Not reportable

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO C460/2008

In the matter between:

KLAAS ISAACS **APPLICANT**

and

EDUCATION LABOUR RELATIONS COUNCIL **1ST RESPONDENT**

BELLA GOLDMAN N.O **2ND RESPONDENT**

WESTERN CAPE EDUCATION DEPT. **3RD RESPONDENT**

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application to review and set aside an arbitration award made by the second respondent, to whom I shall refer as 'the commissioner'.

[2] The applicant was employed by the third respondent at the Meiring Primary School, Riebeeck Kasteel. On 4 August 2006 the applicant was suspended on full pay pending an investigation to an act of indecent assault. The charges related to an

incident on 17 March 2006, when the applicant was alleged to have indecently assaulted a learner at the school, Zelmarie Filander, by placing her hand on his penis and touching her breast. The applicant was dismissed on 3 November 2006 after a disciplinary enquiry. A subsequent appeal to the MEC failed. The applicant thereafter referred an unfair dismissal dispute to the first respondent for arbitration. On 22 May 2008, the commissioner ruled that the applicant had been fairly dismissed. Her award is the subject of these proceedings.

Condonation

[3] The applicant has applied for condonation for the late filing of his review application, and the third respondent has applied for the condonation of the late filing of its answering affidavit. Turning first to the applicant, he states that he received the award on 27 May 2008. The present application was delivered on 18 August 2008 some five weeks late. In support of the application for condonation, the applicant cites difficulties that he experienced in obtaining legal advice, occasioned in the main by the fact that the applicant's cover under a Legalwise policy had been exhausted.

[4] The third respondent has also contended that the applicant's supplementary affidavit was filed late, in that it was filed without an application for condonation four months after the date on which it appears that the transcription of the arbitration proceedings was completed. Although the LRA does not establish a time period within which a record must be filed following the filing of the review application, Rule 7A(8) requires the delivery of any supplementary affidavit within ten days of the date on which the registrar has made the record available. It is not clear from the papers precisely when the record was made available to the applicant, but he has provided details of the delay occasioned by the cost of the transcription, and efforts that he made to raise the money for the transcription itself and the time that he required, as a lay person, to familiarise himself with a lengthy record and to compile his supplementary affidavit.

[5] In so far as the third respondent's application for condonation for the late filing of its answering affidavit is concerned, the reason for delay is ascribed to the late briefing of counsel and to counsel's unavailability. It is submitted further that it is the interests of justice that the delay be condoned

[6] The court has a discretion to condone the late filing of process, and ordinarily does so by considering the degree of lateness, the reasonableness of the explanation for the delay that is proffered, and the prospects of success. In so far as the filing of the application and the answering affidavit are concerned, in neither instance is the delay in filing the relevant process excessive, and in both cases, the explanation for the respective delays are, in my view, reasonable The prospects of success in each case are at best a neutral factor. In these circumstances, the late filing of the application and the answering affidavit are condoned. To the extent that it is necessary, the late filing of the applicant's supplementary affidavit is condoned.

The rule 11 application

[7] In February 2010, the applicant filed what was termed a 'notice of exception' in which he contended that any reference to his disciplinary record and any annexures in respect of that record are inadmissible, since these were never brought before the commissioner and do not form part of the present dispute. The applicant sought the striking from the 'statement of case' of all complaints and references to his disciplinary record. In March 2010, the notice was supplemented by further submissions relating to the matters raised in the 'exception'.

[8] The steps taken by the applicant are misguided. First, the applicant's objections have their root in an affidavit. There is no statement of case in the present proceedings, and the rules relating to exceptions do not apply. Disciplinary action taken against the applicant on previous occasions was introduced into evidence by a number of witnesses, without objection; this is captured in the commissioner's summary of the evidence. To the extent that the applicant's complaint is that the third respondent has attempted to introduce material into these proceedings that did not form part of the record of proceedings before the commissioner, the function of this court, as will appear more fully below, is to assess the commissioner's award against the material before her, and to decide whether the award passes a threshold of reasonableness. It is ordinarily not appropriate therefore for a review court to have regard to material not before a commissioner. The present application was argued on the basis of the record, and will be decided on that basis. In any event, the applicant's disciplinary record was not referred to by the commissioner in her award,

and it clearly did not form part of her reasoning. Save to state that the applicant's notices constitute an irregular step and that no regard will be had to material other than that before the commissioner, I need deal no further with this issue.

The commissioner's award

[9] The arbitration proceedings continued for some 8 days. The record of the arbitration exceeds 1600 pages, excluding the bundles of documents. In her award, the commissioner sets out a summary of the evidence. Four witnesses gave evidence on behalf of the respondent, the third respondent in these proceedings. These were the complainant, Zelmarie Filander, Mr Cupido, the head of department, Ella Filander, the complainant's mother, and the principal of the school, Mr Heynse. The applicant then gave evidence, and called four witnesses. They were Hilton Carolus, Julian Charles Jacqueline Joubert and Grivenia Manuel. I do not intend to burden this judgment with a repetition of the evidence led by each witness. I have made a careful study of the record, and the commissioner's summary is a sufficiently accurate précis of the evidence led.

[10] The commissioner framed the issue that she had to decide as whether the applicant had breached a rule by indecently assaulting the complainant in the manner described in the charge. It was not disputed that dismissal was an appropriate sanction for this misconduct, should the applicant be found guilty of the charges against him.

[11] After her summary of the evidence, the commissioner drew a number of conclusions that warrant repetition in full:

> *"92. I found the complainant Zelmarie Filander to be very consistent and credible witness. Her evidence with respect to what took place on 10 March 2006 did not deviate from that she gave at the disciplinary hearing and her evidence remained consistent despite rigorous cross examination. On the other hand the applicant's evidence and that of his witness was riddled with inconsistencies of which I will give some examples of below. It was put to the complainant and to Heynse that various witnesses would be called to give evidence relating to the statements the complainant and Heynse were supposed to have made yet the applicant did not call those witnesses. The witnesses in question were Magdalena, Joniver and Chrissie. The applicant as he was giving evidence appears to have been fabricating things as he went*

along for the reasons stated below. The applicant's evidence was at times vague and difficult to follow. Further the four witnesses he called appeared to have been coached by him for reasons which I refer to below.

93. The applicant relied heavily on various letters which either he was supposed to have written to Mrs. Filander or that the Principal, Heynse was suppose to have written to indicate that since February 2006 he was concerned about Zelmarie to participate in remedial programme, yet in none of these letters did he refer to the remedial programme. Further there are two letters which dated 23 February 2006 that he wrote to Mr. Filander both of which apparently should have been dated 13 February 2006. The letter which was in the respondent's bundle does not make mention of the alleged appointment on 10 March 2006 and appears to be asking Mr. Filander to agree to a meeting whilst the one in the applicant's bundle is confirming the meeting of 10 March 2006. The applicant's submission that the one in the respondent's bundle was a draft and that he always keep a draft is nothing short of preposterous. What would be the point of keeping a draft letter in a file of which the contents bears little resemblance to the actual letter sent.

94. The applicant stated in his evidence that in retrospect he should have sought the permission of the farmer at Zongausdrift farm to visit the farm but did not. He then said that he asked Heynse to get permission for him and he referred to an alleged minute of a meeting he had with Heynse on 4 May 2006 in which Heynse allegedly undertook to contact the farm owner to get permission for the applicant to visit the farm the next day. The next day the applicant said that he and Zelmarie again went to Zongausdrift to keep an appointment he had with Mrs. Filander but the applicant did not check that Heynse had sought the permission and thus could have just gone onto the farm the following day as he had no reason to believe that Heynse had not sought and obtained permission. When Zelmarie told him that her mother was not at home he left without going to check for himself even though he did not believe her.

95. I asked the applicant why he had not after 10 March 2006 phoned Mrs. Filander or posted a letter. The applicant said that the school does not pay for stamps or phone calls easily. This answer is not logical as it would have been cheaper for him to bear the cost of a phone or a stamp which would be less that the cost of the petrol he used to drive to Zongausdrift.

96. The applicant on his grounds for appeal submission stated that he wanted to call a witness who saw him travel to Zongausdrift with Zelmarie on 5 May 2006. When Carolus testified he said that he saw the applicant and Zelmarie drive past him on 10 March 2006, when asked to prove he saw the applicant and Zelmarie drive past on 10 March and not 5 May 2006 Carolus

said that he had diarised the journey as being on 10 March 2006 but that he has since lost his diary. This appears to be rather a convenient loss. The applicant said that he had mistakenly referred to 5 May instead of 10 March 2006 in his appeal submission.

97. The applicant stated that he never asked Zelmarie or any other pupils to buy him grapes or to enquire about buying grapes, yet Grivenia stated that he did on occasion ask learners to buy him grapes and that he did ask Zelmare to buy him grapes.

98. The applicant and his witness made much of the fact that one of the main reasons that Zelmarie did not want the applicant to see her mother was that he heard her and Grivenia discussing their sex lives. Grivenia said that the applicant gave both she and Zelmarie letters to give to their parents relating to their inappropriate discussion about sex, yet the applicant never referred to such letters.

99. The applicant made much of the fact that Heynse was out to get him and that Heynse had orchestrated Zelmarie's allegations I am left confused as to what the applicant believed were the motives for Zelmarie's alleged fabrication. Was it Heynse's vendetta or was it the fact that Zelmarie did not want her mother to find out that her school work and attendance were poor or was it because she did not want her mother to know she was sexually active or was it all three? The applicant appeared to be clutching at straws. In any event Zelmarie's mother said that she was aware that her daughter's poor attendance record at school as she asked her to stay at home and she also knew that this had a bearing on Zelmarie's school work. The applicant appeared to use the classical defence to a case of sexual misconduct allegation which is to imply that the complainant has loose sexual morals.

100. Julian's evidence relating to him obtaining the documents for the applicant from a cupboard also appeared to be contrived. The chances of randomly choosing documents from a lever arch file which related to a number of learners being to those to Zelmarie are slim.

101. Zelmarie allegedly told three of the applicant's four witnesses that she fabricated the allegations against the applicant as she was scared of her mother. All three were apparently good friends of the applicant yet none confronted her about her behaviour and both asked her twice about her allegations. It is also quite a coincidence that Julian just happened to overhear Zelmarie telling Jacqueline of her fabrications at Bricks.

102. Heynse denied being the author of the majority of the letters which were in the applicant's bundle and which bore his signature he also denied that he placed his signature on the letters which the applicant wrote although

he said that the signature on the papers appears to be his. The documents which were in the applicants bundle were all photocopies and as the documents are in dispute the original of the documents should have been produced. I find in the light of the above that it is conceivable that the applicant could have placed the signature on the documents using photocopies.

103. Much was made from the time lapse between the incident and when the applicant reported the incident to Mr. Cupido. The respondent's representative referred to the case of ***R v Valentine*** *(no citation provided) where the judge stated that victims of sexual males and females, often need time to tell what has been done to them……other may find it quite impossible to tell their parents or family members'. It has been widely documented that in these type of cases the victim and especially if the victim is a child feels guilty about the incident and that he or she was responsible for it and hence the time span is not unusual.*

104. There are other examples of inconsistencies that I can refer to but I believe that the above is enough to indicate the non credibility of the applicant's and his witnesses' evidence and that on a balance of probabilities Zelmarie's version of what took place on 10 March 2006 is more probable than that of the applicant and the applicant is not on a balance of probabilities of both the first charge and alternate charge."

The grounds for review

[12] The applicant's grounds for review, as disclosed in his founding affidavit, suggest primarily that the commissioner failed properly to apply her mind to the facts, that she refused to allow the applicant to lead all of his witnesses, that she erred in disbelieving the applicant's witnesses, and that she was biased in her assessment of the evidence. The applicant hereafter filed a lengthy supplementary affidavit in which he elaborated on these grounds...

[13] On the day of the hearing the applicant produced a 160 page document which appeared to comprise submissions that he wished to make in support of both his application for condonation and the main application. Ms Nyman, who appeared for the third respondent, objected to what amounted to the introduction of heads of argument at this late stage. I permitted the applicant to address the court on the basis of the document that he had prepared, and to hand it up to form part of the record.

Applicable legal principles

[14] To the extent that the applicant appears to have misconceived the nature of review proceedings, two points ought to be affirmed at the outset. The first is that in an arbitration hearing such as the one that is the subject of this application, i.e. a dismissal for misconduct, the existence of misconduct is determined by a commissioner on a balance of probabilities. Second, the commissioner is required to determine the dispute informally

The functions of a commissioner were recently spelt out by the Constitutional Court:

> [*65] Consistent with the objectives of the LRA, commissioners are required to 'deal with the substantial merits of the dispute with the minimum of legal formalities'. This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter-claims and reach for the real dispute between the parties. In order to perform this task effectively, commissioners must be allowed a significant measure of latitude in their functions. Thus the LRA permits commissioners to 'conduct the arbitration in a manner that the commissioner considers appropriate'. But, in doing so, commissioners must be guided by at least three considerations. They must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do.1*

[15] It is now well-established that this court is entitled to set aside an arbitration award if and only if the commissioner's decision falls outside of a band of decisions to which no reasonable person could come on the available evidence (see *Sidumo & another v Rustenburg Platinum Mines Ltd & others.2* At paragraph [110] of the judgment, the test is set out thus:

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1 *CUSA v Tao Ying Metal Industries & others* 2009 (1) BCLR 1.

2 [2007] 12 BLLR 1097 (CC)

> *To summarise, Carephone held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in Bato Star: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair*.

[16] In other words, this court is not concerned with the correctness of the arbitrator's decision - what matters is whether the result of the proceedings is reasonable. This is what distinguishes an appeal from a review. In short: whether this court would have arrived at a different conclusion to that reached by the arbitrator on the same evidence is irrelevant- what matters is whether the conclusion falls within a band of decisions to which reasonable people *could* come on that evidence.

[17] This point was recently reinforced by the Labour Appeal Court, in *Bestel v Astral Operations Ltd & others* [2011] 2 BLLR 129 (LAC). The court stated that what is paramount is the justification for the arbitrator's decision, rather than it being considered correct, i.e. that what the reviewing court considers to be a better decision on the available evidence is irrelevant (see paragraph [18] of the judgment). This approach maintains the necessary distinction between an appeal on the one hand and the scope of the right of review contemplated by the LRA on the other.

[18] Just how limited the test for review is was emphasised by Zondo JP in *Fidelity Cash Management (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 964 (LAC).)

> *The test enunciated by the Constitutional Court in* Sidumo *for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent one that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of effective resolution of disputes, awards of the CCMA will be finding and binding as long as it cannot be said that such a decision or award is one that a reasonable*

decision maker could not have made in the circumstances of the case. It will not be often that an arbitration award is found to be one which a reasonable decision maker could not have made ...3

Evaluation

[19] With those principles in mind, I deal first with the ground of review that appears to suggest that the award is reviewable because the applicant was not able to call all his witnesses. This was indeed a complaint raised by the applicant in relation to his disciplinary enquiry, but it is not an issue in relation to the proceedings under review except to the extent that the applicant avers, in his supplementary affidavit, that the bargaining council refused to allocate more days to the arbitration and that this prejudiced him. The applicant was represented at the arbitration by an attorney, who cross-examined the third respondent's witnesses at great length and who called the applicant and four other witnesses to give evidence. It is not evident from the record that the applicant's representative stated that he wished to call further witnesses or that he was denied the right to do so. To the extent that this ground for review may relate to the procedural fairness of the applicant's dismissal, this was never put in dispute by the applicant's representative. The commissioner records as much, and correctly identified the issue before her as being only one of substantive fairness and in particular, the factual issue of whether the applicant committed the misconduct for which he was dismissed.

[20] The commissioner was confronted with two mutually exclusive versions of the events that gave rise to the applicant's dismissal. Without wishing to reduce a mass of evidence to the level of the meaningless, in essence, the complainant stated that in March 2006 the applicant sexually assaulted her in his car by placing her hand on his penis and by fondling her breast, on the way to the complainant's home, after leaving the Constantia farm. The background to the assault was a request by the applicant that the complainant accompany him after school to the Constantia farm to buy grapes, a transaction that the applicant had requested the complainant to arrange with the complainant on the day prior to the incident. The complainant stated

3 At paragraph [100] of the judgment.

that the applicant told her that she should not to discuss the matter with anyone. The complainant reported the incident to Cupido in August 2006. The complainant's version was supported by Cupido, to whom the complainant ultimately reported the incident and by her mother, to whom she made the same report. The applicant's version amounted to a denial of the incident and an averment of a conspiracy against him– he testified that no arrangement regarding the purchase of grapes had been made, that he travelled to the complainant's home with the purpose of visiting her mother to discuss the complainant's poor academic progress, that he did not assault her, and that the entire episode was contrived by the complainant who was afraid that her mother would be made aware of her poor performance and of the fact that she was sexually active. The applicant further averred that his relationship Heynse had deteriorated to the point where Heynse was capable of framing him. The applicant's witnesses served largely to corroborate the applicant's denial version, and also to establish that Heynse had reason to act vindictively toward the applicant.

[21] The commissioner was obliged to resolve the factual dispute before her in accordance with the principles set out in *SFW Group Ltd & another v Martell et Cie & others* 2003 (1) SA 11, where the proper approach to the resolution of factual disputes was explained by the Supreme Court of Appeal (per Nienaber JA) in the following terms:

> *"On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent*

and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the other factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities she had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of the assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it." 4

[22] In other words, the commissioner's prime function was to ascertain the truth as to the conflicting versions before her. She was required, in terms of the approach set out in the *SFW* judgment, to make some attempt to assess the credibility of the witnesses by reference to any internal and external inconsistencies that might exist, to assess their reliability and to consider the probability or improbability of each party's version.

[23] It is evident from the extract from the award quoted above that the commissioner's decision that the applicant's dismissal was substantively fair is principally based on a credibility finding against the applicant and his witnesses, and what she considered to be the inherent improbability of the applicant's version. It is the reasonableness of those conclusions that is at issue in these proceedings.

[24] Turning first to the issue of credibility, a review court ought not to interfere with a credibility finding in circumstances where the court, unlike the commissioner, lacks the advantage of first-hand observation of the witnesses and their demeanour, and where there is no apparent basis from the record to justify calling a commissioner's

4 At paragraph 5 of the judgment..

finding into question. While the importance of demeanour as a factor in the overall assessment of evidence should not be over-estimated, there is a close link between a determination by a commissioner of demeanour and other factors, especially the probabilities. The commissioner's found that the applicant appeared to be 'fabricating things as he went along', that his evidence was 'vague and difficult to follow', and that his witnesses appeared to be coached. In so far as these conclusions are supported by visual observation, the court ought to defer to the commissioner. The commissioner's observations are not gainsaid by the , nor, as will appear below, by the probabilities. There is accordingly no basis to call her conclusion into question.

[25] To the extent that the applicant relies on inconsistencies in the complainant's evidence as a basis for his attack on the commissioner's finding on the probabilities, internal inconsistency is not in itself an indication of unreliability, nor is it a valid basis on which to reject the evidence the evidence of the witness concerned. The applicant's contentions are based largely on a microscopic examination of the record, and averments of inconsistency in the evidence proffered by the third respondent's witnesses, and claims of substantiation in respect of his own. In the applicant's supplementary affidavit alone, there are 229 such items raised, excluding the conclusions drawn by the applicant. I do not intend to burden this judgment with an examination of each. The applicant has, with the benefit of hindsight, scrutinised both the record of the disciplinary hearing and the proceedings under review in the minute and constructed a series of submissions, observations, speculations and arguments, the majority of which was never raised in the arbitration hearing nor importantly, put to the third respondent's witnesses for their comment. There is little purpose served in raking over, at tedious length the evidence of the various witnesses in order to uncover contradictions, variances, omissions, discrepancies differences and inconsistencies. It shows no more than that witnesses differ from one another in their accounts and are liable to error.5 The nature of these averments discloses a failure by the applicant to appreciate the essence of the review test. As I have indicated, the issue is not whether the commissioner was correct or incorrect in coming to the conclusion that she did - she is entitled to be incorrect. It is only when

5 See HC Nicholas 'Credibility of Witnesses' (1985) 102 *SALJ* 32 at

the failure to have regard to relevant evidence or taking into account irrelevant evidence is such that an applicant can be said to be deprived of a fair hearing can it be said that the commissioner acted other than as a reasonable commissioner would. Little point would be served in the present instance in dealing with each of the inconsistencies that the applicant claims. I have perused the record more than once and I am satisfied that the commissioner's approach was not unreasonable. Once she made an adverse credibility finding against the applicant and his witnesses, it followed that the applicant's version fell to be rejected. This is not one of those cases where the commissioner's credibility findings compelled her in one direction and the evaluation of the probabilities in another. The commissioner's approach to the latter was to consider the competing versions as disclosed by the evidence as a whole. She found that the third respondent's version was in its material respects coherent, credible and consistent. On the other hand, the inconsistencies, both internal and external, in the evidence of the applicant and his witnesses were of such a magnitude and his version so probable that it fell to be rejected. The applicant's version required the commissioner to accept that the complaint against him was engineered by the complainant, motivated by a fear of her mother, in cahoots with Heynse, who for reasons of his own had schemed to machinate the applicant's dismissal. The magnitude and nature of the conspiracy necessary between the complainant, her mother, Heynse and Cupido to sustain the applicant's version beggars belief.

[26] In summary: there is no basis on which to interfere with the commissioner's credibility findings, and there is no basis for finding that or her rejection of the evidence of the applicant's and his witnesses was unreasonable.

[27] The applicant relies further on a failure by the commissioner to apply the cautionary rule applicable to a single witness, and submits that the commissioner erred by finding that the complainant's uncorroborated evidence was to be preferred, riddled with inconsistencies as it was. In this regard, the applicant relies on *SA Municipal Workers Union obo Petersen v City of Cape Town & others* (2009) 30 *ILJ* 1347 (LC), in which Molahlehi J set aside an arbitration award in circumstances where the arbitrator had accepted the evidence of a single witness whose credibility had been seriously challenged and whose version had not been corroborated by any

other witness. The present matter is clearly distinguishable. The third respondent's case was not based only on the complainant's evidence. The version proffered by the complainant was corroborated in material respects by her mother and by Cupido, to whom she reported the incident. As the commissioner observed, it was also consistent with the version that the complainant had presented at the applicant's disciplinary enquiry. To the extent that the applicant contends that the commissioner ought to have applied the cautionary rule on account of the nature of the incident that formed the basis of the charges against him, the same considerations referred to above apply. In any event, the authorities referred to by the applicant in this regard have been overtaken by the approach adopted by the Criminal Law (Sexual Offences and Related Matters) Act, 32 of 2007, which provides that a court may not treat the evidence of a complainant in cases involving the alleged commission of a sexual offence with caution on account of the nature of the offence, nor may the court draw an adverse inference from the complainant's failure to make a complaint concerning a sexual act at the first reasonable opportunity. The commissioner referred to the latter issue in her award, referring to *R v Valentine* to find that a lapse in time between the incident complained of and the reporting of it was inconsequential.

[28] In short: the third respondent's case did not depend exclusively on the evidence of the complainant; commissioner had regard to the evidence of all of the third respondent's witnesses, as she was obliged to do.

Costs

[29] The court has a broad discretion, established by s 162 of the LRA, to make an order for costs according to the requirements of the law and fairness. The fact that the applicant has not been successful militates in favour of a costs order in favour of the third respondent. However, I accept for present purposes that the applicant is a layperson, and that he did not fully appreciate the nature of these proceedings or the hurdles that he was required to overcome. In this sense, I accept that he has acted in good faith and that the application was not brought frivolously but with the purpose of advancing his interests and to restore his reputation. The prospect of an adverse costs order should not serve to discourage applicants in these circumstances from

pursuing their rights. In these circumstances, I intend to make no order as to costs. Finally, the third respondent's answering affidavit is replete with unnecessary and gratuitous remarks of a personal nature directed at the applicant. This is hardly the standard of professionalism that is expected from legal representatives in their preparation of papers filed in this court, and is a factor that militates against a cots order in favour of the third respondent.

In the result, I make the following order:

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

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of hearing: 8 December 2010

Date of judgement: 13 September 2011.

Appearances:

For the applicant: In person

For the third respondent: Adv R Nyman, instructed by the state attorney.