**THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN**

**JUDGMENT**

NOT REPORTABLE

Case no: C15/2015

In the matter between:

**ZANDISILE MAKHENKAYA** Applicant

and

**SOUTH AFRICAN LOCAL GOVERNMENT**

**BARGAINING COUNCIL** First Respondent

**ZOLA MADOTYENI NO** Second Respondent

**CITY OF CAPE TOWN** Third Respondent

**Heard**: 11 May 2017

**Delivered**: 11 October 2017

**JUDGMENT**

RABKIN-NAICKER J

[1] This is an opposed application to review an arbitration award under case number WCM081402. The second respondent (the Arbitrator) found the dismissal of the applicant to have been procedurally and substantively fair.

[2] The applicant was dismissed pursuant to a disciplinary hearing in which he faced the following charge:

"You misconducted yourself in that on or about 14 April 2914, at approximately 16H15, at the Maitland train station you sexually harassed a fellow Council employee by touching her inappropriately on the back thigh and buttock and stated that you have been longing to be there."

[3] The applicant summarises his version of events in his founding affidavit in which he avers inter alia the following: "…just as I was about to pass by the complainant, the wind blew up her dress and I held it and pulled the dress down with the intention to cover her exposed body. She angrily reacted by saying that I must leave her alone. I sensed her anger and apologised and told her that I simply wanted to cover her and then continue walking on my way."

[4] The applicant contends that the award is not one that a reasonable decision-maker could make in that he should have rejected the evidence of the complainant and her witnesses and accepted that of the applicant and his witness. Mr Leslie for the Third Respondent submitted that properly construed the present application amounts to an impermissible attempt to appeal against the arbitrator's findings of fact.

[5] In considering the record in this matter and the Award in question, I can find no basis on which the relief sought by the applicant can be granted. It is not for this court to interfere with the Arbitrator's finding on the credibility of the versions of the witnesses on either side of the dispute.[1] In any event, the version proffered by the applicant at the arbitration was inherently improbable and his only witness contradicted applicant's evidence in various respects. Suffice to say that the

[1] Mphigalale v Safety & Security Sectoral Bargaining Council & others (2012) 33 ILJ 1464 (LC) at para 15

complainant put on the same dress she had worn on the day in question at the arbitration, to illustrate that it was not the type of dress that could be blown up by the wind and certainly not above her armpits as alleged by the applicant. It was a snugly fitting denim dress.

[6] The complainant's testimony as to what happened was corroborated by her contemporaneous written statement; the evidence of her sister who confirmed that she was shaken up and in a panicked state of mind immediately after the incidence and by her manager who confirmed that the complainant was clearly traumatised.

[7] Various attempts are made in submission on behalf of the applicant to find discrepancies in the complainant's version. These have no bearing on whether the Award is reasonable in relation to the full conspectus of evidence that served before the Arbitrator. To restate the law as set out by the SCA in Herholdt:

"[25] In summary, the position regarding the review of CCMA awards is this: 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 that was before the arbitrator. 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."[2]

[8] The Award in question is well considered and carefully drafted and properly weighs up whether the sanction of dismissal was appropriate. This review was previously reinstated by the Court with costs to be costs in the review. I am not

[2] Herholdt v Nedbank Ltd (Congress of SA Trade G Unions as Amicus Curiae) 2013 (6) SA 224 (SCA)

going to award costs in this matter on the basis that the applicant is an individual employee[3] . I make the following order:

Order

The review application is dismissed.

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

**Applicant**: Cheadle Thompson & Haysom INC

**Third Respondent**: G. Leslie instructed by Bisset Boehmke McBlain

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[3] National Union of Mineworkers v East Rand Gold & Uranium Co 1992 (1) SA 700 (A)