



**THE LABOUR COURT OF SOUTH AFRICA**  
**(HELD AT JOHANNESBURG)**

**Not Reportable**

**Case No: JR 2830/17**

In the matter between:

**NEW HEIGHTS 1157 CC**

**t/a TASHAS V&A**

and

**COMMISSION FOR CONCILIATION,**

**MEDIATION AND ARBITRATION**

**CECILIA BRUMMER N.O**

**SHOWUSA obo DANIEL TANAKA DENESI**

Applicant

First Respondent

Second Respondent

Third Respondent

**Heard: 11 August 2020 (In Chambers)**

**Date of judgment: 18 August 2020. Judgment delivered by email by 14:00**

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**JUDGMENT**

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**VAN NIEKERK J**

- [1] The applicant seeks to review and set aside an arbitration ruling issued by the second respondent (the arbitrator) on 29 November 2017. In her award, the arbitrator found that the applicant had unfairly dismissed the third respondent and ordered the applicant to compensate him a sum equivalent to 5 month's remuneration, being R16,000.
- [2] The application is unopposed. The applicant is nonetheless required to establish that the arbitrator's decision, having regard to the evidence, is so unreasonable that no reasonable decision-maker could come to it.
- [3] The material facts are recorded in the award. The third respondent was employed by the applicant as a kitchen assistant, earning some R 3200 per month. He is an asylum seeker and has formal recognition of his refugee status. The applicant contended that the third respondent was in possession of a fraudulent work permit. He was given until 28 January 2017 to obtain a valid work permit. He did so and produced a document dated 27 January 2017 from the Department of Home Affairs. The third respondent continued working and was told by the kitchen manager on 28 August 2017, some seven months after production of the document, that his document was not an original. He was requested to return his uniform and "chased away". The arbitrator found that the witness who testified on behalf of the applicant had very little detail or knowledge about the matter, and that he did not have a discussion with the third respondent at any time. The matter had apparently been dealt with by another member of the applicant's staff who at the time of the arbitration, was no longer in the applicant's employ, and who was not called to give evidence. The witness could not dispute the water mark from the Department of Home Affairs on the permit, nor could he comment on the fact that the South African Revenue Services had accepted the document and used it as the basis for registering the third respondent as a

taxpayer. The third respondent testified that he had approached the Department of Home Affairs when told by his employer that his paperwork was not original. He returned to the Department of Home Affairs when the second document was issued to him on 27 January 2017. In her analysis of the evidence, the arbitrator found that there had never been any charge of fraud against the third respondent and that no disciplinary processes were ever instituted. She concluded that the applicant's case "is built on flimsy suppositions and is fraught with inaccuracy." The arbitrator found that the applicant's witness was not credible, that he was evasive, and refused to answer questions which exposed the applicant's version to be inaccurate. On the other hand, the arbitrator found the applicant to have presented clear and credible testimony and to have complied with the instructions given to him. She found that there was no evidence to suggest that the document was fraudulent, or that the third respondent was complicit in any way in any misconduct. The arbitrator went on to observe that the applicant's conduct, both prior to the dismissal and subsequent thereto, as well as during the course of the arbitration hearing, had been appalling.

- [4] It is well-established that this court is empowered to intervene by way of review if and only if the arbitrator's award is so unreasonable that no reasonable decision-maker could come to the same decision having regard to the material that served before the arbitrator. The grounds for review raised by the applicant are that the arbitrator committed an error of law by applying the principles and guidelines for cases of misconduct and incapacity enquiry and that she committed an error of fact as a result of a failure to apply her mind to the facts and evidence presented.
- [5] There is no basis on which the arbitrator's award stands to be reviewed and set aside. The award is considered, and the arbitrator was clearly aware of the line between misconduct and incapacity and the processes that attached to each. It was the applicant's witness who stated during the hearing that the third respondent had committed fraud and in particular, that he had submitted a fraudulent work permit. All that the arbitrator stated was that if the applicant had

regarded the third respondent's position of a work permit that was alleged to be fraudulent, it ought to have treated the matter as one of misconduct. It was not in dispute that the third respondent had not been subjected to a disciplinary hearing. To the extent that the applicant suggests that the absence of a valid work permit was some form of incompatibility, this is simply not the case presented by the applicant at the hearing. In particular, there was never any explanation proffered by the applicant for the delay between the third respondent producing a valid work permit on 27 January 2017 as he was requested to do and 28 August 2017 when the applicant appears to have taken the view that the permit was fraudulent and dismissed the third respondent on that basis.

- [6] Finally, the criticisms levelled by the arbitrator at the applicant and its witness, Mr Colin Roll, are entirely justified. Indeed, these criticisms can be extended to the present application and the filing of a review in circumstances where the application manifestly lacks merit and his purpose appears to be no more than denying the third respondent the paltry sum awarded to him by way of compensation. Had the application been opposed, I would have been inclined to dismiss the application with a punitive order for costs.

I make the following order:

1. The application is dismissed.
2. The registrar is directed to forward a copy of this judgment to the third respondent's representative by fax and by email.

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André van Niekerk

Judge of the Labour Court of South Africa

### **APPEARANCES**

For the applicant: Higgs Attorneys, Johannesburg