



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR2278-12 and J2935-12

In the matter between:

DEPARTMENT OF EDUCATION: FREE STATE

Applicant

and

ELRC

First Respondent

DINEO PALESA SELELANE N.O.

Second Respondent

M S LEETO

Third Respondent

Heard: 23 November 2016

Delivered: 20 April 2017

JUDGMENT

WHITCHER J

Introduction

- [1] The third respondent was a school principal in the employ of the applicant. He was charged with sexual assault of a learner, who I shall refer to as the complainant. The main charge alleged that in July 2010 the third respondent

had sexual intercourse with the complainant in his car. An alternative charge alleged that he touched the complainant's breasts and penetrated her private parts with his fingers when she was at school. He was found guilty of only the main charge and dismissed on 11 March 2011. He referred a dispute to the bargaining council claiming that he was not guilty of the offence, and, accordingly, his dismissal was substantively unfair. The second respondent (the arbitrator) found in favour of the third respondent and ordered his retrospective reinstatement. The arbitrator essentially found that the complainant's testimony could not be safely relied on because her version was unclear, inconsistent and contradictory. The applicant seeks to review and set aside the arbitrator's award.

The grounds of review

Incomplete record

- [2] The review application was filed on 26 September 2012. An incomplete record was filed on 20 March 2015. The applicant's excuse is that it discovered in August 2013 that the record was incomplete and, on enquiry, was advised by the council on 14 October 2013 that the remaining record was lost and the arbitrator was not in a position to assist in the reconstruction of the record as she was no longer an arbitrator with the council. On 30 October 2013, they informed the third respondent's attorney about the problem. They received no response until 20 March 2015 when the third respondent's attorneys provided them with parts of the missing record. The applicant contends that the record is incomplete because it does not contain the full evidence of D W Ramedupe who testified on behalf of the third respondent and the written notes of the arbitrator relating to the inspection *in loco*. The applicant contends that the arbitration proceedings should be reviewed and set aside because material evidence is missing and it was thereby prejudiced in prosecuting the review. This ground of review is rejected for the following reasons.
- [3] The applicant failed to attempt a reconstruction of the missing record with the third respondent's attorneys and/or apply to this Court for a directive on the

issue.¹ The contents of the applicant's application demonstrate that it intended instead to use the incomplete record as a strategy to get the proceedings set aside.

- [4] Other than a bald allegation, the applicant has failed to explain why the missing parts of the record are crucial to the review. The record appears to be adequate in that it includes the full evidence of the complainant and the third respondent, the cross-examination of the other witnesses called by the parties and notes taken by the third respondent's attorney at the inspection *in loco*. It is common cause that there were no direct witnesses to the main incident in question. Moreover, the grounds of review as set out in the affidavits focus on the evidence of the complainant.
- [5] The applicant's failure to assertively sort out the record led to the record being filed more than 2 years after the filing of the review and thus the late setting down of this review. The arbitration was a lengthy process – stretching from January to May 2012 and involved the testimony of 6 witnesses. It would be unfair to subject the third respondent, who has remained unemployed since 2011 – and, I should add the complainant herself, to a rehearing of the matter more than 6 years later in the above circumstances.
- [6] In any event, at a pre-enrolment hearing of this review on 2 August 2016, Van Niekerk J ordered that the review application is to proceed on the basis of the existing transcript of the proceedings under review.

Misconstruction of the evidence and mishandling the inspection in loco

- [7] The applicant alleges in broad terms that the arbitrator misconstrued the evidence of the complainant and unreasonably found that the complainant was not a reliable witness and that her version was materially contradictory. The applicant also challenges the arbitrator's findings and handling of the inspection *in loco*. The applicant contends that the arbitrator irregularly relied on the evidence of the people she called while at the inspection *in loco* in

¹ The Practice Manual permitting same came into effect on 1 April 2013.

circumstances where the applicant was not given an opportunity to cross examine these witnesses and thereby challenge their evidence.

- [8] I carefully perused the record of the proceedings. This was done with no direction from the applicant who failed to make reference to any part of the record in its supplementary affidavit or heads of argument, despite the fact that the record runs to some 800 pages and contains long tracts of material irrelevant to the review. My examination of the record reveals the following.
- [9] It was common cause that during the course of 2010 the third respondent had with his private vehicle provided after school transport to a group of seven learners, who included the complainant and one Dingilizwe Ramedupe, and he would drop groups of them off at various points.
- [10] The complainant was 17 years old when she testified at the arbitration and 15 years old when the alleged sexual abuse took place. She testified through an interpreter and intermediary.
- [11] The full extent of her evidence in chief was communicated as follows:

It was a Friday and the school was out, and we went to ride with Mr Leeto. Then the first group alighted. Then the second group alighted. Then the third group was ours. Then the other children alighted. When I was supposed to alight, he pulled me at the door. Then he just went in and started the car, and we left. Then he went to the trees of Mooigenoeg.

Then he went out of the car and locked it. Then he went to relieve himself and then he came back to me. Then he took my underwear out, and then he just put his penis in front of me. Then after he had slept with me, he pulled me over then pushed me out of the car and he was laughing and then he started the car and left.²

² My emphasis.

- [12] When the Commissioner asked for the last part to be repeated, the following was communicated:

He pulled me aside and went into the car and laughed at me and then he left me there.³

- [13] In re-examination, the complainant was merely asked again to tell the arbitrator what had occurred on the Friday when she was in the principal's car, and the following was communicated:

When she tried to get out the car with the other learners, he closed the door and then he drove off. He then went to Mooigenoeng, he stopped to pee. When he finished he came back to the car and opened the side she was sitting. He then pulled down her skirt, moved her panty and penetrated her. Afterwards, he pushed her out the car and left.

- [14] The third respondent's counsel corrected submitted that the evidence communicates two versions regarding where the alleged rape took place – in one it took place in the vehicle and in the other it took place outside the vehicle. My impression was that there was some problem with the interpretation, but this was not clearly asserted and clarified.

- [15] An inspection *in loco* was conducted. It is significant that the arbitrator's observations in the award on the inspection *in loco* coincide substantially with the handwritten notes of the third respondent's attorney. The third respondent in its notes and in the opposing affidavit recorded that the complainant pointed out the scene of the offence as being inside the premises of the Ribblersdale Farm at Mooigeneog. However, it was observed that entry to the farm is barred by a first and second locked gate. At the inspection *in loco*, the arbitrator interviewed a tenant of the farm, a Mrs Buchel and both parties were allowed to ask her questions. Mrs Burchel said that both gates are always locked and the second gate has remained permanently locked since 1988. According to the third respondent's opposing affidavit to this review, it is

³ My emphasis

stated that the applicant's counsel did not indicate to the arbitrator that he wished to challenge Mrs Burchell's report and cross-examine her at the arbitration. The applicant in its replying affidavit merely responded thereto with a bare denial and did not meaningfully challenge these averments.

- [16] In light of the above, the arbitrator's conclusion that the complainant's version as to how, where and when the alleged rape occurred is vague and inconsistent. According to the full transcription of the complainant's testimony, no attempt was made to clear up or explain away these inconsistencies during her re-examination.
- [17] It was demonstrated during the arbitration that the complainant had previously made inconsistent statements about matters which had a bearing on the main charge and her interactions with the third respondent.
- [18] When asked if she had reported the rape at Mooigenoeg to anyone, the complainant said she had reported it to Mrs Skoboto and Mrs Mokgema, teachers at the school. She said she did not tell her stepmother with whom she lived because she was not used to her, which is understandable.
- [19] When it was put to the complainant that both teachers in their written statements made on 19 August 2011 and testimony on behalf of the applicant had denied she had reported the rape to them, the complainant conceded that she had not reported the matter to them. She said she had only told them about the third respondent "touching her and penetrating her with his finger" at school.
- [20] Mrs Skoboto also confirmed in her testimony that at some stage a learner, Seseko had reported to her that the complainant had told her that the third respondent is a rapist. When she tried to confirm same, the complainant denied telling Seseko that the third respondent is a rapist. The complainant confirmed this during her cross examination.

- [21] The complainant further conceded that she had lied to her mother when she told her that the third respondent had taken her to the clinic when she had heavy menstrual pains. Skoboto and Mokhoto both testified that at some stage in 2010 the complainant's stepmother had attended the school to complain that the third respondent had taken her daughter to a clinic without her knowledge and consent. According to the mother, when she once questioned the complainant about her whereabouts, the complainant told her she had gone to the clinic with the third respondent. Both Mrs Skoboto and Mokhoto testified that it was Mrs Skoboto who had in fact taken the complainant to the clinic on the day in question, and that they informed the mother of this.
- [22] It was pointed out to the complainant that she had made several sworn statements to the police - on 5 August and 19 August 2011- and in none of them did she mention the alleged rape at Mooigenoeg [she only mentions the allegations made in the alternative charge]. When asked why, she said because the rape happened *after 19 August 2010*. This response further negatively impacts on the reliability of the complaint's evidence for three reasons.
- [23] Firstly, she had up to this point consistently refused to be drawn on the date, month or year the rape had occurred – her repeated response was that she did not know - only that it was a Friday and after school. Secondly, it was pointed out to her that the allegations that a rape occurred and that it occurred after 19 August 2010 is in direct conflict with her sworn statement made on 5 August 2010 that the third respondent had in effect prior to 5 August 2010 stopped giving her and the other learners lifts because she had reported his alleged touching of her. In her statement made on 5 August 2011, she said: "now he said to us that he doesn't want us anymore inside his car because I told others that he touched my body all over." The complainant's response to these discrepancies was then to deny making the statements and say the statements were not read back and explained to her. Thirdly, the charge sheet alleges that the rape took place in July 2010.

- [24] Here again, no attempt was made by the applicant in its re-examination of the complainant to enable the complainant to explain away all the inconsistencies discussed above – which are numerous and directly relevant to the probabilities of whether the offence in issue was committed.
- [25] It transpired in the record that the school had interviewed the learners who had travelled with the complainant in the third respondent's vehicle. There is no explanation on record as to why the applicant did not secure their assistance and bring at least one of them as a witness to corroborate the complainant's version that the third respondent had one Friday forced the complainant back into his car and drove off alone with her. In these circumstances, one may presume that they did not corroborate the complainant's version.
- [26] One of the learners, Dingilizwe Ramedupe, who travelled with the complainant and was thus in a position to testify as to whether the third respondent had indeed driven off alone with the complainant one Friday, was called as a witness by the third respondent. I agree with the applicant that he was not a good witness and the arbitrator had no reasonable grounds to find that his evidence corroborated that of the third respondent. This, however, does not assist the complainant's version because the rejection of the testimony of a witness does not necessarily establish the truth of the contrary.
- [27] In light of my findings, the ultimate conclusion reached by the arbitrator that she could not safely rely on the evidence of the complainant and that the applicant failed to discharge its burden of proof against the third respondent is one that could be reached by a reasonable decision-maker using the same material that was before the arbitrator.
- [28] In my view, the evidence gives rise to a strong suspicion that the complainant was sexually abused in some manner, but the applicant's case against the third respondent faltered badly because it was not competently prepared and prosecuted. It cannot now on review complain about the outcome.

Condonation and section 158 (1)(c) application

[29] In light of the above findings, the application for the condonation of the late filing of the review application and the review is dismissed. It then follows that the application in terms of section 158(1)(c) of the LRA should be granted.

Order

[30] The review application is dismissed.

[31] The arbitration award made by the second respondent dated 16 July 2012 is made an order of this Court in terms of section 158 (1)(c) of the LRA.

[32] There is no order as to costs.

Whitcher J

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Adv B S Mene, instructed by State Attorney, Bloemfontein

For the Third Respondent: Adv S J Mushet, instructed by Lebea & Associates