JURISDICTION, DETAILS OF THE HEARING AND REPRESENTATION

1. I satisfied myself that the CCMA had jurisdiction to hear this matter.
2. The arbitration hearings were held on 23 August 2018, 19 October 2018, 15 March 2019, 25 April 2019 and 4 July 2019 at the CCMA offices, Anton Lembede St, Durban. The applicant was represented by attorney Mr …………. after an opposed application for legal representation was made. It was granted due to the age of the applicant and his inability to represent himself. The respondent was represented by NEASA official Mr …………..
3. The matter was postponed on a number of occasions due to the unavailability of the respondent’s witnesses or the applicant’s legal representative.
4. Insofar as documents are concerned –
   1. Both parties handed in their respective bundles at the commencement of the arbitration;
   2. During the arbitration, the respondent handed in further documents from time to time; and
   3. On 25 April 2019 the applicant indicated that it had handed to respondent a copy of a video clip showing Ms Lottering (a witness for the respondent) entering and leaving the Westside Lodge;
   4. None of the documents or the clip was disputed as regards authenticity or correctness.
5. A pre-arb was conducted on 23 August 2018 with the consent of both parties. For this purpose a list of issues that are usually encountered in alleged misconduct cases was distributed to both parties. A typed minute of the pre-arb was distributed to both parties. After being amended at the request of the respondent, it was read into the record on 19 October 2018. Both parties were asked to ensure that their witnesses deal with the disputed issues.
6. At the commencement of the arbitration and on each new hearing day, the parties were advised as follows as regards cross-examination: “*Witnesses will be subjected to cross-examination. The purpose of cross-examination is, amongst other things, to show that your version is more probable than that of the other side. It is important to bear 3 things in mind when cross-examining – You must put your version to the opposing witness; If an opposing witness has left out an important fact then that should be put to the witness; If you consider that any evidence of the witness to be false or incorrect then that should also be put to the witness. The purpose of all this is to give the opposing witness an opportunity of commenting on your version. It is very important to contest evidence that you disagree with because evidence that is left uncontested is likely to be accepted as being true. An adverse inference may be drawn if you do not put your version or put a new version ie a version that was not part and parcel of your case previously*.”
7. The applicant did not heed the advice contained in the above paragraph: he failed to put significant portions of his alleged version to the respondent’s witnesses.
8. On 25 April 2019 it became necessary to remind the applicant of the duty of respect between employer and employee, and that the rule applies not only in the workplace, but also in the arbitration. This was done because the applicant chose to engage in laughter during the testimony of Ms Lottering (the victim of the applicant’s alleged assault).

ISSUE TO BE DECIDED

1. Whether the applicant was dismissed unfairly. He sought reinstatement with back pay. No statutory claim was made.

BACKGROUND TO THE DISPUTE

1. The applicant is ……………………. (male, age 69), a full-time night receptionist in the respondent’s hotel. He commenced employment in terms of a written indefinite term contract of employment on 1 June 2000 and was dismissed on 5 June 2018 after being suspended with pay on 28 May 2018. He earned R6000pm for working 45 hours a week at night. The applicant has not found alternative employment despite making attempts, nor has he earned anything from casual employment since the date of his dismissal. His highest standard of education is Std 6. As breadwinner he has 1 adult dependant.
2. The respondent is ………………….. (PTY) LTD T/A …………….., a hotel. It employs approximately 70 persons at the site in question and approximately 600 in the …………..Hotel group comprising 8 branches.
3. The applicant was given a notice to attend a disciplinary hearing on 30 May 2018 containing the following charges: *Charge 1: Desertion of post on 26 May 2018. Alternatively, leaving the workplace early without permission and or authority on the 26 May 2018. Charge 2: Abuse and or swearing and or insulting language towards a fellow co-employee on the 26 May 2018. Charge 3: Assault of a female co-employee whilst on duty on 26 May 2018*.”
4. The disciplinary hearing was held on 1 June 2018. The applicant attended; chose to represent himself; pleaded not guilty; heard the evidence being given against him; and gave evidence in support of his case. He was found guilty on charges 2 and 3 and dismissed.
5. The respondent maintains an appeal procedure but the applicant chose to refer his dispute to the CCMA on 6 June 2018. The matter was conciliated on 27 June 2018 but remained unresolved. Hence the referral to arbitration.
6. Both parties made written closing statements.

SURVEY & ANALYSIS OF EVIDENCE & ARGUMENTS

1. The respondent called the following witnesses in support of its case: …………… (grade C security officer employed at the site for 14 months); …………… (IR/HR administrator for the group for 12 years); ……………..(aka …………..) (front desk receptionist for 4.5 years); …………. (assistant general manager for 15 years); and ……………. (general manager for 5 years). Only the applicant gave evidence in support of his case.
2. Lottering resigned from the respondent’s employment on 31 May 2019. She did not return to complete the re-examination of her evidence.
3. No procedural issues were raised during the pre-arb process. Despite that the applicant made closing submission running to almost 5 pages on procedural issues.
4. The following was agreed to, common cause, undisputed or conceded during the pre-arb and/or the arbitration:
   1. The applicant was aware of the rule to the effect that physical or verbal abuse or violence are not permissible in the workplace;
   2. The applicant was aware that breaching these rules was serious and dismissible offences;
   3. Lottering was 30 weeks pregnant at the time of the alleged incident;
   4. Lottering had called the police and for an ambulance after the alleged incident;
   5. Lottering had also called assistant general manager …………..to report the alleged incident;
   6. Lottering was taken to Addington Hospital immediately after the alleged incident for a check-up;
   7. The applicant had an excellent relationship with Mr …………..(the CEO); and with Lottering; and with the group HR administrator Mr …………..;
   8. The applicant had long service; and
   9. There was no issue relating to the consistent application of the rules in the workplace.
5. I find all the respondent’s witnesses to be reliable and credible witnesses. Moreover, they had no reason to fabricate evidence against the applicant: he admitted that he had no enemies in the workplace who would welcome his downfall.
6. I find the applicant was not a reliable or credible witness because he failed to put significant portions of his alleged version to the respondent’s witnesses in cross-examination as follows:
   1. That the person who had caused injuries to Lottering was in fact the security officer Mthiyane by him having carried her in an awkward manner to the waiting taxi;
   2. That the general manager was a liar;
   3. That Lottering –
      1. Was a “Judas;”
      2. Was a person of bad character;
      3. Had “conned” him out of the monies and gifts that he gave her;
      4. Was mentally disturbed or bi-polar;
      5. Was a violent person: she used to take glass tumblers (company property) and throw them at him; she cut his clothing and tie with a pair of scissors; and she used a koki pen to write over his clean white shirt;
      6. Got him to pay R1500 towards the replacement of the electricity distribution board (DB) in her flat;
      7. Smoked, inhaled or sniffed “some kind of smoke” on the evening in question;
      8. Was given time-off by him if she was unwell and that he was authorised to do so;
      9. Went regularly to Addington Hospital during working hours to fetch medication.
7. The applicant was specifically requested at the end of the arbitration to make submissions on the weight, credibility and reliability that should be placed on his evidence due to his failure to put his version to the respondent’s witnesses. He failed to make these submissions.
8. The applicant’s attorney is a highly qualified and experienced member of the legal profession (and ex-magistrate). With the applicant being represented by a person of such calibre I find that the applicant probably misled his own attorney about his version. In other words, if he had instructed his attorney correctly and honestly, the attorney would probably have put that version to the respondent’s witnesses in cross-examination. As it was, the attorney left no stone unturned during thorough cross-examination.
9. I accordingly find all the above (in para 21) to be recent fabrications by the applicant.
10. Significant parts of the applicant’s version were contradictory, inconsistent, inexplicable or puzzling. I set out only some of these below:
    1. That Lottering was taking high doses of medication and drugs. But he could not explain why his version was that she walked briskly on the night in question. Nor was it explained why he had put to Lottering in cross-examination that she was “sluggish” on the night;
    2. That he was a trained first-aider and his training indicated that pregnant persons should not be carried in a particular way. But he could not explain why he did not stop the security officer Mthiyane from carrying Lottering in that way to the waiting taxi;
    3. That the CEO Mr ……….. allegedly held the applicant in high esteem and regard because he was honest, meticulous, dedicated and punctual. He had also apparently used his knowledge of computers to boost the business of the respondent. But the applicant could not explain why the CEO did not intervene to stop “bad things” from happening to him during the disciplinary process;
    4. As regards his relationship with Lottering –
       1. It was common cause that Lottering had sent the applicant numerous SMSs, some with strong language informing him that he must not contact her; that she did not want anything from him; that he must stay away from her; and that he must stop calling her. Despite that he could not explain why he gave her money and gifts;
       2. That he had on his own initiative requested the banking details of Lottering so that he could deposit monies into it. But he insisted on calling her a “con;”
       3. That even though she allegedly had a bad character; had allegedly betrayed him; and had allegedly “conned” him out of thousands of rands over the years, he would **even today**, help Lottering because he had a kind, loving, good, generous, and charitable heart;
       4. That Lottering was a “Judas.” But he could not explain why he had maintained a friendship with her to this day;
       5. That after his dismissal, he and Lottering had become **closer** friends. This is despite the fact that she was the person who had allegedly caused trouble for him;
    5. I put it to the applicant that I found it strange that he, as an unemployed person, was helping someone (ie Lottering) who is employed. Should it not be the other way round? He gave no answer;
    6. The applicant disputed having paid for Lottering’s medical expenses. But his own evidence showed that he had paid for her to be examined by a “white lady doctor;”
    7. The applicant praised himself on a number of occasions about his meticulous adherence to procedure in the workplace. Even though he regularly made entries in the occurrence book (OB), he failed on the night in question, to record the incident, or at least his version of the incident;
    8. The applicant also failed to explain why his version was only being revealed during the arbitration, and why he had failed to explain to the chairperson his version during the disciplinary hearing.
11. Applicant submitted in his closing statement that Lottering’s evidence was tainted by her acceptance of the monies and gifts. I reject this submission for the following reasons:
    1. Her acceptance of the monies and gifts has no relevance to determining the principal issues: whether the applicant assaulted her;
    2. It was never put to Lottering that she had inveigled the applicant to give her monies and gifts;
    3. Despite many SMS appeals by her for him to stay away from her, he insisted on making contact with her. The only inference that one can draw is that he gave her these things freely and voluntarily.
12. The following findings are made, on the probabilities, on the disputed issues:
    1. Whether the applicant is guilty of charges 2 and 3: The applicant’s defence in relation to both charges was a bare denial. Lottering’s evidence was clear: she had challenged the applicant about his absence from the reception especially as it was a busy evening and he had left her alone in the reception. She also asked him whether he had used one of the clean rooms to take a shower. The applicant, uttered the words “*Hey you bitch*” before advancing towards Lottering and grabbing her by the throat. She tried to remove his hand from her throat but he pushed her, causing her to fall. I have no hesitation in accepting the evidence of Lottering. Moreover her evidence is in accord with the facts that are common cause. I find accordingly that the applicant was found guilty correctly of these serious charges.
    2. Whether the sanction of dismissal was fair: I find the sanction of dismissal to be fair in respect of charge 3. Violence in the workplace must be condemned. This incident was worse: it was by a male against a vulnerable and defenceless pregnant woman. Moreover the applicant cannot be trusted to perform his job without endangering the safety of other members of staff. The general manager made it clear that respondent took the safety of its staff, especially females, seriously.
    3. Whether the employment relationship was rendered intolerable: I find that to be so as a result of the applicant committing these offences.
13. There is a troubling issue and that is whether the applicant attempted to subvert the process at the CCMA. Briefly the facts are that –
    1. There are a number of SMSs that show that he was worried by the CCMA process and wanted to meet with Lottering. Some of the gifts and monies were given by the applicant to Lottering on the eve of or close to the various hearing days at the CCMA. The applicant’s own version was that he gave Lottering thousands of rands as “*milk money for baby*,” a bed, stove, clothing, dress and shoes besides dining in the Wimpy. (Lottering disputed receiving some of these monies or gifts. But it is not necessary to resolve this dispute.);
    2. Page 37 of the respondent’s bundle contains an SMS dated 23 October 2018 from the applicant to Lottering in the following terms: “*Dol my apologies. Just a favour let me know about my job and I promise will wash your feet. Worship you. God bless. BYE DOL*.” It was put to the applicant by me that this suggested that the applicant wanted Lottering to give evidence favourable to him and that he will respond by washing her feet. The applicant agreed that this was a reasonable interpretation of this SMS;
    3. With the finding already made on the principal issue, that the applicant was correctly found guilty of charges 2 and 3, it is not necessary, and I refrain, from deciding whether monies and gifts were given as inducements to influence Lottering to give evidence in his favour. I leave it to the reasonable reader to draw his or her own conclusions.
14. A few months into the arbitration proceedings the applicant and Lottering had a rendezvous in a hotel room at Westside Lodge. A video clip was handed in of Lottering entering and leaving those premises. It is not clear what the applicant intended to convey by offering this evidence; nor did he make any submissions in his closing statement about the significance thereof. I can only infer that the applicant was attempting to portray Lottering as a person of questionable character and/or low morals. The applicant is to be condemned for introducing intrigue into the proceedings especially as he repeatedly protested that he saw Lottering as his own daughter.
15. The applicant’s defence was frivolous and merit-less. The respondent would have been awarded costs had it been legally represented. Lottering is to be commended for maintaining honesty, respect and dignity during the proceedings despite many provocations.

AWARD

1. The application is dismissed.

Dated at DURBAN on this the 12th day of JULY 2019.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**R J PURSHOTAM**

*Commissioner*