



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR2767/22

In the matter between:

JACK NAMOGANE MACHENGWANA

Applicant

and

EDUCATION LABOUR RELATIONS COUNCIL

First Respondent

COMMISSIONER SERETSE MASETE

Second Respondent

MEC FOR EDUCATION-LIMPOPO PROVINCE

Third Respondent

HOD FOR EDUCATION – LIMPOPO PROVINCE

Fourth

Respondent

Heard: 13 March 2025

Delivered: 17 September 2025

JUDGMENT

MAFA-CHALI, AJ

Introduction

- [1] This application is in terms of Section 145 of the Labour Relations Act¹ (LRA) and the Applicant (Jack Machengwana) seeks to review and set aside the arbitration award issued by the Second Respondent (the Arbitrator) on 12 September 2022, under the auspices of the First Respondent, the Education Labour Relations Council (ELRC). The Applicant also made an application for condonation of the review application.
- [2] In terms of the award, the Commissioner found that the dismissal of the Applicant was substantively fair and dismissed his claim. The Applicant furthermore prayed for costs of the application only if opposed.
- [3] The Third and Fourth Respondents opposed this application.

Background facts

- [4] The Applicant was employed by the Department of Education, Limpopo Province, as a School Principal at Kenneth Masekela Primary School, under the Motetema Circuit. The Applicant was dismissed by the Respondents on 26 May 2021 on charges that he failed to submit an incident report to the Circuit Manager as instructed and for bribing a parent/guardian, as well as the child who was sexually assaulted, with a view to silencing them from pursuing the sexual assault allegations. He lodged an appeal against his dismissal, and the appeal was unsuccessful.
- [5] The Applicant challenged his dismissal at the ELRC. The Arbitrator found that his dismissal was both substantively fair and dismissed the Applicant's case. He has now lodged this review application in terms of Section 145 of the LRA, seeking to review the decision of the Second Respondent on various grounds.
- [6] On or about 2 November 2017, a young girl named A[...] P[...], aged about 7 or 8 years, who was in grade 2 at Kenneth Masekela Primary School, was sexually assaulted by some boys of the same age who were also at the same school.

¹ Act 66 of 1995, as amended.

- [7] After being made aware of the incident by the Deputy Principal on 3 November 2017, the Applicant convened a meeting at the school with the Chairperson of the School Governing Body (SGB) and the school leadership (SNT) to discuss the incident. The Deputy Principal was informed by the victim's guardian of the sexual assault that had taken place at the school the previous day.
- [8] According to the Applicant, a decision was taken to report the incident to the Circuit Manager, and the Applicant and the Chairperson of the SGB, acting on a decision taken at the meeting, proceeded to report the incident to the Circuit Manager the very same day, but did not find the Circuit Manager; but found Mathunyane and Makgobatlowane.
- [9] The Applicant and SGB Chairperson also visited the victim's family and found the child victim, but her guardian was not at home.
- [10] The following day, on 4 November 2017, the Applicant and the SGB Chairperson visited the child victim's home again and spoke to the guardian. There is, however, a dispute about what was discussed with the guardian. According to the Applicant, he expressed his view to the guardian about the environment the child was staying, as she was staying in a shack at that time, and found it not to be a conducive environment for the child to live in and he suggested that he would take up the matter with the SGB member regarding fundraising for purposes of building a house for the child and alternatively if that fails, the Applicant himself will build a three roomed house for the child and this was even recommended by social workers.
- [11] The Third Respondent, however, submitted that the Applicant tried to bribe the guardian and child not to report the sexual assault, since on a later date, he met with the guardian and the child at Groblersdal town and gave them a lift in his vehicle and took them home. Whilst in the vehicle, the Applicant gave the child money, which amount is also in dispute, and promised to build the child and the guardian a house. There is also a dispute about the Applicant's motive for this offer.

- [12] It is common cause that the Applicant submitted the handwritten report at the Circuit offices and was instructed to submit a typed report instead. He was also instructed to obtain reports from the two teachers with respect to the alleged sexual harassment and to submit those reports to the Circuit office. The instructions were given by Mr Mathuyane.
- [13] There is a dispute about whether the Applicant eventually submitted the typed report as instructed.
- [14] The version of the guardian, M[...], is that the Applicant, in the presence of the Chairperson of SGB, threatened her, alleging that there was no case of sexual assault of the girl and that he was friends with the investigating officer investigating the alleged sexual assault, who would influence him to throw the case away.
- [15] The guardian further alleged that the child was given R500.00 and pizza when they met the Applicant at Groblersdal town with the motive to discourage the guardian from pursuing the allegations of sexual assault. The Applicant disputed this version and submitted that he gave the girl an amount of between R150 and R200 and never bought her pizza.

Grounds of review

- [16] The first ground for review is that the Applicant submitted that the Arbitrator committed a misconduct in that he conducted the proceedings in a manner that was indicative of a reasonable apprehension of bias on his part.
- [17] The second ground is that the Arbitrator failed to give complete and impartial attention to the totality of the evidence, which is inconsistent with the evidence led as reflected in the record, thereby failing to apply his mind, committing reviewable gross misconduct.
- [18] The third ground is that the Arbitrator failed to apply his mind to the applicable principles of mutually destructive versions, failed to deal with the credibility of witnesses and reliability and probability, and drew inferences not supported by any evidence.

- [19] The last ground of review is that the arbitrator failed to consider that, in terms of South African Law, no rape could have taken place because the culprits and the girl, who were between the ages of 7 and 8, had no capacity to commit any offence, particularly rape.

Condonation application

- [20] The Applicant also made an application for condonation of the review application and submitted that it was a month and some days late, and the reasons for lateness are that the Applicant's case was delayed by Legalwise, who assisted him in appointing his current attorneys. The Applicant submitted that he became aware of the award around 14 September 2022, and the last day of the six-week period to file the review was around 25 October 2022. He explained the trail of communications between Legalwise and his attorneys from 20 September 2022 until 30 November 2022.
- [21] The Applicant submitted that he has prospects of success in the matter in that the case is on the fact that he failed to report a rape incident which took place at 2 November 2017 and the Arbitrator disregarded the evidence that he submitted the report to the Circuit office and both a handwritten and typed report which were all rejected by Mr Mathunyane, and further that there was no evidence to prove allegations of bribery by the child's guardian.
- [22] The Third and Fourth Respondents have not submitted any opposing submissions to the condonation application besides stating that the contents of the paragraphs dealing with the condonation application in the Applicant's notice of motion are denied.
- [23] Having considered the Applicant's condonation application, it is hereby granted on the grounds that the delay is not excessive and there is a good explanation for the delay. There are also prima facie prospects of success in the review application.

Submissions by the Applicant

- [24] It was submitted that the arbitrator disregarded the fact that the Applicant reported the alleged rape incident at the relevant circuit office, wherein he was instructed to submit the report, but the handwritten report he submitted was rejected on the basis that he was required to submit a typed report.
- [25] It was further submitted that no rape incident could have plausibly taken place because the perpetrators accused of same did not have the capacity to commit such an act, as they are underage.
- [26] It was further argued that in *CUSA v Tao Ying Industries and Others*², the Court held that commissioners are required to deal with the substantial merits of the dispute with the minimum of legal formalities and it is therefore required that the commissioner must deal with the substance of a dispute between the parties in considerations of the following three factors: resolve the real dispute between the parties, do so expeditiously and resolve the dispute fairly to all the parties as the LRA requires of them to do.
- [27] The Applicant also referred to the judgment in *Country Fair Foods (Pty) Ltd v CCMA and Others*³ which held that the core requirements of natural justice are the need to hear both sides rule (*audi alteram partem*) and the impartiality of the decision-maker (*nemo index in sua causa*). It was argued that the Arbitrator exceeded his powers, committed gross irregularities and/or misconduct, was biased and failed to apply his mind properly on the evidence before him, and therefore, the award falls to be reviewed and set aside.

Submissions by the Third and Fourth Respondents

- [28] It was submitted that the Arbitrator conducted the proceedings in a fair and consistent manner, and was consistent with his application of the rule of law and natural justice as expected when conducting an arbitration in terms of section 138(1) of the LRA.
- [29] It further argued that there is no evidence that sustains the complaint by the Applicant that the Arbitrator conducted proceedings in a manner that gave an

² [2009] 1 BLLR 1 (CC) at para 74.

³ [1999] 11 BLLR 1117 (LAC).

apprehension of bias. During proceedings, there was no complaint by the Applicant challenging the Arbitrator on the basis of bias; therefore, the Court must reject this ground of review as it falls short of meeting the legal requirement of legal apprehension of bias.

- [30] The Third and Fourth Respondents further argued that the Court has to consider the effect of *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*⁴ (*Herholdt*) that even where the reasons given by a commissioner are clearly wrong and there has been some irregularity, such a decision may not be set aside if, on the basis of the issues raised and the evidence presented to the commissioner, the outcome was a reasonable one. The *Sidumo*⁵ test will justify setting aside an award on review when the version is unsupported by any evidence and also involves speculation by the commissioner. *Sidumo* was to be read in conjunction with *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation, Arbitration and Others*⁶ (*Gold Fields*).
- [31] It was further submitted that the review application is not about the correctness of the award by the Arbitrator but about the process that was followed during the arbitration process. The principles in *Bidvest Panalpina Logistics Now Bidvest International Logistics v Commission for Conciliation, Mediation and Arbitration and Others*⁷ must also be considered.
- [32] The Arbitrator found on counts one and two that the version of the Respondent's witness of a three-roomed house and a bribe of R500 given to the learners was never challenged, and the Applicant's version of a request for an RDP house through the SGB Chairperson and the amount of between R100 and R200 was never put to the Respondents' witnesses. The Arbitrator, therefore, rejected the version of the Applicant because it could not have been true on a balance of probabilities.

⁴ (2013) 34 ILJ 2795 (SCA).

⁵ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC).

⁶ [2014] 1 BLLR 20 (LAC).

⁷ (JR1303/2020) [2024] ZALCJHB 425 (8 November 2024).

- [33] On count three for failure to submit a report, the Arbitrator also found the Applicant guilty on a balance of probabilities as the Applicant failed to call witnesses that he had alleged to have given them the report to corroborate his version of events. The only witness that the Applicant called conceded under cross-examination that the Applicant lied about submitting the report. The Court must therefore come to the conclusion that there was no irregularity or error by the arbitrator in his decision. It is not an issue of whether the decision was right or wrong for review by the court.
- [34] On all the charges, the Applicant failed to provide evidence to refute the allegations against him. The Arbitrator therefore correctly found on the balance of probabilities that the Applicant attempted to bribe the victim and her guardian by giving the victim money and promising the guardian to build her a three-roomed house. The Applicant failed to rebut the allegations that he had, in fact, given the child R500 and pizza and promised and attempted to persuade them to drop the sexual violence charges.
- [35] The Applicant failed to call witnesses to support his version that he submitted the report to the Circuit Manager. The only witness that the Applicant brought to testify on his behalf conceded that the Applicant was lying that he had submitted the report to the Circuit Manager as instructed. Therefore, the Arbitrator correctly found that the Applicant did not submit the incident report. The Commissioner identified the real issues between the parties and properly characterised the nature of the dispute.
- [36] The argument by the Applicant that there was no crime committed because, in terms of South African Law, children under the age of 7 lack criminal capacity must be rejected. The Applicant was found guilty of failure to submit an incident report to the Circuit Manager. The incident is of a serious nature that had taken place under his care, and he was required to report such an incident. The Applicant dealt with the incident in an insensitive manner, making him unfit to be a School Principal, where he is the guardian for the learners. The Applicant is capable of bribing his way out of serious misconduct in order to keep an image of the school and himself, which makes him unfit to be a School Principal.

- [37] A reasonable arbitrator is unlikely to have reached any other decision on whether the Applicant submitted the report to the Circuit Manager. His failure to call witnesses that he had given the report could have meant only that the Applicant did not submit the report as instructed. A reasonable arbitrator confronted with all the above evidence could not have reached any other decision than the guilty verdict. A reasonable arbitrator would have considered the seriousness of the misconduct, which was that the Applicant failed to implement a lawful instruction to submit an incident report.

Evaluation

- [38] The legal framework for review of arbitration awards is sourced from s 145(2) of the LRA. The test for review has been set out in various authorities.
- [39] In *Gold Fields*⁸, the Labour Appeal Court held that *'a reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable'*.
- [40] The Third and Fourth Respondents presented evidence of Mr Dinkwanyane, the Circuit Manager, who indicated that he heard about the incident at the school through Mr Mathunyane, who picked it up from the media, and that triggered him to go to the school to investigate. The evidence that the Applicant failed to report the incident is supported by the dates, as the incident happened on 2 November 2017 and his report was done on 23 November 2017.
- [41] In his testimony, the Applicant gave two contradictory dates on which he reported the incident, initially verbally to 3 November 2017 to Mr Mathunyane at the circuit office, and a handwritten report on 9 November 2017, and later testified he wrote the report on 8 November 2027. The typed report is dated 21 November 2017. The Third and Fourth Respondents disputed his version that he reported the incident on the same day or either on 8 or 9 November 2017, but that it was only reported on 21 November 2017 when an

⁸ *Gold Fields* supra at para 16.

investigation was conducted and the Applicant was instructed to submit a written report.

- [42] The evidentiary burden was on the Applicant to prove that he indeed reported the incident to Mr Mathunyane. According to the record of the proceedings, it was never put to Mr Dinkwenyane under cross-examination that the Applicant submitted the report immediately after the incident.
- [43] The Applicant has not submitted evidence to prove that he reported the incident immediately, and neither did he call Mr Mathunyane as a witness to substantiate his defence and no reason was advanced for such failure to call a very important witness to support his version. The Applicant's version was riddled with improbabilities and contradictions.
- [44] It is also evident, according to the record of the proceedings, that the Applicant did not challenge the child's guardian, M[...], that he gave her R500, which was the money that the guardian took to the Circuit office and also given to the police when she reported the incident; but his testimony was that he gave her between R150 and R200. From the record of the proceedings, M[...] was a credible witness, and she remained consistent in her evidence even under cross-examination. Furthermore, the Applicant did not challenge the evidence of M[...] that he promised to build the family a three-roomed house. The Applicant's version, that he told M[...] that he would, in fact, ask one of the SGB members, who is a councillor, to build them a house, was not put to the M[...].
- [45] The evidence of the Applicant's witness, Mr Maapea, the chairperson of the SGB, corroborated the Respondent's version rather than that of the Applicant that the incident was not reported by the Applicant, in that when he went to the circuit office on 3 November 2017, they did not find the circuit manager, but reported to Makgobotlwane. He was not certain that the typed report was verbally submitted on 9 November 2017, as his testimony was that he was told telephonically that on that date at 21h00, it was submitted. Makgobotlwane was also not called as a witness by the Applicant to rebut the Respondents' version of failure to report the incident. Maapea's version and

that of the Applicant are contradictory in respect of who exactly they reported the incident to at the circuit office, Mathunyane or Makgobotlwane.

- [46] The Applicant misconceived the issue the Arbitrator had to determine, as the issue of rape was not an issue for the Arbitrator's determination, and therefore the question of criminal culpability of the boys of ages 7 to 8 to rape the girl of the same age was an irrelevant factor in this matter, but for the criminal courts to determine.
- [47] Furthermore, the Applicant's version about the involvement of the SGB Chairperson, Mr Maapea, to build the child's family a three-roomed house was unknown to Mr Maapea, and therefore, Mr Maapea's evidence did not support the Applicant's version on very material aspects of this critical evidence of the bribe in this regard.
- [48] It is an established cardinal rule in our jurisprudence that '*he/she who alleges must prove*'. This cardinal rule is followed in various jurisdictions and South Africa is no exception. The rule's central thrust is that the burden of proof lies with the party that asserts the existence of certain facts whose veracity has to be determined by the presiding officer.
- [49] It is also trite law that a party that fails to challenge under cross-examination, *prima facie* allegations adverse to it, cannot claim victory, but such amounts to conceding defeat. The Constitutional Court approved the same principle in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*⁹ and said:
- 'If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne_v Dunn* and has been adopted and consistently followed by our courts.'
- [50] The Arbitrator's findings are detailed well in paragraphs 25 to 28 of the arbitration award, and they have been supported by evidence contained in the

⁹ 2000 (1) SA 1 (CC) at para 61.

record of the arbitration proceedings, and the Arbitrator dealt with all the crucial evidence before him in coming to his conclusions and findings. The Respondents placed before the Arbitrator material and compelling evidence that was not challenged at all and/or unsuccessfully challenged by the Applicant.

- [51] The Arbitrator evaluated and assessed the evidence presented before him on the charges levelled against the Applicant regarding the allegations of failure to report the incident of sexual harassment of the child at the school and the bribery of the girl and her guardian with R500 and the building of a three-roomed house, thereby jeopardising the administration of justice of the Respondent.
- [52] The Arbitrator dealt with the probability and credibility of the evidence of the parties and gave reasons for accepting the Third and Fourth Respondents' evidence rather than the Applicant's version. The reasoning of the Arbitrator showed that the Applicant failed to report the sexual harassment incident, and further that the Third and Fourth Respondents' evidence sufficiently proved that the Applicant bribed the minor child and her guardian, and thus the Applicant's version was highly improbable. The Arbitrator correctly found the Applicant's conduct inappropriate in his position as the Principal and therefore, the sanction of dismissal was appropriate under the circumstances.
- [53] In *Herholdt*¹⁰, the Supreme Court of Appeal made it clear that the review of an arbitration award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA. The following was stated:
- 'For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145 (2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all 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.'

¹⁰ *Herholdt* supra at para 25.

[54] In the conspectus of what is set out above, the Court finds that the Arbitrator conducted himself consistent with his duties and has not committed gross irregularities in the conduct of the arbitration proceedings, and that, by making a finding that the dismissal of the Applicant was sustained on the evidence before him, his conclusion fell within a band of decisions to which a reasonable decision maker could come on the available evidence. This application to review and set aside the arbitration award shall not succeed as the dismissal of the Applicant was substantively fair.

Costs

[55] The rule of practice, that costs follow the result, does not apply in labour matters, but the Court has a wide discretion in respect of costs in consideration of the requirements of law and fairness. In my view, this is a case where the interest of justice will be best served by making no order as to costs.

[56] In the premises, I make the following order:

Order

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

G. Mafa-Chali

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate V Makofane

Instructed by: Kern, Dekker & Muthevhuli Inc

For the Fourth Respondent: Advocate M Simelane

Instructed by: State Attorney

LABOUR COURT