THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 2125 / 13

In the matter between:

UNIVERSITY OF VENDA	**Applicant**
and	
LIFE REUBEN MALULEKE	**First Respondent**
CHRISTOPHER MANNDE N.O. (AS ARBITRATOR)	**Second Respondent**
COMMISSION FOR CONCILIATION, MEDIATION	
AND ARBITRATION	**Third Respondent**

Heard: **12 September 2016**

Delivered: **28 February 2017**

Summary: **CCMA arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – Test for review – Section 145 of LRA 1995 – application of review test set out – determinations of arbitrator compared with evidence on record**

Evidence – evaluation thereof by arbitrator – arbitrator failing to make any credibility findings of witness testimony – constituting irregularity – issue of credibility of witnesses considered

Evidence – evaluation and determination thereof – no proper assessment of probabilities – approach of arbitrator irregular – proper probabilities considered

Dismissal – sexual harassment – principles considered and applied – complainants sexually harassed by employee – dismissal fair in the circumstances

Review of award – conclusion of arbitrator irregular and unreasonable – arbitration award reviewed and set aside – substituted with award that dismissal fair

Cross review – time limit for filing the cross review – principles considered – cross review materially late – no proper case for condonation made out – cross review dismissed

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JUDGMENT

SNYMAN, AJ

Introduction

[1] The applicant has instituted a review application in this Court seeking to review and set aside an arbitration award made by the second respondent in his capacity as an arbitrator of the Commission for Conciliation, Mediation and Arbitration ('the third respondent'). This application has been brought in terms of Section 145 of the Labour Relations Act[1] ('the LRA'). This is however not the only application to be considered. The first respondent has instituted a cross review application, in terms of which the first respondent seeks to review and set aside certain of the findings contained in the second respondent's award, as well.

[1] Act 66 of 1995.

[2] This matter has as its origin the dismissal of the first respondent by the applicant for misconduct relating to what can readily be described as sexual harassment, which dismissal the first respondent pursued as an unfair dismissal dispute to the third respondent. This dispute came before the second respondent for arbitration on 27 May and 12 to 14 August 2013. Following the conclusion of the arbitration proceedings, and in an arbitration award dated 27 August 2013, the second respondent found in favour of the first respondent, and determined that the dismissal of the first respondent by the applicant was procedurally fair, but substantively unfair. The second respondent directed that the first respondent be reinstated with retrospective effect to the date of his dismissal, and be paid back pay of R420 000.00, being an amount equivalent to 12(twelve) months' salary. It is this award of the second respondent that then gave rise to this review application brought by the applicant.

[3] As to the cross review by the first respondent, this came about as a result of certain factual findings made by the second respondent, in terms of which the second respondent found that the first respondent did commit the misconduct complained of towards one of the individual complainants, even though the second respondent found it was not sexual harassment *per se*. The first respondent is dissatisfied with this finding, in essence contending that he should have been acquitted of any misconduct, and the cross review is aimed at achieving this. The first respondent also challenged the finding that his dismissal was procedurally fair, in the cross review.

[4] The applicant received the arbitration award on 28 August 2013, and served and filed its review application on 9 October 2013, the last day on which it was due. This means that review application was thus timeously brought and is properly before Court.

[5] The cross review, as stated, is founded on the same arbitration award handed down on 27 August 2013. The notice of motion and founding affidavit in the cross review was only filed on 21 August 2015, close on two years later. This is clearly late, and condonation was needed. The first respondent then indeed also applied for condonation for the late filing of his cross review application.

[6] I will now proceed with deciding both the applicant's review application, as well the first respondent's cross review, by firstly dealing with the application for condonation for the late filing of the first respondent's cross review.

Condonation: cross review

[7] As stated above, the first respondent's cross review was filed on 21 August 2015, which was more than a year after the pleadings in this matter had already closed. Also, the applicant had already filed its heads of argument three months earlier.

[8] I can see no reason why any party who seeks to bring a cross review application, which arises out of the exact same award forming the subject matter of the main review application, should not bring such an application within the same 6(six) weeks' time limit as contemplated by Section 145 of the LRA.[2] This approach has been followed by this Court.[3] In *Zuma and Another v Public Health and Social Development Sectoral Bargaining Council and Others*[4] the Court dealt with an application for condonation for the late filing of a cross review. The Court held that the length of delay was about 12 months, which the Court calculated from the date the award was first handed down.[5]

[9] In particular, and in *Harmony Gold Mining Company Ltd v Commission for Conciliation Mediation and Arbitration and Others*[6] it was held as follows:

> 'In terms of section 145 of the LRA, an application for review has to be launched within six weeks of the date of publication of the award to the parties. On Dyanti and NUM's own version the cross-review ought to have been filed on or about 15 December 2010, since they had received the award on 3 November 2010. …'

[2] See Section 145(1)(a) which reads: 'Any party to a dispute who alleges a defect in any arbitration proceedings … may apply to the Labour Court for an order setting aside the arbitration award-
(a) within six weeks of the date that the award was served on the applicant …'
[3] See *Higgens v Commission for Conciliation, Mediation and Arbitration and Others* [2013] JOL 30844 (LC) at para 4.
[4] (2016) 37 ILJ 257 (LC) at paras 24 – 25
[5] Id at para 27.
[6] [2015] JOL 32867 (LC) at para 17.

I would agree with this kind of approach. *In casu*, this meant that the cross review application was due to have been brought on or before 9 October 2013.

[10] However, and even if one applies a most generous approach, and accept that the cross review need only be filed as part of the answering affidavit under Rule 7A(9), this means that the cross review would be due within 10(ten) days of the date when the applicant complied with Rule 7A(8).[7] The applicant filed its supplementary affidavit in terms of Rule 7A(8)(b) on 31 January 2014. The Court in *Harmony Gold Mining*[8] also followed a similar approach, and said:

> 'Further, in any event, as at 13 April 2011, Harmony complied with its obligations in the main review in terms of rule 7A(6) and (8) of this Honourable Court's rules. Harmony's attorneys of record dispatched the record to Dyantyi and NUM's attorneys by registered mail and obtained proof of service in this regard. As such, Dyantyi and NUM should have launched their cross-review at this point. However, Dyantyi and NUM wasted time and delayed for almost a further four months.'

Applying this generous approach, the cross review would be due to have been brought by 15 February 2014, at the latest.

[11] Either way, the cross review application is materially late, being either close on 22 (twenty two) months late, or just more than 18(eighteen) months' late, and seeking condonation was certainly necessary. In specifically dealing with an application for condonation for the late filing of a review application, the LAC in *A Hardrodt (SA) (Pty) Ltd v Behardien and Others*[9] referred to the judgment in *Queenstown Fuel Distributors CC v Labuschagne NO and Others*[10] and said:

> 'The principles laid down in that case included, firstly that there must be good cause for condonation in the sense that the reasons tendered for the delay

[7] Rule 7A(8) reads 'The applicant must within 10 days after the registrar has made the record available either- (a) by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit; or (b) deliver a notice that the applicant stands by its notice of motion'.
[8] (*supra*) at para 30.
[9] (2002) 23 ILJ 1229 (LAC) at para 4.
[10] (2000) 21 ILJ 166 (LAC).

had to be convincing. In other words the excuse for non-compliance with the six-week time period had to be compelling. Secondly, the court held that the prospects of success of the appellant in the proceedings would need to be strong. The court qualified this by stipulating that the exclusion of the appellant's case had to be very serious, i.e. of the kind that resulted in a miscarriage of justice.'

[12] The Court in *Academic and Professional Staff Association v Pretorius No and Others*[11] aptly summarized all the considerations applicable to deciding condonation in the instance of the late filing of a review application, and said:

'The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or the failure to comply with time frame; (c) prospects of success or bona fide defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice. … It is trite law that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay.'

[13] In the end, the general principles applicable to deciding applications for condonation apply even more stringently where it comes to review applications. In *National Union of Metalworkers of SA on behalf of Thilivali v Fry's Metals (A Division of Zimco Group) and Others*[12] the Court said:

'What is clear from the judgment in *Hardrodt* is that general principles applicable to condonation applications are even more stringently applied where it comes to a condonation application for the late filing of a review application. In review condonation applications, the explanation that needs to be submitted must be compelling and the prospects of success need to be strong. Where it comes to the issue of prejudice, the applicant in fact has to show that a miscarriage of justice will occur if the applicant's case is not heard.

[11] (2008) 29 ILJ 318 (LC) at paras 17 – 18.
[12] (2015) 36 ILJ 232 (LC) at para 22.

> The reason for these more stringent requirements is that review applications occur after the parties have already been heard, presented their respective cases and a finding has been made. Under such circumstances, considerations of justice, fairness and expedition require that challenges of such findings must not be delayed and must be completed as soon as possible.'

The Court in *Thilivali*[13] added the following consideration when evaluating condonation applications in reviews:

> 'It must also always be considered that the applicant for condonation actually bears the onus to prove good cause for condonation to be granted in terms of the principles set out above. There is, however, an additional consideration which applies in employment disputes in determining whether an applicant for condonation has discharged this onus. This is the fundamental requirement of expedition. The Constitutional Court has, as a matter of fundamental principle, confirmed that all employment law disputes must be expeditiously dealt with and any determination of the issue of good cause must always be conducted against the back drop of this fundamental principle in employment law …'

[14] I can see no reason why all the considerations, as summarized above, should not equally apply to applications for condonation for the late filing of a cross review application.

[15] Dealing firstly with the delay, there is no doubt that the delay in this instance is material. What is required is that the entire period of the delay must be fully explained. In setting out how the explanation for the delay must be provided, the Court in *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and Others*[14] held:

> 'In explaining the reason for the delay it is necessary for the party seeking condonation to fully explain the reason for the delay in order for the court to be in a proper position to assess whether or not the explanation is a good one. This in my view requires an explanation which covers the full length of the delay. The mere listing of significant events which took place during the period

[13] Id at para 25.
[14] (2010) 31 ILJ 1413 (LC) at para 13

> in question without an explanation for the time that lapsed between these events does not place a court in a position properly to assess the explanation for the delay. This amounts to nothing more than a recordal of the dates relevant to the processing of a dispute or application, as the case may be.'

[16] The first respondent's explanation for the delay is not only materially lacking, but to a large extent completely non-existent. The explanation for the delay is contained in one paragraph of the affidavit supporting the condonation application. All that is said therein is that the first respondent was not 'properly advised', and consequently he dealt with the 'aspects' relating to the cross review in his answering affidavit. I have difficulty accepting this explanation. The first respondent is a lecturer in the applicant's law school. He filed a detailed answering affidavit containing 167 pages of detailed analyses, submissions, and criticisms of the findings of the second respondent and the testimony presented by the witnesses in the arbitration. However he purportedly does not think to file a cross review at this time. I simply do not buy this. Also, the cross review itself is supported by a founding affidavit consisting of 56 pages with the same kind of detailed particulars and submissions. I cannot believe that the first respondent could not appreciate or understand that he needed to file his own cross review at the outset if he wanted to challenge specific findings of the second respondent. The first respondent also does not take this Court into his confidence by giving details of who advised him, how exactly he was advised, and when he was advised. As a whole, the singular explanation provided is simply not plausible.

[17] The reason why the first respondent decided to file a cross review application only in 2015, is in my view simple. This reason is that he received the applicant's heads of argument on 22 May 2015. At this time, and having considered these heads, it is likely that the first respondent appreciated that there may well be difficulties in the approach adopted by the second respondent considering his own findings of fact, when applying the principles relating to sexual harassment. The first respondent must have appreciated that he now needed to challenge the findings of fact of the second respondent where it came to one of the complainants, lest it be found that these findings may well justify his dismissal as they stood. But this belated action was far too little, far too late.

[18] In the end, the first respondent has offered no explanation at all for the entire period from the date when the arbitration award was handed down in 2013, until the point of receiving the applicant's heads of argument in May 2015. The complete absence of such an explanation has to be fatal to the condonation application. In the end, the approach of the applicant was quite simply that condonation was there for the asking, which approach is clearly wrong. The Court in *Seatlolo and Others v Entertainment Logistics Service (A Division of Gallo Africa Ltd)*[15] was critical of this kind of approach of entitlement, where the Court explained:

> 'It is trite law that condonation should only be granted where the legal requirements have been met and is not a default option. It remains an indulgence granted by a court exercising its discretion whilst being cognizant of the criticism emanating from the Constitutional Court and the SCA and bearing in mind the primary objective of the expeditious resolution of disputes articulated in the Act.'

[19] It is equally trite that without any explanation for the delay, the issue of prospects of success are actually irrelevant.[16] In *National Education Health and Allied Workers Union on behalf of Mofokeng and Others v Charlotte Theron Children's Home,*[17] the Labour Appeal Court said that:

> '… this court has previously confirmed the principle that without a reasonable and acceptable explanation for a delay the prospects of success are immaterial'

In this case, and because the first respondent has not offered any explanation for what is a material delay in bringing the cross review, any prospects of success the first respondent may have in his cross review cannot come to his assistance, and are rendered immaterial.

[15] (2011) 32 ILJ 2206 (LC) at para 27.
[16] See *Mziya v Putco Ltd* [1999] 3 BLLR 103 (LAC) at para 9; *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC) at 211G-H; *Colett v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 *ILJ* 1948 (LAC) at para 38.
[17] (2004) 25 *ILJ* 2195 (LAC) at para 23.

[20] The first respondent's condonation application for the late filing of the cross review is thus doomed to fail. There is no explanation for what is a substantial delay. The issue of prejudice has not been properly addressed in the condonation affidavit, other than the first respondent in essence making general statements that no one will be prejudiced by the delay. Even if the first respondent's cross review has merit, as he suggests, I consider that the following *dictum* in *Ferreira v Die Burger*[18] describes what should equally apply *in casu*:

> 'I am sympathetic to the fact that the applicant may have a case but, were we to grant this application, this court would subvert a crucial principle in matters which deal with personal relationships, namely labour relations, that these disputes have to be dealt with expeditiously and finalized as quickly as possible. Where in a case such as this, there has been so flagrant of violation of the rules, then, as Myburgh JP correctly decided, a lack of any explanation at all shrugs off other considerations.'

[21] In the circumstances, the first respondent has failed to make out a proper case for the granting of condonation for the late filing of his cross review application. The first respondent's application for condonation for the late filing of his cross review falls to be dismissed. As such, there is no cross review properly before this Court for consideration. I shall therefore have no further regard to the first respondent's cross review, in deciding this matter.

[22] The issue of condonation of the cross review now being decided, I will turn next to the merits of the review application of the applicant, by first setting out the relevant facts in this matter.

<u>The relevant facts</u>

[23] The first respondent was employed by the applicant as a senior lecturer in its school of management services. The first respondent was also a part time lecturer in the applicant's law school. The first respondent commenced employment on 31 January 1986 and was ultimately dismissed on 27 January 2012, as a result of the events set out hereunder.

[18] (2008) 29 *ILJ* 1704 (LAC) at para 8.

[24] The first respondent was also a member of the university council, and the general secretary of the joint staff organisation representing employees at the university.

[25] The applicant dismissed the first respondent for misconduct relating to sexual harassment of three female students. There were a number of individual incidents, giving rise to these charges, which will now be elaborated on.

[26] One of the incidents related to a student called M. T. ('T.'). She was studying towards an LLB degree and the first respondent was her lecturer in administrative law and interpretation of statutes. The incident occurred at the time of the year end examinations of 2010 held in November 2010.

[27] On 14 November 2010, T. was on the way to block A, together with a friend, D. S. ('S.'), to study. They came across the first respondent, who called them both over. After they joined the first respondent, he proceeded to ask them for their cellphone numbers which they wrote down for him. The first respondent then said that he would call T. later with regard to assisting her with her marks.

[28] Some time later whilst she was studying, T. was contacted by the first respondent on her cellphone. The first respondent requested T. to meet him at the sports hall. T. obliged, and accompanied by S. part of the way, went to the sports hall. When she arrived at the sports hall, she saw the first respondent standing with a group of people. But when the first respondent saw her, he separated himself from this group and came to T..

[29] The first respondent, when then standing alone with T., told her that there was no way in which she could pass the course as she has plagiarized work. The first respondent however told T. that he could arrange for her to pass the course if she paid him 'with her body'. The first respondent thus suggested to T. that he would ensure that she passed the course if she had sexual intercourse ('intercourse') with him. T. was shocked at the suggestion, but said to the first respondent that she 'would think about it'. T. then left and immediately told S. what had happened.

[30] The first respondent persisted in his pursuit of T.. He later phoned her again, and told her to meet him next to the book shop. Again, T. obliged and went to meet the first respondent there. This time he was alone. The first respondent suggested to T. that she come to his residence and he would assist her with an assignment. T. answered that she could not, because she was studying for exams at the time. The first respondent then proceeded to pull T. towards him, grabbed her buttocks and kissed her. T. reacted by pushing the first respondent away, and moved away. T. again told her friend S. what had happened.

[31] It may be added that T. failed the course under the auspices of the first respondent as lecturer, but passed the course the following year under the auspices of another lecturer.

[32] The second incident concerned another female student, N. N. ('N.'). She was also a law student in 2010, with the first respondent being her lecturer in administrative law and interpretation of statutes. N. asked the first respondent for assistance for a group topic for a group assignment. The first respondent told her that the group had to come to the office to rewrite the names of the group before he could assist.

[33] Later, the first respondent asked N. to come to his office. She went to his office, with the view to once again ask for assistance with the group topic. She was accompanied by her friend L.. The first respondent told her that he was going to give them a zero mark because they were not serious about the group topic assignment. He however then asked that if he did give a topic, what would he get in return? N. understood this to mean that the first respondent was proposing sexual favours in exchange for a topic. N. was not willing to agree to this, and she subsequently received a zero mark for the assignment.

[34] N. however qualified to write exams that year. In the case of students that did not qualify to write exams, they could attend at the first respondent's office to make oral presentations as to why they should nonetheless be permitted to write exams. N.'s friend, L., was one of these students that went to make oral presentations. L., after leaving the first respondent's office, came to N. and told her that first respondent had asked her to inform N. that if she wanted to

boost her marks, she could come and see the first respondent. N. then indeed went to the first respondent's office. She was then awarded 60%, without her having to actually make presentations. There was however no need for her to have made presentations in the first place.

[35] The first respondent told N. not to tell the other students that he gave her 60%. The first respondent told her that he 'wanted her', and that it had been a 'long time' that he wanted her. The first respondent however did not touch her, and she left.

[36] The third incident concerns F. N. ('N.'). The first respondent was her administrative law lecturer in 2010. In her case, events arose when the first respondent distributed student scripts in class on 16 November 2010. She however did not get hers. The first respondent announced that those students that did not get their scripts had to come to his office, and she went to his office, and joined a queue of students.

[37] When N.'s turn came to enter the first respondent's office, she was not given her script. She was however shown a mark sheet reflecting that her mark was 5%. She queried this, and was asked by the first respondent if she was questioning his authority. The first respondent then asked for her cellphone number, which she gave, saying he would call her later. She then left.

[38] At around 19h00 that same day, the first respondent then called N.. He told her that she could come to his office to collect her script. She told him she was ill and could not come. But later that same evening, she was told by a fellow student that the first respondent was still in his office, so she decided to go and collect her script. She then went to the office of the first respondent at about 21h00, and found him still there. The first respondent gave N. her script, on which she saw that he wrote a mark of 25%. The first respondent told her that he had done her a favour, as she did not deserve this mark. The first respondent then asked N. to go and have drinks with him, and exchange her body for further marks. N. told the first respondent that she needed to go and study and left.

[39] The first respondent denied committing any of the acts referred to above. As to T., he admitted that he had met T. in November 2010 as she alleged, but

contended that she had come to him to ask him if he had finished marking her assignment script, and he told her he had not. According to the first respondent, it was also T. that asked him to do her a favour by giving her a 60% mark. He said he never touched or kissed her or asked for her body.

[40] As to N., the first respondent said that none of what N. stated had happened. He admitted that N. did come to his office to do an oral presentation and he gave her a mark according to her presentation, and that was all that happened.

[41] Where it came to N., the first respondent stated that he was not even in the office on the evening when N. said she had come to the office to collect her script. All that had happened was that he did call her that evening to tell her to collect her script, which she only did the following day, 17 November 2010. He said that he could not have used a mark sheet to record a mark of 5% as alleged, as mark sheets were no longer used. He contended he never made suggestions to N. as she alleged.

[42] The applicant had a policy on sexual harassment in place, which was adopted effective 1 December 2009. The policy applied not only between employees of the applicant, but to students of the institution as well. The policy defined 'sexual harassment' as including unwelcome sexual advances in exchange for favours, or other requests which are objectionable in the context of the working environment. Of particular application in this case, unwanted behavior constituting sexual harassment is defined as being 'intimidation of students into submitting to unwanted sexual advances in return for marks'. A procedure is then also prescribed in terms of which sexual harassment can be reported and dealt with.

[43] On 18 November 2010, T., N. and N. filed a group complaint about the conduct of the first respondent, with the management of the applicant. They formally accused him of sexual harassment. They undertook to write individual detailed statements, if required. Following this group complaint, the three complainants were indeed asked to provide individual statements, which they did.

[44] The first respondent was then informed in writing on 25 November 2010 of the allegations brought against him by the three complainants, with particulars of the same. He was also provided with the three individual statements. He was asked to respond to these allegations. The first respondent provided a comprehensive response dated 23 December 2010. All of this conforms, more or less, with the process in terms of the applicant's sexual harassment policy. After evaluating all the information obtained, the applicant informed the first respondent on 11 March 2011 that it was satisfied that there existed a *prima facie* case which he had to answer.

[45] The applicant then raised charges against the first respondent, which it brought on 21 April 2011. Charges 1 and 2 were labeled to be that of 'gross misconduct', and related to the two incidents in respect of T., being in short where he offered her marks in exchange for intercourse with him, and where he proceeded to touch her buttocks and kiss her. Charge 3 is equally labeled as one of gross misconduct and relates to the incident in respect of N. which also concerned offering her marks in exchange for her body. Finally, charge 5, also a gross misconduct charge, related to N. and the incident where he said that he wanted her. There were two other charges (charge 4 and 6) which were not persisted with in the arbitration proceedings, therefore I will not deal with these charges any further.

[46] Comprehensive disciplinary proceedings then took place on these charges, before an independent chairperson, over the period from April 2011 to August 2011. The transcript of the evidence in the disciplinary hearing encompasses close on two lever arch files. Written submissions in mitigation and aggravation were submitted. In a written finding dated 8 December 2011, the chairperson recommended the dismissal of the first respondent. The first respondent appealed, but the appeal was not successful. The first respondent then pursued his dismissal as an unfair dismissal dispute to the CCMA, and it is this dispute that ultimately came before the second respondent for arbitration.

[47] Turning then to the arbitration award of the second respondent, he found in dealing with substantive fairness, that the first respondent had indeed conducted himself towards T. as reflected in the charges raised, which the

second respondent himself considered inappropriate behaviour. The second respondent however found that this conduct did not amount to sexual harassment. Where it came to the incidents in respect of N. and N., the second respondent in effect acquitted the first respondent of the charges. The second respondent accordingly held that the first respondent's dismissal was substantively unfair. The second respondent also considered the issue of procedural fairness, and found the first respondent's dismissal to be procedurally fair. The second respondent then directed that the first respondent be retrospectively reinstated with 12 months' back pay, as referred to above.

The test for review

[48] The appropriate test for review is now settled. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[19] Navsa AJ held that the standards as contemplated by Section 33 of the Constitution[20] are in essence to be blended into the review grounds in Section 145(2) of the LRA, and remarked that 'the reasonableness standard should now suffuse s 145 of the LRA'. The learned Judge held that the threshold test for the reasonableness of an award was: '…Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'[21]

[49] Accordingly, in every instance where the constitutionally suffused Section 145(2)(a)(ii) pursuant to *Sidumo* is sought to be applied to substantiate a review application, any failure or error of the arbitrator relied on must lead to an unreasonable outcome arrived at by the arbitrator, for this failure or error to be reviewable. In my view therefore, what the review applicant must show to exist in order to succeed with a review application in this instance is firstly that there is a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. But even if this failure or error is shown to exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure that is equally the end of the review

[19] (2007) 28 ILJ 2405 (CC).
[20] Constitution of the Republic of South Africa, 1996.
[21] Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96.

application. In short, in order for the review to succeed, the error of failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable. In *Herholdt v Nedbank Ltd and Another*[22] the Court said:

> '…. 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 the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

[50] As to the application of the reasonableness consideration as articulated in *Herholdt*, the LAC in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[23] said:

> '…. in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material.'

[51] Accordingly, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.[24] This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived at by the arbitrator. In the end, the review application would succeed only if the outcome arrived at by

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[22] (2013) 34 *ILJ* 2795 (SCA) at para 25.

[23] (2014) 35 ILJ 943 (LAC) at para 14. The *Gold Fields* judgment was followed by the LAC itself in *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.

[24] See *Fidelity Cash Management* (*supra*) at para 102.

the arbitrator cannot be sustained on any grounds based on that material, and the irregularity, failure or error concerned is the only basis to sustain the outcome the arbitrator arrived at.[25] In *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others*[26] it was held:

> '…. the reviewing court must consider the totality of evidence with a view to determining whether the result is capable of justification. Unless the evidence viewed as a whole causes the result to be unreasonable, errors of fact and the like are of no consequence and do not serve as a basis for a review.'

[52] Against the above principles and test, I will now proceed to consider the applicant's application to review and set aside the arbitration award of the second respondent.

Grounds of review

[53] The first part of the applicant's review case as made out in the founding affidavit is simple. According to the applicant, with the second respondent having accepted in his own award that the first respondent had indeed committed the misconduct he had been charged with in respect of T., the second respondent committed a gross and reviewable irregularity in not accepting that this kind of conduct constituted sexual harassment. According to the applicant, and for this reason alone, the only reasonable outcome could be that the first respondent's dismissal was fair, because he sexually harassed T..

[54] The other part of the applicant's review case concerns, in summary, a complaint by the applicant as to the manner in which the second respondent dealt with and then determined the evidence relating to the misconduct the first respondent had been charged with where it came to N. and N.. According to the applicant, had the second respondent properly considered and determined the evidence as a whole, together with the pertinent probabilities, the only reasonable outcome that he could have arrived at is that the first

[25] See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32.
[26] (2015) 36 ILJ 1453 (LAC) at para 12.

respondent also committed this misconduct, which equally constituted sexual harassment, towards N. and N..

[55] I will now proceed to consider the review application based on these two principal grounds of review, as summarized above.

Evaluation: sexual harassment

[56] The second respondent was undoubtedly correct when he said that the issue in this matter was principally one of sexual harassment. The second respondent accepted that the untoward behaviour committed by the first respondent towards T. indeed occurred, but did not consider it to be sexual harassment. At least, and when deciding the review ground where it comes to the misconduct towards T., with the cross review being disposed of, the second respondent's findings of fact where it came to this misconduct committed by the first respondent must stand.[27]

[57] The second respondent accepted that the first respondent asked T. for sexual favours in exchange for giving her marks, in the context of her failing the course. But the second respondent reasoned that this did not amount to sexual harassment, because T. initially answered the second respondent's advances by saying she would 'think about it', and she never actually indicated to him that this caused her discomfort or that she considered the conduct unacceptable. Then, as to the second incident, the second respondent accepted that the first respondent kissed T. and grabbed her buttocks. According to the second respondent, this was the first time T. indicated the conduct was unwelcome, when she pushed him away. The second respondent reasoned that even this was still not sexual harassment, because T. went to the sports hall when the first respondent asked her to despite the earlier incident, and the first respondent did not repeat the conduct again after T. pushed him away. The second respondent concluded that this conduct of the first respondent was 'inappropriate' and not 'befitting a person of his stature', but that was as far as the nature misconduct went. According to the second respondent, this misconduct of the first respondent could be remedied by applying corrective discipline to the first respondent.

[27] See *Xstrata SA (Pty) Ltd (Lydenburg Alloy Works) v National Union of Mineworkers on behalf of Masha and Others* (2016) 37 ILJ 2313 (LAC) para 7.

[58] Can this kind of reasoning of the second respondent, considering his own findings of fact, be considered to be reasonable and thus sustainable? In my view, and for the reasons elaborated on hereunder, unfortunately not.

[59] Once the issue a CCMA arbitrator is required to determine is misconduct relating to sexual harassment, certain imperatives come into play. In *Campbell Scientific Africa (Pty) Ltd v Simmers and Others*[28] the Court said:

> 'The treatment of harassment as a form of unfair discrimination in s 6(3) of the Employment Equity Act 55 of 1998 (EEA) recognises that such conduct poses a barrier to the achievement of substantive equality in the workplace. …'

The Court then added:[29]

> 'By its nature such harassment creates an offensive and very often intimidating work environment that undermines the dignity, privacy and integrity of the victim and creates a barrier to substantive equality in the workplace. It is for this reason that this court has characterised it as 'the most heinous misconduct that plagues a workplace'

[60] Accordingly, a commissioner when considering this kind of misconduct must always bear the objective of eliminating this kind of barrier articulated in *Campbell Scientific*, in mind. And in order to do this, specific tools are provided, by way of the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace[30] ('the Code') issued in terms of the Employment Equity Act ('the EEA')[31]. This means that once the second respondent became alive to the fact that the alleged misconduct of the first respondent concerned alleged sexual harassment, the second respondent was compelled to have specifically considered and applied the Code. As said

[28] (2016) 37 ILJ 116 (LAC) at para 19.
[29] Id at para 21.
[30] GN 1357 in *GG* 27865 of 4 August 2005 issued in terms of Section 54(1)*(b)* of the Employment Equity Act. See also GN 1367 in *GG* 19049 of 17 July 1998 for the Code of Good Practice on the Handling of Sexual Harassment Cases published in terms of the LRA. The two codes are virtually the same.
[31] Act 55 of 1998

in *SA Metal Group (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[32]:

> 'It is peremptory then for a commissioner to apply the 2005 code when he or she presides over arbitrations dealing with dismissals for alleged misconduct, in which alleged acts of sexual harassment constitute the said misconduct. …'

[61] A reading of the award of the second respondent shows that he did not specifically refer to the provisions of the Code at all. It cannot even be said that the second respondent had regard to the principles contained in the Code, even though not specifically referring to it, because save for only dealing with what could be considered to be 'unwelcome', there is a complete absence of any reasoning relating to most of the principles in the Code, evident from the award. In *Maepe v Commission for Conciliation, Mediation and Arbitration and Another*[33] the Court said:

> *'…* While it is reasonable to expect a commissioner to leave out of his reasons for the award matters or factors that are of marginal significance or relevance to the issues at hand, his or her omission in his or her reasons of a matter of great significance or relevance to one or more of such issues can give rise to an inference that he or she did not take such matter or factor into account.'

Already in this respect, the award of the first respondent is grossly irregular, as he failed to have regard to critical principles he was required to have considered.

[62] However, in terms of the review test as set out above, the existence of a gross irregularity does not necessarily mean the award is reviewable. It must now be considered if the outcome arrived at by the second respondent was nonetheless reasonable. This entails, firstly, a consideration of the actual provisions of the Code, starting with the definition of 'sexual harassment' in clause 4:

[32] (2014) 35 ILJ 2848 (LC) at para 11.
[33] (2008) 29 ILJ 2189 (LAC) at para 8.

> 'Sexual harassment is unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:
>
> 4.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
>
> 4.2 whether the sexual conduct was unwelcome;
>
> 4.3 the nature and extent of the sexual conduct; and
>
> 4.4 the impact of the sexual conduct on the employee.'

[63] In *Bandat v De Kock and Another*[34] the Court said the following, with specific reference to the definition in clause 4:

> '… What is clear from the above provisions of the code is that central to the existence of sexual harassment is conduct that must be 'unwelcome'. If the conduct is not unwelcome, it cannot be sexual harassment. The determination of whether conduct is 'unwelcome' is an objective one, because conduct that may be subjectively unwelcome to one person may not be unwelcome to another.'

The Court in *Bandat* was dealing with how an employer must go about in assessing whether conduct is unwelcome. Further, and considering that the complainant in the case of sexual harassment is actually the victim of what can only be considered as heinous misconduct, the point of view of the complainant cannot be ignored. As was said in *Motsamai v Everite Building Products* (*Pty*) *Ltd*[35]:

> 'Sexual harassment is the most heinous conduct that plagues the workplace; not only is it demeaning to the victim, it undermines the dignity, integrity and self worth of the employee harassed. … Sexual harassment goes to the root of one's being and must therefore be viewed from the point of view of a victim; how does he/she perceive it, and whether or not the perception is reasonable.'

[64] As to what may be considered to be 'unwelcome', this is also specifically dealt with in the Code, in particular in clause 5.2, where it is stipulated:

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[34] (2015) 36 ILJ 979 (LC) at para 72.
[35] [2011] 2 BLLR 144 (LAC) at para 20.

'5.2.1 There are different ways in which an employee may indicate that sexual conduct is unwelcome, including non-verbal conduct such as walking away or not responding to the perpetrator.

5.2.2 Previous consensual participation in sexual conduct does not necessarily mean that the conduct continues to be welcome.

5.2.3 Where a complainant has difficulty indicating to the perpetrator that the conduct is unwelcome, such complainant may seek the assistance and intervention of another person such as a co-worker, superior, counsellor, human resource official, family member or friend.'

[65] In *Bandat*[36], the Court dealt with the most direct basis on which conduct could be indicated to be unwelcome, where it was held:

> 'How does one then go about in objectively determining whether the kind of conduct as set out in clause 5 of the Code is unwelcome? In my view, the first question that has to be asked is whether the conduct was ever complained about by the employee. This can be done by the perpetrator being informed that the employee considered the conduct to be unwelcome and the perpetrator then being called on to cease the conduct. Or the employee can formally pursue a complaint with more senior management using relevant harassment policies that may be applicable, or raising a grievance. …'

[66] However, and as is clear from the above provisions in clause 5 of the Code, indicating that the conduct is unwelcome goes beyond just directly declaring it to be unwelcome. In fact, and even if no complaint or grievance is raised, the conduct may still be considered to be sexual harassment, provided a proper explanation is provided by the complainant for not raising the complaint earlier. In *Makoti v Jesuit Refugee Service SA*[37], the Court said the following:

> 'The applicant's testimony of the specific acts of sexually aggressive behaviour of the director aimed at her was relatively detailed, plausible and could not be directly contradicted by the respondent. Understandably, the respondent

[36] (*supra*) at para 74.
[37] (2012) 33 *ILJ* 1706 (LC) at para 44.

> sought to suggest that her account ought not to be believed because she never raised any grievance about it at the time. It is true that the applicant's failure to make an issue of a deeply felt grievance at the time when it was suffered calls for a plausible explanation, which must be carefully assessed.'

[67] Whether behaviour is repeated must also be considered in the context of deciding whether it is unwelcome. In simple terms, the behaviour may be such that the perpetrator should be able to reasonably assess for himself or herself that it would be unwelcome, considering the earlier reaction from the complainant, prompting the perpetrator of his or her own accord to not repeat it again. In *Mokoena and Another v Garden Art Ltd and Another*[38], where the Court said:

> 'Sexual attention becomes sexual harassment if the behaviour is persisted in, although a single incident of harassment may constitute sexual harassment, the recipient has made it clear that the behaviour is considered offensive and the perpetrator should have known that the behaviour would be regarded as unacceptable.'

And in *Gaga v Anglo Platinum Ltd and Others,*[39] the Court said:

> '… if not the initial behaviour, then, at the very least, the persistence therein is unacceptable…'

[68] Next, nonverbal reactions by the complainant could also signal that the conduct is unwelcome. This could take the form of for example walking away or turning away, pushing the perpetrator away, obstructing contact or interaction with the perpetrator, or engaging third parties to 'run interference', so to speak.

[69] Another important consideration in deciding whether conduct is unwelcome is the actual dynamic and nature of the relationship between the perpetrator and the complainant.[40] This dynamic must not only be considered within the context of the employment relationship, but also at a personal level. It may

[38] (2008) 29 *ILJ* 1196 (LC) at para 47.
[39] (2012) 33 *ILJ* 329 (LAC) at para 41.
[40] See *Bandat* (*supra*) at para 81.

well be that this dynamic justifies and reasonably explains a situation where there is no complaint about the conduct, despite such conduct on face value being conduct worthy of complaint. The Court in *Gaga*[41] said:

> 'The failure by the complainant to take formal steps against the appellant should be construed likewise in the light of the personal and power dynamic in the relationship, which probably operated to inhibit the complainant…'

[70] The Court in *Campbell Scientific*[42] also considered the nature of the relationship between the perpetrator and the complainant as to establishing whether the conduct is unwanted, and said the following, with reference to the conduct of the perpetrator:

> '… Far from not being serious Mr Simmers capitalised on Ms Markides' isolation in Botswana to make the unwelcome advances that he did. The fact that his conduct was not physical, that it occurred during the course of one incident and was not persisted with thereafter, did not negate the fact that it constituted sexual harassment … Mr Simmers' conduct violated Ms Markides' right to enjoy substantive equality in the workplace. It caused her to be singled out opportunistically by Mr Simmers to face his unwelcome sexual advances in circumstances in which she was entitled to expect and rely on the fact that within the context of her work this would not occur. In treating the conduct as sexual harassment, Ms Markides, and other women such as her, are assured of their entitlement to engage constructively and on an equal basis in the workplace without unwarranted interference upon their dignity and integrity. This is the protection which our Constitution affords.'

[71] It does not matter that the three complainants, T., N. and N., are not employees of the applicant. The applicant's own policy on sexual harassment provides that students are covered by it. Also, the Code, and all its provisions, nonetheless remains applicable, and any of the kind of conduct contemplated by the Code, committed by the first respondent towards the complainants, would still constitute sexual harassment. In *Campbell Scientific*[43], the Court held:

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[41] *Gaga* (*supra*) at para 42.
[42] (*supra*) at para 33.
[43] Id at para 22. See also clause 2.1 of the Code.

> 'Both the 1998 and the amended codes of good practice provide that victims of sexual harassment may include not only employees, but also clients, suppliers, contractors and others having dealings with a business. …'

The Court concluded:[44]

> '… The fact that Mr Simmers did not hold an employment position senior to that of Ms Markides or that they were not co-employees did not have the result that no disparity in power existed between the two. His conduct was as reprehensible as it would have been had it been metered out by a senior employee towards his junior in that it was founded on the pervasive power differential that exists in our society between men and women and, in the circumstances of this case, between older men and younger women.'

[72] Applying the above, and if what the three complainants complained of is indeed true, I am satisfied that it would qualify as being unwanted conduct as contemplated by the code. At least in the case of T., her testimony as to this conduct was accepted by the second respondent himself. Whether the testimony of the other two complainants should also have been accepted by the second respondent is dealt with later in this judgment. What does however appear to be undeniable is that in response to the conduct, all three complainants in very close proximity to the incidents made formal statements to complain about what happened, first as a group, and then individually. In the case of T., she also immediately told her friend (S.) about what happened, following each incident. Also, and when the first respondent sought to kiss T. and touch her buttocks, she pushed him away, which indicates the conduct is unwanted[45].

[73] Even if it can be said, as the second respondent suggests, that in the case of T. she should not have told the first respondent in response to his suggestion of sexual favours for marks, that she 'would think about it', this cannot change what the first respondent did. T. testified that she said this because she was 'traumatised'. It is my view that in the context of the authorities referred to above, this kind of reaction by T. would be a natural reaction by on the part of

[44] Id at para 33
[45] See *Christian v Colliers Properties* (2005) 26 ILJ 234 (LC) at 238H-239D.

a young student confronted with such an unwanted proposition by her lecturer directly responsible for her success in a course, and is tantamount to trying to escape from the situation instead of incurring the ire of her harasser by expressly rejecting the advance. She was trying to protect her position as a student that needed to retain the good graces of her lecturer who was responsible for her passing the subject.[46] It is what Waglay DJP (as he then was) called, in *Motsamai*[47]*, a* 'dignified retreat'. It is my view that for T. to say 'I will think about it', in this context, can comfortably be considered to be same as declaring what was happening to be unwanted. This is precisely the situation the Court envisaged in *Gaga*[48] where it was said:

> '… It would be unfair to the employer were the appellant to be allowed to avoid liability for sexual harassment on the basis of the ignorance of his victim of the steps required to be taken in the policy and her hesitation in taking them. The complainant's evidence looked at as a whole suggests that she was uncertain about how to deal with the situation. Her conspicuous vacillation was an understandable response in a youthful and junior employee. She was placed in the invidious position of being compelled to balance her sexual dignity and integrity with her duty to respect her superior; which obligation no doubt was appreciably compromised by his behaviour.'

[74] A critical consideration is the nature and dynamic of the relationship that existed between the first respondent and the three complainants. He was their lecturer and they were his students. He was in a highly respected position, lecturing law to susceptible young minds, and clearly has substantial power over them as his students. There is a significant amount of trust, if not admiration, that exists between a student and a lecturer. Added to that, the first respondent was an older male figure as well, standing against three young female students.[49] There exists what the Court called in *Campbell Scientific*[50], a substantial 'power differential', which makes exploitation by way of sexual harassment possible.

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[46] Compare *SA Metal Group* (*supra*) at para 15.
[47] (*supra*) at para 18
[48] *Gaga* (*supra*) at para 42.
[49] See *Campbell Scientific* (*supra*) at para 20 where the Court said: '…a sexually hostile working environment is often less about the abuse of real economic power, and more about the perceived societal power of men over women …'
[50] Id at para 27. See also *SA Metal Group* (*supra*) at para 15.

[75] Considering the kind of relationship the first respondent had in this case, where it comes to the three complainants, together with the substantial power differential, it must follow that the first respondent must always be beyond any kind of reproach where it comes to his students and his dealings with them, especially his female students. This is actually contemplated by the applicant's sexual harassment policy, where it provides that propositions of a sexual nature in exchange for marks is sexual harassment. The first respondent should not even put himself in a position where the kind of complaints which came forward in this matter, were even possible. The point is that considering the first respondent's particular position and relationship vis-à-vis the three complainants, he would reasonably know that it is unlikely that they would challenge him if he sought favours, and what he did can only be seen as unwanted exploitation of his position amounting to sexual harassment, no matter what. I consider the following *dictum* from the judgment of the erstwhile Industrial Court in *J v M Ltd*[51] to be apt:

> '… It is difficult enough for a young girl to deal with advances from a man who is old enough to be her father. When she has to do so in an atmosphere where rejection of advances may lead to dismissal, lost promotions, inadequate pay rises, etc - what is referred to as tangible benefits in American law - her position is unenviable.
>
> Fear of the consequences of complaining to higher authority whether the complaint is made by the victim or a friend, often compels the victim to suffer in silence. That sexual harassment of an employee in an inferior position is despicable is only fully realized when one has to comfort a young girl crying her heart out in a quiet corner.'

[76] The next consideration is whether what the first respondent did, on the version of the three complainants, would entail the kind of conduct that could be seen to be sexual harassment. The Code, specifically in clause 5 thereof, deals with this, and provides:

> '5.3.1 The unwelcome conduct must be of a sexual nature, and includes physical, verbal or non-verbal conduct.

[51] (1989) 10 ILJ 755 (IC) at 758B-E.

5.3.1.1 Physical conduct of a sexual nature includes all unwelcome physical contact, ranging from touching to sexual assault and rape, as well as strip search by or in the presence of the opposite sex.

5.3.1.2 Verbal conduct includes unwelcome innuendos, suggestions, hints, sexual advances, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person's body made in their presence or to them, inappropriate enquiries about a person's sex life, whistling of a sexual nature and the sending by electronic means or otherwise of sexually explicit text.

5.3.1.3 Non-verbal conduct includes unwelcome gestures, indecent exposure and the display or sending by electronic means or otherwise of sexually explicit pictures or objects.

5.3.2 Sexual harassment may include, but is not limited to, victimization, *quid pro quo* harassment and sexual favouritism.

5.3.2.1 Victimization occurs where an employee is victimized or intimidated for failing to submit to sexual advances.

5.3.2.2 *Quid pro quo* harassment occurs where a person such as an owner, employer, supervisor, member of management or co-employee, influences or attempts to influence an employee's employment circumstances (for example engagement, promotion, training, discipline, dismissal, salary increments or other benefits) by coercing or attempting to coerce an employee to surrender to sexual advances. This could include sexual favouritism, which occurs where a person in authority in the workplace rewards only those who respond to his or her sexual advances.'

The aforesaid speaks for itself.

[77] The allegations *in casu* concerns the first respondent offering to all three complainants extra marks in exchange for having intercourse with him or

providing sexual favours to him. He suggested to them that he 'wanted them'. Individually, the first respondent conducted himself as follows towards the three complainants: (1) the case of T. he proposed intercourse in exchange for passing a course and pulled her close, grabbed her buttocks and kissed her; (2) in the case of N. he implied sexual favours for a research topic, and when she did not accede to this, she received a zero mark; (3) in the case of N., he asked her out for drinks in the context of suggesting she exchange her body for marks. This kind of conduct would without doubt be sexual in nature, and would also be what is defined as *quid pro quo* harassment in the Code.

[78] The first respondent promised an advantage or benefit to the three complainants in exchange for sexual favours, in circumstances where the awarding of that advantage or benefit would be within the power of the first respondent to bestow (being the additional marks awarded or passing the course). In the case of T., the further incident would be direct physical contact constituting harassment as defined in the Code. And in the case of N., threatening to give her a zero mark and then actually giving her a zero mark because she did not agree to his innuendo of a sexual nature, would be victimization as contemplated by the Code. In summary, and if what the three complainants said happened indeed happened, the conduct of the first respondent would constitute sexual harassment.

[79] A final issue to deal with is the approach by the second respondent to the effect that following the second incident with T. where she pushed the first respondent away, the misconduct was never repeated, the first respondent should in some way be excused. This kind of approach is entirely unacceptable. It is trite that even a single incident can constitute sexual harassment.[52] Further, this incident of grabbing T. and kissing her must be considered in the context of the earlier incident, where he asked for sexual favours in exchange for marks. The act of repeating the conduct, when T. never acquiesced to his first request, makes the first respondent's conduct in grabbing T.'s buttocks and kissing her inexcusable, even if never repeated again after that. In *SA Post Office Ltd v CCMA and Others*[53] the Court dealt

[52] See clause 5.3.3 of the Code; *Campbell Scientific* (*supra*) at para 22; *SA Metal Group* (*supra*) at para 20; *Bandat* (*supra*) at para 76.
[53] [2011] JOL 28128 (LC.

with a comparable situation, and a similar finding made by a commissioner. The Court said:[54]

> 'In so far as the second occasion is concerned, the commissioner found that because she did not indicate that the touching was unwelcome the employee was unaware of her response thereto. In so concluding, the commissioner failed to consider the evidence of the second incident later that same night after supper, when the employee performed the same action and Jones successfully placed physical barriers in the form of colleagues between her and the employee.
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> … The employee ought to have foreseen from Jones's initial reaction to his advances on the first occasion that any further advance would not be welcomed. However, he persisted with that conduct. When Jones did not physically react to the first incident during supper, and given her initial rejection of his advances on the very first occasion during the lunch, the employee probably assumed that his advances were now welcomed.'

The Court then concluded as follows with reference to the reasoning of the commissioner:[55]

> '… He paid no heed to the fact that at a rational level, Jones gave the employee the benefit of the doubt the first time he made an advance on her and that only after she found the benefit to be misplaced did she take control of the situation in a discreet and effective way. She was objectively not the girl who cried wolf.'

These same considerations would equally apply to the reasoning of the second respondent in this instance.

[80] The second respondent is an educator. In *Grey v Education Labour Relations Council and Others*[56] the Court was dealing with a sexual relationship that existed between a teacher and a learner. The Could said:[57]

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[54] Id at paras 102 – 103.
[55] Id at para 105.
[56] (2016) 37 ILJ 379 (LAC).
[57] Id at para 16.

> '… Where an educator has abused the position of trust in which he is employed, and given that continued employment would require further and ongoing interaction with and exposure to children, dismissal is 'a sensible operational response to risk management'

Although such a sexual relationship in the case of teacher and learner is prohibited by statute[58] the above *dictum* is not without some appropriate application *in casu*. I cannot see why these same sentiments should not equally apply in the case of misconduct of sexual nature in institutions of higher learning between educators and students, where continued exposure of the perpetrator to students is a reality. In *Maepe*[59], Jappie JA writing for the majority of the Court, dealt with sexual harassment committed by a senior CCMA commissioner and said:

> '… When circumstances are present which cast serious doubt on the integrity of a person holding a position such as that previously held by the appellant, then, in my view, such a person is not a fit and proper person to be entrusted with such a position.'

I consider a university lecturer to occupy a similar kind of position.

[81] It is therefore in my view clear that the conduct of the first respondent towards T. constitutes sexual harassment. The second respondent's findings that this was not the case is entirely irregular, and equally not a reasonable outcome. I am satisfied that the only reasonable outcome has to be that what the first respondent did where it came to T. constituted sexual harassment.

[82] In the case of N. and N., if what they complained of is true, then this would also constitute sexual harassment. But because the second respondent did not accept their testimony in this regard, it has to be decided, in the next part of this judgment, whether these findings of fact of the second respondent is in any way irregular and/or unreasonable.

[83] I conclude on this topic by saying that it is strictly speaking not even necessary to consider the reasoning of the second respondent where it came to the

[58] See Section 17(1)*(c)* of the Employment of Educators Act 76 of 1998.
[59] (*supra*) at para 47.

cases of N. and N., considering that the misconduct and sexual harassment where it comes to T. only would justify the dismissal of the first respondent for sexual harassment. Referring to the sanction of dismissal upheld by a commissioner for sexual harassment, the Court in *Campbell Scientific* said:[60]

> '… the sanction imposed serves to send out an unequivocal message that employees who perpetrate sexual harassment do so at their peril and should more often than not expect to face the harshest penalty.'

[84] Nonetheless, and for the sake of being complete, I will now turn to determine whether the first respondent indeed committed the conduct with which he had been charged by the applicant, where it comes to N. and N., and thus whether the findings by the second respondent to the contrary is reviewable.

Evaluation of the evidence

[85] According to the applicant, the second respondent committed a gross and reviewable irregularity in not also finding that the first respondent committed the sexual harassment towards N. and N. with which he had been charged. As touched on above, and with the cross review being disposed of, the second respondent's findings of fact where it comes to T., not being challenged by the applicant, stands. This means that what happened to T. would also play a role in deciding the cases of N. and N..

[86] From the outset, the second respondent dealt with the group complaint made by the three complainants on 18 November 2010, and described it as an 'exaggerated piece of evidence'. The second respondent also considered that the individual statements by the three complainants were different from the group statement. The second respondent then decided to disregard this group statement, in favour of the individual statements. I can find little fault with this reasoning. It is clear to me that the group statement was just intended to 'get the ball rolling', so to speak, on the sexual harassment complaint. This is evident from the fact that the group statement specifically contemplated and mentioned that individual statements from the three complainants would be made, should the applicant decide to take the matter

[60] (*supra*) at para 35.

further. This group statement thus had no value in deciding this matter, other than proving a complaint was immediately brought by the complainants. Its contents was properly disregarded by the second respondent.

[87] But where it came to the witness testimony, I must confess that I have difficulty with the manner in which the second respondent dealt with the evidence. Firstly, he never made any credibility findings where it came to the testimonies of the various witnesses that testified before him. In particular, and considering the first respondent's complete denial that he had done anything wrong, it was important to have assessed his credibility. The complete lack of credibility findings by the second respondent is a material failure and irregularity on his part. As was said in *Sasol Mining* (*Pty*) *Ltd v Ngqeleni NO and Others*[61]:

> 'One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him. The commissioner was obliged at least to make some attempt to assess the credibility of each of the witnesses and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability or improbability of each party's version. The commissioner manifestly failed to resolve the factual dispute before him on this basis. ….'

[88] The versions presented by the witnesses for the applicant, on the one part, and those for the first respondent, on the other part, were directly contradictory, as to whether the events complained of even happened. This further necessitated proper reasoned credibility findings to have been made by the second respondent, which needed to be reflected in his award. In *Blitz Printers v Commission for Conciliation, Mediation and Arbitration and Others*[62]

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[61] (2011) 32 ILJ 723 (LC) at para 7. In *SFW Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para 5, the Court said the following as to how to assess credibility: '…the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf…, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. …a witness' reliability will depend, apart from the other factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. …'

[62] [2015] JOL 33126 (LC) at para 37.

the Court said the following in finding the award of the arbitrator to be reviewable:

> '…. The second respondent, had he discharged his duties properly, was compelled to determine this conflicting evidence and thus decide what evidence to accept, and what to reject. The second respondent had to assess credibility and probabilities and come to a proper and reasoned finding as to what evidence to accept. The second respondent did none of this ….'

[89] It is my view that in cases such as these, which more often than not only involve the perpetrator and complainant, proper credibility findings are important. This was also recognized in *Gaga*[63] where the Court dealt with the situation where 'The commissioner made no explicit finding accepting or rejecting the appellant's total denial that he had ever made any suggestive remarks or had ever sexually propositioned the complainant'. The Court held:[64]

> 'In the result, the commissioner's lapse in not performing a full assessment of the complainant's credibility with reference to her almost guileless candour, forthright demeanour, lack of bias, and the consistency of her evidence in relation to the remarks and propositions having been made and their unwelcome nature, as supported by the inherent probabilities evident particularly in the manner in which the complaint came to light, meant that he ignored relevant considerations and failed to apply his mind properly to material evidence and the definitional requirements of sexual harassment in the policy and the code. … '

[90] If one reads the award of the second respondent, it is clear that when determining the evidence, all he does is to regurgitate the testimony of the complainants, the testimony of the first respondent in answer thereto, and then makes a finding on what the second respondent calls the 'probabilities'. There is simply no consideration or any kind of analysis as to what testimony must be accepted, what must be rejected, and why. The conduct of the second respondent in this respect is comparable to the following *dictum* from the judgment in *Sasol Mining*[65], where the Court said:

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[63] (*supra*) at para 29.
[64] Id at paras 43.
[65] (supra) at para 7.

> 'Regrettably, the commissioner's logic (or, more accurately, the lack of it) permeates many of the awards that are the subject of review proceedings in this court. Some commissioners appear wholly incapable of dealing with disputes of fact - their awards comprise an often detailed summary of the evidence, followed by an 'analysis' that is little more than a truncated regurgitation of that summary accompanied by a few gratuitous remarks on the evidence, followed by a conclusion that bears no logical or legal relationship to what precedes it. What is missing from these awards (the award under review in these proceedings is one of them) are the essential ingredients of an assessment of the credibility of the witnesses, a consideration of the inherent probability or improbability of the version that is proffered by the witnesses, and an assessment of the probabilities of the irreconcilable versions before the commissioner...'

[91] It is thus clear that the second respondent's approach to considering and deciding the evidence is a gross irregularity and a material failure. But does this mean that the outcome arrived at is unreasonable? To answer this question necessitates a complete assessment of the testimony presented by the witnesses, as it appears from the record.

[92] A reading of the transcript of the testimony of the witnesses in the arbitration leaves me convinced that the testimony presented by T., N. and N. emerged principally unscathed. To a large extent, their respective testimonies matched the individual statements they had made in November 2010. Each one of them readily conceded to the existence of differences between the group statement initially made, and their individual statements. Their versions about what happened to them remained consistent under what was vigorous and extensive cross examination. Although I cannot comment on their demeanour, the manner in which they testified as apparent from the transcript appears to be open and forthright. In short, I could find nothing material in the transcript that detracted from the credibility of their evidence.

[93] I may add that all of the complainants had at the time of the arbitration moved on into their respective careers, and had no vested interest in continuing to perpetrate a fabrication. There was simply no feasible reason why individual female students would put themselves through the trauma of the case that

followed (both in the disciplinary hearing and in the arbitration), with the spotlight firmly on them, simply to get rid of or punish the first respondent. There was no evidence of any prior difficulties or untoward relationship, between the three complainants and the first respondent. In *Gaga*[66] the Court said the following about the issue of the absence of any cause for fabricating such a version:

> 'The complainant had no discernible reason to be dishonest about the pattern of behaviour and her discomfort. Both she and the appellant confirmed that in all other respects they had a good working relationship. … For the court to accept the appellant's total denials as truthful, we would be required to believe that the complainant and Ms Mogaki, with unknown motives, had conspired to falsely accuse the appellant of serious misconduct. Neither witness displayed bias against the appellant of that order...'

I consider the same reasoning applies *in casu*, especially having regard to what was mostly bald denials on the part of the first respondent.

[94] I also find it hard to believe that three individual students, even if they were friends, would spontaneously fabricate different instances of sexual harassment. This is especially so considering the second respondent's own findings that the first respondent indeed misconducted towards one of them (T.) in the manner as she had complained about. So, and if one of them did not fabricate the events, it is unlikely that the other two would. Also, the three of them could gain nothing by targeting the first respondent, because even if he was removed, they would not get better marks or pass the course.

[95] Considering then the testimony of the first respondent, I do not believe he fared as well as the three complainants in giving evidence. He was certainly an argumentative witness and even resorted to distorting statements by the witnesses to suit his own purposes. He gave lengthy monologues about irrelevant issues. A fair amount of his testimony was not based on his own recollection of events, but rather what he read from recorded testimony, such as that contained in the earlier disciplinary hearing and statements made therein. Several aspects of his evidence was never put to any of the

[66] (*supra*) at para 36.

applicant's witnesses under cross examination.[67] As said in *Trio Glass t/a The Glass Group v Molapo NO and Others*[68]:

> '…. The effect of the failure to put such an important issue to the third respondent under cross-examination must mean that this evidence must be disregarded….'

[96] In the end, a proper consideration of the evidence leaves me satisfied that the testimony of T., N. and N. is to be preferred over the testimony of the first respondent, on the basis of it being overall more credible. But the enquiry does not end just with a credibility finding. As said in *SFW Group Ltd and Another v Martell et Cie and Others*[69]:

> '…To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities...'

[97] What is thus also needed is a probability finding, which entails a process of reasoning by way of inferences to be drawn from the facts, to arrive at a conclusion that is the most natural, plausible and logical conclusion to be drawn out of any number of possible conclusions, from those facts.[70] As said in *Bates and Lloyd Aviation (Pty) Ltd v Aviation Insurance Co*[71]:

> 'The process of reasoning by inference frequently includes consideration of various hypotheses which are open on the evidence and in civil cases the selection from them, by balancing probabilities, of that hypothesis which seems to be the most natural and plausible (in the sense of acceptable, credible or suitable).'

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[67] *ABSA Brokers (Pty) Ltd v Moshoana N.O. and Others* (2005) 26 *ILJ* 1652 (LAC) at para 39; *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 *ILJ* 452 (LC) footnote 13.
[68] (2013) 34 *ILJ* 2662 (LC) at para 41.
[69] 2003 (1) SA 11 (SCA) at para 5.
[70] See *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport* (2000) 21 ILJ 2585 (SCA) at para 9; *Govan v Skidmore* 1952 (1) SA 732 (N) at 734A-C; *Bates and Lloyd Aviation (Pty) Ltd v Aviation Insurance Co* 1985 (3) SA 916 (A) at 939I-J; *Food and Allied Workers Union and Others v Amalgamated Beverage Industries Ltd* (1994) 15 ILJ 1057 (LAC) at 1064C-E; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 *ILJ* 945 (LC) at para 37
[71] 1985 (3) SA 916 (A) at 939I-J.

This reasoning was similarly adopted in *Food and Allied Workers Union and Others v Amalgamated Beverage Industries Ltd*[72], where it was held as follows:

> 'The fact that the evidence is consistent with the inference sought to be drawn does not of course mean that it is necessarily the correct inference. A court must select that inference which is the more plausible or natural one from those that present themselves …'

[98] Considering that, at a level of credibility, the testimony of the witnesses for the applicant is to be preferred, the facts as established by the testimony of these witnesses, together with the undisputed and common cause evidence, must be utilized to draw the requisite inference referred to above. In this regard, a number of considerations are pertinent, which I will now set out.

[99] I can see no reason why the first respondent would ask for the cell phone numbers of students, and then call them at times which are actually after hours. There was no evidence that the first respondent behaved in this fashion towards all students. Also, each of these students had an issue with marks, and the first respondent was in a position to provide these marks. The logical inference that can be drawn from this is that the first respondent knew that he could possibly extract sexual favours from these students in exchange for providing them with what he knew they needed. In *Kok v Commission for Conciliation, Mediation and Arbitration and Others*[73] the Court said:

> '… I must further say that I find it simply inexplicable why a branch manager such as the applicant would telephone a contract cleaner (who does not even work for the third respondent) on nine occasions, and even after hours. And also, why would the applicant take the kind of interest in Tshabalala as he did, but took no similar interests in any of the other cleaners. To say that these issues constitute probabilities against the applicant is undoubtedly correct.'

[100] Also, the three complainants immediately came forward and complained about what happened to them. They presented these complaints to the highest authority in the applicant, and did so without asking for anything in return. In

[72] (1994) 15 ILJ 1057 (LAC) at 1064C-E.
[73] [2015] JOL 32888 (LC) at para 29.

the end, two of them still failed the course, but passed it the following year under the auspices of a different lecturer.

[101] The second respondent, in dealing with the evidence of N., made much of the fact of what he considered to be an improbability, where it came to her contention that she actually went to the first respondent's office the evening of 16 November 2010 to collect her script, and not the following day as suggested by the first respondent. According to the second respondent, it was unlikely that N. went to the first respondent's office that same evening, because she told the first respondent when he called her to come and get the script that she was not feeling well and would come the next day. This reasoning of the second respondent indicates to me that he simply misconstrued the evidence. N. never disputed and in fact indicated of her own accord that she initially did convey to the first respondent that she would come to collect the script the next day. What then happened is that one M., who went to see the first respondent that very evening, conveyed a message to her that the first respondent was still in the office and she could still go to collect her script. She then changed her mind, and went to collect it. There is nothing unlikely in this. The one situation does not contradict the other. It is mere one event following on the other, and circumstances changed after the further message N. received.

[102] The specific probabilities that also support the version of N. is that on the undisputed evidence, the first respondent asked for her cell phone number and called her to come and collect a script. As touched on above, I cannot comprehend why a lecturer would ask for a student's cell phone number to just call the student to come and get her script. There is no reason why he could not present this script to her in the normal course of classes. Then there is also the inexplicable situation of N. going to the first respondent's office to collect her script, together with a queue of other students that also went to collect their scripts, but instead of the first respondent actually giving it to her, he asked for her cell phone number, and called her much later that day, after all the 'normal student traffic' for the want of a better description, had dissipated, to come and fetch it. This seems part of a standard *modus operandae* of the first respondent, and has many comparisons to the situation

with T.. In my view, probabilities indicate that the first respondent had created a situation where could meet with and suggest sexual favours from N., and then capitalize without risk of possible interruption should she be susceptible to the suggestion.

[103] In the case of N., the second respondent does appear to accept that N. did qualify to write the exams, but nonetheless went to the first respondent's offices for an oral presentation normally only applicable to those candidates that did not qualify to write the exams. It is also not disputed that the second respondent gave her 60%. The second respondent however concludes that it was unlikely that the first respondent propositioned N. for sex, as she contended to be the case, for a two reasons. The first reason was that it was unlikely that the first respondent apologized to N. for remarks he had allegedly made to her earlier about her "attitude' of not attending class. The second reason is that the applicant did not investigate this issue of N. being given 'free marks', in essence implying that it was necessary to have taken action against N. for it.

[104] I have difficulty in sustaining this reasoning of the second respondent, on any basis. The glaring and unanswered point is why would a student that already qualified to write the exam go and do an oral presentation reserved for those that did not qualify. The only reason has to be that the first respondent promised her more marks. In this context, the evidence of N. makes sense, being that she was given 60% without having to make a presentation, as she did not need to make it in the first place. Once again, this situation created the opportunity for the proposition of sexual favours. This is simply the most likely scenario. To simply seek to detract from this inference because of the non existence of an apology on an unrelated issue and no action being taken against N. for receiving these 'free marks', is untenable.

[105] N. testified that the statement the first respondent made to her was 'ke a o batla', which she interpreted to mean that the first respondent wanted her for sex. The second respondent seems to reason that because the first respondent did not touch her, it was 'unfair' for N. to interpret this statement in this way, if indeed it happened. The reason for this conclusion of the second respondent was in essence a finding that because N. was friends with the

other complainants, she probably heard about the first respondent from them, leading her to interpret this statement in this way. For the reasons already elaborated on above when dealing with the principles relating to sexual harassment, this kind of reasoning by the second respondent is entirely unsustainable. It is about how N. as a complainant felt about the conduct, perceived the statement, and not which interpretation might be 'fair' or 'unfair' after the fact. The point is that it is a statement that could readily have the meaning that N. ascribed to it, and considered in the context of this matter, this is most likely exactly what was meant.

[106] In the end, the most natural, plausible and logical inference to be drawn from the facts, as a whole, and as discussed above, has to be that the first respondent committed the misconduct towards N. and N. as well, and his conclusions to the contrary is simply not a reasonable outcome. Thus, I have little hesitation in concluding that the first respondent sexually harassed N. and N. as well, as this being the only reasonable outcome in this matter.

[107] Based on the discussion earlier in the judgment concerning the principles relating to sexual harassment, and with it being accepted that the first respondent indeed sexually harassed N. and N. as well, his dismissal would be a competent and fair sanction. As such, the applicant's review application must succeed, and the award of the second respondent falls be reviewed and set aside in this respect as well.

Conclusion

[108] It is therefore my conclusion that the reasoning and findings of the second respondent to the effect that T., N. and N. were not sexually harassed by the first respondent is grossly irregular, and outside the bands of what may be considered to be a reasonable outcome. It is thus not sustainable, and falls to be reviewed and set aside.

[109] Having reviewed and set aside the award of the second respondent where it comes to the sexual harassment of T., N. and N. by the first respondent, I see no reason to remit this matter back to the third respondent again for determination *de novo* before another arbitrator. All the required evidence has

been led and is on record. The transcript is detailed, complete and extensive, and all the documentary evidence presented is part of the record. I have all the evidentiary material available before me so as to enable me to finally determine this matter, which evidentiary material is in any event unlikely to change in any newly constituted arbitration.[74] A further consideration is that one would not want to put all three complainants, who have now clearly gone on with their lives and have fledging careers, to be put through the trauma of testifying about these events again.

[110] This, matter, in the end, is one of sexual harassment, the first respondent having sexually harassed all three complainants, T., N. and N.. It is the kind of conduct that is a scourge in the workplace[75], and must be rooted out of existence. In *F v Minister of Safety and Security and another (Institute for Security Studies, Institute for Accountability in Southern Africa Trust and Trustees of the Women's Legal Centre as Amici Curiae)*[76] the Court held:

> 'The abuse of women and girl-children is rife in this country. ... This was aptly articulated in *Carmichele*:
> '"Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women.' . . . South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights."'

There cannot be any doubt that the dismissal of the first respondent must be held to be substantively fair, especially considering his persistent denial that he did anything wrong.[77] I shall therefore substitute the award of the second respondent with an award that the dismissal of the first respondent by the applicant was substantively fair.

[111] This then only leaves the question of costs. When it comes to the issue of costs, and in terms of sections 162(1) and (2), I have a wide discretion. When

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[74] See *Blitz Printers* (*supra*) at para 77.
[75] See *Campbell Scientific* (*supra*) at para 33; Gaga (*supra*) at para 48; *Erasmus v Ikwezi Municipality and Another* (2016) 37 ILJ 1799 (ECG) at para 57.
[76] (2012) 33 *ILJ* 93 (CC) at para 37.
[77] *Kok* (*supra*) at para 37; *SA Post Office* (*supra*) at para 142

exercising this discretion, I consider a costs award against the first respondent to be entirely justified.[78] I say this for a number of reasons. Firstly, the first respondent filed an answering affidavit consisting of 167 pages of mostly irrelevant and argumentative contentions, and containing references to evidence that was not even before the second respondent. The founding affidavit in the cross review is 56 pages of mostly legal argument, having no place in such a pleading. The first respondent also brought a condonation application of sorts, purportedly under Section 158(1)(f) of the LRA, also encompassing close on 100 pages (including annexures) of mostly completely unnecessary and irrelevant information. The first respondent's cross review was ill founded, and clearly an afterthought, but still required consideration. It must have been apparent, in my view, that the first respondent had little prospect in successfully defending this matter, but still he soldiered on. Therefore, I consider a costs award against the first respondent to be warranted.

Order

[112] In the premises, I make the following order:

1. The applicant's review application is upheld.

2. The first respondent's cross review is dismissed.

3. The arbitration award of the second respondent dated 27 August 2013 and issued under case number LP 9048 – 12 is reviewed and set aside.

4. The arbitration award of the of the second respondent dated 27 August 2013 and issued under case number LP 9048 – 12, is substituted with an award that the dismissal of the first respondent by the applicant, was substantively fair.

5. The first respondent is ordered to pay the applicant's costs.

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[78] Compare *Kok* (*supra*) at para 40.

S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Adv Z M Navsa
Instructed by:	Bowman Gilfillan Inc Attorneys
For the First Respondent:	In Person