



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1808/13

In the matter between:

JIMSON GALEBODIWE MOTSHOANE

Applicant

and

EDUCATION LABOUR RELATIONS COUNCIL

First Respondent

COEN HAVENGA N.O.

Second Respondent

DEPARTMENT OF EDUCATION: GAUTENG

PROVINCE

Third Respondent

Heard: 13 July 2016

Delivered: 9 March 2018

Summary: Approach to review of an arbitration award not to be conflated with approach in appeals. Arbitrator's findings connected to the evidence and findings that a decision maker acting reasonably could have made.

JUDGMENT

GOOSEN, AJ

Introduction

- [1] This is an application for the review and setting aside of an arbitration award ('the award) in terms of section 145 of the Labour Relations Act¹ (the LRA).
- [2] At the time of termination of his services, the Applicant was employed by the Third Respondent for a period of approximately 16 years; three years thereof as principal at the Soshanguve South Secondary School.
- [3] After a disciplinary hearing which was held on 19 March 2012; the Applicant was dismissed upon being found guilty of the following allegations:

"Allegation 2:

It is alleged that in or around 2010, you committed an act of sexual assault on a girl learner of Soshanguve South Secondary School, i.e. "Complainant No. 1" at or around the Mabopane Cemetery.

Allegation 3:

It is alleged that during or around January 2011, you committed an act of fraud in regard to examinations and/or promotional reports in that you promoted learners in contravention with the prescribed policy.

Allegation 4:

It is alleged in and around the period 2010 to 2011, you conducted yourself in an improper, disgraceful or unacceptable manner in that you questioned girl learners of Soshanguve South Secondary School, i.e. "Complainant 2" and/or "Complainant 3", on their virginity.

Allegation 5:

It is alleged that in and around the period 2010 to 2011, you assaulted several girl learners of Soshanguve South Secondary School, i.e. "Complainant 2", "Complainant 4", "Complainant 5" and/or "Complainant 6", in that you hit them on their hands."

¹ Act 66 of 1995 as amended.

- [4] On 1 August 2012, the Applicant referred an unfair dismissal dispute to the First Respondent. He challenged both the procedural and substantive fairness of his dismissal.
- [5] The Applicant duly got notice of the award on or about 15 July 2013; and delivered an application for the review and setting aside of the award on 22 August 2013.
- [6] On or about 24 June 2014, the Applicant filed the transcribed records in terms of rule 7(A)(6) of the rules of the Labour Court.²
- [7] In its heads of argument; the Third Respondent *inter alia* submitted that:³
- “6.1 The Applicant has impermissibly attempted to expand his grounds of review to include grounds canvassed for the first time in the ‘supplementary affidavit’ which was only filed on 18 September 2014, about 15 days after the Third Respondent has filed the answering affidavit.
- 6.2 The Applicant’s so-called “supplementary affidavit” was filed after the Applicant had already delivered a notice to in terms of rule 7A(8)(b) of the Labour Court Rules. It will be submitted that after delivery of the notice in terms of rule 7A(8)(b) the Applicant could not supplement his founding affidavit by introducing new grounds of review not canvassed in the founding affidavit.”
- [8] Upon the perusal of the court file; the Court was not able to find the 7A(8)(b) notice referred to in the Third Respondent’s heads of argument.
- [9] However, on 6 September 2014; the Third Respondent duly delivered its answering affidavit. After that; on 18 September 2014, the Applicant delivered a “supplementary affidavit”. Prudent to mention is paragraph 2 of the Applicant’s supplementary affidavit which reads as follows:

² The Applicant’s notice in this regard is headed “NOTICE IN TERMS OF RULE 7(a)”. The Court accepts that this constitutes a mere error on the part of the Applicant; and that considering the purpose and attachments to the notice; it almost certainly was intended to be a notice in terms of rule 7(A)(6) of the rules of the Labour Court.

³ At paras 6.1, 6.2.

"I am the Applicant herein and I deposed to my founding affidavit on the 3rd of August 2013, and it is in that affidavit that I made an allegation that I reserve my right to supplement the aforesaid founding affidavit upon receiving the transcribed record of the arbitration proceeding. I may mention that the transcript was only made available to us during the month of June 2014 after an application was made by my legal representatives for a transcribed record and same was forwarded to the Respondents and receipt on the 24th of June 2014."

[10] The rules of the Labour Court relating to supplementary affidavits are clear. It reads as follows:

"7A(8) The Applicant must within 10 days after the Registrar has made the record available either –

(a) by delivery of a notice and the 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."

[11] In this matter; the Applicant delivered his supplementary affidavit, approximately three months after he was in a position to serve and deliver same in terms of rule 7A(6).

[12] Apart from what is quoted from the Applicant's supplementary affidavit above; it contains no further explanation for the late filing of the supplementary affidavit. Particularly; no application for the condonation of the substantive non-compliance with the Labour Court's rules in this regard; was made in the papers placed before the Court.

[13] The Applicant raises various grounds of review in his founding affidavit. In summary; they are:

13.1 The Second Respondent did not act "fairly" in making the award; and did not consider and apply his mind to the issues before him. He deliberately ignored the material placed before him; resulting in him committing a gross irregularity and made an

award which a reasonable decision-maker “may have not made”;

- 13.2 The Second Respondent misdirected himself in finding that the dismissal of the Applicant was procedurally and substantively fair; ignoring the fact that the disciplinary hearing of the Applicant was finalised in his absence whereas he had an explanation for his absence;
- 13.3 The Second Respondent ignored the contents of exhibit “D” to the bundles presented (record of sms’es between the Applicant and Mr Kotsokoane; the ‘investigating officer ‘in the matter; informing him about the Applicant’s absence;
- 13.4 The Second Respondent made wrong conclusions; not based on evidence presented; that a medical certificate of the Applicant explaining his absence was sent to a wrong fax number;
- 13.5 The Second Respondent ignored the letter by one of the complainants, Lebogang Mbasia; in which she apologised to the Applicant and alleged that she was used by teachers who wanted to “score” their battles with the Applicant;
- 13.6 The Second Respondent failed to take into consideration that although the allegations against the Applicant; being sexual assault alleged to have been committed in 2010; the incidents were never reported immediately; but only in 2011. In this regard the Second Respondent ignored that there was no evidence that the complainants were threatened not to report the transgressions;
- 13.7 The Second Respondent failed to take into consideration that such allegations “only came after” the demotion of Ms Matsimela from grade 12;

- 13.8 The Second Respondent failed to take into consideration that the virginity test allegation was finalised in the absence of the complainant Keketso Kgomo;
- 13.9 The Second Respondent ignored the “fact” that it was conceded by Mr Maotoe, the then Deputy Principal at the school; that the decision to promote the learners was agreed “at School Assessment Team” level and not by the Applicant;
- 13.10 The Second Respondent further ignored the evidence of Ms Dora Kgatle; who was the Head of Department at the school; dealing with the “promotion policing” adopted at SMT levels. In particular; Mrs Kgatle confirmed that she signed certain “letters”;
- 13.11 The Second Respondent failed to take into account that no fraud was proved against the Applicant in his individual capacity;
- 13.12 The Second Respondent exceeded his powers in that he did not act in accordance with the terms of the Act; when he proceeded to adjudicate upon the arbitration proceedings; despite the fact that he was informed by the Applicant that he is still awaiting the outcome of the appeal of the internal disciplinary hearing;
- 13.13 The Commissioner misdirected himself in ruling that the complainants were minors at the time of the alleged offence whereas they were above age;
- 13.14 The Commissioner further committed an error in that he ruled that intermediaries and CCTV be used in “their testimony”;
- 13.15 The Second Respondent did not properly and justifiably apply his mind to the facts or the law in this instance;
- 13.16 The Second Respondent failed to afford the Applicant a fair and proper hearing in the circumstances by his conduct in the arbitration proceedings; thus, rendering his award irrational.

Test for review:

[14] The Labour Courts consistently warn about applying principles associated with appeals in applications for the review of arbitration awards. The Court holds the view that this application is another example of an application for review; advanced on principles typically associated with appeals. For this reason, the test for review of arbitration awards under the LRA; as formulated by our Courts; is quoted hereunder:

[15] In the case of *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd v Legobate*;⁴ the Labour Appeal Court held that:

“[12] The test that the Labour Court is required to apply in a review of an arbitrator’s award is this: “Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?” Our courts have repeatedly stated that in order to maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator’s award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator’s reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the arbitrator. The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.”

[13] An award will no doubt be considered to be reasonable when there is a material connection between the evidence and the result or, put differently, when the result is reasonably supported by some evidence. Unreasonableness is, thus, the threshold for interference with an arbitrator’s award on review. However, a survey of the judgment of the Labour Court reveals that it reviewed and set aside the Commissioner’s award without finding that the result of the award was unreasonable. Nowhere in its reasons did the Labour Court find

⁴ [2015] 36 ILJ 968 (LAC).

expressly or by implication that the decision is one that could not reasonably be reached;

[15] However, having identified the misdirection committed by the Commissioner, namely his failure to consider and apply his mind to the totality of the facts and circumstances of the case, the Labour Court failed to progress to the second stage of the enquiry by asking whether, despite the failure to consider and apply his mind to the totality of the facts and circumstances of the case, the result of the award was one which a reasonable Commissioner could reach. In so doing, the Labour Court adopted a piecemeal approach to the review test which is fundamentally at odds with *Sidumo* as endorsed in both *Herholdt* and *Gold Fields*.

[16] In *Gold Fields*, this Court rejected the piecemeal or fragmented approach to reviews, where each factor that the commissioner failed to consider is analysed individually and independently, for principally two reasons. The first is that it “assumes the form of an appeal” and not a review, and the second is that it is mandatory for the reviewing court to consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could have made. To evaluate every factor individually and independently, it observed, is to defeat the requirements in s 138 of the LRA in terms of which the arbitrator is required to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities, albeit expeditiously and fairly. On this approach, therefore, the failure of a commissioner “to mention a material fact in his or her award”, or “to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute”, or “commits an error in respect of the evaluation or consideration of facts presented at the arbitration” would not, in itself, render the award reviewable; and

[18] Similarly, instead of asking if the award is one that a reasonable decision-maker in the position of the Commissioner could not reach, the Labour Court asked whether the sanction imposed by the employer the appropriate sanction. In doing so, it effectively enquired into the correctness of the commissioner's decision on the fairness of

the sanction, thus elevating the enquiry from a review to an appeal. Even if the Labour Court was of the view that the sanction was inappropriate, it failed to appreciate the very circumscribed basis upon which it was entitled to interfere with the commissioner's award. This, in the context of a review of an award of a Commissioner under the LRA, is a significant error, which constitutes a valid ground for setting aside the decision on appeal."

[16] In *Head of the Department of Education v Mofokeng and Others*⁵ the Labour Appeal Court held that:⁶

"[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA* and others have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.

[31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependant on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in section 6 of the Promotion of Administrative Justice Act ("PAJA"); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously etc. The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be

⁵ [2015] 36 ILJ 2802 (LAC).

⁶ At paras [30], [31] and [33].

reasonably reached in light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues; and

- [33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination."

- [17] Recently; the Labour Appeal Court in *Moen v Qube Systems (Pty) Ltd and Others*⁷ *inter alia* held that:⁸

⁷ [2017] 38 ILJ 2712 (LAC).

⁸ At paras [14] and [17].

“[14] Central to the appeal was the argument that the court a quo had applied the wrong test for review. It is now trite law that the test for review is whether the commissioner’s decision is one that a reasonable decision-maker could not reach in the circumstances of the case...

....

[17] This dictum emphasises that the significance of the arbitrator’s reasons is less important than a careful examination by the reviewing court of the result arrived at by the arbitrator, after a consideration of all the materials placed before the arbitrator. This exercise does not entirely exclude an examination of how the arbitrator might have arrived at his or her conclusion, in that a review will still succeed if the conclusion reached is unsupported by or in conflict with the evidence read as a whole.”

Procedural fairness:

[18] As stated; the Applicant challenges both the findings of procedural and substantive fairness herein. In relation to the issue of the procedural fairness (or not) of his dismissal, the Applicant’s heads of argument mainly focus on the events of 19 and 20 March 2012; particularly with reference to the “message” that Mr Kotsokoane was requested to convey to the presiding officer; on behalf of the Applicant.

[19] The nub of the Applicant’s argument in this regard is detailed in paragraphs 6.1 to 6.9 of his heads of argument. Paragraphs 6.2.5 and 6.2.6 read as follows:

“6.2.5 Also the evidence of Ms Mookeletsi when she was explaining as to what was the valid reason for being absent, which he explained as such “Let us say that we have disciplinary hearing today, we are supposed to sit down in a disciplinary hearing, and then may be before we start, there is a communicate between yourself and the Departmental rep to say, I am not available, let us say I am sick, and then there is documentary evidence to that effect, or you are saying: “I am consulting with the doctor and will give documents to indicate

that really I was sick on that day. Then the fact that you are ill, I will regard that as a valid reason for not being at the disciplinary hearing". That was completely ignored by the Second Respondent;

6.2.6 That is exactly what the Applicant did, on the 19th March 2012 having contacted Mr Kotsokoane that he is attending to a doctor and Mr Kotsokoane promising to convey the message to the presiding officer. On the 20th of March 2012 the Applicant faxing a letter to the number which was given to him by MR Kotsokoane."

[20] The Second Respondent; in the award, under the heading "Procedural Fairness of the Dismissal"⁹ *inter alia* held that:

"I find no substance in the allegations of procedural unfairness. It was ruled that the hearing proceed in the absence of the Applicant. There were three sittings of the disciplinary hearing, and the Applicant was afforded ample opportunity to prepare and consult. He was allowed access to witnesses, but failed to respond to arrangements to facilitate this. The Applicant did not attend the hearing on 19 March. His medical certificate only reached the employer on the afternoon of the second scheduled day. When he failed to attend, the presiding officer attempted to call him on his mobile phone as well without success. The presiding officer also previously gave him her contact number and asked him to communicate with her. He chose not to do so. It is unacceptable that he made himself unavailable knowing that he is absent, and might be contacted to enquire about his whereabouts. He only faxed the medical certificate on the second scheduled date, which demonstrate a lack of urgency. Irrespective of whether he informed the prosecutor per text message, he had to submit proof, which he failed to do in time.

[21] From the aforesaid it follows that the Second Respondent did give consideration to the Applicant's communication with Mr Kotsokoane, during the morning of 19 March 2012.

⁹ Atpara 6.2 of the award.

- [22] The Commissioner; effectively held that even if it is accepted that the Applicant informed the said prosecutor per text message of his alleged illness on the morning of 19 March 2012; he was still required to submit proof of his absence for medical reasons. As stated; the Commissioner concluded that the Applicant failed to submit the necessary proof on 19 March 2012.
- [23] Factually; the findings made by the Commissioner on this issue cannot be said to be findings that a decision-maker; acting reasonably; could not have made.
- [24] On the Applicant's own version; the relevant medical certificate was only sent to his employer on 20 March 2012. It is common cause that 20 March 2012 was the second day of the hearing. It is further common cause that the hearing commenced on 19 March 2012.
- [25] Having considered the history of the disciplinary action against the Applicant; together with previous "sittings"; and the fact that the presiding officer on a previous occasion specifically gave the Applicant her contact number and asked him to contact her on that number; it cannot be said that the finding as to procedural fairness to continue with the hearing on 19 March 2012; against the said background facts; was unreasonable.

Substantive fairness:

- [26] The Applicant raised various grounds for the review of the award in relation to the said allegations 2, 3, 4 and 5.
- [27] From a perusal of the said grounds; it is apparent that to a large extent; they are premised on the Commissioner's alleged failure to consider parts of the evidence; that according to the Applicant, ought to have swayed the general probabilities in his favour.
- [28] As stated above; the approach adopted by the Applicant herein; conflates the principles pertaining to a typical appeal and review of an arbitration award in terms of the LRA. Ultimately, the question is not whether the Commissioner's decision was right or wrong. The question is whether the decision rendered by

the Commissioner is a decision that a decision-maker, acting reasonably, could have made. The emphasis is not on a singular correct conclusion on the facts; but rather on an outcome that reasonably falls within a radius of conclusions that could be made from the evidence presented. As long as the Commissioner's findings could be considered to fall within a radius of reasonable conclusions; and is connected to some of the evidence placed before the Commissioner; such findings cannot be reviewed.

[29] As stated; allegation two was that, in or around 2010, the Applicant committed an act of sexual assault on a girl learner of Soshanguve South Secondary School "Complainant No 1." (Thokozile Kubheka); at or around the Mabopane Cemetery.

[30] The Applicant's complaints regarding the Commissioner's findings on allegation two can be summarised as follows:

30.1 The Arbitrator failed to consider the fact that complainant number one alleged that the incident took place in 2010; and that the matter was only reported in 2011. The complaint was not voluntary as it was only reported after a separate incident that took place involving the said complainant and another learner.

30.2 There is no evidence before the Arbitrator that the said complainant was threatened by the Applicant; in the event that she reported the incident to the authorities.

30.3 The Arbitrator failed to consider the evidence of Ms Matsemela regarding the reasons the said complainant left the Soshanguve South Secondary School. The said Ms Matsemela is on record stating that *"the Applicant taught the complainant physical science; and she (the complainant) informed her (Ms Matsemela) that she cannot concentrate in class because of the things the Applicant has done to her."* Her evidence however

demonstrated that the Applicant was not the complainant's teacher; but only her principal;

30.4 The Arbitrator failed to consider complainant number one's version as improbable for the following reasons:

30.4.1 After the alleged "incident" the said complainant continued to ask for lifts from the Applicant on several occasions;

30.4.2 That during one of the said lifts offered to the complainant, her drink was "spiked" by the Applicant; but the complainant failed to report such incident. The complainant was "always" in the company of the Applicant;

30.4.3 According to the complainant there was an adult male at the cemetery who saw the said complainant. The male person enquired from the complainant as to whether the Applicant was troubling her. The said male further informed the complainant that he will keep guard; in case the Applicant "troubles" her. If the complainant's evidence is credible; she would have "made a report" to the said male; if she was touched "uncomfortably" as the male was willing to assist her.

30.4.4 The Commissioner failed to consider the fact that the said complainant left the school due to her pregnancy. This evidence was corroborated by the witnesses of the Applicant; Brenda and Tiisetso.

30.4.5 Despite the fact that the complainant's uncle was a member of the school's governing body; she failed to report the Applicant's alleged conduct to him.

30.4.6 Despite the fact that the complainant reported the incident to Mr Mollik; she never informed Mr Mollik about the spiking incident, because Mr Mollik never testified about that incident.

[31] The Commissioner provided a summary of the evidence of each witness that testified during the arbitration proceedings. The summaries of the evidence recorded in the award, are detailed to the extent that the Court is satisfied that the Commissioner reasonably considered the evidence presented at the arbitration. The Arbitrator summarised his findings in respect of allegations 2, 4 and 5 as follows:

“In respect to the allegations 2, 4 and 5 the Applicant merely denied any knowledge of the alleged misconduct. His allegation that Ms Matsimele became his enemy when he removed her from grade 12 classes, does not have any substance. I found no evidence of animosity fuelled by such sense of revenge in her evidence. His allegations of fabrication of evidence is improbable. The Complainant 1 provided such detail that one would not expect a fabricated evidence. Why would she make up a story of going to the cemetery while it would be easier to merely say it happened in his office, for instance? The detail about scratching the candles with money, and that his phone rang, seems improbable to be part of a fabricated story. The Applicant's version that she left the school because she was pregnant, is refuted by the uncontested evidence that she delivered her baby in December. That would substantiate her version that she only fell pregnant after she left the school, in April, actually 9 months prior to delivery. The witnesses called by the Applicant could not refute this. The witness Makgabo contradicted himself on this and other issues. The other witness for the Applicant, Brenda Ngwenya, was by her own admission prepared to lie on behalf Complainant 1, a fact that surely taints her credibility. I find it improbable that the complainants fabricated the evidence of the virginity tests, or the assault by hitting them on their hands;

And;

I can find no substance in the allegation that the Complainants' version is a fabrication and a lie. I can find no probable motive for the witnesses to

fabricate evidence and lie at the arbitration hearing. The Applicant could not provide any probable evidence that would support such notion. I therefore find the evidence of the Complainants given at the arbitration hearing credible and probable. I find that it was proven on balance of probabilities that the Applicant committed an act of sexual assault on the Complainant 1 as defined in the Criminal Law (Sexual Offences and related matters) Amendment Act, no 32 of 2007. He unlawfully and intentionally without the consent of the Complainant forced himself on her in a sexually motivated manner as described in her evidence. I further find on the balance of probabilities that the Applicant committed fraud, conducted himself in an improper, disgraceful or unacceptable manner by questioning the Complainants on their virginity, and committed assault by hitting the Complainants on their hands;

And;

With consideration of all the relevant cautionary rules I find that the Respondent provided evidence that proves on a balance of probabilities that Mr Motshoane committed the alleged misconduct he was charged with. There is therefore evidence before me that proves that Mr Motshoane contravened a rule or standard regulating conduct in that, or of relevance to, the workplace.”

- [32] The Commissioner clearly considered the evidence placed before him in relation to allegation 2. The abovementioned issues raised by the Applicant in relation to the Commissioner’s findings on this allegation; effectively amounts to criticism of the Commissioner’s approach in his analysis of the evidence, in determining whether the allegation was proved on a balance of probabilities. Considering the case law referred to above, it cannot be concluded that the Commissioner misconceived the nature of the enquiry before him; alternatively, that there was no fair determination of the issues placed before him. The Commissioner’s conclusions on this allegation are connected to the evidence presented; to such an extent that his findings fall within a radius of reasonable outcomes on the evidence presented. On this basis alone; the Court finds that the arguments presented on behalf of the Applicant failed to persuade the Court that the Commissioner’s findings on this allegation, are not findings that a decision-maker, acting reasonably could not have made.

- [33] From a perusal of the record of the arbitration proceedings it follows that the Applicant did little to cast serious doubt on the credibility and reliability of complainant number one's evidence. In the main; the Applicant argued that the said complainant's version of the events was fabricated.
- [34] The Commissioner took a reasonable approach to the analysis of the evidence presented; in that he considered the credibility of the various witnesses as well as the general probabilities of the evidence presented. The approach adopted by the Commissioner in this regard, cannot be faulted. In addition; the Commissioner's approach in determining what appears to be mutually destructive versions of fact; was in general compliance with established law in this regard.¹⁰
- [35] According to allegation 3, the Applicant, during in or around January 2011, committed an act of fraud in regard to examinations and/or promotional reports, in that he promoted learners in contravention with the prescribed policy.
- [36] In the main; the arguments presented on behalf of the Applicant on this allegation can be summarised as follows:
- 36.1 The Commissioner ignored the fact that the decision to promote or condone the learners was not the sole decision of the Applicant. In this regard Mr Maote; the Deputy Principal at the school; and Ms Dorah Kgatle, the Head of Department; also made contributions on the promotion of the learners. These individuals also signed documentation confirming their participation in the said process; and to confirm their approval of the criteria which was adopted by the school;
- 36.2 The Commissioner ignored the evidence placed before him that a District Traversal team assessed the schedules every January of the new year and that the said team visited the school in the

¹⁰ See: *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et CEE and Others*_2003 (1) SA 11 (SCA).

beginning of 2011. The team was allegedly “happy” with the criteria used by the school;

36.3 The Arbitrator ignored the evidence that the Applicant telephonically discussed criteria which was adopted by the schools on promotions; with Mr Lehobye.

[37] On this allegation the Commissioner *inter alia* held that:

“I accept the evidence of the Respondent that learners were promoted in contravention with the prescribed policy. The Applicant remains responsible and accountable for the actions of the SAT. The amendment of the promotional schedules that came back from the district according to their own authorised requirements, is a misrepresentation of the actual result and fraudulent. The Applicant cannot escape liability for the unlawful actions.”

[38] Again, the arguments presented on behalf of the Applicant on this allegation; appear to conflate the principles pertaining to an appeal; as opposed to the principles in relation to the review of an arbitration award. In the main; the Applicant criticises the finding of the Commissioner on the basis that the Commissioner “ignored” certain evidence.

[39] In general; the Court does not find that the Commissioner ignored relevant evidence to the extent that it had an unfair distorting effect on the outcome of the arbitration proceedings; and particularly; that the findings made by the Commissioner on this allegation; are not connected to the evidence. Again, the Commissioner correctly conceived the nature of the issue placed before him; and rendered a result that falls within a radius of reasonable outcomes on the evidence presented.

[40] The Commissioner did not find that it was the Applicant by himself; that decided to promote the learners, without the participation and/or intervention of the SAT. On a proper construction of the award on this allegation; it again follows that the Commissioner was alive to the fact that a decision to promote the relevant learners was indeed made at SAT level. The nub of the Commissioner’s decision on this allegation was that ultimately the Applicant is

responsible; and should be held accountable, for unlawful; and unauthorised promotional requirements. In this regard Ms Kgatle *inter alia* testified that:

“After going through the learners’ appeals, we indicated on the relevant learners’ applications, which we handed over to the principal and then the principal had promised that he would take these appeals, forward such appeals to the District for enlistment. And then when I saw Tsofolofelo listed in Grade 12, I am not entirely surprised because another thing is, I personally, I am not very much in liking of promoting learners because I generally motivate them to repeat so as for them to pass their matric satisfactory. So, when I saw that she was not in this class of Grade 12. I see that no, the principal had submitted the appeals letters for endorsement and then I assumed that well, she could very well be in that list as well.”¹¹

- [41] In the premises thus, the said witnesses testified that after the learners’ appeals; that the relevant learners’ marks were adjusted in accordance with criteria determined by the Applicant. It was the Applicant that undertook to refer the appeals to the District Office for enlistment. The evidence reveals that it was not disputed that the relevant learners were subsequently promoted to the next grades; and that the said learners were promoted without the intervention of the District Office. Importantly it was not disputed that the learners were promoted in contravention of the prescribed promotion policy of the Department.
- [42] The evidence dictates on a balance of probabilities, that ultimately the decision to promote the said learners was made by the Applicant. Consequently; to the extent that the Commissioner held the Applicant responsible for the promotion of the learners in question; such conclusion was reasonable.

¹¹ See also the evidence of Mr Maotoe: “Yes, we sat down at the SAT, but it was not a full compliment because after completion we had to take such to the District to say that insofar as we are concerned this is how these children or learners could be assisted; and “We gave the list to the principal for submission, forwarding to the District and then what would happen the learners and the parents would come to the principal to check on the progress, as to how was it coming as per the appeals; and “As I said that, look the final results were given to the principal for submission to the District and the parents and the learners would (indistinct) to the principal for progress reports.”

[43] Allegation 4 relates to in and around the period 2010 to 2011; when the Applicant allegedly conducted himself in an improper, disgraceful or unacceptable manner in that he questioned learners of Soshanguve South Secondary School; namely Keketso Kgomo and Maria Makua, on their virginity.

[44] The Applicant criticises the Commissioner's findings on this allegation on the following basis:

44.1 Ms Matsemela and Ms Motene gave conflicting accounts of how the Applicant wanted to conduct virginity tests on the complainant. The contradiction in the evidence of the two said witnesses exist, notwithstanding them being informed by the complainant of what happened to her at the hands of the Applicant;

44.2 According to the complainant the Applicant asked her about her virginity on several occasions. She however failed to inform teachers Ms Matsemela and Ms Motene. No mention was made during her evidence that the Applicant at any stage wanted to insert a finger in her vagina.

44.3 Despite the fact that the "incident" was in 2010; it was never reported to her parents and only "friends" were informed. No formal complaint was made until 2011.

44.4 Allegation 4 relates to two complainants; but only one complainant testified; and there was no amendment to the allegation against the Applicant. Notwithstanding same; the Arbitrator found the Applicant guilty as charged. The Arbitrator's findings on this allegation are detailed above. The Applicant's defence to this allegation is premised on a denial that the alleged conduct ever occurred.

[45] During the arbitration proceedings the evidence of one of the complainants, Maria Makua, was led. Ms Makua *inter alia* testified as follows:

"That is me. He called me during school. I was summons..... and upon my arrival at his office he placed his feet on top of the table and he could enquire about my virginity, whether I am still one or not. Then I respond by saying: "yes". And as he used to call me (indistinct) he called me after office hours to go to his office and he will enquire about my virginity and I will say: "Yes" and asked if he could set an appointment. That there is a certain lady at school, that we can go and check the lady and if I am still a virgin, the lady will confirm same also. And one other day when I was in the sick room whilst I was sick, Mr Motshoane did enter the sick room, Your Worship, he did enter the sick room and enquired as to what the problem is; and

"I informed him that I am feeling a little bit dizzy as I do not know what is wrong and he brought two tablets. He said I must take the two tablets, but I did not do so. I just left them on top of the drawer which was in the sick room, and he enquired again whether indeed am I still a virgin and I said: "Yes". He asked if he could put his hands, Your Worship, on my private parts, my vagina specifically. I refused and he got angry and then since then (indistinct), Your Worship, when we make noise in his classroom he would call us, the first time he reprimanded us nicely so and the second time when we went there or upon him summoning us to his office he gave us 16 lashes on the hand and he told us that we are going to fail and indeed, we did fail."

- [46] The aforesaid evidence was not seriously challenged under cross-examination. In addition; Ms Makua explained her failure to report the said incidents earlier; by stating that she was scared to do so. This aspect was not seriously contested.
- [47] Considering all the evidence placed before the Commissioner; the Court concludes that the Commissioner's findings regarding this allegation, are connected to the evidence; and fall within a radius of reasonable outcomes.
- [48] Uncontroverted direct evidence was presented about the fact that the Applicant repeatedly questioned the said complainant on her virginity. The evidence further demonstrates that the circumstances under which the Applicant conducted himself in the manner aforementioned; was indeed improper, disgraceful and unacceptable. In this regard specific reference is

made to the evidence of Ms Makua that the Applicant expressed the intention to touch her vagina.

- [49] The Applicant's argument to the extent that it should be taken into account that there was no evidence that the Applicant inserted a finger in any of the complainant's vaginas, is nothing less than staggering. If the said argument aims to suggest that the Applicant's behaviour could only have been improper, disgraceful or unacceptable in circumstances that he inserted a finger in the said complainant's vagina, such argument is rejected in the strongest possible terms. The notion that improper and unacceptable behaviour could only follow a physical violation of a female learner's bodily integrity and security; falls short of an appreciation of the gravity of the Applicant's misconduct herein.
- [50] The balance of the arguments presented on behalf of the Applicant on this allegation; amounts to no less than a critique of the manner in which the Commissioner evaluated the probabilities herein. The fact of the matter is that the Commissioner, as evidenced in the award; demonstrated that the evidence was indeed considered; and that the evidence of Mr Ms Makua was held to be credible.
- [51] All told; the Court concludes that an argument to the extent that the Commissioner's conclusions herein are not conclusions that a reasonable decision-maker could have made; stands to be rejected.
- [52] Allegation 5 is that the Applicant; in and around the period 2010 to 2011; assaulted several girl learners of Soshanguve South Secondary School (complainants 2, 4, 5 and 6); in that he hit them on their hands.
- [53] According to the Applicant the findings of the Commissioner in relation to this allegation; stands to be reviewed because;

53.1 Although this incident allegedly happened in 2010, it was only reported in 2011. There were material contradictions in the testimonies of the following witnesses; despite the fact that the "incident" was witnessed by all of them:

53.2 Ms Makua stated that the Applicant only punished her once; but referred to two separate incidents. Ms Makua failed to mention what “instrument” the Applicant used to lash her;

53.3 Ms L Ndlovu testified that they were lashed for making noise. No mention was made of the Applicant calling them “Shangaans”; and that they were assaulted with a belt;

53.4 Ms L Phobola testified that the Applicant called them “Shangaans”; and that she was not assaulted twice as indicated by Ms M Makua. She did not mention the manner in which she was assaulted by the Applicant; initially she testified that she was never assaulted; and later on, changed her version. Not all the learners who were allegedly assaulted by the Applicant were called to testify; although Ms Makua stated that they were present when the assault took place.

[54] The Third Respondent; in its heads of argument argues that the Applicant did not challenge the Arbitrator’s finding on this allegation in his founding affidavit. Therefore, according to the Third Respondent, this finding effectively remains unchallenged. According to the Third Respondent, the Applicant only saw to challenge this finding in his heads of argument; which is impermissible.

[55] Considering the Court’s remarks and findings pertaining to the Applicant’s founding affidavit and supplementary affidavit above; the Applicant’s grounds of review are only to be considered with reference to the said founding affidavit. It is indeed, correct that the Applicant failed to rely on any reviewable irregularity and/or unreasonable outcome in relation to this allegation.

[56] If however, the Court is wrong in this regard; the Court makes the findings, detailed hereafter. The transcribed record of the evidence presented on behalf of the Third Respondent on this allegation; demonstrates that some of the contradictions in the evidence alluded to by the Applicant in his heads of argument; were indeed present. However; notwithstanding same, all the complainants that testified on this allegation consistently remained adamant that the Applicant subjected them to physical punishment. Mere contradictions

per se; do not render a finding such as the one made by the Commissioner on this allegation; to be unreasonable. Considering the evidence as a whole; and the fact that the Applicant was the principal of the said complainants; it is to be expected that their evidence would differ on some issues as to the events in question. In fact; considering the number of complainants that testified on this issue; it could even be said that consistent testimony; on all aspects of the allegation by all the complainants; could have raised questions of reliability and/or veracity of their evidence.

- [57] As stated above; the question before the Court is not whether the Commissioner's finding was correct. The question is rather whether the Commissioner's conclusion is connected to the evidence; and was an outcome that a decision-maker, acting reasonably, could have made.
- [58] The Commissioner explained the reasons for his findings in this regard in the award. The Court is satisfied that the Commissioner did consider the evidence; and further did make the necessary credibility findings in relation to the witnesses that testified. All the evidence considered; the Court concludes that it cannot be said that the Commissioner's conclusions on this allegation, were not connected to the evidence and a decision that a reasonable decision-maker could not have made.
- [59] The allegations against the Applicant were extremely serious. This case is an example where a long service record cannot compensate for the serious misconduct of which the Applicant was found guilty of. Misconduct of this nature cries foul of the rights of female members of society to be treated with dignity, respect and without abuse; whether emotional and/or physical.
- [60] Ultimately the Applicant was the principal of the said school. He was employed in a position of trust. In fact; it could be said that the Third Respondent; by appointing the Applicant in that capacity, entrusted the Applicant to take all reasonable steps to ensure that learners at the school; in this instance with specific reference to the female learners; would not be subjected to the type of conduct which the Applicant ultimately subjected them to.

[61] The Court is unable to find any reason to conclude that all the witnesses that testified against the Applicant; with particular reference to the allegations relating to “sexual offences”; conspired against the Applicant. There is absolutely no reason; based on the evidence; to find that all the said complainants had a motive to lie and in doing so, to ensure the dismissal of the Applicant. Considering the above; the Court finds that the Applicant has failed to advance persuasive grounds for the review of the arbitration award issued herein.

[62] After consideration of the factors recorded in section 162 of the LRA; the Court concludes that this is not a matter in which a cost order would be appropriate. In particular; it cannot be said that the Applicant conducted himself in a manner; both prior, during and/or after the arbitration proceedings; and during the review proceedings; that would justify a cost order against him.

Order:

[63] The following order is made:

1. The application is dismissed.
2. There is no order as to costs.

C Goosen

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Advocate M Mosopa

Instructed by: Leballo Attorneys

For the Respondent: Advocate MJ Ramaepadi

Instructed by: State Attorney: Johannesburg

LABOUR COURT