity. Makhoba then looks at the mobile phone and starts to take many credit bets. In other words, Makhoba prints bets on her terminal without receiving any cash for the bets. The footage also shows the employee on least one occasion looking at Makhoba when she was printing the tickets/bets.

9.3. Credit bets constitute a serious offence and dismissal as a sanction is always imposed. If the bets are not paid for it will cause the applicant financial loss. Also, if a person wins the bet taken, the person will benefit for not paying for it. It led evidence further that if credit bets are condoned, it will serve only to promote such conduct. It also dismissed Makhoba for placing credit bets. Makhoba reported a loss of R700.00 when cashing up on her terminal. This prompted the applicant to view video footage and that is when it discovered impropriety on Makhoba and the employee’s part. The trust relationship with the employee cannot be salvaged.

9.4. Even though the employee was short on her terminal when cashing up, the monies balanced. She should not have called a fellow employee (a Ms Lerato) when she was cashing up to double check her cash shortfall but rather a team leader (which according to the applicant, can also be viewed in the video footage).

9.5. It was not permitted to share login details. It was permissible to use a different employee's login details when logging onto a computer but not a terminal (which is situated next to a computer). If there is a shortfall when cashing up on an employee's terminal, it will be assumed that the shortfall is attributable to the person whose login details were used on the terminal. The only exception to print bets is if you are at an event and you do not "have a machine to send a voucher". You can then contact the branch and request vouchers (presumably a betting ticket), but it must be done with senior management's consent. This only happened on one occasion when there was an event at the Vereeniging Correctional Service.

[10] Below is a summary of the employee's evidence at arbitration:

10.1. She was not aware of the disciplinary code. She disputed that credit bets were impermissible. She worked for the applicant for 6 years prior to her dismissal.

10.2. She was authorised by her manager, Shabalala, to allow her colleague on 1 September 2022 (presumably Margaret) to login onto her terminal.

10.3. The employee conceded under cross-examination that her version at the disciplinary hearing was that she handed Makhoba a mobile phone reflecting a message from Margaret, requesting her to place bets on Margaret' behalf. During cross-examination however, she stated that she simply handed the phone to Makhoba without reading the text message from Margaret.

10.4. When pressed further, she stated that there were team members who "were sent to work on the field" and that they were allowed to send them messages from clients to print tickets on their behalf.[4] She says that a ticket expires after a certain period and that is why she gave the

[44] I understand that reference to "field work" refers to work outside of the applicant's premises.

mobile phone to Makhoba. The team manager and managers were aware of this and encouraged them to sell tickets in this way.

[11] Mathope testified that it is not possible to log onto a system twice in a day. When "relievers" visit other branches, they do not use their own login details but the details of mobile clerks from that particular branch.

[12] Makhoba testified that:

12.1. She was employed by the applicant as a betting clerk. Insofar as field work is concerned, betting clerks attend do work in the field. Betting clerks "were playing tickets on behalf of customers". A manager's permission is required to place bets in the field on behalf of customers.

12.2. Under cross-examination, she testified that she was dismissed because she gave a ticket to a person who was in the street before receiving money for it. She conceded that placing credit bets were wrong.

12.3. When questioned by the commissioner in respect of the credit bet in question for which she was dismissed, she mentioned that Margaret assisted with facilitating the transaction and that she (i.e., Makhoba) did not receive the cash but Margaret received the cash (R150.00).

The Award

[13] As mentioned, the commissioner found the employee's dismissal to be procedurally fair but substantively unfair.

[14] The commissioner accepted that employees were not permitted to conduct credit bets and that the employee was aware of this rule. The commissioner found that the employee did not place a credit bet but her colleague, Makhoba did.

[15] Even though the employee did not raise the issue of consistency at the arbitration, the commissioner implied that the applicant applied discipline inconsistently. The commissioner stated that another employee, Lerato was present for a moment when Makhoba was placing credit bets but "there was no indication of any disciplinary actions taken against her". Presumably this was with reference to the video footage which displayed Lerato verifying the employee's cash balance when cashing up.

[16] The commissioner accepted the employee's evidence that she was not aware if credit bets were placed in her presence. The commissioner found that the employee was working and did not see the credit bets. The commissioner reasoned that when the employee handed a mobile phone to Makhoba, she would not have known if the message on the mobile phone was for a customer or for Makhoba's "own betting". The commissioner stated that the employee just happened to be there when Makhoba placed the credit bets.

[17] The commissioner found further that if the employee was aware that credit bets were taking place, she would have reported it. She found that even if the employee witnessed credit bets, dismissal was not an appropriate sanction as she was not "associated" with such conduct. Accordingly, the commissioner found that the employee's dismissal was substantively unfair. However, the commissioner limited her backpay to 12 weeks in that the employee did not "entirely have clean hands".

Grounds of review

[18] The applicant avers that the Award is one that is "not of a reasonable and objective decision maker, was unjustifiable in relation to the reasons advanced and accordingly the arbitrator exceeded her powers in terms of section 145(2)(a)(iii) of the Act, and has committed a gross irregularity in the conduct of the proceedings, including making mistakes of law, resulting in her misconceiving the nature of the enquiry, accordingly justifying the reviewing and setting aside, alternatively correcting, of the award handed down by her".

[19] In its supplementary affidavit, the applicant makes an encompassing statement that the commissioner's finding that the employee did not commit the misconduct was not a finding that a reasonable arbitrator could have come to.

[20] The applicant takes issue with various findings in the Award. Much of the detail in the applicant's supplementary affidavit revolves around the contention that the employee was present when the misconduct took place and failed to report it. The applicant also relies on video evidence that was led during the arbitration to demonstrate that the employee facilitated and witnessed credit bets being placed.

[21] The applicant also takes issue with the commissioner's findings that:

21.1. The employee "did not associate with the misconduct, but she just happened to be there in the middle of her colleagues when the incident took place"; and

21.2. It applied discipline inconsistently.

Evaluation

Test on review

[22] The Labour Appeal Court in *Securitas Specialised Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others*[5] stated thus in relation to the test on review:

> "[19] The test for review is this: "Is the decision reached by the arbitrator one that a reasonable decision-maker could not reach?"[6] To maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are

[5] (2021) 42 ILJ 1071 (LAC).
[6] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) para 110.

unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the arbitrator. The result will be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.[7]

[20] This Court has eschewed a piecemeal approach to a review application by the Labour Court. The proper approach is for the Labour Court to consider the totality of the evidence in deciding "whether the decision made by the arbitrator is one that a reasonable decision-maker could make."[8] [added emphasis]

[23] Accordingly, this court is required to assess whether, based on the totality of the evidence, the Award is one that a reasonable decision-maker could make.

[24] I turn now to consider the grounds of review.

Employee's failure to report the misconduct

[25] The applicant relies heavily on this ground of review. As mentioned above, the applicant contends that the employee had a duty in terms of its disciplinary code to report misconduct.

[26] At this point, it is appropriate to consider the decision of *NUMSA obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others*[9]. In *Dunlop*, the Constitutional Court expanded on the principle dealing with derivative misconduct. It is the doctrine which could see the dismissal of

[7] *Herholdt v Nedbank Ltd (COSATU as amicus curiae)* [2012] BLLR 1074 (SCA) paras 12 and 13.
[8] *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2014] 1 BLLR 20 (LAC) at paras 17 and 18.
[9] (2019) 40 ILJ 1957 (CC).

employees for their failure to report misconduct of other employees, whose identity is not known to the employer.

[27] The court held that the duty to inform an employer of the identity of perpetrators of misconduct arises from the duty of good faith. It also held that the duty to inform on employees is a two-way street between the employee and employer. The court stated the following:[10]

> "Added to the difficulty of factually inferring a duty of disclosure is that the imposition of this kind of duty on the basis of good faith can never be unilateral. The duty to disclose must be accompanied by a reciprocal, concomitant duty on the part of the employer to protect the employee's individual rights, including the fair labour practice right to effective collective bargaining. In the context of a strike, an employer's reciprocal duty of good faith would require, at the very least, that employees' safety should be guaranteed before expecting them to come forward and disclose information or exonerate themselves. Circumstances would truly have to be exceptional for this reciprocal duty of good faith to be jettisoned in favour of only a unilateral duty on the employee to disclose information. [added emphasis]

[28] The court accordingly held that in the context of a strike, the employer's concomitant reciprocal duty of good faith entails guaranteeing the employee's safety.

[29] Importantly, the court also determined the following:

> "This immediate recourse to "derivative misconduct" in logic and practice seems premature until all avenues of some form of individual and culpable participation in the collective violence are excluded. Why? First, because the possible duty to disclose misconduct of others only arises once that misconduct is established. Second, because it would be wrong to use the duty to disclose as an easier means to dismiss,

[10] See paragraph 76 of the judgment.

rather than dismissal for actual individual participation in violent misconduct itself. And third, it may result in the imposition of a harsher sanction on employees who did not take part in the actual primary misconduct."[11] [added emphasis]

[30] By this, the court held that it can only be fair to discipline an employee for derivative misconduct until it has been established that the employee has *not* participated in the misconduct.

[31] In my view, this ground of review faces two self-standing hurdles. The first is that the evidence demonstrated that the employee "participated" in the primary misconduct (i.e. the placing of credit bets). Indeed, Ms Hufkie, who appeared for the applicant, confirmed during argument that the employee "participated" in the misconduct. The employee permitted Margaret to place a credit bet using her terminal. The employee also facilitated Makhoba's placing of credit bets on her (i.e., Makhabo's) terminal. Accordingly, given that the employee participated in the misconduct, it was not appropriate for the applicant to have disciplined and dismissed her for failing to report the misconduct (as cautioned by the court in *Dunlop*).

[32] Secondly, it is questionable whether the employee had a duty to report the misconduct, given that the applicant was aware who the perpetrators were. The purpose of the doctrine is to assist employers identify the perpetrators. See also for example *African Meat Industry & Allied Trade Union &* others *v Shave & Gibson Packaging (Pty) Ltd*[12], where the employer made several requests to employees to identify perpetrators of misconduct during a protected strike. No information was forthcoming, and the employer charged employees for *inter alia* derivative misconduct, convened a disciplinary hearing against them, found them guilty and dismissed them. That the employer was in a position to identify the perpetrators of the misconduct, through for example photographs, Whitcher J held that it logically followed

[11] See paragraph 45 of the judgment.
[12] (2024) 45 ILJ 79 (LC).

that "where the employer had the means to obtain the information, there would have been no ground to burden the employees with a duty to provide the information".[13]

[33] In the circumstances, this ground of review stands to fail. It is therefore unnecessary for me to determine whether the applicant has complied with its concomitant reciprocal duty of good faith for having required the employee to report the misconduct (including what it entailed). Even if I am wrong that the derivative misconduct doctrine does not apply to the facts of this case, I still believe that this ground of review stands to fail. In my view, the rule requiring the employee to report the misconduct would be unreasonable or weigh heavily as mitigating factors for the very reasons mentioned in the above two paragraphs.

Finding that employee did not associate with the misconduct

[34] As mentioned above, the applicant charged the employee for failing to report the misconduct (i.e., the credit bets). However, at the arbitration proceedings, in its opening statement, the applicant's representative, Mr Botha stated *inter alia* that:

> "The actions or omissions of the employee was not acting in the best interest. She therefore failed in her fiduciary duty towards the company, and placed the company at risk. By risk, the witnesses will be testifying as to what the financial risk would have been. They will be explaining what is meant by credit betting, and how this lady was actually an accomplice through the misconduct of fellow employees".[14] [added emphasis]

[35] The Labour Appeal Court (LAC) in *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[15] held that employers may

[13] Paragraph 112 of the judgment.
[14] Page 8, volume 1 of the transcript of the record, lines 3 to 8.
[15] (2019) 40 ILJ 2477 (LAC); [2019] 12 BLLR 1304 (LAC) at paragraphs 16 and 17.

rely on competent verdicts at arbitrations or disciplinary hearings provided that employees are not prejudiced. The LAC held that prejudice would arise if an employee is unaware of the case the employee has to meet. There can be no prejudice "if the record shows that had the employee been alerted to the possibility of a competent verdict on a disciplinary charge he would have conducted his defence any differently or would not have had any other defence".[16]

[36] One therefore firstly has to consider whether a charge of being an accomplice is a competent verdict to the main charge (i.e., failing to report the credit bets). The Law of South Africa (LAWSA) defines competent verdicts as follows:

> "When the evidence does not prove the offence charged, but it does prove another offence which does not appear on the charge sheet as an alternative, the court may convict of the other offence if it is a competent verdict. Competent verdicts are the lesser offences implied by the main charge. A conviction of the lesser offence is permissible only when the main charge has not been proved."[17]

[37] Joubert however, favours a definition which includes not only a lesser offence but also one that is "akin" to the crime not proved. He states that:

> "It is possible that the evidence might fall short of proving the crime charged, but nevertheless succeeds in proving beyond reasonable doubt the commission of some other offence not specifically formulated as an alternative charge . . . to the charge in the indictment or charge-sheet, as the case may be. This type of situation is governed by the statutory rules pertaining to so-called competent verdicts, that is, the unexpressed or latent or implied charges which only surface once the

[16] See paragraph 17 of the judgment (footnotes omitted).
[17] The LAWSA, Criminal Procedure, vol 12, 3rd edition, D Smythe, J Omar paragraph 179 (footnotes omitted).

crime charged is not proved but some other crime, which is normally lesser than or akin to the crime charged, is proved."[18]

[38] In *EOH*, the employer charged the employee for acting dishonestly but dismissed the employee for gross negligence. The employee challenged his dismissal at the CCMA. The arbitrator found the employee's dismissal to be substantively unfair in that he had not been charged for gross negligence. The commissioner also noted that "the test for dishonesty and negligence are mutually destructive". EOH took the matter on review, which this court dismissed.

[39] In upholding the appeal, the LAC accepted that the evidence established that the employee was at least negligent. It failed to see how his evidence would have been any different, including submissions in mitigation and aggravation had he been charged with negligence.

[40] In my view, the charge of being an accomplice to the misconduct is a competent verdict in that it is lesser than or akin to the main allegation of misconduct. In *casu*, the employee was not prejudiced by being an alleged accomplice. She was alerted to this allegation of misconduct at the commencement of the hearing. Furthermore, as will be shown, the employee's defence would have been no different whether in respect of not reporting credit bets or being an accomplice to it. In any event, there are also elements of an allegation of being an accomplice mentioned in the charge sheet. The first allegation of misconduct specifically states that the employee permitted a team member to print credit bets on her terminal, using her login details. It must be restated that employers are not skilled legal practitioners and sometimes define or restrict allegations of misconduct too narrowly or

[18] Joubert (ed) Criminal Procedure Handbook 10 ed (Juta & Co Ltd, Cape Town 2011) at 302. See also *Phakane v S* 2018 (4) BCLR 438 (CC) (5 December 2017), where the minority judgment referred to this excerpt, though noting that the purpose of the competent verdict is to "provide the state with the ability to prosecute an individual for a lower crime".

incorrectly.[19] The LAC has also cautioned courts and arbitrators against adopting a formalistic or technical approach.[20]

[41] Burchell describes an accomplice as:

> "…one who takes part in the commission of the crime, but not as a perpetrator or an accessory after the fact. Accomplice liability is distinct from that of the perpetrator, being based on the accomplice's own unlawful conduct and fault (mens rea), but it is also liability which is accessory in nature in that there can be no question of accomplice liability without the existence of a perpetrator who commits the crime".[21]

[42] Below is a summary of what he outlines as the elements for being an accomplice:[22]

43.1. Causal relationship: there must be a causal relationship between the accused's conduct and the unlawful consequence. He states that: "It is arguable that both factual and legal causation are required for perpetrator liability, but only factual causation in the sense of 'furthering' or 'assisting' in the commission of the crime is necessary for accomplice liability".

43.2. Omission: the mere failure to prevent the commission of a crime does not entail liability, and the passive spectator is not penalised. He notes that where inaction amounts to "participation" in the crime itself, or assistance, authorisation or encouragement of the perpetrator, he or she may be an accomplice.

43.3. Knowledge: An accomplice is liable for the part he or she plays in the perpetrator's crime. It does not matter if the perpetrator does not know of the accomplice's assistance.

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[19] See *EOH* at paragraph 16.
[20] Ibid. paragraph 15.
[21] Jonathan Burchell, Principles of Criminal Law, revised (3rd ed), 2006, page 599.
[22] Ibid. pages 600 to 605 (any footnotes omitted).

43.4. Degree of accessoriness: Here, someone else must have committed the crime. In other words, a person cannot be an accomplice to his or her own crime.

43.5. Fault (*mens rea*): He notes that it would be sufficient if the accused foresaw the possibility that the principal offender's crime was being or was about to be committed and, accepting this risk into the bargain, went ahead and furthered or assisted in the commission of that crime. This, with the proviso that the accused must have known that his or her conduct was unlawful.

[43] I am satisfied that the employee acted as an accomplice in respect of the credit bets that were placed. The crux of this form of misconduct constitutes dishonesty.

[44] The employee knew or was reasonably expected to be aware what credit bets were and that it was not permitted in the applicant's workplace. The employer led evidence at the arbitration that it trains employees in respect of its disciplinary code twice a year and regularly reminds employees against placing credit bets. It is improbable that the employee was not aware that credit bets were impermissible, especially because she had been in the applicant's employ for 6 years prior to her dismissal. In any event, the commissioner found that the employee was aware that credit bets were impermissible.

[45] During the employee's evidence, she first attempted to distance herself from the misconduct and then to justify it. She stated that the "charges did not belong to her". She conceded under cross-examination that her version at the disciplinary hearing was that she handed Makhoba a mobile phone indicating a message from Margaret, requesting Makhoba to place bets on her behalf. The employee testified that she simply handed the phone to Makhoba without reading the text message. It is unlikely that the employee would not have read the text message before handing the phone to Makhoba. She clearly

facilitated the misconduct in this way and thereafter witnessed Makhoba place credit bets (this is also evident from the video footage). As it was put to the employee by the applicant's representative, tickets were being "spewed out" of Makhoba's terminal and there was no exchange of cash for the tickets. Makhoba too, in her testimony confirmed that credit bets were wrong and that cash for the bets were not placed at the time.

[46] The employee also permitted Margaret to place a credit bet on her terminal. This is also evident from the video footage and the employee did not deny this. It seems that the employee again attempted to distance herself from this act. Her evidence was that it was permissible to share login details. That explanation does not assist the employee, given that she permitted Margaret to utilise her terminal to print a credit bet. There appears to be no reason why Margaret was allowed to use the employee's terminal for this purpose. The employee's conduct clearly established a causal relationship to the "unlawful consequence" (i.e., the credit bets).

[47] In attempting to justify the placing of credit bets the employee's testimony was that was the way they worked. The employee's evidence was that credit bets were permissible when employees do "field work" by placing bets for customers offsite. The applicant stated that the only exception to the rule against credit bets is when there is an event and there is no machine to send a voucher, but that this only occurred once at an event at the Vereeniging Correctional Service. If the credit bets placed by Margaret and Makhoba were for legitimate business purposes offsite, it is unlikely that the applicant would have disciplined the employee.

[48] The employee also acted with the requisite *mens rea*. She permitted Margaret to place a credit bet using her terminal. She also facilitated the credit bets that Makhoba placed. She handed her a mobile phone to enable her to do so. Under cross-examination the employee stated that:

"MS MOKOENA: I gave Sibongile the message that came from Margaret, so it was her choice to play the numbers or not".[23]

[49] The employee thus conceded that she had foreseen that Makhoba may place the credit bets. The employee foresaw that the misconduct could occur, she facilitated and witnessed it.

[50] On these facts, it cannot be gainsaid that the employee was an accomplice to the misconduct. She was dishonest in her conduct in furthering or assisting her colleagues to conduct credit bets. It is also clear that the employee would not have conducted her defence any differently or would have had a different one had she only been charged with failing to report the misconduct. In sum, her version was that she disputed that credit bets were impermissible and attempted to justify why they were placed. This defence would not have been any different if she was only charged with failing to report the misconduct or being an accomplice.

[51] Now that it is established that the employee acted as an accomplice, does that mean that the award is reviewable. I think so. The employee was dishonest. Her conduct constitutes a serious infraction and must be viewed within the context in which the rule against credit bets operates in the applicant's workplace. Van Niekerk J (as he then was) in *King Price Insurance Company Ltd*[24] restated the high premium on honesty in the workplace and that it compromises the trust relationship. He states that: "…This court has long held that in the employment relationship, a premium is placed on honesty and that conduct involving moral turpitude compromises the trust relationship between employer and employee…".[25]

[52] The employee also displayed no remorse throughout the proceedings for her conduct and only attempted to shift the goal post. This serves as a further indicator why the trust relationship between the parties cannot be salvaged.

[23] Page 26, lines 6 and 7 of the transcript (record) bundle, volume 2.
[24] (JR 2055/2020) [2023] ZALCJHB 101 (17 April 2023).
[25] At paragraph 15 of the judgment.

The mitigating factors in this case, which is the employee's length of service and the fact that at the end of the day, the cash in her terminal balanced, unfortunately cannot aid her under these circumstances.

[53] On a conspectus of the above, I am inclined to uphold the applicant's review application. I do not believe that the commissioner arrived at a decision that a reasonable decision maker could have arrived at. In short, the outcome arrived at in the award is unreasonable. It is disconnected with the evidence that was before the commissioner, unsupported by any evidence and involves speculation by the commissioner.

[54] It is accordingly unnecessary to consider the applicant's further challenge to the award insofar as the commissioner's finding of inconsistency is concerned. Suffice to state to that to the extent that the commissioner's finding of inconsistency influenced the outcome of the award, the applicant correctly avers that it was not allowed an opportunity to deal with this finding. Consistency was also not in dispute at the arbitration.

[55] Lastly, I do not believe this matter ought to be re-considered by a different arbitrator. There is little point in remitting the matter for a rehearing. All of the relevant evidence is before this court and thus an order of substitution finds warrant.

[56] In the premises, the following order is made:

<u>Order</u>

1. The arbitration award under case number GAVL3546-20 is hereby reviewed and set aside.

2. The arbitration award is substituted by the following:

> *"The dismissal of the third respondent was substantively and procedurally fair".*

3. There is no order as to costs.

MI Savant

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant : Ms Cora Hufkie, Macgregor Erasmus Attorneys