THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

Case Number: C583/12

In the matter between:

SIZAKELE BOQWANA	**Applicant**
And	
EDUCATION LABOUR RELATIONS COUNCIL	**First Respondent**
COMMISSIONER BELLA GOLDMAN NO	**Second Respondent**
THE MINISTER OF EDUCATON WESTERN CAPE	**Third Respondent**

Date heard: 7 May 2015

Delivered: 8 October 2015

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application for review of an arbitration award under case number PSES280-11/12WC in which the second respondent (the arbitrator) found that the applicant's dismissal was substantively and procedurally fair. The arbitration was heard over seven days and the award is some 123 paragraphs in length.

[2] The applicant was employed by the Department as an educator. At the time of his dismissal he was employed as Deputy Principal at Ukhanyo Primary School. At the time of the incidents for which he was dismissed he was employed as Acting Departmental Head.

[3] In about January 2011, the applicant was charged with misconduct relating to the alleged assault of learners who were minors at the time of the incidents and at the arbitration hearing. They gave their evidence behand a one way mirror at the arbitration.

[4] The charges against applicant were as follows:

"Charge 1

You are guilty in terms of section 17(1)(b) of the Employment Educators Act 76 of 1998 (hereinafter referred to as the Act) in that on or about 3 December 2010 whilst on duty you conducted yourself in an improper disgraceful or unacceptable manner towards 1st Complainant by hugging and or kissing her.

Charge 2

You are guilty of misconduct in terms of section 18(1)(q) of the ACT in that you on or about 3 December 2010 whilst on duty you conducted yourself in an improper disgraceful or unacceptable manner towards first Complainant by telling her you love her and or giving her your number for such purposes.

Charge 3

You are guilty of misconduct in terms of section 17(1)(c) of the Act in that on or about first term January to April 2009 you sexually assaulted 2nd Complainant by hugging her and touching her thighs and /or forcing her to kiss you.

Alternative to Charge 3

You are guilty of misconduct in terms of section 17(1)(c) of the Act in that on or about first term January to April 2009 you sexually assaulted 2nd complainant by hugging her and touching her thighs and/or forcing her to kiss you.

Charge 4

You are guilty of misconduct in terms of section 18 (1) (q) of the Act in that you on or about in during the first and second term of school (February to March 2010 and April to June 2010) whilst on duty you conducted yourself in an improper,disgraceful, disgraceful or unacceptable manner towards 2nd complainant by:

(a) telling her you love her and/or

(b) giving her your number for such purpose

Charge 5

You are guilty of misconduct in terms of section 17(1)(c) of the ACT in that during the period 2009 toward the end of 2010 you had a sexual relationship with a learner 2nd complainant of the school where you are employed in, that involved hugging, kissing and caressing her private parts with your finger."

[5] The grounds for review of the Award as contained in the founding affidavit are the following that the Arbitrator:

5.1 Misconstrued the evidence which resulted in her coming to an incorrect finding;

5.2 Failed to conduct the arbitration proceedings in a fair and consistent manner;

5.3 Issued an arbitration award that is not consistent with the evidence that was led, and therefore failed to apply her mind to the dispute.

[6] The supplementary affidavit is a lengthy document which highlights various parts of the record of the proceedings in order to support the above grounds of review and points out certain contradictions in the evidence of the complainants and their witnesses, as well as makingd various references to the conduct of the arbitrator.

[7] It is as well to repeat the trite principle that a review does not concern the question as to whether an arbitrator came to a correct result. This court must ask the following questions:

"(1) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process employed by the commissioner give the parties a full opportunity to have their say? (2) Did the commissioner identify the dispute he or she was required to arbitrate? (3) Did the commissioner understand the nature of the dispute he or she was required to arbitrate? (4) Did the commissioner deal with the substantial merits of the dispute? (5) Is the commissioner's decision one that another decision maker could reasonably have arrived at based on the evidence? Where a commissioner fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where he or she fails to follow proper process, he or she may produce an unreasonable outcome, but this is to be considered on the totality of the evidence and not on a fragmented, piecemeal analysis. Therefore, the argument that the failure to have regard to material facts 'may potentially' result in a wrong decision has no place in review applications — failure to have regard to material facts actually defeats the constitutional imperative that an award must be rational and reasonable."[1]

[8] I am also mindful that the LAC has stated in **Minister of Safety & Security & another v Madikane & others:** [2]

"[46] The court a quo was at pains to point out that if it had been dealing with an appeal it would have been more inclined to say that the arbitrator's conclusion on the probabilities was wrong 'when all the evidence is properly weighed'. The court a quo seemed thereby to suggest, or imply that, because of the test for

[1] Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others (2014) 35 ILJ 943 (LAC) at para 20
[2] (2015) 36 ILJ 1224 (LAC)

reviews (which is different to that of appeals) a failure to weigh all the evidence and probabilities, in deciding whether to draw inferences, was reasonable. That approach cannot be correct. The failure to weigh all of the relevant evidence and the probabilities to draw inferences and make findings cannot be said to be reasonable. It is not only wrong not to take into account all of the relevant evidence but it is also unreasonable and clearly what a reasonable decision maker would not do."

[9] The applicant's evidence is recorded by the Arbitrator in the Award as follows:

"71. The Applicant became aware of the accusation of the 1st complainant on 7 December 2010 when he was called by the Principal and told that the parent of the 1st complainant had visited the school the previous day re an incident that took place on 3 December 2010 in Fishhoek in an open field where he was accused of kissing and hugging the 1st Complainant. The parent had no intention of taking the matter further but just wanted to see the applicant. A meeting was arranged for the following day 8 December 2010. On that day he had two interviews, one for the post of Head of Department, the post he was acting in and the Deputy Principal post, both of which he successfully obtained following the interviews. The applicant asked the Principal to arrange the meeting with the parent either before or after the interviews for that day. The parent could not meet on that day so a meeting was arranged the following day at 08h00.

72. That meeting was attended by the applicant, the principal, the deputy principal, Ms Linda, the 1st Complaint's brother and the 1st Complainant. The Principal said he is not there to comment or mediate but just to listen. After the 1st Complainant had recounted her story she left the meeting. The 1st Complainant said that on 3 December, the applicant had taken her to an open field where he had hugged and kissed her and then dropped her at Food Zone, she did not mention Anelo or the 2nd Complainant. The applicant's comment to the fact that 1st Complainant saw Sethu who was at Food Zone whilst he she (sic) was at the pedestrian entrance of Site 5 was that it was not possible as the two are 3 to 4 kilometres apart. The applicant was then asked to give his version.

73. The applicant said that in October 2010 he received anonymous calls about once or twice a week at lunch time from a female who would tell him she loves him and when he asked who she was, she would tell him that she would tell him when the time was right and when the applicant ask how he could respond when he did not know who it was; the phone would then be dropped or money would run out. The applicant told the meeting that the 1st Complainant may have had knowledge of that call and that he knew that because he traced that call to the 2nd Complainant who told him when he confronted her that her phone is with the 1st Complainant.

74. The applicant at the meeting said to the parent "Thank you for coming, I apologise for the inconvenience of you coming here." The brother said "You must apologise to the 1st Complainant or are you saying that my sister is creating a story." The applicant said he was not in a position to say more, but he was sorry for the inconvenience caused to the mother as he knows she should be at work. The 1st Complainant was then called in and the applicant asked her if she knew of the SMS's he used to receive and she said she was aware of one that was sent to the 2nd Complainant which was 'don't mess with me you are a child".

75. The mother was then reluctant to carry on with the meeting and the Principal told her to write down what was said at the meeting and give it to him, in case the Department wanted it and he went to his interviews and obtained both posts and chose to accept the Deputy Principal Post.

76. The witness stated that after he received these anonymous calls in October where the caller would not identify herself. He decided in November to go to the Vodacom containers to phone the caller, as when he returned her call from his phone she would not answer. He was accompanied by two of his colleagues Mr Nkuko and Mr Giliana. They did not go into the booth with him. He phoned the number and discovered the caller was the 2nd Complainant. The other educator who knew about the calls was Ms Joyce, he did not tell his wife, Ms Duba as he did not believe she could understand. He only told her of the incident on 7 December 2010 when he realised the matter was serious.

77. One day whilst the learners including 1st and 2nd Complaints were writing exams he received a please call me from the 2nd Complainant. He sent her and SMS to the effect “I know who you are, I am not on friendly terms with kids in that fashion” The calls stopped thereafter.

78. A short while after the applicant bumped into the 2nd Complainant at the man gate as she was returning from writing exams. He confronted her and asked her if it was her who had been calling him. She said it was not her it was the 1st Complainant who has her phone. It was put to the witness that this version was never put to the 1st Complainant, her mother, or the Principal.

79. On 14 January 2011 the applicant was suspended, despite the 1st Complainant’s mother saying she forgave him and him seeing a letter to that effect.

80. The applicant stated he believed that these allegations were fabricated as part of a conspiracy with respect to him not being promoted and he referred to a letter dated 28 January 2010 in terms of which complaints were made against him being appointed Acting Deputy Principal without interviews being conducted. The letter went on to state what happened to a Principal who had been murdered at another school would be small compared with what would happen here. The letter was addressed to the Department of Education Labour Relations and was signed by two people who wished to remain anonymous. It was put to the Applicant that the letter was a threat against the Principal and not him.

81.The applicant stated that on 30 November 2010 as HOD he was at the District Office discussing Progressions and Promotions as a result of the exam results. He was told that he had to make certain corrections and that was what he was busy with the grade 6 teachers doing those corrections on the morning 2 December 2010 in the computer lab room 08h30 to 12h00.

82. He further stated that on 2 December 2010 between 08h00 and 09h00 he received a phone call from the District Office that he had to go and deliver a signed document which was emailed to him relating to his interviews the following week. He went to deliver those documents after school with his wife, Ms Duba and Ms

Joyce. It was put to him in cross-examination that he went with 1st Complainant to deliver the letter in the morning, he denied this…."

[10] The Department called 6 witnesses to the arbitration which included the First and Second Complainants, the mother of the First Complainant (Mrs Matwa) and Mr Tyali, the principal, Mr Gobozi, an educator at the school and a learner at the school, Sethu Botha. Four witnesses testified on behalf of the Applicant, three of them fellow educators and the fourth his wife.

[11] Various inconsistencies in the evidence given for the Department have been emphasised on behalf of the applicant in submitting that the Arbitrator did not appropriately weigh these. However, a reading of the record and Award, does reflect that the Arbitrator was alive to some inconsistencies in the evidence given by the witnesses for the department and considered these not to be material. These are dealt with in detail in paragraph 115 of the Award:

"115. The applicant made much of the following:

- The fact that in the case of the 1st Complainant the charge sheet referred to on or about 3 December 2010 but the complainant stated that the incident took place on 2 December 2010. The charge sheet stated, on or about and in itself is self explanatory.
- The fact that the Ist Complainants mother recalled that the incident took place on 3 December 2010, at the Disciplinary hearing. He evidence was hearsay ad again it is not material as various discrepancies between her and her daughter's evidence are also not material, such as that she could not recall that her daughter told her that the applicant was going for interview the following week.
- The fact that the 1st and 2nd Complainant stated that the 2nd Complainant stored the applicant's phone number as 'friend whilst Anathi stated that ot was stored as 'Mister' It may have been stored under two names but most

likely under 'friend' but in any event this dos not discredit the entire evidence of 1st and 2nd Complainant.

- The fact that the 1st Complainant could not possibly have seen Sethu who was in the street in the area of Food Zone when she was in the car by the pedestrian entrance of site 5. The distance is 150 metres away, an inspection in loco showed that she could see and hear although she may not have heard whether Sethu said Sir B or Ta Sezu. In this case the applicant tried to mislead the hearing by saying that the distance was three to four kilometres, whilst it was about 150 metres."

[12] In addition, she found the evidence of the complainants to be credible and the primary defence of the applicant that the accusations were as a result of a conspiracy to be unproven. She records in paragraph 114 of her award:

"114. I found both 1st and 2nd Complainant to be extremely credible witnesses who stood their ground despite vigorous and arduous cross examination as did all the respondent's witnesses. There was no reason for the Complainants or the respondent's witnesses to fabricate their evidence. The applicant was not able to substantiate his conspiracy theory. The letter he referred to dated January 2010 which he stated pointed to a conspiracy theory was in fact a threat to the principal not to the applicant. If there was unhappiness about him being appointed to either of the posts he was appointed to there is a far less arduous and traumatic process that can be used rather than inventing a sexual harassment process and getting so many learners to fabricate evidence and to fabricate tears and emotions in two long and traumatic processes".

[13] As for the applicant's witnesses, the Arbitrator supported her finding that their versions were improbable:

"116. The applicant had the alibis of educators to cover for him for the morning of 2 December; I find it highly improbable that they all remembered what time they saw him on 2nd December 2010, if they did. Ms Linda at the disciplinary hearing said she saw him at 11h00. At the arbitration she said she saw him at 09h00. Ms Duba, the applicant's wife stated that she went to see the applicant

after 12h00 about the corrections and then she sent someone to fetch the car keys, thus accounting for the whole day. The applicant never mentioned this in his evidence. I find it more likely that the Educator's who stated that they met with the applicant to have their progressions and promotions corrected on the morning 2 December were more likely to fabricate evidence or part thereof than respondent's witnesses, given that fabrication must have taken place on one side."

[14] The arbitrator also drew a negative inference from the fact that the applicant did not call any witnesses "regarding the schedules when they were collected from the District Office and whether corrections were required and when (morning or afternoon of 2 December) the applicant took the signed letter to the District Office regarding his interviews the following week were crucial to the applicant's case and were worth requesting a postponement if one or both witnesses were not available on 3/4 April. Even though the applicant stated he would call these witnesses he did not."

[15] In view of the above, I find that the arbitrator acted as a reasonable decision-maker in the way that she weighed up the probabilities and drew inferences from the evidence. It is not this court's role to determine whether she came to the correct conclusion. Her conduct of the proceedings while robust was fair and met all the requirements set out in the LAC Goldfields judgment referred to above. There is no basis to find that the arbitrator came to an unreasonable result based on her assessment of the evidence more especially considering that the 'conspiracy' theory advanced on behalf of the applicant was submitted to include even the mother of the 1st Complainant, who the evidence showed was new to the area. Further that the applicant did not ever report the alleged SMS messages he was receiving to his Principal, although as the Arbitrator noted, it was well known that sexual harassment allegations were rife at the school.

[16] I therefore find that the Award is not susceptible to review. The Award had serious consequences for the applicant's career. I do not intend to award costs in the matter given that the applicant is an individual and in line with the jurisprudence as

set out in NUM v East Rand Gold & Uranium Co Ltd[3]. I therefore make the following order:

Order

1. The application is dismissed.

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: Adv. S Mbobo instructed by Pinini Attorneys

Third Respondent: Adv A De Wet instructed by the State Attorney

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

For the Applicant: