



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no: D265/2013

In the matter between:-

DEPARTMENT OF EDUCATION, KZN

Applicant

And

COMMISSIONER A. S. DORASAMY

First Respondent

EDUCATION LABOUR RELATIONS COUNCIL

Second Respondent

S J ZUMA

Third Respondent

Heard: 17 July 2014

Delivered: 31 July 2015

Summary: Application for review of arbitration award.

JUDGMENT

HASLOP AJ

- [1] The applicant has applied to this Court for the review and setting aside of an arbitration award by the first respondent who found that the dismissal of the third respondent by the applicant was procedurally and substantively unfair and directed the applicant to reinstate him with effect from 1 March 2013 and to 'place him in a suitable position'. He further directed that the third respondent would forfeit his remuneration and benefits for the period between the date of dismissal and the date of reinstatement.
- [2] The third respondent was an educator employed by the applicant at the Cosmos Primary School.
- [3] He was dismissed following a disciplinary enquiry at which he was charged with having committed the following misconduct:

'Charge 1: On or about 11 May 2010 at or near Hilton Intermediate School you committed an act of sexual assault on a learner [A.....] [M.....] in that you asked her to come inside the cottage and closed [sic] the door behind her and she refused, then you closed the door and started touching her, pulling her towards the bed and thereby contravening section 17 (b) of the Employment of Educators Act, as amended.

Alternatively

On or about 11 May 2010 at or near Hilton Intermediate School, while on duty you conducted yourself in an improper, disgraceful or unacceptable manner in that you asked a learner [A.....] [M.....] to come inside the cottage and close the door behind her and she refused, you closed the door and started touching her, pulling her towards the bed and thereby contravening section 18 (1) (q) of the Employment of Educators Act, as amended.

Charge 2: On or about 7 May 2010 at or near Hilton Intermediate School, while on duty you conducted yourself in an improper, disgraceful or

unacceptable manner in that you attempted to romance a learner A..... M..... by touching her and thereby contravening [sic] section 18 (1) (q) of the Employment of Educators Act, as amended.'

- [4] The presiding officer of the disciplinary enquiry found that 'it is quite evident that Mr Zuma is guilty of the charges brought against him and I accordingly find that he is guilty as charged'. He did not specify, in respect of the first charge, whether the third respondent was found guilty of the main charge or its alternative but he found that the conduct warranted the sanction of dismissal.
- [5] The victim of the alleged misconduct, A..... M....., is a young girl, just in Grade 5 at the time of the allegations. When the matter came before the first respondent in arbitration proceedings it seems that her parents had decided that it would not be in her best interests to testify, even though she had testified at the disciplinary hearing.
- [6] The parties' representatives then advised the arbitrator that they did not intend to tender oral evidence at the arbitration.
- [7] According to paragraph 2 of the arbitration award, the parties agreed that the 'evidence as recorded by the presiding officer would be the evidence for the arbitration process'.
- [8] The record contains neither a transcript of the evidence led at the disciplinary hearing, nor even the presiding officer's notes of the evidence. The only 'record' of that evidence is the summary contained in the presiding officer's findings, and that is relatively perfunctory.
- [9] Indeed, it is not even complete. The index to the record placed before the court reflects that the presiding officer's findings are to be found from page 29 to page 34 of the relevant bundle. Page 29 is indeed the first page of the findings, and page 34 the last. However, the paragraph numbering within those pages is not sequential. The paragraph following paragraph 2.7 is numbered 2.16. The summary of evidence contained in the findings appears largely to leave out the evidence of the second witness for the employer.
- [10] It is not clear from the arbitration award whether this apparently incomplete document is the one that was handed to the arbitrator by the parties. One

assumes that it was, since the pages before the court are sequentially numbered in two places, one for the review application and one, presumably, for the arbitration proceedings. There is, in fact, an index to the arbitration record among the papers and this appears to support the likelihood that there is not simply a page missing from the court's copy of the record.

- [11] The arbitration award itself is difficult to follow, as the arbitrator appears to have included the complete written submissions of the two parties in his award in the midst of the award itself. Those submissions do mention the 'missing' witness, whose name appears to be N....., but the award does not do so independently of the submissions.
- [12] It is possible that the arbitrator did not notice that there was a page missing from the 'record' of the evidence that he was meant to consider. In that event the arbitrator did not consider all of the evidence placed before him in accordance with the parties' agreement as he recorded it, and, if that is the case, the award should be set aside on those grounds alone.
- [13] But even if the findings document given to the arbitrator was complete and the missing page somehow became detached before the matter reached this court, there are significant problems with the manner in which this arbitration was conducted.
- [14] The first of these lies in establishing precisely what the agreement between the parties was regarding the evidence that the arbitrator was to consider.
- [15] As I have mentioned, the award itself records that the parties agreed on the following process:
- '2.1 No oral evidence will be tendered.
 - 2.2 The evidence as recorded by the presiding officer would be the evidence for the arbitration process.
 - 2.3
 - 2.4 The matter will be dealt with in the form of Heads of Arguments as follows'
- [16] There then follows a time frame for the delivery by the parties of their heads of argument. It appears that it was those heads of argument that were then

incorporated by the arbitrator into the body of his award as 'RESPONDENT'S SUBMISSION' and 'APPLICANT'S SUBMISSION' respectively.

[17] The employer's submission states that the commissioner was enjoined to consider 'all the evidence placed in front of him (which) would include the evidence led at the disciplinary hearing (which) is common cause and forms part of the bundle'.

[18] On the other hand, the employee's submission, as incorporated in the award itself, contains the following statement:

'The legal representatives of the parties then agreed that only the evidence of Nombulelo Nene, Mrs J I Mkhize and that of the Applicant were to be handed in by consent. In this regard it was specifically pointed out that no other portions of the chairperson's findings and or evidence could be utilized, as the Respondent did not have any other witnesses present and furthermore the Applicant did not agree with the findings and the other evidence contained in the findings as captured by the presiding officer as this was not a record of the internal disciplinary proceedings.'

[19] The underlined portion is underlined in the award itself, though it is not indicated whether the underlining was the arbitrator's own or the employee representative's, as copied by the arbitrator.

[20] It seems clear from this that the parties were by no means in agreement regarding precisely what material the arbitrator should consider in making his award. Oddly, having prefaced his award by stating that the parties had agreed that the evidence recorded by the presiding officer would be the evidence in the arbitration, the arbitrator states, at paragraph 9.15, that there was no agreement that the evidence of A....., the complainant in the disciplinary case, would be admitted. But he does not say whether there was agreement that her evidence would not be admitted.

[21] Nevertheless, having said that, he then dealt with the evidence of Amanda anyway and decided to apply the cautionary rule to that evidence. It does seem strange that the parties might have agreed to present evidence to the arbitrator that excluded that of the complainant and N..... who seems, from the presiding officer's summary, to have been her companion at the time.

However, the arbitrator ought, at the very least, to have established precisely what the agreement was between the parties. If there was in fact no common understanding as to what he was to take into account, he ought to have called for the parties to lead oral evidence.

[22] Clause 25.6.2 of the second respondent's dispute resolution procedure reads as follows:

'The panellist appointed to arbitrate in the dispute must determine the procedure to be followed in the arbitration in order to resolve the dispute as fairly and quickly as possible, but must deal with the merits of the dispute with a minimum of legal formalities. In this respect the panellist may make any other direction to the parties concerning the conduct of the arbitration.'

[23] So, while the arbitrator has relatively wide powers regarding the form the arbitration will take, and he may dispense with certain legal formalities, he nevertheless has to resolve the dispute as fairly as possible, and he has to deal with the merits of the dispute.

[24] To decide a case fairly in circumstances where the versions of the parties are diametrically opposed without having regard to any proper evidence at all, and without even a written statement of such facts as may be agreed, seems to me to be an impossible task.

[25] In *Arends & others v SA Local Government Bargaining Council & others*¹ the Labour Appeal Court recently stated the following

'... When parties desire to proceed without oral evidence in the form of a special case, it is imperative that there should be a written statement of the facts agreed by the parties, akin to a pleading ... The stated case must set out agreed facts, not assumptions. The purpose of the rule is to enable a case to be determined without the necessity of hearing the evidence. An oral stated case predicated upon poorly ventilated and potentially unshared assumptions as to the facts defeats the purpose of the requirements of a stated case and, as this case shows, will lead to problematic results.'²

[26] It went on at para [17]:

¹ (2015) 36 ILJ 1200 (LAC).

² at para [15].

‘An arbitrator faced with a request to determine a special case where the facts are inadequately stated should decline to accede to the request.’

- [27] That case involved an interpretation rather than an unfair dismissal dispute, and it will, by the very nature of the dispute, be easier to find common factual ground in such a matter, but it seems to me that the principles informing those statements must apply equally to arbitrations such as this one.
- [28] I consider the situation in this matter to be quite different from that where one of the parties elects not to call a witness, or not to lead evidence at all, or is unable for some reason to present certain evidence but other evidence is available. In that case the party making the election would generally stand or fall by it, or would have to overcome the absence of a witness in some other way. That is not what happened here. Here it seems that all of the witnesses were available except for the complainant, but the parties reached, or perhaps did not in fact reach, an agreement the consequences of which made it virtually impossible for the arbitrator to deal with the merits in such a way that a fair decision could be reached.
- [29] It is not necessary for me to deal with the applicability of the cautionary rule, or the way the arbitrator dealt with the question of hearsay, or indeed with his assessment of the ‘evidence’ generally, for at least two reasons, which I state at the risk of repeating myself.
- [30] The first is that if there was no agreement concerning the material to be considered by the arbitrator in the absence of oral evidence, he should not have proceeded without such an agreement or without hearing oral evidence. And, if there was any doubt as to what that agreement was, the arbitrator should first have established precisely what the agreement was before proceeding. As I have already said, it is clear from the award itself that the arbitrator was aware of a dispute in this regard before he made his finding on the merits of the matter.
- [31] Secondly, the so-called evidence available to the arbitrator from a reading of the presiding officer’s findings was not evidence at all, but the presiding officer’s own summary of the evidence that he heard. There was no way that the arbitrator could have known to what extent that summary captured the

evidence that was actually led. It ought to have been clear to him that the summary was hopelessly inadequate to allow him to come to a proper conclusion in a matter where there were clearly radically different versions of what had actually transpired.

- [32] The employee had also complained that his dismissal was procedurally unfair. The arbitrator found that it was, but it is not particularly clear whether it was because the employee had not been permitted legal representation at his disciplinary hearing or because the presiding officer had not advanced reasons for refusing legal representation, or both.
- [33] I do not follow his reasoning either. He referred to the well-known case of *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation Mediation & Arbitration & others*³, and mentioned the principles set out in that case. He seems not to have found fault with the employer's disciplinary process with reference to any of those principles.
- [34] However, he then referred to the question of legal representation and referred to the case of *Law Society of the Northern Provinces v Minister of Labour & others*⁴. The decision in that case, which was eventually overturned on appeal, although only after the arbitrator delivered his award in this matter, dealt in any event with legal representation at the CCMA. Its relevance to internal disciplinary hearings is not clear from the award.
- [35] The well-established test of review of an arbitration award such as this is the one set out by the Constitutional Court in paragraph 110 of the judgment in *Sidumo and another v Rustenburg Platinum Mines Ltd and Others*⁵, namely whether the decision reached by the commissioner is one that a reasonable decision-maker could not have reached.
- [36] If it is, then the award must be reviewed and set aside. If not, it stands.
- [37] The Supreme Court of Appeal then explained the role of the reviewing court in

³ (2006) 27 ILJ 1644 (LC)

⁴ (2012) 33 ILJ 2798 (GNP)

⁵ [2007] 12 BLLR 1097 (CC) at paras 79 and 110.

the light of that decision. In *Herholdt v Nedbank Ltd*⁶ Cachalia and Wallis JJA stated the following :

‘That test (the test in *Sidumo*) 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 (a more stringent test than asking whether the decision is one that the arbitrator could reasonably reach). 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.’

- [38] Of course, an award is reviewable under section 145 (2) (a) of the LRA if the commissioner committed a gross irregularity in the conduct of the arbitration proceedings. In *Herholdt*⁷, the SCA considered what this means and summarised the position as follows in paragraph 25:

‘...For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145 (2) (a) (ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.’

- [39] Because of the problems with the evidentiary material that was placed before the arbitrator I am of the view that a reasonable decision-maker could not have come to the same conclusions as the first respondent, because a

⁶ 2013 (6) SA 224 (SCA). at para 12.

⁷ *Supra* at para 25.

reasonable decision-maker would have required that the parties place material before him that would have enabled him to properly assess the facts of the dispute and, if the parties were unable to do so, would have required them to lead oral evidence. If one of the parties was unable to do so, a reasonable decision-maker would then have assessed such evidence as he had heard in accordance with the rules of evidence, including the rules applicable to hearsay evidence.

[40] It was argued that, given the fact that the complainant's parents are unlikely to be persuaded to allow her to testify, there is no point in referring the matter back for re-hearing before another arbitrator. I disagree. This court is faced with the same problem regarding the evidence as faced the first respondent. Nor does it know what the agreement was between the parties regarding the presentation of that evidence. Indeed, it is not even in possession of all of the evidence 'recorded' by the presiding officer, because of the missing page in the record.

[41] In the circumstances, I make the following order:

1. The arbitration award dated 18 February 2013 and issued by the first respondent under the second respondent's case number PSES 689-11/12 KZN is hereby reviewed and set aside.
 2. The second respondent is directed to re-enrol the matter for arbitration before an arbitrator other than the first respondent.
 3. There is no order as to costs.
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Haslop, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: L Naidoo

Instructed by: The State Attorney, Durban

For the Third Respondent: P J Blomkamp

Instructed by: Govindasamy Ndzingi & Govender Inc, Pietermaritzburg