



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR689/14

In the matter between:

MEC FOR EDUCATION: NORTH WEST PROVINCE

Applicant

and

MP RASUTHA

First Respondent

EDUCATION LABOUR RELATIONS COUNCIL

Second Respondent

SM OSMAN N.O

Third Respondent

Heard: 11 July 2018

Delivered: 28 September 2018

Summary: Application for condonation for late filing of review – delay of four months substantial in review involving dismissal of individual – in such cases, principles set out in *Queenstown Fuel Distributors CC v Labuschagne NO & Others* to be followed - explanation for delay neither compelling nor reasonable – no need to consider prospects of success - in any event, prospects of success in review application poor – applications for condonation and review dismissed.

JUDGMENT

COETZER, AJ

Introduction

- [1] This is an application to review and set aside an arbitration award issued by the third respondent (the Arbitrator) on 28 October 2013. The application arises from the finding that the dismissal of the first respondent, an educator, was unfair. The first respondent had been dismissed by the applicant after he was found guilty of allegations that he had engaged in a sexual relationship with a learner. I will, for purposes of this judgment, refer to the learner in question as 'the Learner'.
- [2] In his award, the Arbitrator found that the Learner's evidence that the first respondent had engaged in a sexual relationship with her was neither probable nor credible. On the strength of this, the Arbitrator found that on a balance of probabilities the first respondent had not committed the misconduct alleged and thus that his dismissal was substantively unfair. The Arbitrator consequently ordered that he be reinstated retrospectively to the date of his dismissal.
- [3] The applicant challenges the reasonableness of this finding. In particular, it contends that the Arbitrator did not properly analyse the evidence before him and drew certain conclusions which could not be justified on the available evidence. The applicant contends that these irregularities committed by the Arbitrator render the award one which no reasonable arbitrator could have arrived at.
- [4] The review application was delivered late and the applicant has sought condonation for such late filing. For reasons which will become clear, it is necessary to deal with the application for condonation first.

Condonation

- [5] The arbitration award was received by the applicant on 8 November 2013. The last day to file the application within the time limits imposed by section 145(1) of the Labour Relations Act¹ (the LRA), was 20 December 2013. The applicant however only filed the application on or about 23 April 2014, more than four months late. By any measure, this is a substantial delay in the context of dispute resolution under the LRA.
- [6] The applicant's founding affidavit in the application for review also deals with the application for condonation. The affidavit is deposed to by its Acting Deputy Director: Employee Labour Relations Services and attempts to explain the delay.
- [7] The deponent submits that after receiving the award, she realised that the award was unreasonable and she commenced with preparation of a submission to 'the powers that be' for their approval to have the award reviewed by this Court. On her own version, she commenced with those submissions on 11 November 2013.²
- [8] The deponent alleges that upon commencing the preparation of the submission, she realised that she had lost her notes from the arbitration. Notwithstanding this, she was able to finalise the submissions one month later, on 11 December 2013. She does not indicate how she was able to finalise those submissions without her notes. Conversely, she was able to do so by 11 December 2013, but she does not provide any explanation for why a delay of a month was occasioned.
- [9] The deponent states that the submissions were then sent to the Acting Director: Employee Labour Relations Services on 11 December 2013. On the same day, the Acting Director signed the submission indicating his

¹ 66 of 1995, as amended.

² This was clarified in the replying affidavit at paragraph 9. The founding affidavit's reference to 11 December 2013 was erroneous.

support for a recommendation that an application for review should be pursued. The signed submission was then only sent to the Acting Executive Manager: HRM & D on 19 December 2013 who also signed the submission before the closure of the applicant's offices for the period 20 December 2013 to 6 January 2014.

- [10] On 14 January 2014 the submission was signed by the Acting Chief Financial Officer and then finally approved by the Acting Superintendent General on 20 January 2014. I pause to mention that by this stage the application was already one month late.
- [11] While the deponent confirms receiving the signed submission on 20 January 2014, there is no explanation as to why it took her almost another three weeks for it to be sent to the applicant's Legal Unit on 10 February 2014. Once this was attended to, the deponent indicates that she was 'informed' that the Legal Unit had instructed the State Attorney on 13 February 2014 and that the State Attorney briefed Counsel in Pretoria only a month thereafter, on 12 March 2014. By this stage, the application was already almost three months overdue.
- [12] The deponent submits that Counsel was only available to consult with the applicant on 27 March 2014, but that she was not available on that date and accordingly the consultation with Counsel was rescheduled to 4 April 2014. Papers were then prepared by Counsel and finalised by 9 April 2014. As indicated above, the application was however only filed with this Court on or about 23 April 2014.
- [13] The applicant contends that it has prospects of success in that several irregularities were committed by the Arbitrator and the award is 'glaringly unreasonable'. It relies, in principle, on its grounds of review to demonstrate its prospects of success. Those grounds are, for reasons set out hereunder, of little value.

[14] The first respondent opposes the application for condonation. He makes the point in the opposing affidavit that there are several extended periods in the applicant's explanation which are unaccounted for and where no explanation has been tendered at all. He contends that the explanation given is not satisfactory and, further, that the applicant has 'very little chance of success' in relation to the review application.

[15] The law in respect of condonation applications in this Court is well-established. It is trite that condonation is not simply there for the taking.³ This Court is required to exercise its discretion in regard to applications for condonation, taking account the extent of the delay and the reasons therefor, the prospects of success and the prejudice occasioned by granting or refusing the application.⁴

[16] In making the above determination, the well-known case of *Melane v Santam Insurance Co. Ltd* provides the following additional guidance:

"[t]here is a further principle which is applied and that is without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without good prospects of success, no matter how good the explanation for delay, an application for condonation should be refused."⁵

[17] The need for expedition in the resolution of labour disputes is similarly well established. The promulgation of the Practice Manual in this Court as well as various amendments the LRA in 2015 have placed renewed emphasis on the obligations of litigants in this Court.

[18] Recently, in *Makuse v Commission for Conciliation, Mediation & Arbitration & Others*⁶, this Court indicated that as part of the overall scheme of ensuring effective and expeditious resolution of labour disputes it will subject

³ See *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) 532C-E and, more recently, *Academic and Professional Staff Association v Pretorius NO and Others* (2008) 29 ILJ 318 (LC) at paras 17–18.

⁴ *Mashishi v Mdladla NO & others* (2018) 39 ILJ 1607 (LC) at paras 6 – 7.

⁵ *Melane v Santam Insurance Co Ltd* above at 532C-D.

⁶ [2015] 12 BLLR 1216 (LC).

applications for condonation to strict scrutiny.⁷ This is particularly true of review applications concerning the dismissal of an individual employee. In this regard the Court made reference to the following dictum of the Labour Appeal Court in *Queenstown Fuel Distributors CC v Labuschagne NO & Others*:⁸

“[24] ... In principle, therefore, it is possible to condone non-compliance with the time-limit. It follows, however, from what I have said above, that condonation in the case of disputes over individual dismissals will not readily be granted. The excuse for non-compliance would have to be compelling, the case for attacking a defect in the proceedings would have to be cogent and the defect would have to be of a kind which would result in a miscarriage of justice if it were allowed to stand.”

[25] By adopting a policy of strict scrutiny of condonation applications in individual dismissal cases I think that the Labour Court would give effect to the intention of the legislature to swiftly resolve individual dismissal disputes by means of a restricted procedure, and to the desirable goal of making a successful contender, after the lapse of six weeks, feel secure in his award.” (Emphasis added).

[19] I agree. The present matter involves the dismissal of an individual and the delay is, as I have indicated, substantial. The delay is aggravated by the fact that it was almost entirely self-created and, more particularly, due to a lack of diligence on the part of the applicant.

[20] Measured against the yardstick set out in *Queenstown Fuel Distributors CC* above, the applicant’s explanation for this delay is neither reasonable nor compelling. Several delays, of varying durations, have simply been glossed

⁷ Ibid at paras 5 and 6. See also *Food & Allied Workers Union on behalf of Gaoshubelwe v Pieman’s Pantry (Pty) Ltd* (2018) 39 ILJ 1213 (CC) at paras 187 – 188; *Mbatha v Lyster & Others* (2001) 22 ILJ 405 (LAC) at para 18; *A Hardrodt (SA) (Pty) Ltd v Behardien & Others* (2002) 23 ILJ 1229 (LAC) at paras 3 – 4; *Lentsane & others v Human Sciences Research Council* (2002) 23 ILJ 1433 (LC) at para 14.

⁸ (2000) 21 ILJ 166 (LAC).

over by the applicant, while any explanations which have been provided are generalised or cursory in nature.

- [21] The applicant fails to explain why it took the deponent more than a month to finalise the submission to her superiors on 11 December 2013. The submission was, as I have indicated above, sent to the relevant persons for signature and received back by her, duly signed, on 20 January 2014.
- [22] At this point the explanation becomes exceedingly vague. The applicant offers no explanation for why it took the deponent until 10 February 2014 to simply refer the matter to the Legal Unit.
- [23] No reasons are tendered by the applicant to explain why the State Attorney dithered for more than a month before instructing Counsel on 12 March 2014. Such inaction is deeply concerning in circumstances where the application was already several months overdue. A confirmatory affidavit from the State Attorney explaining this delay was imperative, but not provided.
- [24] Despite the fact that the application was already at this stage substantially late, the applicant exhibited little interest in expediting the filing of the application for review. The decision of the State Attorney to brief Counsel who was only available to consult on 27 March 2014 is indicative of mood prevailing at the time. Once again, no explanation has been provided by the State Attorney for a decision which had the effect of exacerbating the delay even further.
- [25] The deponent avers generally that she could not attend the consultation on 27 March 2014 and consequently it had to be rescheduled to 4 April 2014. No details are provided in this regard.
- [26] I pause to mention that it is concerning that the applicant appears to have only informed the first respondent of its intention to review the award on 8 April 2014 by way of a letter addressed to the first respondent's attorneys. In

an affidavit filed by the first respondent's attorney, he records that he personally made several attempts to contact the deponent during November and early December 2013, but was not able to reach her until 9 December 2013.

- [27] It is also entirely unclear from the deponent's explanation why it took a further two weeks from the date that the application was 'finalised', on 9 April 2014, to when it was eventually filed with this Court on 23 April 2014
- [28] In short, the explanation tendered by the applicant is neither reasonable nor compelling, as contemplated by the Court in *Queenstown Fuel Distributors CC*. The applicant in fact appears to have litigated at its leisure, with little regard for the time limits set out in the LRA, the Rules or Practice Manual of this Court. The applicant has also failed to take this Court into its confidence in explaining the delays occasioned by it and appears to have simply assumed that this Court would grant condonation.
- [29] The Labour Appeal Court has held on several occasions that in the absence of a reasonable explanation, the applicant's prospects of success are immaterial.⁹ In the circumstances, I do not believe it necessary to consider the prospects of success in determining the application for condonation. The application for condonation accordingly falls to be dismissed and, consequently, the application for review along with it.
- [30] To the extent that I may be wrong in my conclusion above, I believe that it is prudent for me to set out some discussion of the applicant's prospects of success pertaining to the review application. As will become clear, in my view, the applicant has poor prospects of success.

Relevant background

⁹ See *Mziya v Putco Ltd* (1999) 3 BLLR 103 (LAC) at para 9; *National Education Health and Allied Workers Union on behalf of Mofokeng and others v Charlotte Theron Children's Home* (2004) 25 ILJ 2195 (LAC) at para 23; *Mgobhozi v Naidoo NO and Others* [2006] 3 BLLR 242 (LAC) at para 34; *Colett v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 1948 (LAC) at paras 38-39.

[31] The first respondent was employed by the applicant as an educator at Lerona Secondary School. He commenced employment as an educator on 5 October 2009.

[32] On 13 October 2010 the first respondent was charged with the following offence:-

“On or around February 2010 at Le Rona Secondary School, you committed an act of misconduct as contemplated in the Act when you had a sexual relationship with a learner by the name of [name omitted], who is a learner at the school where you are employed, thereby contravening Section 17(1)(c) of the Act.”

[33] The reference to ‘the Act’ in the charge refers to the Employment of Educators Act¹⁰ (the Act). It provides, in section 17(1)(c), that an educator ‘must be dismissed’ if he or she is found guilty of having a sexual relationship with a learner of the school where he or she is employed.

[34] The first respondent was found guilty of the charge against him and dismissed on 10 December 2010. Following an appeal against this sanction, his dismissal was only confirmed some fifteen months later, on 20 March 2012. It is not clear from the transcript or any documents in the record why this process took so long, particularly in circumstances where the allegation was serious and held considerable implications for all parties involved, including other learners at the school.

[35] The delays in this matter are not the exclusive preserve of the applicant. The first respondent then waited until 26 October 2012 before referring his dispute to the second respondent. He sought condonation for the late referral and it was granted. Following an unsuccessful attempt at conciliation, the matter was referred to arbitration.

¹⁰ 76 of 1978

The arbitration

- [36] The dispute was arbitrated only some 12 months later, on 8 to 10 October 2013. It is also not clear from the record why such a lengthy delay was occasioned in enrolling the dispute for hearing.
- [37] The applicant led the evidence of four witnesses being the Learner, as well as her aunt, cousin and another educator at the school, Ms Mahonono. The third respondent gave evidence on his own behalf and also called his fiancé and another educator at the school who stayed with him for part of the relevant period, Mr Mokebisi, to give evidence.
- [38] The first respondent was required to teach grade 10 and 12 classes and became the applicant's Economics and Accounting teacher in January 2010. The Learner was in one of the grade 10 classes taught by the first respondent and was, at the time, 18 years old due to the fact that she had repeated grades on two prior occasions.
- [39] The Learner contends that the first respondent approached her, seemingly out of the blue, on a Friday afternoon and asked her to be in a relationship with him. She says that she accepted his proposal the following day, when he asked her again. At the time she was in a five-year relationship with another man, but had decided to end that liaison in favour of the first respondent.
- [40] The Learner stated that the relationship with the first respondent had started on 5 February 2010 and that she had told two of her friends about it. It lasted for approximately one month and had progressed to a sexual relationship before it ended.
- [41] She contends that they would rendezvous at school, in the township and at his home, which was in the vicinity of the school. In particular, she indicated

that she would arrive in his classroom after school on Mondays to Thursdays with a friend, at around 16h00, and that the three of them would speak for a while. The friend, who had accompanied her to avoid any suspicion of an improper relationship, would then leave the Learner and the first respondent to their own devices (this constituting no more than hugging, according to the Learner).

- [42] The Learner indicated that she and her friend would visit the first respondent at his home in the evenings. While she initially indicated that she could not remember what time these visits would happen, she later indicated that it was after she had eaten supper at her aunt's house. I pause to mention at this juncture that the Learner's aunt indicated in her evidence that the Learner always arrived home between 17h00 and 18h00 and that she never left the house in the evenings.
- [43] The Learner nevertheless alleged that at these nightly visits, her friend would leave the first respondent's home after a while and that the Learner and the first respondent would then start kissing, switch the lights off and have sexual intercourse in the bedroom. There were, according to the Learner, two single beds on opposite sides of the room. This was denied by the first respondent who was adamant that there was only one double bed in the room. His version was confirmed by his fiancé and Mr Mokebisi.
- [44] The Learner made several worrying concessions during cross-examination. She admitted that she was a disobedient learner but stated that this only occurred after the relationship with the first respondent had started. She also could not remember how many times she had visited the first respondent at his home, what time she would normally arrive there or how long she visited him.
- [45] Importantly, she also could not remember how many times she allegedly had sexual intercourse with the first respondent. She was pressed on the fact that during the disciplinary enquiry she had said that they only had sexual intercourse on one occasion, while at the arbitration she had alleged that it

happened more than once. She was unable to provide a proper reason for this discrepancy.

- [46] The Learner indicated that she had decided to disclose the relationship after she was confronted by two educators at the school, who appear to have been informed about it by her cousin. Her cousin had approached the school following a community meeting at which the Learner and the first respondent had been implicated for engaging in a relationship.
- [47] The first respondent denied that he ever had any sexual relationship with the Learner or any other learner. The first respondent's evidence was that he first became aware of the allegations that he had had sexual intercourse with a learner on the morning of Monday, 1 March 2010. After assembly he was approached by Mr Sunday, an educator at the school, who informed him that there were allegations that the first respondent was 'in love' with the Learner and that she had not 'slept at home' over the weekend.
- [48] The first respondent's evidence was that he was shocked by this. He had in fact taken leave and had departed for Welkom to submit his graduation papers at 12h00 on Thursday 25 February 2010 and had only returned on Sunday 28 February 2010. This was confirmed by Mr Mokebisi who stayed with the first respondent during the relevant period. The applicant could not refute any of this evidence.
- [49] In relation to the alleged meetings between the Learner and the first respondent, he stated that he would return to his home shortly after school closed at 14h30 each day, except on Fridays when he taught extra classes to grade 12s. He accordingly could not possibly have been at school with the Learner at 16h00 because he was always at home at that time. This was confirmed by the evidence of his fiancé and Mr Mokebisi.
- [50] In that regard, he indicated that his fiancé stayed with him at his home during the period 13 January 2010 to 22 February 2010, when she moved out to

accommodate Mr Mokebisi. Both his fiancé and Mr Mokebisi confirmed the salient features of the first respondent's evidence.

- [51] After hearing about the allegations, the first respondent took advice from his Union and resigned on 15 or 16 March 2010. Following his resignation, the management team of the school was 'chased away' by students on 17 March 2010. The Department of Education then intervened, dispatching one Mr Dire to the school. Mr Dire told the first respondent to withdraw his resignation and to fight the charge. The first respondent obliged.
- [52] In order to clear his name, the first respondent approached both the South African Police Services ("the SAPS") and the Department of Education to investigate the matter. When the SAPS attended the school, the deputy principal, Mr Motloun, informed them that an investigation had revealed no misconduct on his part and the matter was considered closed.
- [53] Tellingly, it was common cause that three other learners had similarly accused him of inappropriate behaviour but had subsequently withdrawn their accusations. The Learner had also initially withdrawn her allegation about the existence of a sexual relationship.
- [54] The Learner however changed her version again after she discovered that the first respondent had allegedly 'badmouthed' her. As a consequence, in October 2010 the first respondent was issued with a notice to attend a disciplinary enquiry and he again chose to resign. However, after discussing the issue with his Union he withdrew his resignation, this time to fight the allegations against him.
- [55] The first respondent contended that he was the victim of a plot which had been hatched by a group of schoolgirls who wished to 'teach him a lesson'. The reason for this, according to him, was because the grade 10 class had been a problem group, riddled with repeaters and disobedient learners whom he tried to discipline. Unsurprisingly - he contends - his attempts at reform made him unpopular with certain learners, including the Learner.

- [56] He also alleged that when he first joined the school he was told by the Principal, Mr Jantjie, that he should be careful around female students as they had previously landed educators in hot water by making scurrilous accusations against them. He referred in particular to the case of 'Mr Eddy'. This evidence was not really disputed by the applicant.

The review test & evaluation of the prospects of success

- [57] The applicant takes issue with various aspects of the award. However, upon closer scrutiny the grounds of review set out in the founding affidavit reveal that the applicant's complaints amount to nothing more than isolated complaints in relation to perceived inconsistencies or inaccuracies which appears from the award. In particular, the applicant is unable to explain how any of the Arbitrator's alleged missteps warrant interference by this Court.
- [58] The test on review is a strict one. Trawling through an award in the hopes of finding a misdirection or error on the part of the arbitrator is not sufficient for purposes of succeeding on review in this Court. This was confirmed by the Supreme Court of Appeal in *Herholdt v Nedbank Ltd*¹¹:-

“[25] A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.”
(Emphasis added).

- [59] In *Head of the Department of Education v Mofokeng and Others*¹² the Labour Appeal Court held, *inter alia*, as follows:-

¹¹ 2013 (34) ILJ 2795 (SCA).

¹² [2015] 1 BLLR 50 (LAC) at paras 30 - 33.

“[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* (Congress of SA Trade Unions as Amicus Curiae and this court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & 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.”

and

“[32] ... To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.” (Emphasis added).

[60] The Arbitrator identified the issue which he had to decide as follows at paragraph 3 of the award:-

“The issue to be decided by myself pertains to whether the applicant, Mr. M P Rasutha is indeed guilty of the charge of having a sexual relationship with a learner.”

[61] This was the charge the employer had to prove on a balance of probabilities. It is only once this charge was proven that section 17(1)(c) of the Act

became relevant.¹³ It is clear that the Arbitrator engaged in the correct enquiry.

[62] The Arbitrator's award accurately summarised the evidence led at the arbitration. The award also reflects a judicious consideration of the evidence and weighing up of the competing versions. In doing so the Arbitrator found that the Learner's evidence was 'deplorable', while the first respondent was a 'lousy' witness.

[63] Faced with these difficulties, he nevertheless made the following finding at paragraph 41 of the award:-

"I am not satisfied that the respondent had proved on a balance of probabilities that indeed there was sexual relationship. I am not inclined to accept the testimony of a single witness who could not remember material incidents and or events or either the frequency of the serious allegations which she purported. In *Mabona & Another v Minister of Law & Order & Others* 1988 (2) SA 654 (SE) the Court held that the credibility of the witnesses and the probability or improbability of what is said cannot be regarded as separate enquiries to be considered piecemeal. They are indeed part of a single investigation into the acceptability or otherwise of the respondent's version."

[64] While the exact contours of the exercise undertaken by the Arbitrator in evaluating the evidence and resolving irreconcilable disputes of fact are not apparent from the award, it is clear that he was alive to the fact that there were two irreconcilable versions before him. In resolving them, he relied on a consideration of the probabilities inherent in the two versions presented at the arbitration.

[65] Such an approach does not necessarily warrant interference by this Court. In contrast, in *Solidarity on behalf of Van Zyl v Kpmg Services (Pty) Ltd &*

¹³ In the circumstances it is not necessary for me to deal with whether the provisions of section 17(1) are in conflict with the provisions of the LRA and, in particular, the right not to be unfairly dismissed and I accordingly do not deal with it any further.

*others*¹⁴ this Court, referring with approval to the unreported judgment of *Transnet Ltd v Gouws & others*¹⁵, indicated the correct approach to adopt when dealing with credibility findings as follows:

“[19] As I have indicated above, the important question which had to be tackled by the arbitrator was whether the employer, on a preponderance of probability, had established that the first respondent had received cash bribes from Nu-Liner. The key question for him was which version was more probable. He was able to reach a decision on the probabilities without having to have regard to the credibility of each witness. It is quite possible for evidence to be assessed purely on its probability, assuming for the purposes of that assessment that the witnesses who testified were credible. It is not necessary for a judicial officer or arbitrator to find a witness not to be credible in order to find that his evidence is not probable. In this regard, there is an informative and authoritative article by the former judge of the Appellate Division, H C Nicholas “Credibility of Witnesses” (1985) 102 SALJ 32.

[20] In my view, the failure by the arbitrator to make a pertinent finding on credibility does not demonstrate that he failed to understand the proper approach to the assessment of conflicting evidence. The arbitrator appears clearly to me to have understood that his primary task was to resolve the conflicting versions by having regard to the balance of probability. He applied the correct judicial technique in this regard. Accordingly, his failure to address the credibility of each witness and comment thereon is not a fatal flaw which would entitle the applicant to review of his award.’ (Emphasis added).

[66] The Court went on to say that:

“[16] In summary, complaints about errors made in the treatment and assessment of evidence by an arbitrator will normally be bound up in an attack on the overall reasonableness of the result, and will not in themselves constitute separate grounds of review to be determined

¹⁴ (2014) 35 ILJ 1656 (LC).

¹⁵ Case no JR206/09 Labour Court 25 April 2012.

independently from the result (as they did under the 'latent irregularity' or 'dialectical unreasonableness' approach).

[17] While arbitrators should always aspire to meet the exacting standard set by the Supreme Court of Appeal in *Stellenbosch Farmers' Winery* for the proper assessment of conflicting versions by a finder of fact, an arbitration award that does not live up to this standard will not automatically be subject to review. Arbitrators are empowered to deal with the dispute with a minimum of legal formalities, their decisions are immune from appeal, and the legislature has set a high bar for reviewing arbitration awards. Errors committed by an arbitrator in the assessment thereof will not necessarily vitiate an award." (Emphasis added).

[67] The Arbitrator considered that the Learner had been unable to provide simple details about various issues, such as how often she had sexual intercourse with the first respondent or when this happened. Her versions in respect of certain issues were contradicted by the evidence of the first respondent, whose evidence was corroborated by his witnesses in all material respects. The Learner's evidence was even contradicted by her aunt's evidence on one aspect.

[68] The applicant also failed to lead a number of critical witnesses to prove the misconduct which it alleged the first respondent had engaged in, including the friend who allegedly accompanied the Learner on her excursions to the first respondent's classroom and home. This was noted by the Arbitrator.

[69] Weighing the probabilities of the two versions before him against the evidence led at the arbitration, the Arbitrator reached a decision which cannot be said to be so unreasonable that no other decision-maker could have reached the same result. Consequently, the award is one which falls within a range of reasonable outcomes.

[70] In any event, this Court should be slow to interfere with arbitration awards where the applicant seeks to impugn credibility findings of the arbitrator.¹⁶ The Arbitrator would have had the advantage of being present in the same room as the persons against whom credibility findings have been made.¹⁷

[71] The applicant also takes issue with the quantum of the award of back-pay, citing that no evidence was led at the arbitration regarding the first respondent's salary at the time of his dismissal. This is true. But what the applicant has clearly overlooked is paragraph 3 of the pre-arbitration minute which was concluded by the parties on 6 June 2013 clearly recording what the first respondent's salary was at the time of his dismissal.

[72] In the circumstances, I can find no reason to interfere with the Arbitrator's award. As indicated above, the applicant's prospects of success are clearly poor.

[73] In the circumstances I make the following Order:-

Order

1. The application for condonation is dismissed;
2. The application for review is dismissed;
3. No order is made as to costs.

N Coetzer

Acting Judge of the Labour Court of South Africa

¹⁶ See *Department of Health (Western Cape) v Democratic Nursing Organisation of SA on behalf of Cloete & Others* (2016) 37 ILJ 2398 (LC) at para 30.

¹⁷ See also *Malan & Another v Law Society, Northern Provinces* 2009 (1) SA216 (SCA) at 221 I-J; *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 705-706.

Appearances:

For the Applicant: Mr M Gwala

Instructed by: State Attorney

For the First Respondent: No appearance