



IN THE LABOUR COURT OF SOUTH AFRICA, POLOKWANE

Not reportable

CASE NO: JR 442 /17

In the matter between:

MZUKISI NJISANE

Applicant

and

COMMISSIONER MARK HAWYES

First Respondent

EDUCATION LABOUR RELATIONS COUNCIL
Respondent

Second

**GAUTENG PROVINCIAL DEPARTMENT OF
EDUCATION**
Respondent

Third

Heard: 24 October 2018

Delivered: 8 November 2018

JUDGMENT

- [1] The applicant was employed as a teacher in 1987. In April 2017 when he was the principal of Maputle Primary School he was charged with improper, disgraceful and unacceptable behaviour for touching the breasts of a female educator at his school and attempting to kiss her. A disciplinary enquiry was instituted against him and on 19 June 2017 the applicant received and acknowledged a letter from the Head of the Department of Education which reads as follows:

“Dear Mr. Njisane

Disciplinary Hearing Outcome

You were charged with misconduct in terms of item 5 of the Disciplinary Code and Procedure for Educators.

The allegation read as follows:

Allegation1

It is alleged that on 22 October 2016 you behaved in an improper, disgraceful and unacceptable manner in that you touched the breasts of Ms. Mahowa, an educator at Maputle Primary School and/ or attempted to kiss her.

In view of your actions, you are thus charged with misconduct in terms of Section 10(1)(q) OF Employment of Educators, Act 76 of 1998, as amended.

VERDICT

Alegation1: Guilty

SANCTION

Since you were found guilty on the allegation, the Presiding Officer has after careful consideration of mitigation and aggravating circumstances submitted, issued the following sanction.

Dismissal in terms of Section 18(3)(i) of the Employment of Educators Act, (Act 76 of 1998), as amended.

RIGHT TO APPEAL

Your attention is drawn to Section 25(2) of the Employment of Educators Act, (Act 76 of 1998 as amended) which provides that an educator or an employee has a right to appeal to the Member of the Executive Council against the finding by the Presiding Officer of the disciplinary hearing and against the sanction imposed in terms of section 18(2)(e) to (i).

Should you want to appeal, your appeal should be made to the MEC on the attached form within five (5) working days of your receiving this notice for the attention of Mr. Oupa Bodibe at Fax no: (011) 355-0542.

Furthermore, copy of this appeal must be forwarded to Ms. Toniya Lyras at Fax no: 086 612 8474. Should such a copy of appeal not be received within the stipulated time-frame, the sanction will automatically be implemented.

Attached please find an appeal form in the event of you wanting to appeal".

- [2] Schools closed for the winter school holidays on 30 June 2017 and reopened on 24 July 2017. As the third respondent had not received the applicant's appeal, the district office issued a mandate on 6 July 2017 for the implementation of the sanction of dismissal with effect from 21 June 2017. It was brought to the third respondent's attention that the applicant had reported for duty. The third respondent mandated Ms Mphongo its Circuit Manager to inform the applicant that he should not have been at school as he had been dismissed.
- [3] On 26 July the applicant visited the Dispute Management office in the Gauteng West District and informed Mr. Tshitshimba that he had lodged

an appeal with the Member of the Executive Committee for Education (the MEC). He was requested to submit proof. He submitted a fax transmission report which reflected that he attempted to fax his appeal to the number of Ms Lyras on 28 June 2017. The result of the fax transmission is "com error 326". On 26 July the applicant sent an email to an official who works in MEC's office. He submitted that he did so in response to being asked to produce proof that he had filed his appeal. The applicant submitted that as he was not aware that he had been dismissed on 21 June 2017 he referred an unfair discrimination and victimisation dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). It was scheduled for hearing on 25 January 2018. On 16 January 2018 the applicant referred an unfair dismissal dispute and a condonation application to the second respondent (the ELRC). On 25 January commissioner Pretorius of the CCMA issued a ruling in the applicant's unfair discrimination dispute to the effect that it lacked jurisdiction over the dispute. He directed the CCMA to transfer the dispute to the ELRC as a misconduct dispute in a ruling dated 22 February 2019. The ELRC refused to condone the applicant's late referral of the unfair dismissal dispute. In the application at hand the applicant seeks an order reviewing and setting the condonation ruling aside. The application is opposed by the third respondent.

- [4] In his reasons for refusing condonation the first respondent (the arbitrator) rejected the applicant's version that he became aware of his dismissal upon receiving a phone call on 27 July that he was not supposed to be at his school as he had been dismissed. He further rejected the assertion that the applicant's dismissal was confirmed on 31 August 2017 when he did not receive his salary. He found that the explanation the applicant proffered for referring his dispute to the ELRC late was tantamount to no explanation. Even the reasons the applicant provided for referring the dispute to the CCMA first as a discrimination dispute did not assist him as the arbitrator was not convinced that the applicant was not aware that he had been dismissed in the letter he received on 21 June 2017. He concluded that an excessive delay of over

6 months without reasonable explanation constituted sufficient grounds for refusing condonation.

[5] The applicant's grounds for review are that the arbitrator committed gross irregularities in the conduct of the arbitration by making a number of errors which led to him reach an unreasonable decision. He submitted that the arbitrator erred in not considering his replying affidavit. He further erred in not taking into account that the chairperson of his disciplinary enquiry did not have the authority to issue the sanction of dismissal. He also failed to consider all the contents of the letter the applicant received on 21 June 2017. The applicant submitted that the arbitrator erred in not considering that he had a right to appeal which had been violated by the third respondent. He failed to consider that he prosecuted his dispute diligently by referring an unfair discrimination dispute to the CCMA on 18 August 2017. He also erred in not considering the prejudice the applicant would suffer as a result of the refusal of condonation.

[6] The third respondent opposed the review application on the grounds that all the grounds the applicant sought to rely on were invalid and that the condonation ruling could not be faulted. The test for review based on section 145(2) of the Labour Relations Act¹ (the LRA) that the arbitrator committed gross irregularities in the conduct of an arbitration is enunciated as follows in *Head of the Department of Education V Mofokeng and Others*²

'However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted section 145 of LRA,, confining review to "defects" as defined in section 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough

¹ Act 66 of 1995.

² [2015] 1 BLLR 50 (LAC) para 32.

to vitiate the award. Something more is required. 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 inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.'

- [7] The first step the applicant had to establish was whether the arbitrator made errors. I have considered the submissions on behalf of the applicant and the third respondent and am convinced that the applicant did not establish that the arbitrator made errors for the reasons given below:
- [8] The applicant did not refute the third respondent's averments that in terms of clause 8 of schedule 2 to the Employment Educators Act³ (Educators Act), the presiding officer of a disciplinary enquiry has the power to impose the sanction of dismissal. The applicant's ground for review that the arbitrator erred in finding that the presiding officer had the power cannot stand. The record supports the third respondent's argument that the arbitrator correctly found that the applicant was advised of his dismissal on 21 June 2017 and referred his dispute to the ELRC more than 6 months late. The letter received by the applicant on 21 June 2017 (the letter) advises the applicant that he had been found guilty of the charge of misconduct which had been preferred against him. It further advises him that the presiding officer had issued the sanction in terms of section 18(2) (i) of the Employment of Educators Act. In the letter, the applicant is pertinently apprised of his right to appeal with the MEC within 5 working days from 21 June 2017 and to fax a copy of his appeal to Ms Lyras. He was given the fax number of both the MEC and

³ Act 76 of 1998.

Lyras. The applicant is further informed in the letter that should a copy of his appeal not be received within the stipulated period the sanction would be implemented automatically. The letter is couched in very clear terms. On the applicant's own version before the arbitrator he did not exercise his right to appeal within the stipulated period. When the 5 working days after 21 June 2017 expired, the sanction of dismissal was implemented. He attempted without success to fax his appeal to Lyras on 28 June 2017. The result was "com error 326" his attempt fell short of the requirement in the letter that his appeal had to be received within 5 working days. He did not fax his appeal to the MEC within 5 days at all and emailed it to a staff member of the MEC's office on 26 July 2017, long after the 5 working days' period had expired. There is therefore no merit in the applicant's submission that the arbitrator erred in finding that he was dismissed on 21 June 2017 as his finding is based on evidence tendered at arbitration.

- [9] The arbitrator can further not be faulted for finding the reason proffered by the applicant for the delay unacceptable. Refusing condonation for excessive delay which the applicant provided no reasonable explanation for is consistent with authorities on condonation. The applicant failed to establish valid grounds for review. His application cannot succeed.

- [10] In the premises the following order is made:

Order

1. The application for review is dismissed.

Z Lallie

Judge of the Labour Court of South Africa

Appearances

For the Applicant:

Advocate F.P. Phamba

Instructed by:

Sinele W.W. Attorneys

For the Respondent:

Advocate T. Motloenya

Instructed by:

State Attorney (Johannesburg)