



(1) Reportable: No  
(2) Of interest to other Judges: No

Signature

Date

**IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN**

Case no: D138/2024

In the matter between:

**NJABULO SIPHESIHLE MBEJA**

**Applicant**

and

**THE HEAD OF DEPARTMENT FOR THE  
DEPARTMENT OF EDUCATION (EASTERN  
CAPE)**

**First Respondents**

**EDUCATION LABOUR RELATIONS  
COUNCIL**

**Second Respondent**

**MBULELO SAFA N.O**

**Third Respondent**

**Heard: 18 FEBRUARY 2026**

**Delivered: 30 MARCH 2026**

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**JUDGMENT**

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## MAESO AJ

1. This is an application to review and set aside the third respondent's award date 7 February 2024 and to substitute the award with a finding that the applicant is not guilty of the charges preferred against him, alternatively remitting the matter to the second respondent for a hearing *de novo*.

## BACKGROUND

2. The applicant was employed by the first respondent as an educator at a school for children with special needs, from August 2018. In June 2021, the applicant was charged with:-
  - 2.1 *"a contravention of Section 17(1)(b) of the Employment Educators Act 76 of 1998, in that he had sexually assaulted 7 learners by having forcefully kissed them and having touched their bodies (buttocks, thighs, rib cages) without their consent;*
  - 2.2 *A contravention of Section 18(1)(q) of the Employment of Educators Act in that he had conducted himself in an improper, disgraceful and unacceptable manner for having made sexual advances to 7 learners;*
  - 2.3 *A contravention of Section 18(1)(f) of the Employment of Educators Act, in that he had unjustifiably prejudiced the administration, discipline or efficiency of the department, office or school for having intentionally sexually harassed and having made sexual advances towards 7 learners by touching them inappropriately without their consent.*
3. The disciplinary proceedings were conducted in accordance with Section 188A of the Labour Relations Act 66 of 1995, in which the third respondent was appointed to conduct the disciplinary enquiry into the allegations set out above . The enquiry

commenced on the 24 February 2022 and was only concluded on the 8 December 2023. The third respondent found the applicant guilty of all charges in February 2024. A sanction of dismissal was imposed. The applicant was also found to be unsuitable to work with children as provided for in the Children's Act.

## THE AWARD

4. At the hearing, evidence of 2 complaints, both learners at the school, was led. The first witness was aged 16 and gave evidence in camera. She testified that in February or March 2021, whilst alone with the applicant in the computer room, he closed and locked the door and started to touch her inappropriately. At the time, she was 15 years old and did not say anything about the event but confirmed that she felt very bad about what had happened to her. She confirmed the content of her written statement that was made two to three months after the incident. She confirmed that she did not report the matter to the school authorities but having disclosed the event to a friend, the story soon spread.
5. The other witness, also a learner, also testified in camera. She testified that in June 2021, when she was 20 years old, she was called by the applicant to go and sweep in the library. He followed her there and asked her to kiss him. She refused and did not report the incident to anyone because she was afraid.
6. The applicant on the other hand denied the allegations. He contended the evidence was unreliable as only two of the seven complainants testified against him indicating that the evidence was a lie.

7. The applicant advanced a version that the learners who testified against him were being manipulated by people who remained unidentified and who were allegedly jealous of him because of his financial circumstances.
8. The third respondent noted that the witnesses testified about their own experience of being abused and assaulted. The third respondent was aware that the dispute before him was made up of mutually destructive versions. He referred to ***Stellenbosch Farmers Winery Group***<sup>1</sup> when dealing with this evidence.
9. The third respondent found the complainants to be credible witnesses whose evidence remained materially consistent under cross examination.
10. The third respondent also dealt with the contradictions in the complainant's evidence and held that these were immaterial and did not detract from the witnesses' reliability.
11. One contradiction was in respect of the complainant's description of the incident. In her statement she described two incidents where she was touched inappropriately whereas at the enquiry, she describes only one incident. This contradiction is described by the third respondent as being immaterial. Another contradiction was with respect to the description of where the complainant was touched. In her statement, the witness indicated that she was touched in the "private part and body". In the hearing, she said she was touched on her breast, private parts and buttocks. The complainant explained when she used the word "body" in her statement it referred to the other parts of her anatomy described in the hearing. Once again, this was considered by the third respondent to be immaterial.

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<sup>1</sup> Stellenbosch Farmers Winery Group Limited and Another v Martel et Cie and Others [2003] 1 SA 11 (SCA) para 5

12. When dealing with the argument that it was highly improbable that the complainants would not report the matter immediately after the incident, the third respondent concluded that there is “no formula in the way the victims of sexual related crimes react to their ordeal” and relied on authority to support the view that victims of sexual harassment react to their own ordeals in circumstances differently and in most circumstances, long after the fact.<sup>2</sup>
13. It was also accepted with reference to the Old Mutual case referred to above that in these circumstances, having to complain to a higher authority often compels the victim to suffer in silence.
14. On the evidence, the third respondent concluded that the acts described by the complainants were inappropriate and satisfy the definition of sexual assault. The complainants were vulnerable learners living with a disability of being deaf. They were taught by the applicant who was in a position of authority over them.

## THE REVIEW

15. The applicant contended that the third respondent did not properly consider the evidence before him. It is argued that the third respondent supported his findings with evidence that was never tendered by the complainant nor did it form part of the charges of misconduct.
16. For this reason, it is argued by the applicant that the award is not an accurate reflection of the evidence led at the arbitration and this must indicate that the third respondent misconceived the nature of the evidence and the issues he was

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<sup>2</sup> Old Mutual Life Assurance SA (Pty) Ltd v Makanda and Others [2020] 41 ILJ 444 (LC)

required to determine. It was further argued that this misconception materially distorted the evidence as well as the ultimate outcome.

17. It is submitted that had it not been for this material error of fact, there was no other basis for the third respondent to have found the applicant guilty. In other words, it is submitted but for this error, the second respondent would have arrived at a different conclusion.
18. Clearly, the reference in the award to the applicant having had sexual intercourse with a witness was not evidence placed before the commissioner and was not put to the applicant to deal with during the course of evidence. The arbitration record includes a report on the alleged misconduct at the school dated 1 June 2021 conducted by Mr Gunker, the circuit manager for the Alfred Enzo West Education District. This report included statements taken from complainants, one of which alleged that the applicant's colleague had sexual intercourse with her using a condom. The same witness gave evidence in the arbitration and confirmed that the statement she wrote 3 months after the incident, in English, was to report the allegations made against the applicant and his colleague. The complainant described how the applicant touched her inappropriately and candidly admitted that as the incident had occurred 2 to 3 years ago, she may have forgotten minor details but confirmed that what was written in her statement was "the truth" and was reliable. The record does not make any reference to the allegations made by the complainant in her statement against the applicant's colleague, who allegedly had sexual intercourse with the complainant.
19. When the second respondent summarized the evidence of the complainant in the award, no reference was made to the complainant having had sexual intercourse

with the applicant. The award describes the evidence led by the complainant as inappropriate touching and kissing.

20. The third respondent describes the complainant's statement as difficult to comprehend because of the level of English used. The statement formed part of the bundle of documents at the arbitration, and it is clearly written in broken English making the content difficult to understand. However, on a close reading of the statement, the allegation of sexual intercourse is made against the applicant's colleague and not the applicant.
21. The conclusion in the award that the applicant had sexual intercourse with the complainant is incorrect. The third respondent's mistake is serious but that is not the end of the matter.
22. I am not convinced that but for the error, the third respondent would have arrived at a different conclusion. The evidence given by the complainant is detailed and clearly describes the applicant's inappropriate touching of her body and forcing her to kiss him.
23. The applicant denied the allegation, but the fact of the matter is that two different learners, one aged 15 and the other 20 years' old, described the incidents in writing soon after the event and then confirmed the allegations during the arbitration sometime after the incident. There was no reason for the witnesses to manufacture their version of events.
24. To suggest as the applicant does, that the evidence presented by the witnesses was false because it was being manipulated by an unnamed person who was jealous of him because he was financially successful, lacks probability and was correctly rejected.

25. This court has confirmed that it will depend on the materiality of the error or irregularity and its relation to the result of an award as to whether the award is reviewable. It has been accepted that irregularities or errors in relation to facts or issues may not necessarily produce an unreasonable outcome or provide a compelling indication that the arbitrator has misconceived the enquiry.
26. The test for review was settled by the Constitutional Court in ***Sidumo and Another v Rustenburg Platinum Mines Limited and Others***<sup>3</sup>. The enquiry is based on the reasonable decision maker test to determine whether the decision reached by the commissioner is one which a reasonable decision maker could not reach. When assessing the reasonableness of this award, the court must consider the material evidence which was before the third respondent during the arbitration proceedings.
27. When considering whether an award is unreasonable, the court is guided by the judgment of ***Murphy AJA, Head of the Department of Education v Mofokeng and Others***<sup>4</sup>, here the court held as follows:-

*“[30] The failure by an arbitrator to apply his or her mind to issues which are material to determination of a case, will usually be an irregularity. However, the Supreme Court of Appeal (“SCA”) in Heroldt v Nedbank Limited [2013] 34 ILJ 2795 (SCA); 2013 (6) SA 224 (SCA) and this court in Goldfield Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others [2014] 1 BLLR 20 (LAC): [2013] ZALAC 28 have held that the before such an irregularity results in the setting aside of the award, it must, in addition, reveal a misconception of the true enquiry or result in an unreasonable outcome.*

*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*

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<sup>3</sup> [2007] 328 ILJ 2405 (CC)

<sup>4</sup> [2015] 1 BLLR 50 (LAC), paras 30 & 31

*arbitrator misconceived the enquiry. 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 on the arbitrator's conception of the enquiry, 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 or relevant factors informing the decision; the nature of the competing interest impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Providing the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable.*

28. In this case, the third respondent was correctly seized with the facts of the matter. On the evidence placed before him and in his award, it cannot be said that the third respondent would not have found the applicant guilty of sexual harassment or sexual assault had he not made reference to applicant having sexual intercourse with the witnesses.
29. In the award, the third respondent describes sexual assault as the intentional and unlawful violation of another person's integrity without consent. He also confirmed that sexual assault would include conduct of a sexual nature "like touching, kissing on the lips, fondling the breasts and buttocks of the victim. The third respondent goes on to confirm in the award that the act for which the applicant was found guilty involved the touching of the genital organs and the breasts of the complainant as well as the forceful kissing of the other complainant. This met with the requirements

of the definition of sexual assault. Having concluded this, the third respondent found that the applicant was guilty of the first charge recorded in paragraph 2.1 above. Furthermore, the sexual assault also rendered the applicant guilty of the second charge set out in paragraph 2.2 above.

30. In concluding, that the applicant was guilty of sexual assault of the two learners, it followed that the applicant had conducted himself improperly as contemplated in charge 3 set out in paragraph 2.3 above.
31. It is clear to me that the facts relied on by the second respondent when determining whether the applicant was guilty of the misconduct was with regard to the evidence of the complainants when they described how they were inappropriately touched and/or forced to kiss the applicant.
32. This type of conduct by a teacher on vulnerable learners is reprehensible and cannot be condoned. The third respondent's single reference in the award that the applicant had sex with a complainant was plainly erroneous. The determinative question is whether the error is of such a nature as to render the award reviewable. As set out above, the applicable test is whether the decision reached by the third respondent is one that a reasonable decision maker could not reach on the material before him. Errors of fact or law do not in themselves, warrant interference unless they are material and have a distorting effect on the outcome.
33. In the present matter, the third respondent's finding of guilt did not depend on the inference of sexual intercourse and the reference did not distort the outcome. The conclusion that the applicant was guilty of sexual assault was grounded on credible evidence given by the complainants.

34. The erroneous reference to sexual intercourse, while serious, does not point to an unreasonable result given the totality of the evidence before the third respondent.
35. In the context of a Section 188A process, setting aside the award and referring the matter back to the Education Labour Relations Council will require retrospective reinstatement. This is not inappropriate in these circumstances.
36. Having regard to the evidence as a whole, the third respondent's decision falls within the band of reasonable outcomes and the review application is dismissed.

ORDER:

- (i) The application to review and set aside the arbitration award issued under case number D138/2024 is dismissed.
- (ii) There is no order as to costs.

MG MAESO

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Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr. Mkhize

Scelo Mkhize Attorneys

For the First Respondent : Ms Gayiano instructed by the State Attorney

LABOUR COURT