



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JR 409/13

In the matter between:

NELSON SEKOBO

First Applicant

and

**MEC: DEPARTMENT OF BASIC
EDUCATION (GAUTENG)**

First Respondent

**COMMISSIONER PEARL N MBEKWA
(N.O.)**

Second Respondent

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Third Respondent

Heard: 17 June 2014

Delivered: 24 February 2015

Summary: (Review – dismissal).

JUDGMENT

LAGRANGE J

Introduction

- [1] This matter is an unopposed review application. At the time the matter was heard, I was somewhat surprised that it was unopposed even though the first respondent had succeeded in the arbitration proceedings. Nonetheless, the application must stand or fall on its merits, irrespective of whether it is opposed.
- [2] The applicant also applied for condonation for the late filing of his review application, which was only filed in early March 2013 when it should have been filed in mid-December 2012. Even though the delay is significant, in the absence of opposition from the first respondent, there is no indication of any prejudice the latter suffered. I am also mindful of the fact that the six week period expired at an awkward time of the year and that part of the reasons, though one that can only be a partial and limited justification for the lateness, was lack of funding to instruct attorneys. Although the merits are poor for the reasons set out below, I believe that it would be better, in the context of an unopposed matter, to deal with them finally than by way of condonation. Accordingly, somewhat reluctantly, condonation should be granted.
- [3] The applicant was dismissed following an alleged incident which took place at his house following a farewell function for matric learners. Teachers and a group of learners had gone to his house after the farewell lunch. He was accused of sexual assault on one of the learners who came to his house involving touching her breasts and having sexual intercourse with her. The applicant was an administrator at the school.
- [4] The evidence of the principal, Ms Molefe ('Molefe'), was that she only learnt of the incident the following Monday when parents of some of the learners came to complain about incidents which had taken place at the applicant's home the previous Friday. The other complaint related to an assault on a male pupil by someone else who was at the applicant's house but was not connected in any way with the school.

- [5] At the disciplinary enquiry, the alleged victim of the sexual assault testified against the applicant. A complaint of alleged rape had also been lodged with the police by the learner. On 17 June 2011, the learner signed an affidavit to the effect that she had been “forced” to open the case against the applicant by the principal and her deputy. The coercive measure they had allegedly used was to threaten to withhold her matric results. She then recanted her previous version and claimed that she had not even had consensual sex with the applicant, let alone forced sex. At the arbitration hearing she then appeared as a witness for the applicant.
- [6] Despite the complainant’s recantation, two of her fellow pupils testified in lurid detail about what they had observed peering through a bedroom window at the applicant’s house. If their testimony is to be believed, it would have been difficult for an arbitrator not to have concluded that indeed the applicant had sexual relations with the complainant at his house on that occasion. They also testified to the effect that when the complainant emerged from the room in question she appeared visibly shaken.
- [7] The principal had testified that a person she referred to as the complainant’s “mother”, but who appears to have been her grandmother, had brought her in. In the complainant’s presence, the grandmother was crying hysterically because she did not know how she must go to face her relatives in the North-West because she had brought her to attend school in Gauteng. The complainant had also raised the alleged sexual assault on this occasion. The details of the complaint were not related to her. She denied withholding any results and explained the process by which matric results are published. She was unaware that the complainant had made an affidavit retracting her allegations and claiming she had been forced to make them. She denied that any results have been withheld but agreed that someone from the Congress of South African Students (‘COSAS’) had come to collect the complainant’s matric results, but she did not know why the complainant herself had not come. It is noteworthy that the applicant’s counsel at the arbitration did not put to the principal when the complainant’s results had allegedly been withheld despite the arbitrator pointing out that this was necessary.

- [8] It was also put to the principal that she had personally accompanied the complainant to the police station to lay the charge against the applicant, but the complainant never confirmed this in her testimony. The principal denied any knowledge of the criminal matter which had been initiated. At no stage during her cross-examination was it put to her why she would have falsely sought to implicate the applicant in such a serious act of misconduct or criminal behaviour of the kind alleged.
- [9] The applicant denied any contact with the complainant at his house or any prior dealings with her. He also called as his witness Ms T Manenzhe ('Manenzhe') an educator who had also returned to the applicant's house after the lunch. Her version was that she retired to a room at his house to rest and that later the complainant came to the room and lay beside her. She could not remember if the complainant was still in the room when she woke up. In her testimony, the complainant agreed that she went to sleep in the same room as Manenzhe and left at approximately 01H00. She said she only went inside the house when it started pouring with rain because she was not wearing warm clothing. She claimed she had sent an SMS to the applicant apologising for the accusation she had made against him. The applicant also said he had received such an SMS but unfortunately had lost the phone on which the SMS was recorded. Regarding the complaint being made to the principal on the Monday, the complainant agreed that she had gone to the school with her grandmother that day and that the principal had said she must write a letter. The principal had told her what to write. She also claimed that she had been forced by the principal to go to the police station and lay a charge of the rape against the applicant. She said that she had obtained her results through COSAS, the student's organisation. She did not offer any reason why the principal would have wanted to implicate the applicant in such a serious offence. She also did not explain why she had gone with her grandmother to the school the following Monday.
- [10] The arbitrator related and analysed the evidence in copious detail. In finding against the applicant, the arbitrator found the following evidence significant in

concluding that the complainant was not coerced to lay charge against the applicant:

- 10.1 There was no evidence to contradict the principal's version that she only became aware of the complaint against the applicant because of the visit by the complainant and her grandmother following the year end function.
- 10.2 The complainant did not testify that the principal had accompanied her to the police station, which suggests she did so of her own volition.
- 10.3 No reason was advanced in the evidence why the principal would have maliciously reported the complaint of sexual assault, nor why she would have coerced the complainant to make such a claim. Moreover the principal's claim is that she had a good relationship with the applicant was not disputed.
- 10.4 The statement of the complainant attached to the arbitration bundled differs from the statement she made to the police which demonstrated her truthfulness. I note in this regard that the first statement was not included in the record filed by the applicant, but he does not take issue with the arbitrator's finding that the statements differ.

[11] The arbitrator also felt that the evidence of Manenzhe and the applicant were contradictory in a number of respects about the applicant's whereabouts at his house on the Friday evening. She further noted that Manenzhe could not remember a number of aspects of events of that day. By contrast, she found that the evidence of the two learners who claimed to have witnessed the sexual conduct of the complainant and the applicant was by and large not disputed and there was no reason why they should have falsely implicated the applicant.

Grounds of review

[12] The applicant contended that the issues to be decided by the court are:

12.1 Whether he was subject to the relevant portions of the Employment of Educators Act 76 of 1998 or the Education Laws Amendment Act, 53 of 2000.

12.2 Whether there was any evidence of sexual assault or harassment placed before the arbitrator.

[13] In regard to the first issue, he contends that he was merely an administrative clerk and not an educator and therefore not subject to the code of conduct governing educators which forbids sexual relationships between educators and learners. The first issue was raised in written argument at the arbitration. The second ground is essentially a ground which contends that there was no evidence of sexual assault before the commissioner and that sexual intercourse with the complainant could not amount to sexual assault. The applicant did not supplement his grounds of review in his supplementary affidavit. The applicant cannot rely on any further grounds raised in his heads of argument which were not set out in his founding papers and I have confined myself to those grounds which are properly before the court. The Labour Appeal Court has made it clear in the unreported case of *Comtech (Pty) Ltd v Commissioner Shaun Molony N.O. and Others* (Case no DA 12/05, dated 21 December 2007) that it is not sufficient for a party to simply relate conclusions of law in the founding papers for a review application. A party must set out the factual grounds on which it seeks to base its review. While it may be excusable in a founding affidavit to state limited grounds of review and in less detail, by the time an applicant has the record of proceedings it must then make up for the deficiencies in the founding affidavit and set out the factual basis for its grounds of review in full. When it came to his supplementary affidavit, the applicant did not supplement or amend the grounds of review set out in the founding affidavit. Accordingly, I have confined myself to the ones summarised above.

Evaluation

[14] Firstly, there is nothing to indicate that the applicant was charged or found guilty in terms of legislation specifically applicable to educators. The notice of

his disciplinary enquiry was couched in terms of clause 6 and 7 of the Disciplinary Code and Procedures of the Public Service Act as encapsulated in PSCBC Resolution 2 of 1999. Moreover, this point was only raised in argument and was not raised as part of the applicant's case of unfair dismissal during the hearing of evidence. It was also not mentioned at the outset of the arbitration proceedings that this was a point which the applicant intended to argue.

- [15] As it appears to be incorrect that he was disciplined in terms of any statute specifically relating to educators and that, it was not raised in any event in the course of challenging the employer's witnesses, this ground must fail.
- [16] In relation to the second ground, the issue is whether there was any basis on the evidence for finding the applicant guilty of sexual assault in the sense of having non-consensual sexual relations with the complainant. The arbitrator clearly disbelieved that the complainant's retraction of her complaint was genuine because there was no evidence advanced why the principal would have behaved so vindictively towards the applicant. Secondly, the arbitrator disbelieved her claim that the principal threatened to withhold her marks. It is noteworthy in this regard that there was no evidence led to support a claim that the complainant had attempted to obtain her marks but had been thwarted and had to resort to using a third party to obtain them.
- [17] The arbitrator also accepted the evidence of the complainant's fellow learners' evidence of witnessing the applicant and complainant engaged in a sexual act and that the complainant appeared shaken when she emerged. On her version, it was the principal who had drew up the complaint and forced her to initiate it. But nowhere in the complainant's evidence does she explain why she went with her grandmother to the principal in the first place, on the first working day following the events at the applicant's house. It is apparent that it was these factors which led the arbitrator to conclude that he was guilty of the misconduct as charged.
- [18] There may be some criticism made of the arbitrator's reasoning such as when she misconstrued the evidence of the complainant in saying in her testimony

that she drafted her complaint in her own hand. But the arbitrator's reasoning is secondary in deciding if her finding is reasonable. When the substantive findings of an arbitration award are attacked on account of the arbitrator's reasoning, the only standard for assessing the reasoning is with reference to the test enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,¹ namely, was the decision reached by the commissioner one that a reasonable decision-maker could not reach?.² Importantly, this test focuses less on the reasoning of the arbitrator as such and more on whether the arbitrator's findings are ones that no reasonable arbitrator could arrive at on the evidence before the arbitrator. This has been reaffirmed in the SCA judgment in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*³ in which, it was held that an arbitrator's own reasoning is merely indicative of whether it might be unreasonable. The award will still stand if the outcome arrived at by the arbitrator is one that could reasonably be reached on the evidence before the arbitrator.⁴

[19] I cannot say that the arbitrator's findings about the respective credibility of the witnesses was one that could not be reached on the evidence, nor can I say that her effective finding that the complainant had been subjected to non-consensual sexual activity by the applicant is one that no reasonable arbitrator could have reached.

Order

[20] In the circumstances,

20.1 The applicant's late filing of the review application is condoned.

¹ (2007) 28 ILJ 2405 (CC).

² At 2349, para [110].

³ (2013) 34 ILJ 2795 (SCA).

⁴ *Herholdt* at 2802, para [12], where the SCA characterised the reasonableness standard of review of arbitration awards in the following way: "The test involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. 17 On this approach the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision maker could reach in the light of the issues and the evidence."

20.2 The application is dismissed.

20.3 No order is made as to costs.

R Lagrange J

Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES:

FOR THE APPLICANT:

G J Lidovho

Instructed by Sisa Nhlabathi Attorneys

FOR THE FIRST RESPONDENT:

No Appearance

LABOUR COURT