

FOR RESPONDENT

:

J. HLOPHE

JUDGEMENT 05/02/08

[1] This is an application for determination of an unresolved dispute instituted by the applicant against the respondent in terms of the provisions of the Industrial Relations Act.

[2] In her papers the applicant stated that she was employed by the respondent as a waitress on the 25th February 1997 and was in the continuous employ of the respondent until the 4th June 2003 when her service was terminated by the respondent. She avers in her papers that the termination of her employment was unlawful and both procedurally and substantively unfair and unreasonable in all the circumstances of the case.

[3] She now claims that the respondent should therefore pay her terminal benefits as follows:

Notice pay	E1,916.00	
Additional Notice pay		E1,596.00
Severance allowance		<u>E3,990.00</u>
Total	<u>E7,502.00</u>	

[4] The respondent denies that the applicant was unlawfully terminated. In its reply it stated that;

“3.2 Applicant’s services were terminated after she was found guilty of unlawful and unauthorized possession of gambling chips amounting to E1,500.00 and trying to encash them against company rules, which is viewed as a serious offence by the company.

3.3 The said termination followed a fully-fledged disciplinary process where all the rules of fair procedure were followed.

3.4 The dismissal was fair and was for an offence contemplated by Section 36 of the Employment Act.

3.5 Taking into account all the circumstances of the matter, it was fair to dismiss the applicant.”

[5] The evidence led before the court revealed that the applicant who was a waitress was on duty during the evening of the 3rd May 2003. At one of the tables in the Casino room were three people being RW1 Lucky Vusi Maseko, Vusi Maseko (now deceased) and a certain person of European origin referred to in the evidence as

“a white man.” RW1 said he heard the applicant talking to the late Vusi Maseko asking him to change gambling chips for her. RW1 said the applicant went away and returned with the chips under a tray. RW1 said before Vusi Maseko could change the chips, the applicant and Vusi were led away by someone from the surveillance department. They were led to the office of RW2 who first interrogated the late Vusi Maseko and thereafter the applicant. Vusi Maseko told RW2 that the chips were given to him by the applicant. The applicant when interrogated however denied that she gave Vusi Maseko the chips.

[6] RW2, Elmon Fakudze told the court that he received a tip off from someone who telephoned him and told him what had happened between the applicant and Vusi Maseko. RW2 was at home at that time and it was around 04:00 hours when he received the telephone call. He then went to work and played the tape to review the incidence that was reported to him. RW2 said when he interrogated Vusi Maseko he told him that he was given three gambling chips valued at E500:00 each by the applicant. RW2 said Vusi Maseko produced the three chips from his packet wrapped in a white tissue paper.

[7] The surveillance camera tape was played in court. It did

not however assist the court much as it was not clear and had no sound. From the blurred pictures the applicant is seen approaching Vusi Maseko who is sitting with three people at the table. She is carrying a tray. She extends one hand towards him in a way that suggests that she is giving him something white in colour. As the pictures were blurred, it was not clear what that substance was.

ANALYSIS OF THE EVIDENCE:-

[8] The evidence that was clear to see from the tape was that there was somebody was seated between RW1 and the late Vusi Maseko. The court has difficulty in accepting RW1's evidence about what was allegedly said by the applicant to the late Vusi Maseko pertaining to the chips for the following reasons:

8.1 If the applicant was on a mission to commit a crime by having the chips exchanged for money, why would she speak so loud to Vusi Maseko in such a way that their conversation was heard by RW1 who was not sitting next to Vusi Maseko but one person away from Vusi Maseko.

8.2 RW1 also told the court that when the applicant came to give Vusi Maseko the chips, he heard her

say “here are the chips.” The question again is why would the applicant speak so loud to as to be heard by other people other than Vusi Maseko if the two were involved in an illegal transaction.

8.3 Further, it is not clear why would there be a need for the applicant to announce to Vusi Maseko that “here are the chips” if, according to RW1, the two had already arranged that she would give them to him in exchange for money.

8.4 During cross examination when RW1 was asked as to when did he discuss the issue before court with management. He said he never did so but was only informed that he would be giving evidence in court after he had seen the video in the court premises when it was being viewed by the parties at the request of the applicant and his attorney. From the position where RW1 was sitting he could not have heard the conversation between the two unless the applicant had raised her voice which thing she was highly unlikely to do if she was engaged in an illegal deal with Vusi Maseko. It is the court’s conclusion that RW1’s evidence is unworthy of belief and that it is either something that he pieced together after having seen the video or something that he was told

to say in court.

[9] After RW2 Elmon Fakudze had interrogated Vusi Maseko, he then sent for the applicant. The applicant when interrogated denied that she had given Vusi Maseko any chips. During the preliminary enquiry by Fakudze therefore, the position of the applicant was clear. She denied that she gave the three chips to Vusi Maseko. A date for disciplinary hearing against the applicant was set. The applicant pleaded not guilty. At the end of the hearing however the chairman found the applicant guilty. Vusi Maseko who told Fakudze that he was given the three chips by the applicant did not testify at the hearing. RW1 also did not testify at the hearing.

[10] The court was told that it was the company policy not to call customers to testify during disciplinary hearings against employees. This company policy clearly violated the applicant's right to a fair hearing and cannot be used by the respondent as an excuse for its failure to call a vital witness. The failure of the respondent to call Vusi Maseko at the disciplinary hearing unfairly denied the applicant the opportunity to cross examine that witness. It cannot therefore be said that the disciplinary process was fair.

[11] The evidence by Elmon Fakudze that the late Vusi Maseko told him that it was the applicant who gave him the three chips is inadmissible as hearsay. Fakudze said Vusi Maseko also made a written statement to him. This statement was handed to court and marked "R1". It was not clear for what purpose it was handed to court. It is clearly inadmissible if its purpose was to prove the contents therein. It can only be admissible as proof that such a statement was written by the person who wrote it. It clearly does not fall under the exceptions to the rule against hearsay, and it is not a public document.

See: HOFFMANN & ZEFFERTT: "THE SOUTH AFRICAN LAW OF EVIDENCE" (2001) 4th Edition at p.124

[12] The applicant denied that she was in possession of the gambling chips. The burden of proof was on the respondent to prove on a balance of probabilities that the applicant was in unlawful possession of the chips on the night in question. From the evidence of Fakudze it seems that it is not per se unlawful for the employees to be in possession of the gambling chips. He said that if an employee has been given the chips by a customer, that

employee must declare the gift to the person responsible at the tables who will in turn report to the surveillance room. It seems therefore that even if the court were to find that the applicant was in possession of the three gambling chips on that night, the respondent would still have to prove that the possession thereof was unlawful because they have not been declared. Further, there was no evidence that there were any gambling chips that went missing from the respondent's premises on that night or that there was a customer who had reported having lost three chips on that night or at any other time.

[13] From the observations above, it cannot be said that the termination of the applicant's service was fair as envisaged by Section 42(2) of the Employment Act of 1980. The court is alive to the provisions of Section 11 of the Industrial Relations Act which state that the court is not strictly bound by the rules of evidence or procedure which apply in civil proceedings and that it may disregard any technical irregularity which does not or is not likely to result in a miscarriage of justice. In this case the court having rejected the evidence of RW1, there was no other credible evidence before it.

[14] The court, taking into account all the evidence before it and all the circumstances of the case, will come to the

conclusion that the applicant's termination was unlawful and procedurally and substantively unfair and unreasonable in all the circumstances of the case.

[15] The applicant told the court that she is 54 years old. She said she is not employed. At the time of her dismissal she was earning E1,916.00 per month. Taking into account all these factors and all the circumstances of the case the court will make an order that the respondent pays the applicant the following terminal benefits and compensation for the unfair dismissal:

1. Notice pay	E1,916.00
	2. Additional notice
E1,596.00	
	3. Severance allowance
E3,990.00	
	4. Compensation (E1,916.00 x 5 months)
<u>E9,580.00</u>	
	Total
<u>E17,082.00</u>	

[16] There is no order as to costs

The members agree.

NKOSINATHI NKONYANE
JUDGE - INDUSTRIAL COURT