



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C521/2020

In the matter between:

GAYE URSULA RAUBENHEIMER

Applicant

and

WESTERN CAPE EDUCATION DEPARTMENT

First Respondent

JACOBUS DU PLESSIS NO

Second Respondent

EDUCATION LABOUR RELATIONS COUNCIL

Third Respondent

Heard: 10 September 2025

Delivered: 2 December 2025

Summary: Review of award, criteria met, award set aside. Award substituted
- dismissal substantively unfair - applicant reinstated.

JUDGMENT

DANIELS J

Introduction

- [1] This application is brought under section 145 of the Labour Relations Act No. 66 of 1995 to review and set aside the arbitration award (“award”) of the second respondent issued on or about 30 September 2020, under case number PSES320-19/20 WC. The applicant seeks an order reviewing and setting aside the award, substituting the award with a finding that her dismissal was substantively unfair and ordering her reinstatement.¹

Material facts

- [2] The facts are largely common cause:

2.1 The applicant was an educator, in the employ of the first respondent (the “Department”) and has been an educator for thirty-three years. Prior to her dismissal, the applicant was the deputy principal of the Pacaltsdorp Senior Secondary School, Western Cape.

2.2 On Friday 25th May 2018, Mr Ronaldo Mostert (“Mostert”) one of the learners taught by an educator, Ms Letitia Steenkamp (“Ms Steenkamp”) approached Ms Steenkamp with other learners to recover the cellular phone, Ms Steenkamp had confiscated from another learner, Mr Leroy Herman. Ms Steenkamp was reluctant to release the phone and instead handed the learners letters addressed to their parents.

2.3 The first respondent alleges that the applicant asked Ms Steenkamp to identify Mostert, who had accused her husband of forcing him out

¹ Pleadings, p42, para 10

of the classroom. The first respondent alleges that the applicant said to Mostert: *“jy is ‘n skeelgat en dis hoekom jy so dom is”*. It is common cause that Mostert has a squint in one eye.

2.4 The applicant was charged with using degrading language directed at a learner, in breach of section 18(1) of the Employment of Educators Act, alternatively conducting herself in an improper, disgraceful, or unacceptable manner by insulting a learner. The applicant pleaded not guilty to the charge.

2.5 A disciplinary hearing was held, at which the Department called numerous witnesses to prove its case. It called several learners who were allegedly present at the time of the incident to confirm its version that the applicant had insulted Mostert in their presence. However, Mostert was not called.

2.6 During the disciplinary hearing, allegations were made that the principal and Steenkamp had fabricated the case against the applicant to get rid of her. Further allegations were made that the applicant had attempted to interfere in the disciplinary process to have the charges against her dropped.

2.7 The applicant was found guilty, and dismissed, on or about 24 April 2019. The applicant appealed, and when that was unsuccessful, she referred a dispute concerning the substantive fairness of her dismissal to the Education Labour Relations Council (“ELRC”).

2.8 The arbitration was conducted at the ELRC between September 2019 and September 2020. In the arbitration:

- 2.8.1 The Department called as its witnesses Ms Steenkamp, Mr Clifton Titus (the principal), Mr Deon Rowland Achilles (the presiding officer of the disciplinary hearing) and Ms Gersham Pick. Again, the Department did not call the complainant, Mostert. Nor did it call the learners which had supported its version at the disciplinary hearing.
- 2.8.2 In addition to two staff members, the applicant called three learners, Ms Jaydene Morris ("Jaydene"), Mr Chad Morris ("Chad") and Mr Hendrico Stuurman ("Stuurman"). The learners all testified that it was Steenkamp who had uttered the offensive comments and not the applicant.
- 2.9 The commissioner noted, in para 61 of the award, that the applicant's representative had informed the arbitration that he would be consulting the learners before they testified. Accordingly, so the commissioner reasoned, it is likely and probable that the learners were coached to suit the applicant's case.
- 2.10 The commissioner noted, in para 62 of the award, that the applicant had actively tried to influence the complainants to withdraw the case against her. This, reasoned the commissioner, is inconsistent with someone who wants to defend themselves honestly.
- 2.11 The commissioner, in para 63 of the award, in sweeping terms, states that the evidence of the learners has no credibility. However, thereafter, he only addresses the evidence of Jaydene and why he does not accept her evidence. He mentions that Chad and Stuurman both testified that Jaydene was not present during the incident. He provides no basis to reject the evidence of Chad and Stuurman who testified that the offensive comments were made by Steenkamp and not the applicant.

2.12 The commissioner found that the Department had proven its case on a balance of probabilities, and the applicant's dismissal was substantively fair.

Issues arising

[3] It is necessary to consider the grounds of review raised in the founding and supplementary affidavits. The applicant alleges that:

3.1 The commissioner committed irregularities in the conduct of the arbitration, committed irregularities in relation to his duties as an arbitrator,

3.2 The commissioner failed to apply the normal rules to resolve mutually destructive factual disputes,

3.3 The commissioner was improperly influenced by what occurred at the disciplinary hearing and failed to advance a reasonable basis to either reject the version of the applicant's witnesses or to accept the version of the first respondent's witnesses,

3.4 The commissioner failed to properly consider the evidence of her witnesses,

3.5 The commissioner arrived at an unreasonable outcome considering all the evidence.

Legal principles and analysis

[4] In relation to awards of the CCMA and Bargaining Councils, the test on review is settled. The court must ask whether the “*arbitration award [is] one which no reasonable commissioner could reach on the material before him or her?*” The test is known as the ‘reasonableness test’ or the ‘*Sidumo* test’ named after the citation.²

[5] What is a reasonable outcome will be determined by the facts of each case. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others*³ the Constitutional Court held:

“[45] What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.”

(own emphasis)

[6] The court on review need not consider every issue raised at arbitration. Instead, the court must decide whether the commissioner considered the principal issue before him/her; evaluated the evidence presented, and the outcome is reasonable.⁴

² *Sidumo and another v Rustenburg Platinum Mines Ltd and others* (2007) 28 ILJ 2405 (CC)

³ 2004 (4) SA 490 (CC) at para [45]

⁴ *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & others* (2014) 35 ILJ 943 (LAC) at paras [15] and [16]

[7] Provided that the commissioner asks the right question, and applies his mind to the issues, the award is not reviewable merely because the outcome is incorrect. The court must guard against using the correctness test in reviews, except where this is mandated by the nature of the issue.⁵

[8] When applying the review test, the court follows a logical sequence.

8.1 First, it must be determined if there is a failure or error on the part of the commissioner.

8.2 Second, where there are errors, it must be shown that, but for the errors, the outcome would have been different.⁶ Errors of fact, by themselves, may not be sufficient to vitiate the award. What matters is the materiality of the errors.

[9] Importantly, it is only where the award cannot be sustained on any of the evidence properly before the commissioner that the review will succeed.⁷ This principle is recognized in *Sidumo* at para 119.

[10] More recently, the Constitutional Court, in *Vodacom (Pty) Ltd v Makate and another*⁸ (“*Vodacom*”) held as follows

“The duty of proper consideration is an integral component of the fair hearing right. The founding constitutional value of the rule of law and section 34 of the Bill of Rights require, in my view, that a court should have regard to all material evidence and all material submissions bearing on the issues it must decide. And the court must bring its

⁵ *Bestel v Astral Operations Ltd & others* [2011] 2 BLLR 129 (LAC) at para [18]

⁶ *Fidelity Cash Management Service* (2008) 29 ILJ 964 (LAC) at para [96]; *Head of the Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC) at paras [32] and [33]

⁷ *Campbell Scientific Africa (Pty) Ltd v Simmers and others* (2016) 37 ILJ 116 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and others* (2015) 36 ILJ 1453 (LAC) at para 12.

⁸ (CCT 51/24) [2025] ZACC 13 (31 July 2025) at para 45

reasoning to bear on those material issues and reach a conclusion on them. The evaluation of the evidence and reasoning may – as I say – be erroneous, but there cannot be a fair hearing in compliance with the rule of law and section 34 if proper consideration of the matter before the court has not occurred.” (own emphasis)

- [11] Given that the reasons included in the award acts as the first indication of whether the evidence and submissions made by the parties’ received due consideration, *Vodacom* held that:

“... the reasons should deal with the substantial points which have been raised; include findings on material questions of fact; refer to the evidence or other material upon which those findings are based; and provide an intelligible explanation of the process of reasoning that has led the judge from the evidence to the findings and from the findings to the ultimate conclusion.” (own emphasis)

Analysis of the grounds of review

- [12] First a brief recap on the applicable evidential principles. It is trite that, in a civil case, the question is whether the plaintiff’s evidence is, on the probabilities, correct.⁹ It is only where a consideration of the probabilities fails to indicate where the truth probably lies, that the court need have regard to an estimate of relative credibility (of witnesses) apart from the probabilities.¹⁰ Where the court has regard only to demeanour and not the probabilities, this constitutes a misdirection.¹¹ The probabilities must be assessed *inter alia* on all the relevant evidence using a blend of common sense, logic and judicial experience. Though it is correct that two contradictory versions cannot both be correct, the contradiction itself does not indicate which version is correct and which not. Minor inconsistencies

⁹ *Stellenbosch Farmers’ Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) ([2002] ZASCA 98)

¹⁰ *National Employers General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440 – 441

¹¹ *Body Corporate of Dumbarton Oaks v Faiga* 1999 (1) SA 975 (SCA) at 979

in the testimony is not a basis to reject all the evidence. What matters is whether the essential features of the story that the witness tells is true.¹²

[13] The commissioner was required to consider the totality of the evidence and not merely focus on evidence convenient to the anticipated outcome. Here, the commissioner failed to consider the evidence of two learners who testified that the applicant had not made the offensive comments. These witnesses explained why they had testified to the contrary at the disciplinary hearing. Their evidence was of key importance and required proper consideration. Their evidence could not simply be swept aside as the commissioner did when he stated: “*I have absolutely no credibility in the evidence by the learners*”. The duty of proper consideration, as articulated by *Vodacom*, required a reasonable explanation for the rejection of their evidence.

[14] The commissioner failed to consider the implications of Mostert's failure to testify. In my view, this failure is significant. When a material witness, who is available, is not called, the question arises whether an adverse inference should be drawn. In *Brand v Minister of Justice & another*¹³ Ogilvie Thompson JA (as he then was) stated: “*Now where a witness, who is available and able to elucidate the facts, is not called by a party such failure 'leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him'.*” That the commissioner failed to apply this trite principle is irregular.

[15] The commissioner failed to consider the evidence from Stuurman that the principal had offered him inducements to implicate the applicant. Although this evidence is summarised by the commissioner in para 50 of the award, it played no role at all in the evaluation of the evidence. This omission

¹² *Santam Bpk. v Biddulph* 2004 (5) SA 586 (SCA) at 592

¹³ 1959 (4) SA 712 (A) at 715

indicates that the commissioner failed to properly apply his mind to the issues and failed to apply the normal principles to resolve disputes of fact.

- [16] The first respondent bore the onus of proving the misconduct and, thereafter, proving that the sanction of dismissal was appropriate and fair. The commissioner was required to consider the probabilities of the mutually destructive versions. He ought to have considered if the principal was 'threatened' by the applicant as deputy principal, as suggested by at least one witness, he ought to have considered if the circumstances of the learners during 2018, and 2020, differed and whether this could have accounted for the change in their versions, he ought to have considered whether it was more probable that Steenkamp uttered the offensive comments given that she (Steenkamp) had clashed with the learners a short while earlier.
- [17] The commissioner, when evaluating the evidence, must take into consideration *inter alia* whether the witness has an interest in the subject matter of the evidence and the outcome of the matter. This consideration should have been considered in relation to all the witnesses whether they be the learners (or former learners), the educators, or the principal.
- [18] The commissioner should have resolved the factual dispute as to whether Ms Pick was present when the incident occurred. Ms Pick testified that she was, but the applicant denied this, as did Jaydene. This was important because Ms Pick was the only staff member who could have corroborated Steenkamp.
- [19] The commissioner placed significant emphasis on the applicant's attempt to end the disciplinary process. However, the commissioner failed to consider that the applicant invited a witness to accompany her when she met Mostert at his house. Further, she met Mostert in the presence of his family and requested him to withdraw the case. The commissioner did not

consider that the applicant did not attempt to cover up her approach to Mostert. While the evidence suggests that the applicant did attempt to influence the disciplinary process, this is no indication that the applicant was untruthful in her version of the events.

[20] The commissioner's statement that the learners who testified were likely coached is, with respect, bizarre. It is customary to consult with your witnesses before they testify. If the evidence of those witnesses is consistent, this is no indication that such consistent is artificial, false or constructed.

[21] Given the materiality of the errors in the award, and the commissioner's irregular approach to the evidence, the award is one that no reasonable decision maker could reach. In the circumstances, the award falls to be reviewed and set aside.

[22] Absent the evidence of the complainant, proving the misconduct on a balance of probabilities was always going to be a challenging task. The educators, such as Steenkamp, were subordinates of the applicant and their own interests were at play. Their evidence must be viewed in that prism. The evidence of the learners however, particularly if they are no longer being schooled, was more likely to be trustworthy and reliable. I believe an adverse inference should be drawn from the first respondent's failure to call the complainant. In the circumstances, having considered the evidence, where there are contradictions with the first respondent's witnesses, I accept the version of Stuurman and Chad.

Conclusion

[23] In the circumstances, I make the following order:

23.1 The arbitration award issued by the second respondent, under ELRC case reference PSES320-19/20WC, is reviewed and set aside,

23.2 The award is substituted with a ruling that the dismissal of the applicant is substantively unfair,

23.3 The first respondent is ordered to reinstate the applicant, on the same terms and conditions of employment, without loss of benefits, with effect from the date of her dismissal,

23.4 There is no order as to costs.

RN Daniels

Judge of the Labour Court of South Africa

Appearances:

For the Applicant

Adv DM Nyathi

Jansen Inc Attorneys

For the First Respondent

Adv R Nyman SC

State Attorney