

IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT DURBAN)

Not reportable
Case Number: D97/2010

In the matter between:

MXOLISI SERAPHICUS ZWEZWE

Applicant

and

DEPARTMENT OF EDUCATION KWA-ZULU NATAL

First Respondent

EDUCATION LABOUR RELATIONS COUNCIL

Second Respondent

COMMISSIONER R DE WET N.O.

Third Respondent

Date of Hearing: 17 June 2011

Date of Judgment: 18.. October 2011

JUDGMENT

GUSH J

1. The applicant in this matter applies to review and have set aside the award of the third respondent and that it be altered to the effect that the applicant's dismissal by the first respondent was unfair, alternatively that the matter be referred back to the second respondent for determination before an arbitrator other than the third respondent.

2. Specifically the applicant applies for an order in the following terms:
That the award in respect of substantive fairness of third respondent, being Commissioner R de Wet of the second respondent, under case number PSES146-

09/10KZN, in the proceedings between the applicant and the first respondent, be reviewed and/or set aside in accordance with the provisions of section 145 (1) (a) and 145 (2) of the Act "(sic).

3. The third respondent's award contains a summary of the background to the matter and a very detailed "survey of the evidence and argument". I do not intend to repeat what is contained in the award.

4. Suffice to say that the essence of the matter involved the dismissal of the applicant after he had been found guilty of the following misconduct:

"Charge 1

In at on or about 3 February 2008 at Umzimkulu you conducted (sic) an act of sexual assault on a learner by the name of Lungiswa Radebe, that I contravening section 17 (1) (b) of the Employment of Educators Act as amended.

Alternatively

In that on or about January - February 2008 at Umzimkulu while on duty you conduct yourself in an improper, disgraceful or unacceptable manner by having a sexual relationship with a learner by the name of Lungiswa Radebe, thereby contravening section 18(1)(q) of the Employment of Educators Act as amended".

5. At the time of his dismissal, the applicant was employed by the first respondent as an educator at the Ibisi secondary school. The applicant had been an educator for 12 years, was the Head of Department, and was 38 years old. During December 2007 or January 2008, the applicant struck up a relationship with a

learner (Radebe) who was in grade 10 during 2007 and grade 11 June 2008. The learner was 18 at the time.

6. This relationship was of a very short duration. The relationship ended on 14th February 2008 after the applicant had had intercourse with Radebe, according to her against her wishes.

7. Having heard the evidence of both the applicant and the learner Radebe, and the thorough cross-examination of Radebe and the applicant, the second respondent concluded on a balance of probabilities that the dismissal of the applicant was both substantively and procedurally unfair.

8. The applicant's grounds of review as set out in his founding affidavit are firstly that, (despite this being a review of the award of the second respondent), the decision of the second applicant is **wrong** (my emphasis) and irregularly arrived at and that there is no rational connection between the evidence before the second respondent and the conclusion reached. This averment is amplified in the founding affidavit by the applicant's submissions, which are essentially, that the "complainant" was not a credible witness. The applicant's first ground of review is more akin to an appeal than a review.

9. In the award, the second respondent sets out very clearly that faced with two conflicting versions it was necessary to determine the matter on a balance of probabilities and that that would involve an assessment of the respective witnesses' credibility, and that ultimately the onus rested on the first respondent to establish that the dismissal was substantively and procedurally fair.

10. The second respondent, in the award, diligently applies these principles in reaching the decision that Radebe was a credible witness and having accepted her version of the events, that the dismissal of the applicant by the first respondent was both substantively and procedurally fair. In the award the second respondent in great detail, summarises the evidence before analysing it and the arguments presented at the arbitration before reaching her decision.

11. In matters such as this where the credibility of the witnesses plays such an important part in the determination of the dispute, it is trite that the decision maker who had the benefit of hearing the evidence in person is in the best position to determine credibility. This Court merely has access to the record of the proceedings and has not had for example the benefit of assessing the demeanour of the witnesses. In this regard the second respondent in considering Radebe's evidence in fact specifically records that, despite the "accusatorial nature" of her "lengthy cross-examination", she impressed her as a witness. The second respondent concluded that "her evidence was credible and reliable"¹.

12. Even had this been an appeal against a decision of the second respondent, it is difficult to gainsay the conclusions reached by the second respondent in the award regarding the credibility of Radebe, whose evidence is decisive of the matter and formed the basis upon which the second respondent concluded that the applicant was guilty of misconduct and that his dismissal was unfair.

13. This however is not an appeal. In support of his application to review the award, the applicant has specifically averred that the second respondent

¹ Paragraphs 77 and 80 of the award page 33 of the pleadings.

- (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
- (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
- (iii) exceeded the commissioner's powers;²

14. Section 145 prescribes the basis upon which the court may review a decision of a commissioner. There is nothing from the record and or the award to suggest that the second respondent committed misconduct, a gross irregularity and/or exceeded her powers as a commissioner.

15. The applicant raised a second ground of review that the second respondent indicated that it was common cause between the parties that the provisions of section 3 of the South African Council for Educators Act³ enshrined the conduct expected of an educator when this Act had not been mentioned at all during the arbitration. Whilst this might be so, a reading of the second respondent's award indicates quite clearly that despite referring to this section of that Act, it was certainly not the basis of the second respondent's award nor did it influence the award. I am not satisfied that this ground of review constitutes conduct envisaged by section 145(2) of the LRA.

² Section 145(2) of the Labour Relations Act 66 of 1995.

³ 31 of 2000.

16. It is also worth noting that the second respondent at the commencement of the arbitration, in response to an application by the applicant, ruled that he was entitled to legal representation given the “complex nature” of the allegations which involved an assault and in particular a sexual assault and accordingly that it would have been unfair for the applicant to have dealt with the matter without the assistance of a legal practitioner.

17. In all the circumstances, I am not persuaded that the award of the second respondent is reviewable. Although not raised by the applicant, apart from the provisions of section 145(2) of the LRA, even applying the test as enunciated in *Sidumo*⁴ (the Constitutional Court decision as opposed to the test as set out in the decision of the Supreme Court of Appeals upon which the applicant relied) and confirmed in *Edcon*⁵ viz. “reduced to its bare essentials, the standard of review articulated by the Constitutional Court is whether the award is one that a reasonable decision maker could arrive at considering the material placed before him,⁶ it cannot be said that the decision of the second respondent was one that a reasonable decision maker could not come to considering the evidence placed before her.

18. As far as costs are concerned, I am not persuaded that in the interests of fairness that costs of this matter should not follow the result.

19. I therefore make the following order:

⁴ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC);

⁵ *Edcon Ltd v Pillemer No and Others* (2009) 30 ILJ 2642 (SCA).

⁶ *Ibid* at paragraph 15.

19.1. The applicants review is dismissed with costs;

Gush J

Appearances:

For the Applicant:

B A Bruce of Barry Bruce Attorney

For the Respondent:

N Bhagwandeem, instructed by the State Attorney

Kwa Zulu Natal.