



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JR 2690/21

In the matter between:

NYIKO B. BALOYI

Applicant

and

**MEC: DEPARTMENT OF EDUCATION
GAUTENG PROVINCE**

First Respondent

EDUCATION LABOUR RELATIONS COUNCIL

Second Respondent

THEMBA MANGAYI N.O.

Third Respondent

Heard: 28 August 2024

Delivered: 6 November 2025

JUDGMENT

KUMALO, AJ

Introduction

- [1] In these proceedings, the applicant seeks an order to review and set aside an arbitration award dated 20 July 2021, issued under case number ELRC641-20/21. The award was made by the third respondent (the Arbitrator), acting under the auspices of the second respondent, the Education Labour Relations

Council (ELRC). In the arbitration award, the Arbitrator found that the applicant's dismissal was both procedurally and substantively fair. Although the first respondent filed a notice of intention to oppose the review application, they failed to submit any further documents and did not attend the hearing.

- [2] The applicant also seeks condonation for the late filing of the review application. In considering this application, the Court evaluated several factors, including the length of the delay, the reasons provided for the lateness, the applicant's prospects of success in the review, the significance of the matter, and any potential prejudice to the parties. After weighing these considerations, the Court found that the applicant had shown good cause for the delay. Consequently, the interests of justice support the granting of condonation, and the late filing of the review application is accordingly condoned.

Background

- [3] The applicant also seeks condonation for the late filing of the review application. In considering this request, the Court evaluated several factors, including the length of the delay, the reasons provided for the lateness, the applicant's prospects of success in the review, the significance of the matter, and any potential prejudice to the parties. After weighing these considerations, the Court found that the applicant had shown good cause for the delay. Consequently, the interests of justice support the granting of condonation, and the late filing of the review application is accordingly condoned.
- [4] On 12 August 2019, the applicant submitted representations to the District Director regarding the allegations against him. Subsequently, on 10 October 2019, he was formally notified of an inquiry into the alleged misconduct. Following the disciplinary inquiry, the applicant was dismissed from his employment on 14 December 2020. Dissatisfied with the outcome, the applicant referred the matter to the ELRC for conciliation. When the conciliation process failed to resolve the dispute, the matter proceeded to arbitration, resulting in the issuance of the arbitration award that is now being challenged in these review proceedings.

Arbitration award

- [5] The Arbitrator recorded that the evidence presented by the first respondent revealed a concerning incident involving the complainant and the applicant. According to the testimony, the complainant was accompanied by two colleagues when the applicant approached her and requested assistance with proofreading letters. After completing the task in the applicant's office, he allegedly asked the complainant for a hug. The complainant obliged, but during the hug, the applicant reportedly squeezed her tightly to the extent that she could feel his erect body. He then attempted to kiss her forcefully. When the complainant objected to his conduct, the applicant allegedly responded by saying he could settle for a "baby kiss."
- [6] The complainant's mother, who worked as a general worker at the school, witnessed the incident through the window of the applicant's office. Her testimony indicated that the complainant was facing the applicant, while the applicant's face was turned toward the window. From her vantage point, she observed the applicant leaning in toward the complainant in an apparent attempt to kiss her. Alarmed by what she saw, the mother rushed to the office but encountered the complainant in the administration office instead. She then urged her daughter to leave the premises. The mother also confirmed that two other colleagues were present in the administration office at the time.
- [7] Upon returning home, the complainant's mother sent a text message to the applicant, informing him that the complainant intended to open a case of sexual harassment. However, the case was subsequently put on hold due to allegations that the applicant had explicit photographs of the complainant. Additionally, it was alleged that the applicant's wife had offered to send uncles to pay damages for the alleged misconduct. The mother and the applicant had a close relationship, which included the applicant assisting in securing a volunteer position for the complainant at the school.
- [8] The Arbitrator further noted that, according to the applicant's version, the complainant served as his personal assistant, and they shared a strong working relationship. He stated that they often worked late into the evenings,

including weekends, and he would occasionally give her a lift home. The applicant alleged that the complainant's mother had influenced the allegations against him, claiming that she had previously made sexual advances toward him, which he had rejected.

- [9] The Arbitrator observed that the applicant recalled the incident differently from the complainant and her mother. According to the applicant, the complainant entered his office around 14:30 to offer assistance. He then gave her two letters to proofread. After completing the task, the complainant allegedly remarked that she deserved a hug and placed her hands around his neck while he was seated, with his hands resting on her waist. The applicant denied attempting to kiss the complainant, arguing that the school was busy that day due to the issuing of school reports. He further contended that the apology he sent to the complainant's mother via text message was solely in reference to keeping the complainant at school beyond normal working hours.
- [10] The Arbitrator held that, in line with the applicable prescripts, the first respondent bore the burden of proving the allegations against the applicant. In evaluating the nature of the alleged misconduct, the Arbitrator referred to the Code of Good Practice on sexual harassment to define and contextualise the conduct in question. Faced with two mutually destructive versions, one from the complainant and the other from the applicant, the Arbitrator applied the legal principles established in the case of *Stellenbosch Farmers Winery Group Limited and Another v Martell Cie and Others*¹ to assess credibility and probabilities. He considered the conflicting versions to the effect that the complainant alleged that the applicant hugged firmly and forcefully kissed her, against the applicant's version that the complainant offered the hug and had her hands around his neck while he was seated.
- [11] The Arbitrator ultimately found the complainant's evidence to be more credible and reliable than that of the applicant. This conclusion was based on several factors, including corroboration by an eyewitness—the complainant's

¹ *Stellenbosch Farmers' Winery Group Ltd. and Another v Martell & Cie SA and Others* [2002] ZASCA 98; 2003 (1) SA 11 (SCA) at para 5.

mother—and an inspection in loco, which confirmed that the events inside the office could be clearly observed through the window blinds. Additionally, the complainant's version was supported by a text message exchange between her mother and the applicant following the incident. The Arbitrator rejected the applicant's explanation that the phrase "when you are stressed" referred to the mother, finding this claim to be a fabrication. The mother's message was consistent with the account provided by both her and the complainant, and the applicant had an opportunity to rebut this version but failed to do so convincingly. This, in the Arbitrator's view, reinforced the credibility of the allegations against the applicant.

- [12] The Arbitrator also found that the applicant failed to provide the complainant's mother an opportunity to respond to the serious allegation that she had made sexual advances toward him. Additionally, the applicant did not disclose or produce the alleged explicit photographs of the complainant, which were central to the delay in pursuing the sexual harassment case. The Arbitrator emphasized that, as a senior official, the applicant should have known that accepting a hug from a female subordinate was inappropriate and that he had a duty to discourage such conduct rather than reciprocate by placing his hands on her waist. Even based on the applicant's own version of events, the Arbitrator concluded that the conduct was inappropriate and unacceptable.
- [13] The Arbitrator further reasoned that if the allegations contained in the mother's text message were false, the applicant—as a senior school official—would have found them highly inappropriate and taken disciplinary action against her. His failure to do so lent credibility to the complainant's version of events as reflected in the message. While the applicant's wife provided credible testimony, particularly in denying that she had contacted the complainant's family to arrange the payment of damages, her evidence did not assist in resolving the conflicting accounts between the complainant and the applicant.
- [14] In conclusion, the Arbitrator found the complainant's version of events, corroborated by her mother, to be credible, reliable, and the most probable under the circumstances. He noted that section 17(1)(b) of the Employment of Educators Act prescribes dismissal as the appropriate sanction for sexual

harassment. As such, the Arbitrator held that the first respondent's decision to dismiss the applicant could not be interfered with, rendering the dismissal substantively fair. Furthermore, there was no evidence of any procedural irregularities in the dismissal process, and the Arbitrator therefore concluded that the dismissal was also procedurally fair.

Discussion

[15] The law governing the review of arbitration awards is well-established. The central question in such proceedings is whether the decision reached by the arbitrator is one that a reasonable decision-maker could not have made. This standard ensures that the review process does not simply substitute the court's view for that of the arbitrator, but rather assesses whether the arbitrator's conclusions fall within the bounds of reasonableness..² This principle involves determining whether the arbitrator properly considered the central issue before them, evaluated the evidence presented during the proceedings, and ultimately arrived at a reasonable conclusion. It is important to note that a procedural irregularity on its own may not be sufficient to justify interference with the arbitration award. The review process focuses on the overall reasonableness of the arbitrator's decision rather than isolated procedural flaws..³ In *Head of the Department of Education v Mofokeng and Others* [2014] ZALAC 16, the Labour Appeal Court clarified the standard for reviewing arbitration awards. The Court held that the test for review is not whether the arbitrator's decision is correct, but whether it is one that a reasonable decision-maker could reach. This means that even if the arbitrator made an error, the award will stand if the outcome is supported by the evidence and falls within the bounds of reasonableness. The judgment emphasized that a review does not involve a re-evaluation of the merits but rather an assessment of whether the arbitrator properly applied their mind to the issues, considered the relevant evidence, and concluded that a

² *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) at para 110.

³ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at paras 16 – 17.

reasonable arbitrator could have reached. The presence of a procedural irregularity alone is not sufficient to set aside the award unless it renders the outcome unreasonable. The Labour Appeal Court held that:

“The determination of whether a decision is unreasonable in its result is an exercise inherently dependent on variable considerations and circumstantial factors... The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the inquiry or undertake the inquiry in a misconceived manner. There must be a fair trial of the issues.

However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted section 145 of the LRA, confining review to “defects” as defined in section 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award.... Mere errors of fact or law may not be enough 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...

Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator’s conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If, but for an error or irregularity, a different outcome would have resulted, it will *ex hypothesi* be material to the

determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator, however, must be shown to have diverted from the correct path in the conduct of the arbitration and, as a result, failed to address the question raised for determination."[Own emphasis]

- [16] The above ratio reinforces that the principles governing review proceedings serve a specific statutory purpose: to limit reviews to cases where the right to a fair trial has been compromised or where the outcome is unreasonable. This underscores the critical distinction between an appeal and a review as envisaged in the Labour Relations Act (LRA). While an appeal challenges the correctness of a decision, a review focuses on the reasonableness of the decision-making process itself.⁴ The distinct must not be blurred. In review proceedings, it is immaterial whether the reviewing court disagrees with the arbitrator's reasoning. What must be established is whether there are rational and evidentiary grounds supporting the outcome. The test allows for the possibility that the arbitrator may reach an incorrect conclusion, provided it is nonetheless supported by the overall evidence. If the outcome is reasonable despite any procedural irregularity, the award must stand.⁵ In *Makuleni v Standard Bank of South Africa Ltd and Others*,⁶ the Labour Appeal Court (LAC) emphasized the critical distinction between an appeal and a review.

⁴ Act 66 of 1995, as amended.

⁵ *Duncanmec (Pty) Limited v Gaylard NO and Others* [2018] ZACC 29; 2018 (11) BCLR 1335 (CC); [2018] 12 BLLR 1137 (CC); 2018 (6) SA 335 (CC); (2018) 39 ILJ 2633 (CC) at paras 41 – 43.

⁶ *Makuleni v Standard Bank of South Africa Ltd and Others* [2023] ZALAC 4; (2023) 44 ILJ 1005 (LAC); [2023] 4 BLLR 283 (LAC) at para 4.

The Court reaffirmed that the test in review proceedings is not whether the decision was correct, but whether it was one that no reasonable decision-maker could have reached. This principle ensures that reviews are not used to reargue the merits of a case, but rather to assess the fairness and reasonableness of the decision-making process. The Labour Appeal Court criticised the Labour Court for treating the matter as if it were an appeal, thereby overlooking the Commissioner's reasonable findings. It highlighted that arbitration proceedings are intended to be simple and expeditious, and that procedural fairness must be upheld. The Court also noted the importance of considering the employee's personal circumstances and long-standing service record. This case serves as a reminder that review proceedings are not a mechanism for substituting the court's view for that of the arbitrator or commissioner, but rather for ensuring that decisions are made within the bounds of reasonableness and procedural fairness. The Labour Appeal Court held that:

"...demands reflection in order to digest the essence of the exercise that a commissioner embarks upon. The court asked to review a decision of commissioner must not yield to the seductive power of a lucid argument that the result could be different. The luxury of indulging in that temptation is reserved for the court of appeal. At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only if the conclusion is untenable is a review and setting aside warranted."

- [17] In this matter, the applicant challenged the Arbitrator's handling of several procedural and evidentiary aspects. Specifically, the applicant impugned the Arbitrator's failure to properly consider contradictions in the testimonies of the complainant and her mother. He also took issue with how their statements were admitted and evaluated during the proceedings. Furthermore, the applicant criticised the Arbitrator's refusal to postpone the hearing to allow him time to obtain WhatsApp messages that he claimed would support his version of events.

- [18] The applicant also challenged the Arbitrator's handling of the inspection *in loco*, arguing that it was conducted after the mother had testified, thereby denying him the opportunity to cross-examine her based on the inspection findings. He further contended that only the Arbitrator's own observations were taken into account, without affording him a fair opportunity to respond to or challenge those observations. Additionally, the applicant criticised the Arbitrator's failure to make credibility findings against the mother, particularly in light of her contradictory conduct, having bid the applicant farewell and later sending a text message accusing him of misconduct.
- [19] From the outset, it must be acknowledged that while there may be merit in the applicant's contention regarding the irregular manner in which the Arbitrator dealt with the inspection *in loco*, this irregularity does not render the overall outcome unreasonable. On a holistic assessment of the issues and evidence presented in the dispute, the decision remains within the bounds of reasonableness. This is particularly so given the uncontroverted evidence that the complainant's mother confronted the applicant following the incident, and as the Arbitrator correctly observed, the applicant failed to rebuke her or initiate any disciplinary proceedings in response to the serious and demeaning allegations. It is a reasonable inference that, had the applicant's version been accurate, that the complainant initiated the hug, he would have clearly conveyed that explanation in his text message to the mother.
- [20] This aspect is significant given that it was common cause that the applicant, the complainant, and her mother shared a friendly relationship. In light of this, one would reasonably expect the applicant, when confronted with serious allegations, to attempt to clarify any misunderstanding. Instead, the applicant did not deny or protest the accusation but chose to apologise. This response, rather than a denial, strengthens the inference that the applicant had imposed himself on the complainant. The applicant's claim that the apology was solely for keeping the complainant at work beyond normal hours lacks evidentiary support and is unconvincing.
- [21] Equally, even if the mother's evidence were to be discounted due to concerns about credibility and reliability, the applicant's own version must still be

assessed in light of his failure to immediately and unequivocally reject the allegations. Notably, the applicant criticised the Arbitrator for not permitting the discovery of explicit photographs—images that were also referenced in the mother’s testimony. This overlap lends further credibility to the assertion that the applicant was confronted with serious allegations and, rather than denying them, effectively accepted them through his conduct and lack of protest. Put differently, the photographs the applicant sought to discover were the same ones mentioned in the infamous WhatsApp text, which he failed to rebut and instead responded to with an apology.

- [22] Even without the mother’s testimony, the remaining evidence clearly establishes the applicant’s culpability. It is undisputed, even on the applicant’s own version, that he had a cordial relationship with both the complainant and her mother. The applicant was instrumental in securing the complainant’s employment at the school and maintained a close relationship with the mother. Under cross-examination, both the complainant and the mother confirmed that they had a good relationship with the applicant, a fact the applicant also acknowledged. Therefore, aside from the retrospective allegations of sexual impropriety involving the mother, there appears to be no credible reason why the complainant and her mother would conspire to entrap the applicant or jeopardise his employment, especially in light of his admitted acts of goodwill toward them.
- [23] The applicant’s claim that he was offered a hug while seated is implausible. As the Arbitrator noted, the applicant held a senior position and would not reasonably have permitted or tolerated such conduct from a subordinate. According to departmental guidelines, the applicant’s responsibilities as a school principal include actively deterring sexual harassment in the workplace. This duty implies that, if the allegation were truly unfounded, the applicant would have responded with a firm denial. Instead, he appeared to downplay the incident, attributing it to stress, which undermines the credibility of his defence.
- [24] Notably, the applicant failed to respond to the allegations from the moment he was confronted via text message until he received formal notice from the

Department. As the Arbitrator rightly observed, a reasonable principal would have initiated disciplinary or other formal processes against the mother if the content of the text message were untrue. However, the applicant took no such action until prompted by the Department. This conduct falls short of the standard expected of someone in his position. The inescapable conclusion is that the applicant's version is fabricated. More concerning is that he only reacted once the allegation was formally raised. Taken together, these factors strongly suggest that the applicant's account lacks credibility and reliability. As the Arbitrator concluded, the applicant's version is improbable.

- [25] Accordingly, applying the principles established in *Sidumo*, the Court finds no basis to overturn the Arbitrator's findings, as they are supported by the evidence. The Arbitrator was presented with mutually contradictory versions, applied the appropriate evidentiary rules, and concluded that the complainant's account was credible, reliable, and most probable in light of the circumstances. The award is clearly grounded in a comprehensive assessment of the evidence and is not vulnerable to being set aside. Consequently, the application must be dismissed.
- [26] Finally, these proceedings exemplify a situation in which the Court must censure the applicant for pursuing a meritless case. This is particularly so given that the arbitration award is final and binding on the parties. While the applicant retains the right to access the courts, this right must be balanced against the objectives of the LRA, which include the swift resolution of disputes to ensure certainty in the employer's operational requirements..⁷ This means that, even if the unreasonableness of the award is not immediately apparent, parties must respect the finality of the arbitration process as envisaged in the LRA. They should not burden the already congested court roll with appeals disguised as review applications.
- [27] Ordinarily, the Court would have imposed a costs order against the applicant to reflect its disapproval of the meritless application. However, despite filing a

⁷ *Toyota SA Motors (Pty) Ltd v CCMA and Others* [2015] ZACC 40; (2016) 37 ILJ 313 (CC); [2016] 3 BLLR 217 (CC); 2016 (3) BCLR 374 (CC) at para 1.

notice of intention to oppose, the first respondent did not proceed to oppose the application. In the absence of active opposition, there is no basis for a costs order. Accordingly, no order as to costs will be made.

[28] In the premises, the following order is made.

Order:

1. The late filing of the review application is condoned.
2. The application to review and set aside the arbitration award dated 16 September 2021 under case number ELRC641-20/21 issued by the third respondent acting under the auspices of the second respondent is dismissed.
3. There is no order as to costs.

M. Kumalo
Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the applicant: S. Mbhalati, instructed by Mahlaule Attorneys Incorporated.

For the first respondent: No Appearance.

LABOUR COURT