REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

C656/2011

In the matter between:

RODNEY NDYALVAN	Applicant
And	
EDUCATION LABOUR RELATIONS COUNCIL	First Respondent
HILARY MOFSOWITZ N.O.	Second Respondent
MINISTER FOR EDUCATION: WESTERN CAPE	Third Respondent

Date heard: 6 August 2014

Delivered: 23 January 2015

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to review an arbitration award under case number PSES 206-10/11WC. The second respondent (the arbitrator) found that the applicant's dismissal was procedurally and substantively fair.

[2] The applicant was employed by the third respondent as an educator at Masiphumele High School. He was subjected to an internal disciplinary hearing where he was found guilty of the following charges:

"2.1 misconduct as defined in section 17 (1) (b) of the Employment of Educators Act 76 of 1998 (the Educators Act) in that on or about 18 June 2009, he committed an act of sexual assault on Vuyokazi Ntsimbi, a grade 11 learner at Masiphumelele High School, by touching her breast and thighs; and

2.2 (in the alternative) that he was guilty of misconduct as defined in section 18 (1) (q) of the educators act in that on or about 18 June 2009, while on duty, he conducted himself in an improper, disgraceful unacceptable manner towards Vuyokazi Ntsimbi, a grade 11 learner at Masiphumelele High School, by touching her breast and thighs."

[3] The applicant was dismissed and referred a dispute to the first respondent. The award is dated 6 of July 2011.The third respondent (the MEC) has applied for condonation for the late filing of the answering affidavit, which was filed some three months and 12 days late. Given the nature of this matter, I have decided to exercise my discretion to grant condonation.

[4] The applicant submits that the second respondent (the arbitrator) committed a:

4.1 "latent gross misconduct in the arbitration proceedings by rejecting undisputed or uncontested evidence of the witnesses who testified on behalf of the applicant without giving a reason for doing so.

4.2 "the second respondent relied solely on the testimony of Ntsimbi, her demeanour and credibility notwithstanding that throughout the proceedings it was abundantly clear that her testimony was glaringly contradictory, improbable and based on fabricated evidence. Therefore the second respondent has failed to resolve factual dispute (sic) through a proper assessment of

the evidence before her where she was confronted with two irreconcilable versions."

4.3 "The evidence of the witnesses who came to testify in her favour should not have been treated as evidence because these witnesses were repeating what Ntsimbi narrated to them. Therefore, the source of such evidence is Ntsimbi herself. Contrary to what these witnesses were meant to achieve, which is to support the case of Ntsimbi, they gave contradictory testimonies which could have been rejected and as such evidence amount to heresay and it is a repetition of previous inconsistent statement."

[5] Further issues raised by the applicant in his papers are that an inspection in loco was conducted after the conclusion of the arbitration hearing, which he alleges constituted a gross irregularity. In the supplementary affidavit filed of record, an example of the kind of contradictions pointed to by the applicant in his supplementary affidavit is contained in paragraph 14 of it:

> "contrary to the testimony of Ms Volontiya, Ms Ntsimbi testified that the applicant touched her and also pulled her (transcription:p21 line 22). Ms Zanele Volontiya on the other hand testified that she never noticed tearing off of Ms Ntsimbi's clothes (transcription: P 49 line 9). The applicants representative put it to Ms Volontiya that if Ms Ntsimbi was telling the truth her buttons would have been torn off or her shirt with been torn apart. "

[6] Another example raised by the applicant is that he testified at the arbitration that he at no stage left the school premises even during his lunch break and that this piece of testimony which is very important to his case was never disputed or challenged, and there was no evidence adduced to prove that the applicant left school premises during his lunch. However, it was precisely the evidence of the learner that he had sent her to his home to fetch his lunch box during that period and

followed her there. Further issues highlighted by the applicants was the way in which the learner re-called the layout and details of the applicant's home, including the colour of buttons on the remote to open the gate. One example that is contained in the supplementary affidavit is as follows: "Ms Ntsimbi alleged that there is a space between the fridge and the cupboard. The applicant disputed these averments and stated that the setup in his home has been there for a period of more than five years between the cupboard and the fridge. There is no gap that can even fit a child."

[7] I note that in the presiding officers report of the disciplinary hearing contained in the record of the arbitration proceedings, the applicant's case is recorded as being that the allegations were part of the conspiracy against him and that the principal of the school was the main cause of this. He also hinted that due to the fact that he is active in the community and involved in various school projects that some educators in line with the principal may be conspiring against him.

[8] The arbitrator also records in her award that: "Ntsimbi testified during the internal disciplinary proceedings. A visit to applicant's home was conducted. It was the Department's evidence that applicant had changed certain features of his home in order to create the impression that Ntsimbi had never been to his home. The door handle was changed, the position of the intercom, and the cupboards in the kitchen were changed. It was a different remote the one applicant provided on the day of the incident."

[9] In her analysis of the evidence, the arbitrator found as follows:

"On weighing up the different versions as well as the credibility of witnesses, I find the Department's evidence more credible.

Applicant argued that there was a conspiracy theory against him arising from certain tensions with the school principal and conflict with members in the community. I have not found sufficient evidence to support this conclusion. While I have accepted that there was "bad blood" between applicant and the principal (and maybe within the

community as well), there was insufficient evidence to support the conclusion that the principal and community fabricated the allegations against applicant. I find it highly improbable that a learner would be used as a setup, under such circumstances.

Ntsimbi presented as a credible and consistent witness at arbitration and during the inspection in loco. I have not found any motive for her to fabricate the version of sexual assault or improper conduct. While there may have been some discrepancies in Ntsimbi's account of applicant's home, these were not sufficiently substantial to sway the balance in applicant's favour. Ntsimbi presented in a confident and clear manner, especially considering that she is a young person. She was not easily intimidated and stood her ground, despite vigorous questioning and cross examination. There was no evidence that Ntsimbi had reason to discredit applicant. Even if Ntsimbi did not recall minor details, her overall demeanour tilted the balance in her favour. It is important that Ntsimbi knew that there was a dog, knew about the remote and the intercom ….

I have accepted that applicant touched her breasts and thighs and asked her to touch his erected penis. Ntsimbi pushed applicant (this is possible as they are of a similar size and height) and applicant opened the gate. I have noted the disputed evidence regarding the position of the intercom but do not regard this to have a material bearing on the substance of the matter. Ntsimbi's overall evidence supports the conclusion that she had been in applicant's home. Ntsimbi could only have known that the front door was kept open an account of applicant telling her. It is unreasonable to conclude that she knew the details of the house from a third party. The Department's representative (who attended both *in loco* inspections) indicated that the position of the intercom was moved."

[10] I have stated that this application was opposed. However, and for reasons which are difficult to fathom, the deponent to the answering affidavit, the

Assistant Director: Labour relations in the Western Cape Education Department who states that he is duly authorised to oppose the application and to make the affidavit on behalf of the third respondent, states as follows:

> "as regards the main relief sought by the applicant, namely that the arbitration award be reviewed and set aside, I am advised that the applicant has reasonable prospects of success as is clearly apparent from the arbitration award, the WCED's success at the arbitration hearing was largely based on the strength of the evidence presented there. However, it appears that there are some deficiencies in Mofsowitz's arbitration award, as alluded to by the applicant's grounds of review. Amongst others, that Mofsowitz rejected or ignored the testimonies of Ndyalvan's witnesses without providing reasons therfor. In light of the foregoing, the Minister does not oppose the main relief sought by the applicant.
>
> Notwithstanding the above, it is however respectfully submitted that the applicant not to be reinstated as an educator in the employ of the WCED…."

[11] The deponent goes on to suggest however, that given the circumstances of the dismissal, the applicant no longer enjoys the trust of his employer and should be granted some other relief in the form of compensation as prescribed by the LRA. The legal advice apparently rendered to the third respondent appears to have been deficient to say the least. There is no confirmatory affidavit by the Minister, the third respondent.

[12] The job of this court is to decide whether there are grounds to set aside a binding arbitration award or not. I do note that Mr Coetzee for the third respondent referred to the "proposal" contained in the answering affidavit as "far too generous" and one which cannot be sustained. Given that the so-called 'proposal' contained in the answering affidavit was couched as a legal submission based on advice received, it does not disturb this court's duty to consider the review application on its merits and decide a question of law as to whether the award stands to be set aside.

[12] The evidence given by applicant's witnesses at the arbitration is in fact summarised in the award by the arbitrator as follows:

> "Applicant's neighbour confirmed the colour of the remote, the layout of the kitchen and the fierce nature of the dog. Applicant's colleague confirmed the colour and details of the gate remote.
>
> Sibusiso Ngwane installed the automation system of the gate. The remote was a blue colour with four buttons and the intercom was installed under the electric box.
>
> Applicant's wife confirmed applicant's evidence. Members of the community visit their house regularly and may have given Ntsimbi details of the house."

[13] The arbitrator then considered the credibility of the witnesses on both sides, as referred to above, and found those who gave evidence for the Department more credible. There was no need for the arbitrator to detail her findings in this regard. In **Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others**[1] , the court per Waglay JP summarized the questions a reviewing court must ask in the matter such as this:

> "The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employ give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence.) (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator's decision one that another decision maker could reasonably have arrived at based on the evidence?"

[14] On a reading of the record in this matter, and of the award, the answers to the questions contained in the quotation above are in the affirmative. I do not find that any material evidence was ignored by the arbitrator. But even had that

[1] (2014) 35 ILJ 943 (LAC)

been the case, the law as set out in **Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)**[2] applies, i.e. that "Material errors of fact, as well as 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." On a consideration of the award and the record, the arbitrator's award is well within the bounds of reasonableness.

[14] In all these circumstances I find that the Award in question is not susceptible to review. Given the way in which respondents have dealt with this matter including the late filing of papers, I do not consider it appropriate for costs to follow the result.

[15] In the circumstances I make the following order:

Order

1. The review application is dismissed.

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H. Rabkin-Naicker

Judge of the Labour Court

Applicant: Potelwa Attorney

Second &Third Respondents: Adv. A. Coetzee instructed by the State Attorney

[2] (2013) 34 ILJ 2795 (SCA) at paragraph 25