



THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Not reportable

Case no: PR 53 /2014

In the matter between:

RUBIN BOESAK KLEINBOOI

Applicant

and

THE EDUCATION LABOUR RELATIONS COUNCIL

First Respondent

C VAN DER BERG N.O

Second

Respondent

THE MEC: DEPARTMENT OF EDUCATION:

EASTERN CAPE

Third Respondent

Heard: 21 June 2018

Delivered: 18 October 2018

Summary: Review application. Arbitrator did not properly assess the probabilities as presented in the conflicting versions before him. Arbitration award reviewed and set aside.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award issued on 11 February 2014 under case number PSES250-13/13EC where the Second Respondent (the arbitrator) found the Applicant's dismissal substantively and procedurally fair and dismissed his case.

The evidence adduced:

- [2] The issue to be decided by the arbitrator was whether the Applicant's dismissal was substantively fair as procedural fairness was not challenged.
- [3] In order to assess the arbitrator's findings in respect of substantive fairness and the award he issued, it is necessary to consider the reasons why the Applicant was dismissed and the evidence adduced at the arbitration proceedings.
- [4] The Applicant was employed as a post level one educator and he was dismissed after he was found guilty on the following charges. The charges are as they appeared in the charge sheet.

4.1 It is alleged that you are guilty of misconduct as contemplated in section 17 (1) (b) of the Employment of Educators Act 76 of 1998 (as amended), which *inter alia* reads as follows; "*An educator must be dismissed if he or she is found guilty of – seriously assaulting, with the intention to cause grievous bodily harm to, a learner, student or other employee*" in that on Thursday 13 October 2011, you assaulted A M by hitting her head into the desk and also kicking her when she attempted to run away.

4.2 It is alleged that you are guilty of misconduct as contemplated in section 17 (1) (b) of the Employment of Educators Act 76 of 1998 (as amended), which *inter alia* reads as follows; "*An educator must be dismissed if he or she is found guilty of — serious/y assaulting, with the intention to cause grievous bodily harm to, a learner_dent or other*

employee" in that on Monday 24 October 2011, you assaulted Ab G by smacking, kicking and hitting him on his body.

- 4.3 It is alleged that you are guilty of misconduct as contemplated in section 18 (1) (r) which *inter alia* reads, "*Misconduct refers to a breakdown in the employment relationship and an educator commits misconduct if he or she — assaults, or attempts to or threatens to assault, another employee or another person*", in that on the 14th of February 2012 you smacked a parent Marietta D when she visited your class.
- 4.4 It is alleged that you are guilty of misconduct as contemplated in section 18 (1) (q) which *inter alia* reads, "*Misconduct refers to a breakdown in the employment relationship and an educator commits misconduct if he or she — while on duty, conducts himself or herself in an improper, disgraceful or unacceptable manner,*" in that on the 13th of October, on the 24th of October 2011 and the 14th of February 2012 you behaved unbecomingly when you assaulted or attempted to assault learners and a parent.
- 4.5 It is alleged that you are guilty of misconduct as contemplated in section 18 (1) (q) which *inter alia* reads, "*Misconduct refers to a breakdown in the employment relationship and an educator commits misconduct if he or she - while on duty, conducts himself or herself in an improper, disgraceful or unacceptable manner,*" in that on the 25th of October 2011 you verbally abused a parent, Mr. G when he arrived at the school wanting to report an assault incident between his child and you.
- 4.6 It is alleged that you are guilty of misconduct as contemplated in section 18 (1) (q) which *inter alia* reads, "*Misconduct refers to a breakdown in the employment relationship and an educator commits misconduct if he or she — while on duty, conducts himself or herself in an improper, disgraceful or unacceptable manner,*" in that on the 25th of October 2011 you stormed into another teacher's class to confront a learner, Ab G whose parent reported an incident of assault to the principal.'

- [5] It is evident that the charges related to specific incidents involving learners A M (A), A G (Ab) and parents Mr G and Ms M D (Ms D). The Third Respondent (the employer) called six witnesses during the arbitration proceedings.
- [6] The employer's first witness, Mr Booysen, is the principal of Clarkson Primary School where the Applicant was employed. Mr Booysen testified in respect of the individual charges. Charge 1 related to the assault on A on 13 October 2011. Mr Booysen explained that he became aware of the incident after he received a letter from the parent and he called the Applicant to enquire about the reported incident. In the letter it was reported that the Applicant became angry when A struggled to pronounce a word and he hit her head against the table and when she tried to escape, he kicked her in the ribs. The parent reported that A's nose was bleeding at school and during the night and that she was taken to hospital the following day. The Applicant denied the incident and Mr Booysen prepared a report on the matter. He did not witness the incident.
- [7] Charge 2 related to the assault of Ab on 24 October 2011. Mr Booysen did not witness the incident and it was brought to his attention by Mr G who wanted to lay a charge of assault against the Applicant. Mr Booysen called Ab, a grade 4 pupil, to his office and he confirmed that he was hit by the Applicant. After that Mr Booysen asked Mr G to leave and he called the Applicant to hear his side of the story. The Applicant denied everything and he asked him to go back to his class. At that stage Mr G returned to the school and with reference to the Applicant said that he was the man who had hit his child. Mr G had a walking stick in his hand. Things got out of hand and the Applicant was very aggressive and asked Mr G if he wanted to fight. The Applicant used abusive language and picked up stones. The Applicant moved closer to Mr G and Mr Booysen thought that he was going to throw the stones he picked up. Mr Booysen requested to other educators, Mr Zana and Mr Mey to escort the Applicant to his class. The Applicant did not go to his class and instead went to Ms Vutha's classroom where Ab was, where after he informed Mr Booysen that he was going home.
- [8] Mr Booysen testified that he regarded the Applicant's behaviour towards Mr G as unprofessional.

- [9] Charge 3 related to the incident on 14 February 2012 when the Applicant smacked Ms D. Mr Booysen did not witness this incident as it was reported to him when Ms D came to his class. She was crying and reported that the Applicant had smacked her. He explained that Ms D wanted her daughter, Lee-Ann, to fit a school skirt and the Applicant refused to let Lee-Ann go and told her mother that she was disrupting his class, where after he smacked Ms D. Ms D's mother and another educator, Ms Wolfkop, had to intervene. The Applicant was called to the office to explain what happened, but he never came. Mr Booysen obtained reports from all the persons who were present and who witnessed the incident.
- [10] Charge 4 relates to the breakdown in the employment relationship due to the Applicant's improper, disgraceful and unacceptable conduct while he was on duty with reference to the incidents of 13 October 2011, 24 October 2011 and 14 February 2012 when he assaulted or attempted to assault learners and parents. Mr Booysen explained that the Applicant's conduct was unprofessional and unacceptable.
- [11] In cross-examination it was put to Mr Booysen that it was reasonable of the Applicant to pick up stones to defend himself against an angry parent with a walking stick in his hand. Mr Booysen disputed this and testified that the Applicant's conduct was unprofessional and unreasonable in the context of the workplace being a school. He explained that the Applicant should have acted professionally and should have left the scene and returned to his classroom, as he was requested to do.
- [12] Ms Ntombekhaya Vutha, an educator who teaches English at Clarkson Primary testified that she was busy with the Grade 4 learners when the Applicant came to her classroom in a rush. He stood close to the door, visibly angry and speaking in a loud voice and he asked the learners whether he had hit Ab. The learners responded 'No'. The Applicant then confronted Ab and asked him "Did I hit you? Did I hit you?". Ab was sitting at his desk and he got scared and ran to the back of the class and he stood there and cried. Ab subsequently left the school.
- [13] Mr Booysen came to her classroom shortly thereafter and asked her to write a report about what transpired.

- [14] Ms Vutha testified that she was A's class teacher and when the learners came to her classroom, they stood in front of the classroom waiting to come inside and she noticed that A was crying. She asked A what was going on and why she was crying and A informed her that the Applicant has hit her. In cross-examination Ms Vutha was asked if she noticed any marks on A's face and whether her nose was bleeding and she responded that she did not see marks or nose bleeding.
- [15] A testified about the incident and explained that she could not answer the question the Applicant posed to her and he knocked her head and nose twice against the desk. She cried and her nose was bleeding. A testified that she went to Ms Vutha so that Ms Vutha could wipe off the blood from her nose.
- [16] In cross-examination A explained that after the incident, she waited until the break when she went straight to Ms Vutha's classroom where she told Ms Vutha that she could not answer a question and the Applicant grabbed her and knocked her head against the desk. A explained that she thereafter went to the bathroom to wash. When confronted with the evidence presented by Ms Vutha, namely that A did not explain to her what had happened and that she saw no blood or marks, A said that Ms Vutha made a mistake, as she was not prepared to say that Ms Vutha would lie.
- [17] A conceded that the Applicant would normally tap the learners on their shoulders or neck when they failed to do their homework and that he would ask why it was not done. It was the first time ever he knocked her head against the desk. In cross-examination she testified that the Applicant also kicked her after he knocked her head against the desk and she did not testify about this fact earlier as she was too scared. After the Applicant kicked her, she remained seated in his classroom.
- [18] Ab testified in respect of the events that transpired on 24 October 2011 and he explained that he was writing on the black board and the Applicant was standing close to the black board and when he asked the Applicant to move out of the way, the Applicant hit his head against a desk and also kicked him. He did not cry and did not leave the classroom. When he got home, he told his father that the Applicant had hit his head against the desk.

- [19] The next morning Ab's father went to the school. At the time Ab was in Ms Vutha's classroom and the Applicant entered and took a broom stick to hit him and asked him why he was lying. Ab testified that he ran to the back of the classroom as he was scared that the Applicant would hit him with the broomstick. He testified that he knew his father was going to the school and that is why the Applicant was angry.
- [20] In cross-examination it was put to Ab that Ms Vutha testified that the Applicant entered the classroom, that he was very angry and asked the learners whether he had hit Ab and all but one said 'No'. Ms Vutha never testified about the broomstick and the fact that the Applicant wanted to hit Ab with it. He was asked to explain why Ms Vutha made no mention of the broomstick and the Applicant's intention to hit him. Ab explained that Ms Vutha is friends with the Applicant and she wants him to go back to the school and he testified that Ms Vutha and the other learners who said that the Applicant did not hit him were all lying.
- [21] Ab testified that the Applicant asked the learners whether he had hit Ab and some said 'No' and only one said 'Yes'. He explained that the learners said 'no' because they were scared of the Applicant and they knew he would hit them if they said 'Yes'. Ab testified that the Applicant had a stick and he had hit all the learners who did not do their homework.
- [22] In cross-examination Ab explained that the Applicant left the black board very angry, came to him, grabbed him and hit his head against a chair, slapped him and kicked him all at once.
- [23] Ms D testified about the incident of 14 February 2012 between herself and the Applicant and explained that she went to school twice to fetch her daughter, Lee-Anne and the second time she went with her mother to the Applicant's classroom to ask for Lee-Anne. On the second occasion she was standing on the veranda and the Applicant came from the toilet and he slapped her and said that she was disturbing the school. After the Applicant slapped her, she went to the Principal's office. The Principal proposed that they sort the issue out and he called for the Applicant to come to his office, but he never came.

- [24] In cross-examination Ms D testified that the Applicant initially said to her that she could fetch Lee-Anne during the second break but she was not satisfied with that. She was angry because the Applicant refused to release Lee-Anne and she went back with her mother to fetch Lee-Anne. Ms D conceded that they were arguing outside the Applicant's classroom and that her mother grabbed the Applicant on his chest and that she scolded the Applicant. The Applicant slapped her and she went to the Principal's office.
- [25] The last witness called by the employer was Mr G who explained that he went to the school to get clarity from the Principal in respect of an incident that involved his son, Ab. Mr Booysen sent him away so that he could speak to the Applicant and when he came back from the shop he saw the Applicant outside the office and he confronted him as the person who had hit his son. Mr G was furious, so was the Applicant who took off his shirt and Mr G testified that the Applicant was ready to fight, he took off his spectacles, picked up stones and swore at him. The principal took Mr G into his office and the Applicant went back to the classroom. Mr G testified that he was not prepared to sit around a table with the Applicant to resolve the issue and he was not prepared to make peace with the Applicant.
- [26] In cross-examination, Mr G explained that when Ab told him that the Applicant had beaten him, he was furious and decided to go to the school and he carried his walking stick with him in case there would be a fight. He was very angry when he went to the school and the Principal saw that trouble was coming and he asked Mr G if there was not somewhere else he could go whilst he was going to discuss the matter with the Applicant.
- [27] In cross-examination, it was pointed out to Mr G that his evidence differed in material respects from the evidence of Mr Booysen, for instance Mr Booysen did not testify that the Applicant took off his shirt in an effort to attack or fight with Mr G.
- [28] The Applicant testified in respect of all the charges. In respect of charge 1 he denied that he had assaulted A and he explained that A's homework was not done and as was his practice, he tapped her on the neck and asked why her homework was not done. He disputed that he had assaulted any learner or that he had hit A's head against the desk or that he had kicked her.

- [29] In respect of Ms Vutha, the Applicant testified that Ms Vutha asked him in the staff room what he had done to A that made her cry and he explained that he had spoken to her about the fact that her homework was not done and they did not discuss the matter any further.
- [30] In respect of charge 2, the Applicant testified that he also tapped Ab on his shoulder after Ab did not carry out an instruction and he asked him to explain why he did what he was told not to do. The Applicant denied that he kicked, hit or smacked Ab. He further denied that he stood in front of the black board and that Ab asked him to move away
- [31] The Applicant explained that when he went to Ms Vutha's class to ask Ab why he was telling lies to his father about being hit and he explained that he had a broom in his hand, but it was not to hit Ab, but rather to protect himself from Ab's father, who came to school with a walking stick. He testified that he had asked the entire class whether he had hit Ab and the whole class asked Ab why he had lied to his father as the Applicant did not hit him. He was very angry as Ab told lies to his father.
- [32] The Applicant testified in respect of charge 6 that he was very angry on 25 October 2011 because Mr Booysen called him to the office and informed him that Ab's father was there and he came to hit the Applicant with his walking stick and as he left the Principal's office, Mr G came through the gate pointing a walking stick at him and he thought that Mr G was doing exactly what Mr Booysen warned him about and he picked up stones to defend himself.
- [33] In respect of charge 3, the Applicant testified that Ms D requested that Lee-Anne be released so that she could fit a dress and he refused as he was busy with a maths lesson and Lee-Anne was struggling with maths. Ms D left and he continued with the class. After the class was done, the Applicant went to the toilet and when he returned to his classroom, he heard a lot of noise and he found Ms D and her mother at the door of the classroom. He asked them why was the class so noisy when Ms D approached him. He feared that she was going to attack, more so since she brought somebody with her and he pushed her away from him.

- [34] The Applicant explained that Ms D and her mother were angry when they arrived on the second occasion.
- [35] The Applicant did not dispute that he swore at Mr G but explained that Mr G also swore at him and the argument started when Mr G threatened to hit the Applicant with his walking stick.
- [36] The Applicant called N T (N) as a witness. She was a classmate of A and she testified as to the events relating to A. She testified that the Applicant requested the learners to take out the homework he had given them the previous day and he walked around in the class to check whether they did their homework. A did not do her homework and the Applicant asked her why her homework was not done and she did not respond. The Applicant tapped her at the back of her neck and she started to cry. She cried for less than five minutes. N confirmed that she was present in the class with A and she did not see that the Applicant kicked A or that he had hit her head against the table that caused her nose to bleed. She was unaware of the fact that A went to Ms Vutha and told her about the incident or that A went to the bathroom to wash her face.
- [37] In cross-examination, N testified that the Applicant had never tapped her against her neck but that he pinched her sometimes and that made her angry. She explained that the Applicant tapped A gently against her neck and she probably cried because she did not do her homework when everybody else did theirs. She testified that when the learners did not do their homework, the Applicant *“het altyd ‘n plankie gehad wat ons mee slaan, dan slaan hy ons.”*
- [38] The Applicant also called S N (S) as a witness and he testified as to the events involving Ab. He testified that on 24 October 2011 the Applicant gave the learners instructions and when Ab did what he was not supposed to do, the Applicant tapped him and asked him why he did that. Ab cried and told his father that the Applicant had hit him. He disputed that the Applicant had hit Ab’s head against the desk or that he had kicked him.
- [39] In respect of the events in Ms Vutha’s classroom, S testified that the Applicant came to the class and asked whether he had hit Ab and the learners responded that he did not and the Applicant left. Ab had run to the back of the

classroom. The witness testified that the Applicant did not want to hit Ab with the broomstick.

[40] In cross-examination S testified that the Applicant had a broomstick in his hand when he came to Ms Vutha's classroom and that he thought that the Applicant was going to hit Ab and Ab probably also thought so and that is the reason why he had run to the back of the class. He confirmed that when the learners did not do their homework, the Applicant would tap them against their necks, but he stated that it was not painful and he disputed that the Applicant had hit learners as he never observed him doing that.

[41] The last witness called by the Applicant was K A (K) and she testified in respect of the events involving Ms D. She explained that Ms D came to school to fetch Lee-Anne for measurements for clothes. The Applicant refused to release Lee-Ann from class and he said to Ms D that Lee-Ann could go at the break. Ms D left and she came back later again to look for Lee-Anne. Ms D grabbed the Applicant's shirt and he pushed her away. She did not see that the Applicant slapped Ms D, she only saw that he pushed her away.

[42] It is evident that there were five main incidents covered by the charges levelled against the Applicant. Those are: The A incident of 13 October 2011, covered by charge 1, the Ab incident of 24 October 2011 covered by charge 2, the Ms D incident of 14 February 2012 covered by charge 3, the Mr G incident of 25 October 2011 covered by charge 5 and the incident on 25 October 2011 in Ms Vutha's classroom.

[43] It is evident from the transcribed record that there were material factual disputes in the evidence presented by the witnesses in respect of the incidents.

Analysis of the arbitrator's findings and the grounds for review

[44] In his analysis of the evidence, the arbitrator recorded that there were two questions to be answered. The first was whether or not the Applicant had contravened any of the rules as per the charge sheet and second, in the event that he has contravened any of the said rules, whether dismissal was an appropriate sanction.

[45] The arbitrator correctly recorded that the matter essentially turned on a dispute of fact and he referred to the appropriate manner in which to deal with such disputes, namely that he had to assess the credibility of a witness and the inherent probability or improbability of the versions placed before him.

[46] The approach to be adopted by arbitrators when faced with two disputing versions was set out in *Sasol Mining (Pty) Ltd v Ngeleni NO and Others*¹ (and was referred to by the arbitrator *in casu*). The Court has held that the arbitrator must conduct an

‘. . . assessment of the credibility of the witnesses, a consideration of the inherent probability or improbability of the version that is proffered by the witnesses, and an assessment of the probabilities of the irreconcilable versions before the commissioner. As Cele AJ (as he then was) observed in *Lukhanji Municipality v Nonxuba NO & others* [2007] 2 BLLR 130 (LC), while the LRA requires a commissioner to conduct an arbitration hearing in a manner that the commissioner deems appropriate in order to determine the dispute fairly and quickly, this does not exempt the commissioner from properly resolving disputes of fact when they arise.’

[47] The arbitrator, faced with two conflicting versions, had to follow the approach as set out by this Court and he had to conduct an assessment of the credibility of the factual witnesses, their reliability and overall assessment of the inherent probabilities of the irreconcilable versions before him.

[48] The gist of the Applicant’s case is that the arbitrator did not properly consider the contradictions between the employer’s witnesses, he accepted the evidence of the employer with no regard to the evidence in dispute thereof and he accepted the employer’s version without reconciling the conflicting versions in the employer’s case. The arbitrator’s failure to consider these material issues resulted in a decision that no reasonable decision maker could have made.

Charge 1: A M

[49] In respect of charge 1 relating to A, the witnesses who were able to testify to the events were the Applicant, A, Ms Vutha and N.

¹ (2011) 32 ILJ 723 (LC) at 727C-F.

- [50] A testified that she could not answer the question the Applicant posed to her and he knocked her head and nose twice against the desk. She cried and her nose was bleeding. She testified that she went to Ms Vutha so that Ms Vutha could wipe off the blood from her nose and that she told Ms Vutha that the Applicant grabbed her and knocked her head against the desk.
- [51] Ms Vutha on the other hand testified that A was crying and when she asked her why she was crying, she said that the Applicant had hit her. Ms Vutha denied that A told her what had happened and she testified that she saw no blood or marks on A's face. Ms Vutha's evidence did not support A's version.
- [52] The Applicant testified that A's homework was not done and as was his practice, he tapped her on the neck and asked why her homework was not done. He disputed that he had assaulted any learner or that he had hit A's head against the desk or that he had kicked her.
- [53] N testified that the Applicant tapped A on the back of her neck and she started to cry. She cried for less than five minutes. N explained that A probably cried because she did not do her homework when everybody else did theirs and she denied that the Applicant had hit her head against the desk or kicked A.
- [54] With these clear conflicting versions facing him, the arbitrator's function was to ascertain the truth in the appropriate manner.
- [55] The arbitrator found that as A is a minor, her evidence is to be considered with utmost sensitivity. The arbitrator found that as a witness A was clear as to what happened on the day in question when the Applicant on the other hand denied that he had hit her head against the desk, Ms Vutha confirmed that A was crying, although she saw no nose bleeding and N's evidence was concerning in that she did not sit close to A, yet she remembered in detail that it was only a tap on the shoulder. The arbitrator further found it concerning that A's niece, who sat right next to her was not called as a witness. The arbitrator held that as A was crying according to all the witnesses and still seemed afraid of the Applicant, the most probable inference to be drawn is that the Applicant is guilty of charge 1.
- [56] It is evident from the arbitrator's assessment of the evidence and the conflicting versions that he did not properly consider the versions presented.

On the one hand A testified that her head was hit against the desk and she was kicked to the extent that her nose was bleeding. She went to Ms Vutha and told her in detail what had happened and for Ms Vutha to clean the blood. Not a single witness, apart from A, saw the nose bleeding or the hitting of her head against the desk, as the Applicant and N denied that it had happened. Ms Vutha's version differed in material respects from A's version. The fact that the witnesses saw A crying, does not mean she was crying because she was assaulted by the Applicant as another version was presented namely; she cried because she did not do her homework, a version never considered by the arbitrator.

Charge 2: Ab G

- [57] In respect of the second incident, the witnesses who were able to testify to the events were the Applicant, Ab and S.
- [58] Ab testified in respect of the events that transpired on 24 October 2011 and he explained that he was writing on the black board and the Applicant was standing close to the black board and when he asked the Applicant to move out of the way, the Applicant hit his head against a desk and also kicked him. He did not cry and did not leave the classroom. When he got home, he told his father that the Applicant had hit his head against the desk.
- [59] The Applicant testified that he tapped Ab on his shoulder after Ab did not carry out an instruction and he asked him to explain why he did what he was told not to do. The Applicant denied that he kicked, hit or smacked Ab. He further denied that he stood in front of the black board and that Ab asked him to move away. S testified that the Applicant gave the learners instructions and when Ab did what he was not supposed to do, the Applicant tapped him and asked him why he did that. Ab cried and told his father that the Applicant had hit him. He disputed that the Applicant had hit Ab's head against the desk or that he had kicked him.
- [60] Once again, the arbitrator was faced with conflicting versions and he concluded that the most probable inference to be drawn was that the Applicant was guilty of charge 2.
- [61] It is evident from the arbitrator's assessment that he raised a number of questions, for example "why did Ab G start to cry if there was a comforting tap

on the shoulder” “why make such a big thing about it and why fabricate all of his evidence” rather than to assess the evidence and the probabilities.

Charge 3: Ms D

- [62] In respect of the third incident, the witnesses who were able to testify to the events were the Applicant, Ms D and K.
- [63] The arbitrator expressed his concern for the fact that the Applicant pleaded guilty to this charge in his disciplinary hearing, yet in the arbitration he denied being guilty of the charge. The arbitrator stated that he understood the principle that the arbitration was a hearing *de novo*, yet he made it clear that he had to consider this aspect.
- [64] It is evident from the transcribed record that during the opening statement the Applicant’s representative explained to the arbitrator that the plea of guilty will be changed to a plea of not guilty because the Applicant was provoked when he smacked Ms D and that it only became apparent after consultation with his legal representative that the Applicant should raise the defence of provocation.
- [65] It is evident that the arbitrator did not consider this explanation, but instead penalised the Applicant for not sticking to his version and accepted Ms D’s version as she “at least stuck to her original version”.
- [66] The arbitrator accepted that there was some aggression from Ms D and her mother towards the Applicant, but held that it did not justify his actions. There is once again no proper consideration of the versions presented or the Applicant’s case that his conduct was in response to the conduct of Ms D and her mother.
- [67] The arbitrator took the same approach and the Applicant raised the same complaints in respect of the remaining charges and I do not deem it necessary to deal with the remainder of the charges as I am convinced that the arbitrator failed to consider and assess the evidence as he should have done in respect of all the charges.

[68] In *Sasol Mining*² the Court held that it was one of the prime functions of a commissioner to ascertain the truth as to the conflicting versions before him. The Court held that:

'What he manifestly lacked was any sense of how to accomplish this task, or which tools were at his disposal to do so. The commissioner was obliged at least to make some attempt to assess the credibility of each of the witnesses and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability or improbability of each party's version. The commissioner manifestly failed to resolve the factual dispute before him on that basis. Instead, he summarily rejected the evidence of each of the applicant's witnesses on grounds that defy comprehension'.

[69] It was within this context that the evidence presented had to be assessed and it is the context within which the arbitrator's assessment of the evidence placed before him, should be considered.

[70] I have to deal with the grounds for review within the context of the test this Court must apply in deciding whether the arbitrator's decision is reviewable. The test has been set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*³ as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[71] The arbitrator found in respect of each charge that the most probable inference to be drawn is that the Applicant was guilty of the said charge. However, glaringly absent from the arbitration award is an assessment of the credibility of the witnesses or the inherent probabilities of the versions presented or reasons why the one version is to be preferred and the other to be rejected.

[72] The essential ingredients of an assessment of the credibility of the witnesses and the inherent probability or improbability of the versions before him, is

² *Supra* at para 9.

³ 2007 28 ILJ 2405 (CC) at para 110.

missing in the arbitration award. In my view the arbitrator was incapable of dealing with the disputes of fact and he failed to perform one of his primary functions, namely to resolve disputes of fact.

[73] The arbitrator did not undertake a full analysis of the evidence and the probabilities as they presented themselves during the arbitration proceedings.

[74] In *Sidumo*⁴ it was held that:

'[W]here a commissioner fails to have regard to the material facts, the arbitration proceedings cannot, in principle, be said to be fair because the commissioner fails to perform his or her mandate. In so doing, in the words of Ellis the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings, as contemplated by s 145(2)(a) (ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.'

[75] The same considerations apply to an arbitrator who fails properly to resolve an irreconcilable dispute of fact. For these reasons, the arbitrator's award falls to be reviewed and set aside.

[76] *In casu*, the arbitrator failed to assess the credibility and reliability of all the witnesses, nor did he have regard to the inherent probabilities of the competing versions before him. That failure, and the fact that the award may have been different had the arbitrator properly acquainted himself, renders the award reviewable on account of a gross irregularity committed by the arbitrator in the conduct of the arbitration proceedings.

Relief

[77] This leaves the issue of relief.

[78] The Applicant seeks for the arbitration award to be reviewed and set aside and to be substituted with an order that his dismissal was unfair and that he be reinstated retrospectively. Alternatively, the Applicant seeks an order remitting the matter for a hearing *de novo*.

⁴*Supra* n 4 at para 68.

- [79] In the event the award is set aside on review, this Court has a discretion whether or not to finally determine the matter.
- [80] *In casu* the arbitrator failed to apply his mind to issues which were material to the determination and the outcome of the dispute. In his heads of argument, the Applicant submitted that it would be impossible to determine this matter without proper credibility findings and an arbitrator is best placed to do so. The Applicant seeks an order to remit the matter for a hearing *de novo*. Ms Rawjee for the employer submitted in her argument before Court that if the review was granted, the matter should be remitted for a hearing *de novo*.
- [81] I see no reason to disagree with the relief sought by the Applicant and not opposed by the employer as I am also of the view that it would be in the interest of the parties and in the interest of justice to have the matter properly decided.
- [82] This Court has a wide discretion in respect of costs and in my view this is a matter where the interest of justice will be best served by making no order as to cost.
- [83] In the premises, I make the following order:

Order

1. The arbitration award issued on 11 February 2014 under case number PSES250-13/14EC is reviewed and set aside;
2. The dispute is remitted for a hearing *de novo* before an arbitrator other than the Second Respondent;
3. There is no order as to costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

Applicant: Advocate M Grobler

Instructed by: Nel, Mentz, Steyn and Ellis Attorneys

Third Respondent: Advocate A Rawjee

Instructed by: The State Attorney