



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no JR 3041/12

In the matter between

LIFE HOTEL AIRPORT JHB (PTY) LTD

Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER QUENNDY GUNGUBELE N.O

Second Respondent

ELIZABETH MOILOA

Third Respondent

Heard: 25 November 2015

Delivered: 25 November 2015

Edited: 4 February 2016

EX-TEMPORE JUDGMENT

CELE J

[1] The application before me is one brought in terms of section 145(2) of the Labour Relations Act 66 of 1995 where the applicant seeks to be granted an order carved in the following terms:

1. Reviewing and/or setting aside the arbitration award handed down by the second respondent on 27 October 2012 but received by the applicant on 22 November 2012 under case number GAEK5508/12.
2. Staying the application proceedings pending the finalisation of this review application.
3. Directing that any party who opposes this application be directed to pay the costs thereof.
4. Granting further and/or alternative relief.

[2] The application is opposed by the third respondent in whose favour the award was granted. However after the applicant had complied with rule 7A(8) and having filed the supplementary affidavit, it took the third respondent more than a year to file an answering affidavit. At the commencement of this proceedings court had to deal with the condonation application.

[3] The period of the delay was so long and in the absence of a plausible explanation the court dismissed the condonation application so the opposition to this review application is based on the papers as having been

filed by the applicant, that will be founding papers and the supplementary affidavit.

- [4] It remains common cause between the parties that the third respondent was in the employ of the applicant. She commenced her employment as sous chef and this was in May 2012. She then tendered her written resignation on 16 August 2012. She thereafter referred an unfair dismissal dispute for conciliation. When the dispute remained unresolved she referred that dispute to arbitration.
- [5] She was alleging that she had been constructively dismissed, she tendered evidence during the arbitration hearing and after that the general manager of the applicant, Mr Griesel, also testified. At the end of that arbitration hearing the second respondent issued an award by finding that indeed, the third respondent had been constructively dismissed. The commissioner ordered the applicant to compensate her in an amount equivalent to 12 months of the salary she was earning at the time. The applicant has approached court seeking to review and set aside this award and that it should be found that the dismissal was substantively fair.
- [6] During the arbitration hearing the evidence tendered by the third respondent was essentially around the difficulties that she encountered when she was employed. She indicated, as I have already said, that she had been a sous chef and that she was however promoted, to her understanding, to a head chef by one Karin who was still employed by the time the third respondent started. She was trained by Karin and when Karin suddenly resigned she

was then put into the position of the head chef.

- [7] Some amount of money was added to her salary as she was told by the general manager that she was the head of the department. She was to sort out every problem in her section. She encountered a number of difficulties as any employee would come across challenges at work. At one instance she found herself without any help from her colleagues who frequently absented themselves from work, two of them reported to be ill.
- [8] She took this matter up with the general manager and Mr Griesel told her to sort that out because it was her department. She then says that some of the staff members were even dragging their feet here and there and she had to do what was expected to be done by them to try and cover up all gaps so that the customers at the hotel did not feel that they were not properly being looked after.
- [9] It remained common cause that to the extent that she did her work the general manager had no complaints. He said that he did criticise her here and there which was normal in the cause of employment but she suggested that what she did was not well appreciated. What is confusing in the evidence of Mr Griesel though, is that he seemed to say that he was training her to be a head chef. That is a bit confusing in the sense that she had already been promoted to be head chef. I do not know what training was involved because he did not even talk about training, he said that he was criticising her here and there.
- [10] There are a number of instances where she had difficulties, she referred to

instances where, for instance her house was broken into. She reported that incident to Mr Griesel. She asked to leave early to attend to that incident but she had to make good for that time. She described that as a difficult side of the general manager. She needed time to go to various shops to get quotations in order to file a claim for theft that was committed at her house. She referred to instances where her child or children had taken ill and she needed to look after them. She was allowed to go home early but had to compensate for that lost time.

[11] She referred to instances where she was injured at work. She had to go for medical treatment and when she came back it was insisted upon that she produced a medical certificate. In usual circumstances she would be expected to do so. But she did paint a picture of being confronted by a manager who, if told what difficulties she encountered at work, her manager did not come up with any solution. It is clear from her evidence that if she had a shortage of staff she had to get permission to have a replacement or casual replacement for the staff.

[12] The evidence tendered by Mr Griesel suggested that every employee has challenges but that the Third Respondent was complaining unnecessarily and was crying repeatedly and unnecessarily. He said that she had to be subjected to some kind of training. On page 54 of the transcript, I need to refer to a bit of the evidence given by Mr Griesel, he says the following from line 9:

“Elizabeth was employed with the company from about, I think it was March. My predecessor employed her as a sous chef and then she was

appointed in the sous chef like I said, and then moved over. I took over in May on the property and saw potential in her and then employed her, improved her position to head chef, responsible for the entire kitchen operations at the hotel. So then basically there were, during this time, there were a number of times that we did the discussions of her performance just of a head chef, responsibilities as such to develop her further because we saw a potential and ja it then got to a point, I had lots of... At one stage the last meeting was lots of crying, whatever going on and she handed in her resignation and left the property immediately.”

He says that there were no formal grievances raised by herself. His evidence then continues to say that there was a handbook that contained the procedure if one had a grievance. The third respondent had to sign that handbook. She should have known that as there were no human resources personnel she had to get a form with which to lodge a grievance and she had to give that grievance to him.

- [13] The commissioner listened to all the evidence, issued an award and basically the essential part of his award is contained in paragraph 21 and 22. In 21 he says:

“In this case it is apparent that respondent had no clue on how employer and employee relations got managed in this era, therein he never challenged applicant assertion that she was never taken through the induction process when she started working there. It is common cause that the applicant joined the company when it was experiencing serious rate of staff turnover at senior level in that Karin, who received her in the kitchen as a sauce chef, quickly made her head chef as she soon resigned. When

Darryl came in at general manager level he left applicant to swim or sink as he regarded her as responsible enough to run her department as head chef. Indeed the word training was unheard of as the applicant was expected to prove her potential by operating as she explained above. She had done her best as Darryl also conceded that when she was on duty, there were no complaints from customers. Darryl also conceded that the applicant was expected to cope as she had a lot of responsibilities and his negative words to her were aimed to develop her. I submit that if that is how people got developed at the workplace then business would shut down as no one would thrive under the circumstances of the case.

Applicant had no support whatsoever, but she soldiered on but when the negative feedback amounted she became despondent and resigned in the heat of the moment, at that time she believed that Darryl would never warm up to her as she was continuously under attack.”

[14] I have looked also at the rest of the award. What is happening here is that according the commissioner, you have an employee who lodges a complaint in an informal manner without writing it down, nothing is done about that, she finally breaks down, she is in tears, she resigns, and leaves. The commissioner says this was constructive dismissal.

[15] The applicant calls the finding a misdirection because every employee has her own challenges. The commissioner is said to have misdirected herself in the way that she assessed the evidence. I must thank Mr Hutchinson for drawing my attention to the case of *County Print CC v Commission for*

*Conciliation Mediation and Arbitration*¹ where the court had to deal with the question of constructive dismissal. In the footnote the following appears:

“The court then confirmed the three requirements that must be established for constructive dismissal as set down in *Solid Doors*. The employee must have terminated the contract of employment, employment must have become intolerable for the employee and the employers conduct must have made continued employment intolerable. If all three requirements are present constructive dismissal has been established.”

- [16] A trend has developed, as employers would have it, that when an employee has a grievance she must follow certain procedures. It is common cause that the third respondent never followed any formal grievance procedure.
- [17] What is factually clear though is that the general manager became aware that the third respondent was met with challenges and they were serious challenges, where some of the employees did not pitch for work and she needed a solution to be given to her by the general manager. She did not have the general authority to employ what they called “*skillers*”. One time she employed one and apparently she was taken to task on that.
- [18] Clearly the third respondent showed in her evidence that a point had been raised in the cause of the employer-employee relationship where she could no longer have any faith in the resolution of problem that she encountered when such were given or articulated to Mr Griesel. Clearly, in this case, the third respondent did show to the commissioner that she was confronted with a very difficult situation at work.

¹ (2015) 36 ILJ 2245 LAC

- [19] She did resign by a letter that she gave. Indeed, she had reached a point where one can, even on objective facts, agree with her that it was difficult for her to continue working under this general manager. He is the one who said she cried repeatedly. Yet he does not come forward to say what he did about that and about the complaints that were lodged. In as much as there was no formal complaint in the form of a grievance, there was this crying which was a clear indication that all was not well when the Third Respondent tried to convey the difficulties which she had, she was left indeed to swim against a heavy tide.
- [20] In my view, the commissioner properly assessed this evidence and therefore did not misdirect himself in the manner he went about assessing it. He came to a conclusion that the third respondent was faced with a difficulty of a hard hearted employer who did not want to meet her at least half way. The intolerability that she was confronting was indeed caused by the employer, in the person of a general manager.
- [21] This is a case where I am not able to find any defect as defined in section 145(2) of the Act. Nor am I persuaded that there is any defect as explained in *Goldfields Mining South Africa (Pty) Ltd, Kloof Gold Mining v CCMA & Others*² where the review test is articulated in paragraphs 13 to 21 of the judgment. I cannot find any unreasonableness with this award. Accordingly the review application stands to be dismissed.

² 2014(35) ILJ 943 LAC

I make the following order,

1. Condonation for the late filing of the answering affidavit is refused.
2. The review application is dismissed.
3. No costs order is made.

CELE J

JUDGE OF THE LABOUR COURT

APPEARANCES

For the Applicant: Adv. WJ Hutchinson, instructed by Fluxmans Inc.

For the Respondent: Mr. I M Shongwe, Shongwe Attorneys