REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C272/2014

In the matter between:

MONDE CHRIS SATANI **Applicant**

and

EDUCATION LABOUR RELATIONS COUNCIL **First Respondent**

MS B GOLDMAN N.O. **Second Respondent**

DEPARTMENT OF EDUCATION, WESTERN CAPE **Third Respondent**

Heard: **28 January 2015**
Delivered: **10 February 2015**
Summary: Review – unfair labour practice – LRA ss 145 and 186.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Mr Satani, is a teacher employed by the third respondent, the Western Cape Department of Education. As a result of allegations of his behaving in an "improper and unbecoming manner" toward a learner at Bardale Primary School by making comments with a sexual undertone to her, the Department held a disciplinary hearing. The chairperson found that the employee had committed the misconduct complained of. The Department imposed a final written warning and a fine of R6000, to be deducted in instalments of R600 per month over a year.

[2] The employee lodged an unfair labour practice claim with the Education Labour Relations Council, claiming that the sanction constituted unfair "disciplinary action short of dismissal" in terms of s 186 of the Labour Relations Act.[1]

[3] The arbitrator, Ms Bella Goldman, dismissed the claim. The employee seeks to have that award reviewed and set aside in terms of s 145 of the LRA.

Background facts

[4] The learner[2] was 13 years old but had only progressed to grade 6 at the time of the alleged incident. The employee, Mr Satani, was her grade teacher. The learner did poorly in maths and English. The employee was not her subject teacher for those subjects. Nevertheless, at some time in September or October 2012, he called learners who had performed poorly to his desk to discuss their marks.

[5] The learner says that the employee called the learners to his desk individually. He disputes it. He says he called them up as a group. The learner testified that, when she went to see the employee, he asked her "if she knew she was beautiful" and asked her for her phone number. She did not.

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[1] Act 66 of 1995 (the LRA).

[2] Although the learner was identified in the disciplinary hearing and in the arbitration, the commissioner merely referred to her as "learner A" in the award. I shall do the same, or refer to her simply as "the learner".

[6] The next day, according to the learner, the employee called her to his desk again. He asked her for her phone number again. He also asked her a number of inappropriate questions, such as:

- whether she had a boyfriend;
- if she went out walking at night;
- if she would meet him in the bush.

[7] The learner refused to give the employee her phone number. On the same day, she reported the incident to another learner and to her mother.[3] The latter, in turn, reported it to the principal. The principal called all the affected parties to her office. The employee denied the incident. He said that he asked the learner for her mother's telephone number in order to discuss her poor maths marks.

The award

[8] At the arbitration, the learner recounted the incidents outlined above. Her mother/aunt, another learner and the principal also testified. Their evidence mostly constitute hearsay, as they mainly reiterated what the learner had reported to them. The employee testified and called two other learners as witnesses. The tenor of their testimony was that the employee had not called individual learners to his desk, but called them up as a group.

[9] The employee's attorney, Mr Funeka, put it to the learner that she was not registered and did not have a "CEMIS number" at the time of the alleged incident, hence the employee could not obtain her mother's phone number from her file and had to ask her for it. He also put it to the learner that she did not receive report cards. By agreement, the Department furnished the arbitrator with report cards for the relevant period after the arbitration. It was also agreed that both parties would submit written representations rather than oral argument. When Mr Funeka received the report cards, he claimed in his written representations that they were forged. He did not ask for the arbitration to be reconvened in order to call expert evidence in

[3] The person to whom the learner referred as her mother – who also testified at arbitration – is in fact her aunt, but the learner lived with her and she acted *in loco parentis*.

this regard, nor did he ask for the author of the report cards to be called. The arbitrator said that she was not a forgery expert and could not accept the submission that the report cards had been forged. She pointed out that, in any event, the learner did have a "personal profile" file on which her mother's phone number appeared.

[10] The arbitrator found that the employee's evidence was not credible. Apart from the false allegation that the learner had not received report cards, she took into account the following:

- The principal testified that, when a learner is failing in a particular subject, it is more appropriate for that subject teacher to contact the parent. It would have been more practical and useful for the employee to ask the learner's maths and English teachers to address it, rather than him allegedly asking the learner for her mother's telephone number so that he could contact the parent.
- The employee said that he had never met the learner's mother, but it was common cause that he asked the learner if it was her mother who was recently at the school and was shouting. The mother's version that she had met the employee previously was more probable.
- It was improbable that the employee would never have spoken to learners individually, as he testified.
- The employee testified that his classroom was very small and overcrowded and that he had 52 learners in his class; yet the principal's evidence that there were only 32 learners in his class was substantiated by the class list. His evidence is also contradicted by his own version that he called 11or 12 learners to his desk simultaneously and that there was enough space for them.

[11] The arbitrator concluded that the evidence of the employee and his witnesses was not credible, as opposed to that of the learner and her witnesses. She found that, on a balance of probabilities, the employee had committed the misconduct complained of and that the sanction imposed did not constitute an unfair labour practice.

Grounds of review

[12] Although a number of review grounds were raised in the founding affidavit, Mr *Bosch* confined his attack on two broad grounds, namely bias and unreasonableness.

Evaluation / Analysis

[13] I will deal with each of the two broad grounds of review in turn.

Bias

[14] The test for a reasonable apprehension of bias pertaining to judges has been summarised by the Constitutional Court[4] as follows:

> "The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and by the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions…"

[15] I accept that the same principles must pertain to arbitrators; however, it must be borne in mind that an arbitrator is enjoined to hear the arbitration "with a minimum of legal formalities".[5] As Wallis AJ[6] pointed out in *Naraindath*[7]:

> "It would stultify the entire purpose of the legislation if this Court were, in the face of clearly stated intentions, to insist on arbitrators appointed by the CCMA to resolve unfair dismissal disputes conducting those proceedings in slavish imitation of the procedures which are adopted in a court of law and subject to the technical rules of evidence which apply in those courts. Such an approach is in my view contrary to the express provisions of the LRA.

[4] *President of the Republic of SA v SA Rugby Football Union* 1999 (4) SA 147 (CC) para 48.

[5] LRA s 138.

[6] As he then was.

[7] *Naraindath v CCMA & ors* [2000] 6 BLLR 716 (LC) para 26.

> Section 138(1) is the decisive provision in this regard. It empowers the commissioner to conduct the arbitration in such manner that the commissioner considers appropriate in order to determine the dispute both fairly and quickly. Lest the commissioner is under any misapprehension as to what is required the section goes on to direct that he or she discharges his or her functions with the minimum of legal formalities."

[16] He went on to say:[8]

> "I also agree with the warning which Jali AJ (as he then was) sounded in *Mutual & FederalInsurance Co Ltd v CCMA & others* [1997] 12 BLLR 1610 (LC) about the need for an arbitrator, who adopts a more inquisitorial and participative role in the proceedings than is customarily the case in an adversarial hearing, to be vigilant to ensure not only that the proceedings are fair to both parties but that the appearance of fairness is always maintained. However, with respect, insofar as certain passages in his judgment might be taken to indicate that it is only a traditional adversarial process as we know it from our courts that conforms to the well-established rules of natural justice so that the commissioner's role is to mimic that of a trial judge and be a 'silent umpire', I, with respect, cannot agree with him. There is no warrant for that approach in section 138 and its general adoption in arbitration proceedings before commissioners would stultify the clear purpose of this legislation."

[17] This point was also stressed by the Constitutional Court in *CUSA v Tao Ying Metal Industries*[9]:

> "The LRA introduces a simple, quick, cheap and informal approach to the adjudication of labour disputes.
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> …
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> The absence of appeal from arbitral awards was intended to speed up the process of resolving labour disputes and free it from the legalism that accompanies other formal judicial proceedings. By adopting this simple, quick, cheap and informal approach to the adjudication of labour disputes, Parliament intended that, as far as possible, arbitral awards should be final and should only be interfered with in very limited circumstances.

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[8] *Naraindath (supra)* para 31/

[9] 2009 (10 BCLR 1 (CC); (2008) 29 *ILJ* 2461 (CC) paras 61-66 (per Ngcobo J, as he then was).

…

> Consistent with the objects objectives of the LRA, commissioners are required to 'deal with the substantial merits of the dispute with the minimum of legal formalities'."

[18] The jurisprudence on the duties of a commissioner was also usefully analysed, ironically in a matter concerning the same commissioner, in *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman N.O. & others.*[10] What is clear from the jurisprudence, is that the extent to which a commissioner descends into the arena by adopting an inquisitorial approach will amount to misconduct if it she creates a perception of bias in favour of one of the litigants.

[19] The overarching question is if the commissioner acted fairly. As the court pointed out in *County Fair Foods v Theron N.O.*[11]:

> "The basic standards of proper conduct for an arbitrator are to be found in the principles of natural justice, and in particular the obligation to afford the parties a fair and unbiased hearing… These principles have been reinforced by the constitutional imperatives regarding fair administrative action… The core requirements of natural justice are the need to hear both sides (*audi alteram partem*) and the impartiality of the decision maker (*nemo iudex in sua causa*)."

[20] Commissioner Goldman undoubtedly adopted an overly inquisitorial approach in the arbitration forming the subject of this review application. She constantly interjected and questioned the witnesses at length – sometimes in more detail than their representatives did. But did she overstep the mark to the extent that it would lead to a reasonable apprehension of bias, i.e. to the extent that a reasonable, objective and informed person would have apprehended that she did not bring an impartial mind to bear on the arbitration?

[21] The first answer to this question is that the employee was represented at arbitration by an experienced attorney – the very epitome of a "reasonable, objective and informed person". He did not shy away from his

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[10] (2013) 34 *ILJ* 2347 (LC).

[11] (2000) 21 *ILJ* 2649 (LC) para 7.

duty to represent his client's best interests. Yet he never objected to the on the arbitrator's style of arbitration, nor did he ask for her recusal. Not even at the stage when he submitted his heads of argument, well after the conclusion of the arbitration by way of oral evidence, did he raise a question of bias. Had the arbitrator's overly inquisitorial style raised such an apprehension at that stage, surely the attorney would have raised it, either of his own accord or on his client's instructions. That in itself is a complete answer to the question whether a reasonable apprehension of bias was raised at the time.

[22] The second answer is that the arbitrator was even-handed in her conduct, unusual and intrusive as it was. She did, as Mr *Bosch* submitted, constantly interject when the applicant's attorney, Mr Funeka, was questioning witnesses; she did, at times, appear to go so far as to take over the questioning. But she did the same with regard to the questioning of witnesses by Mr Vorster, the Department's representative. And it must be borne in mind that Mr Funeka is an experienced and trained attorney; Mr Vorster, on the other hand, has no legal training and he indicated at the outset that this was his first arbitration. In those circumstances, it is perhaps understandable that the arbitrator went out of her way to question witnesses in her quest for the truth and fairness. The playing fields were not level. She took it upon herself to try and smooth the pitch. In doing so, she came close to overstepping the mark; but she did not, in my view, commit reviewable misconduct.

[23] It is also clear from a reading of the transcript that most of the evidence was conducted through an interpreter. The learner was an unsophisticated minor of below average intelligence, as is clear from her poor results. She did not always express herself clearly, especially when viewed through the prism of interpretation. That was evidently a further reason why the arbitrator sought to clarify the evidence by intervening and questioning the witnesses herself.

[24] The applicant raises a further point that, according to him, gave rise to a reasonable apprehension of bias. That is that his attorney submitted his written heads of argument without having seen those of the Department.

[25] If that is the case, the applicant only has his own attorney to blame. It appears from the transcript that the parties agreed to a timetable to send their written arguments to the arbitrator. There was no explicit agreement that they would exchange heads. Most legal practitioners would have expected that. But the Department was not legally represented. When Mr Funeka submitted his argument, and if he was so troubled by the fact that he had not seen those of the Department, why did he not simply pick up the telephone and contact Mr Vorster, another representative of the Department, the Council or the arbitrator herself?

[26] The applicant's attorney submitted lengthy heads of argument to the arbitrator, running to some 30 pages. She took his argument into account. She applied her mind to the evidence. There is no apparent prejudice to the applicant arising from the fact that she did not, of her own accord, ensure that the Department had provided the applicant's attorney with a copy of its argument. That was not her duty. Her failure to do so does not constitute misconduct, nor did it prevent a fair trial of the issues.

[27] In conclusion, I am not satisfied that the award is reviewable on the basis that the arbitrator was biased.

Reasonableness

[28] The alternative ground of review is that raised in *Sidumo*[12], i.e. whether the conclusion reached by the arbitrator was so unreasonable that no other arbitrator could have come to the same conclusion. As summarised in *Herholdt*:[13]

> "A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material facts before the arbitrator. Material errors of fact, as well as

[12] *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC).

[13] *Herholdt v Nedbank Ltd* 2013 (6) SA 224 (SCA); (2013) 34 *ILJ* 2795 (SCA) 2806 A-D para 25.

> the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable".

[29] In this case, the applicant has carefully parsed through the award in order to point out alleged discrepancies between the evidence and the arbitrator's conclusions. But that is not the way in which a reviewing court must adjudicate. It needs to consider the conclusion against a conspectus of all the evidence in a holistic manner. Viewed in that way, the conclusion reached by the arbitrator is not unreasonable. She was satisfied that the employee had committed the misconduct complained of. A reviewing court will not lightly interfere with that conclusion. And once that has been shown, the sanction of a final written warning coupled with a fine of R6000 was not severe. It did not constitute an unfair labour practice.

[30] The applicant further complains that the arbitrator considered reports that were submitted after the conclusion of the arbitration. He says that the authenticity of those reports was disputed. But the reports were handed in after the conclusion of the arbitration by agreement between the parties. The employee was represented throughout by his attorney of record, Mr Funeka. He submitted written representations. He did not ask the commissioner to reconvene the arbitration in order for him to challenge the authenticity of the reports, be it by calling expert evidence, calling or the author of the reports to question him or her, or any other way. As the arbitrator says, she is not a handwriting expert. The employee's legal representative did not place any evidence before the arbitrator to challenge the authenticity of the reports. Her reliance on the reports and their implications is not unreasonable.

[31] There is one further consideration. The applicant argued that the commissioner should have had regard to the "cautionary rule" with regard to the evidence of a single witness, i.e. the learner.

[32] It is so that the learner was, in effect, a single witness. The other witnesses corroborated her evidence only insofar as they could testify to what she reported to them. It was hearsay evidence and had to be accorded the appropriate weight. In essence, this is a classic case of "she

said, he said". The arbitrator found the evidence of what "she said" more credible than what "he said".

[33] Firstly, concerning the hearsay nature of the corroborating evidence, the Court in *Naraindath*[14] pointed out that the rule, even in our courts, is no longer absolute in its effect in consequence of the provisions of s 3 of the Law of Evidence Amendment Act.[15] "If that is the approach in our courts of law then it follows *a fortiori* in my view that reliance by an arbitrator upon hearsay evidence which he or she is satisfied on proper grounds is reliable does not constitute a reviewable irregularity." I agree, especially given the corroborative nature of the hearsay evidence in this case.

[34] Secondly, with regard to the "cautionary rule", that rule applies to criminal trials. As the learned authors comment in *Labour Law through the Cases*:[16]

> "The cautionary rule relating to the evaluation of evidence of a single witness in criminal matters, that requires the evidence to be "clear and satisfactory in every respect" before it could be relied on, it was found in *Northam Platinum Mines v Shai NO*[17], has evolved significantly. An arbitrator should assess "the probabilities of the respective versions and, if necessary, make credibility findings to arrive at an outcome". In casu it was held that the "commissioner took the absence of independent corroboration of the employer's witnesses' versions to have been fatal, instead of applying a more nuanced evaluation of the evidence in keeping with the applicable legal principles".

[35] Barely two weeks after the judgment in *Naraindath*[18] the Labour Appeal Court handed down judgment in *Blyvooruitzicht Gold Mining Co Ltd v Pretorius.*[19] That Court pointed out[20]that, in criminal cases, the evidence of a single witness is only treated with caution if it is contested by an

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[14] *Supra* para 33-34.

[15] Act 45 of 1998.

[16] Du Toit et al, *Labuor Law through the Cases* (LexisNexis) sv s 138.

[17] (2012) 33 *ILJ* 942 (LC) at par 31, with reference to S v Carolus 2008 (2) SACR 207 (SCA).

[18] *Supra.*

[19] [2000] 7 BLLR 751 (LAC).

[20] At 754D.

accused. It did not deal with the applicability of that principle to arbitrations in any further detail.

[36] In *Blue Ribbon Bakeries v Naicker*[21] the court noted that the commissioner in that case "fail[ed] to apply the cautionary rules of evidence to the testimony of the first respondent who was a single witness"; but that was in the context where the commissioner failed altogether to make any credibility findings. In the case before me, the commissioner did make a credibility finding against the employee and in favour of the learner. In that context, the failure to apply the cautionary rule applicable to criminal cases does not, in my view, amount to a reviewable irregularity. To hold otherwise would be contrary to the stated aims of the LRA to provide a quick, informal and non-legalistic method of dispute resolution.

[37] The conclusion reached by the arbitrator, based on all the evidence before her, is in my view not so unreasonable that no other arbitrator could have come to the same conclusion.

Conclusion

[38] Despite the fact that the arbitrator's style in this case was on occasion more inquisitorial than would ordinarily be prudent, it was not so egregious as to lead to a reasonable apprehension of bias. Suffice to say that she should caution against being too interventionist in the future. The award is not reviewable on that ground. And viewed against the test of reasonableness, her conclusion, having had regard to all the evidence on record, that the applicant had not discharged the onus of showing that he was subjected to an unfair labour practice, is not so unreasonable that no other arbitrator could have come to the same conclusion.

Costs

[39] The applicant was not successful. However, this Court has to take into account the principles of both law and fairness when deciding costs.[22] I take into account that the applicant is still employed by the Department.

[21] [2000] 12 BLLR 1411 (LC) para 8.

[22] LRA s 162.

He has been punished. He has incurred further legal costs. I do not deem it fair for him to be ordered to pay the Department's costs as well.

Order

The application for review is dismissed.

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Steenkamp J

APPEARANCES

APPLICANT: C S Bosch
Instructed by M Funeka attorneys, Cape Town.

THIRD RESPONDENT: S C O'Brien
Instructed by the State.Attorney, Cape Town.