



Not reportable/Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case No: C1196/2018

In the matter between:

IMATU obo PR

Applicant

and

THE CITY OF CAPE TOWN

First Respondent

**SOUTH AFRICAN LOCAL
GOVERNMENT BARGAINING COUNCIL
(SALGBC)**

Second Respondent

COMMISSIONER R SLAMANG N.O

Third Respondent

Date of Set Down: 28 January 2021

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court

website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 18 February 2022.

Summary: (Review – misconduct – dismissal – non-consensual sex – sex in the workplace – sufficient evidence to justify the arbitrator’s findings as plausible ones even if an alternative interpretation might have been possible – arbitrator’s robust conduct of the case with experienced representatives did not prevent a fair hearing taking place)

JUDGMENT

LAGRANGE J

Introduction

- [1] Under the alternative hearing options prevailing at the time during the Covid pandemic, the parties in this matter elected to have the application decided on the papers.
- [2] Owing to the graphic intimate detail of some of the evidence, the identities of the applicant ('PR') and the complainant ('NS') have not been identified by name.

The award

- [3] PR was charged and dismissed by the first respondent ('the City') after being found guilty of two charges, namely:
- 3.1 Charge 1: 'sexual harassment constituting rape and/or sexual penetration and/or attempted rape and/or attempted penetration in that on or about 05 January 2018, you [name] sexually molested a member of staff namely Ms NS (EWP), by pulling her into the toilet and sexually harassed her without her consent'.
- 3.2 Charge 2: 'conduct unbecoming: in that on or about 05 January 2018, you engaged in sexual activity on the employer's premises.

- [4] PR admitted having engaged in sexual activity with NS, but claimed it was consensual.
- [5] The gist of the arbitrator's award was that PR and NS did engage in sexual activity on the day in question, but even though they were in a sexual relationship, NS did not consent on that occasion. His findings and reasoning were stated in summary form as paraphrased below.
- [6] NS was absent from work for about three days prior to the incident. During her absence there were rumours circulating amongst her colleagues at the workplace that she was having sexual relationships with another colleague, who was also a friend of PR. Her testimony was that PR was angry with her on account of the rumours and he was dismissive of her when she asked to see a new tattoo he had acquired. PR admitted he did not let her see his tattoo but claimed it was because he had to start work. This explanation for him refusing to show her was not canvassed with her.
- [7] PR's version was that they had engaged in consensual sex, but afterwards NS demanded to know when he would leave his girlfriend for her, and became upset with him when he made it clear he would not. On his account, she retaliated by laying the complaint which led to him being charged. The arbitrator rejected this narrative of the revenge of a 'scorned woman' as being improbable.
- [8] The arbitrator reasoned that it was unlikely NS would have engaged in consensual sex with PR if she was demanding that he leave his girlfriend. Had that been the case, it is more probable she would have rebuffed his sexual advances until he agreed to her demand. The fact that there was no evidence that she had previously made such a demand reinforced his belief that it was unlikely she would have raised it immediately after they had sex. In light of the "cumulative effect and nature of the surrounding circumstances" the arbitrator concluded that the probabilities were that PR had not consented to sex on that occasion.
- [9] The arbitrator held that the misconduct PR had been found guilty of was inimical to an employment relationship founded on trust and the sanction of dismissal, which was in compliance with the standards of the municipality, was appropriate and fair.

Grounds of review

[10] The applicant's first ground of review set out in the affidavits, essentially finds fault with the arbitrator's factual findings based on his assessment of the evidence. Secondly, the applicant claims the arbitrator's conduct during the arbitration hearing demonstrated bias in favour of NS.

[11] The applicant identified certain alleged defects in the arbitrator's evaluation of the evidence, which he claims resulted in the arbitrator misdirecting the inquiry and arriving at findings no reasonable arbitrator could have reached, namely:

11.1 The arbitrator's finding that NS would never have consented to sex with PR if she wanted him to leave his girlfriend was bizarre, irrational and at odds with the evidence that despite being jealous of his girlfriend and wanting him to leave her she continued to have sex with him on a daily basis for a period of months, which was irreconcilable with her withholding sex as a means of pressurizing him.

11.2 Secondly, in evaluating two mutually destructive versions, the arbitrator failed to consider evidence damaging NS's credibility.

[12] PR highlighted the conduct of the arbitrator during the proceedings, which he claims supported his allegation of bias on the arbitrator's part. In abbreviated form, these may be expressed as:

12.1 the arbitrator sought to develop a close rapport and uncomfortable familiarity with NS;

12.2 the arbitrator took control of the questioning of witnesses, sometimes without inviting the employer's representative if he had any questions of his own

12.3 the arbitrator asked leading questions of NS, and

12.4 the arbitrator conveyed an allegation made by NS directly to him during a smoke break in the proceedings, when he should not have been communicating with her.

- [13] In the arbitration hearing the applicant was represented by a labour relations officer of his trade union, Mr Pakkies ('Pakkies') and the city by an employee relations practitioner, Mr Jonker ('Jonker') who was employed by the City

Evaluation

- [14] At the commencement of the arbitration, the arbitrator explained that he would elicit opening statements from both parties, before hearing the evidence. He asked both parties that if they were unsure or concerned about anything to bring it to his attention.
- [15] Thereafter he began obtaining details from PR about his case. From time to time, inaccuracies in PR's account were corrected by Jonker and Pakkies or they clarified matters, without objection. In the course of obtaining the details from PR, the arbitrator asked PR a number of leading questions. For example, he asked if he had been given an opportunity to defend himself at the disciplinary hearing and whether he had been treated with respect. He asked him how he pleaded to the charges and to give his own account of the incident.
- [16] After comments from both representatives on what issues were in dispute, NS started with her evidence. Before the arbitrator swore her in, he commented that she seemed nervous and reassured her she could relax. He warned her that he would be asking a number of questions, after which Jonker and Pakkies would have an opportunity to do so. He cautioned her against changing her version under oath and advised her to say if she did not understand a question. The arbitrator began questioning her and, as in the case of PR, asked a lot of background questions about her duties. She divulged that she had also been dismissed. At that juncture Jonker asked to intervene, but the arbitrator declined his request because he was asking her questions to settle her down and her own dismissal was not really material to the dispute.
- [17] During this early stage of her testimony the arbitrator also asked NS not to cover her entire face while she was being questioned and Jonker claimed that she felt intimidated by PR. The arbitrator said he understood why she might want to shield her face on one side but it was important for him to be

able to observe her to evaluate her demeanour. The arbitrator then put a reasonable summary of PR's version of what happened to her and asked her if it was correct. As she proceeded to relate her version, the arbitrator tried to sift out which aspects of PR's account she agreed with and which she did not.

- [18] According to PR, he and NS usually had sex 'at every opportunity' they got, since mid-October 2017 when they met at a workplace function. According to PR they were having sex two to four times every day during working hours, which they called their 'council spin'. He testified that they previously had intercourse about four or five times in the mens' toilet where the incident took place, but this was not put to NS. PR said that after having sex on 5 January 2018, she asked him when he was leaving his girlfriend who was the mother of his two children. When he told her he would never leave his girlfriend they started arguing. He claimed NS never said anything during their encounter except to say she was about 'to come', a claim which was not put to NS under cross-examination. In his brief written statement made after being released by police he did not mention anything she had said after they had sex that day.
- [19] Although nobody at the depot saw them when they were engaged in sexual activity, PR claimed everyone knew because NS would 'brag' about it and tell other female EPW works that they should not talk to PR and to 'stay away from him' because he was hers. NS claimed that during their relationship, their consensual sexual encounters only took place outside working hours, apart from the very first time they had sex, which took place in PR's car at the depot premises in October 2017. The incident on 5 January was only the second time sex had taken place between them in the workplace. Although people at work were under the impression the two of them were dating, that was not actually the case. She admitted indicating to other female colleagues that they should 'stay away from' PR.
- [20] NS testified that a female friend at work ('DG') was involved with another male colleague ('LX'). When PR dropped NS at home on Friday 29 December 2017, she told him she was going to see DG and LX. His response was that she could not go, but she reminded him she was not his

girlfriend. On Saturday night she spent time together with DG and LX, with an expectation she and DG would go out later that night. However, DG eventually decided not to go out, and NS went into town on her own. She only got home on Monday 2 January and was hungover and suffering from back pain. Her doctor gave her an injection and booked her off work for three days. The day before she returned to work, she was phoned by another EPWP worker who asked her if it was true she had sex with LX. NS was shocked and asked where the story emanated from. It was reported to her that DG had told PR that NS and LX had sex during the time DG was washing her child in the shower on the previous Saturday night when NS had been visiting them. NS testified that when DG had been washing her child, she and LX had simply been playing darts with another male friend of the couple who was present. NS said she received a similar call from another colleague trying to confirm the rumour.

- [21] When NS returned to work on 5 January she greeted PR and he just gave her a dirty look, and everyone was looking at her in a 'weird' way because of the rumour, though at first she did not realise that was the reason. When she met PR she asked to see his tattoo, which she had previously treated with lotion, but he just refused to let her.
- [22] NS agreed that when PR had returned to the depot later that day, she had walked behind him up the stairs to the floor where the men's mess room was located, not because she was following him but because she was going to finish cleaning on that floor. She had no intention of even speaking to him because he had been angry earlier when she had asked to see his tattoo, though she did not know why he was angry. She denied that the two of them went to check if the floor was occupied by anyone else or that they spoke about having sex. Floris confirmed that NS was supposed to clean the passageways upstairs but should not have gone up when any male staff were there.
- [23] Upstairs NS said she found PR near the stairway standing next to a pillar. The pillar was adjacent to a mens' toilet and shower cubicle. As she turned into the hallway to go and clean he asked her where she had been the previous three days. She told him that she had been booked off sick and

had brought a medical certificate to work. He accused her of lying and of being with LX. She replied he could believe what he wanted but she knew where she was.

- [24] According to NS, PR then grabbed her by the wrist and said he wanted to 'feel' when she last had sex. Despite her protests to leave her alone and to stop hurting her, she claimed he pulled her into the bathroom, shutting the door behind them. She stated that he held her arms in a 'lock' and PR put his hands in her pants and repeated his remark, after which he unbuttoned her trousers and had intercourse with her. When he had finished he pulled up his trousers, picked up his lighter and looking at her said "*Jy is vuil*"¹, after which he left the bathroom. At the start of this part of her narrative, the arbitrator, asked if she had been 'playing hard to get' when she said she was unwilling to have sex on that occasion, to which she immediately responded she was not 'playing' any sport. She did not want to have sex with him, because he was cross with her and had not said why. She described him as having '*bollewange*' that day. When the arbitrator asked why she did not make more effort to get out of the bathroom, she said she tried but she was in shock and her 'body just went pfft (make a sound)', as the transcript records her answer. PR denied saying she was 'vuil' and denied being interested in who else she slept with because he had a fiancé and two children and NS was just 'a fling'. It was not his business who else she was involved with.
- [25] She wrapped her head scarf around her lower body and followed him to his locker room and asked him "[P], what was that about?". He just repeated his insult, pushed her away, and told her to get away from him. She then sent a WhatsApp message to the senior administration clerk at the depot Ms H Jacobs ('Jacobs') and asked her for the supervisor's phone number. She also asked if Jacobs was alone in her office because she needed to come and speak to her. She told Jacobs what happened and that she wanted to go to the police station to 'make a case'. Jacobs phoned the superintendent and told him to come immediately.

¹ 'You are dirty'.

- [26] Jacobs confirmed this and testified that NS had been crying and was visibly upset when she arrived at her office. To Jacobs, NS seemed traumatised. When she asked her what had happened, NS related in broad terms what happened and that PR had grabbed her and pushed her into the mens' toilet section where he had forced himself on her. She was shocked by NS's account and asked the depot superintendent, Mr S Floris ['Floris'], to come to the depot immediately. When he arrived, NS repeated her version, and the superintendent instructed Jacobs to take her to hospital.
- [27] At that stage, NS still had her scarf around her lower body. She claimed that her pants were around her knees because they were wet and she did not want to pull them up 'because of the semens' (*sic*). Before going to see Jacobs, she made sure that there was no one about and kept her scarf around her. Jacobs confirmed that NS had her scarf around her waist and NS wanted her to look at her pants, which were apparently wet with semen, but Jacobs declined saying she was not qualified to do so, though she could see they were wet. She said NS's pants were zipped up but unbuttoned at the top. According to NS she was still in Jacobs's office when Floris arrived and she did not say anything when he questioned her but he gave her a piece of paper on which she wrote down what had happened. Floris also described NS being in a distressed state when he arrived and he asked her to write down what happened because she was stuttering and he couldn't make sense of her story. Jacobs said that NS had come up to her office after the tea break, which started around the time she got NS's Whatsapp message. Floris testified that NS said he had tea before going to see Jacobs, which he found strange given her state of mind.
- [28] Both Floris and Jacobs were aware that NS and PR were in a relationship. Jacobs said he had told PR the previous December to 'leave' NS, but he could only speak to him, he could not instruct him what to do. Although it was misconduct to conduct sexual relationships at work, what happened outside of working hours was not his business.
- [29] After Floris had seen NS, she was taken for a medical examination at Victoria Hospital Rape Crisis Centre and the incident was reported to a detective. NS testified she was in a suicidal mood at the time and was

booked off by a doctor for a week. When the arbitrator asked if NS had recovered, she responded that she had still not recovered. The arbitrator commented that he accepted that and observed that it was a journey of recovery to which NS replied that it was a 'struggle'. Continuing the arbitrator observed that journeys were always a struggle and that life was not an easy journey, but it was important for her to 'hang in there'. He then returned to questioning her, asking if she had returned to work.

- [30] After the arbitrator finished questioning NS, the hearing adjourned and when it reconvened he invited the parties' representatives to question and cross-examine her. When it re-convened a month later, before allowing the representatives to question NS, the arbitrator said he had been thinking about her evidence and felt he had to ask if what had transpired was not just an occasion when they had engaged in 'rough sex' as some couples did. She said they had never had sex like that before and she had asked him to stop. PR claimed they always had sex that way when they were in the toilet so someone could 'keep a lookout' for other people, but NS was not challenged about her version that it was unusual when she testified. The city's representative declined to ask additional questions and the union representative proceeded to cross-examine NS but acknowledged that he understood it was difficult for her to testify in front of four males in the arbitration.
- [31] The union official's cross-examination was thorough and he had no objections to any of the arbitrator's questioning of NS. During cross-examination, she readily agreed that in November 2017 she and PR had a conversation discussion about the possibility of him leaving his girlfriend and them living together. He said she must wait till his son had his first birthday in July 2018. However, she denied ever asking him to speed matters up, but admitted she would ask him why he kept sleeping with her if he was still with his girlfriend.
- [32] The proceedings broke for an interval after the cross-examination. On resumption the arbitrator raised the fact that NS had approached him during the smoke break and told him that when the hearing had adjourned on the previous occasion, PR had touched his crotch and said he wanted to have

sex with her and he would take her home. The arbitrator asked NS to elaborate on what she had related to him, which she did. The arbitrator clearly wanted to put the issue on the table before all the parties at the earliest opportunity. It was evident from the record that NS had not confided in Jonker before she confided in the arbitrator. Following this revelation, Pakkies had to take instructions from PR. It should be mentioned that Jacobs could not confirm what PR had done when she was outside facing NS and PR was standing behind her, but when she turned around to face him she saw PR was trying to make eye contact with NS. She told him to leave NS alone. As they were leaving the arbitration premises that day, he gesture to NS to come over to him and he would give her a lift, but she told NS to ignore him. Jacobs also related that NS had told him about PR's gesturing to his crotch while they were on their way back from the arbitration venue. When PR testified he denied all the accounts of NS and Jacobs about his alleged interactions with NS at the arbitration venue. He contended it would have been improbable he would have behaved this way towards someone who had cost him his job and in the presence of others.

- [33] After consulting with PR, Pakkies asked the arbitrator if he was not 'conflicted' because of NS confiding in him, without first approaching Jonker first. The arbitrator readily agreed, she ought to have told Jonker so he could have raised it as a preliminary issue before proceedings began. He also mused if it was not in breach of his own frequent warnings to NS not to speak to anyone about her testimony during breaks in the proceedings. Pakkies said he would leave it in the arbitrator's hands and an open discussion continued between the arbitrator and the representatives.
- [34] The arbitrator expressed the view that even though it was irregular of NS to have raised the issue with him, the way she did, he did not think that it was the basis for creating a perception of bias on his part. Importantly, Pakkies agreed that the irregularity was not of the arbitrator's making and concluded his input on the matter by stating that "So I agree with you Mr Commissioner, and at that stage I don't feel like you're conflicted, in in terms of ... (indistinct) I agree ... (indistinct) objectively and impartially, so let's follow then suit in terms of your guidance ... (indistinct – voice drops)". The arbitrator then proceeded to ask NS to testify on what she told him.

Assessment of the grounds of review

Evaluation of evidence

- [35] In rejecting PR's version of 'the scorned woman', the arbitrator's assessment was that it was unlikely NS would have consented to have sex with PR on the occasion in question if she wanted a firm commitment from him there and then that he would leave his fiancé. This was a plausible inference he could have drawn. Equally plausibly, he might have concluded that she actually did raise the issue only after their sexual encounter that day. There had been discussions about him leaving his fiancé and NS had told her he was no longer with her or that she now had a boyfriend. In 2017, he had indicated to her that they could move in together after his youngest son had his first birthday in July 2018. On the other hand, she listened to her friends who told her PR was still living with his fiancé. Though somewhat doubtful about his sincerity she gave the impression that she believed his promises. Nonetheless she wondered why he kept having sex with her if he was remaining with his girlfriend. NS was quite candid that she was engaged in a consensual sexual relationship with PR and hoped it might develop but had her doubts about the things he said indicating his relationship with his fiancé was coming to an end.
- [36] Nevertheless, his rejection of the 'scorned woman' explanation was only one aspect the arbitrator considered in deciding if the sexual encounter that day had been voluntary. He also took account of the fact that there was no evidence NS had actually demanded he must leave his fiancé if their relationship was to continue. He considered the surrounding circumstances too. Part of those surrounding circumstances were NS's unchallenged evidence that rumours had been circulating that she had slept with another colleague since she last saw PR. Further when she first saw him that day and wanted to look at his tattoo he brushed her off and was unfriendly towards her. It was only when PR testified that he claimed he did not let her inspect his tattoo because he was in a rush to get on the depot vehicle. PR simply denied personal knowledge of the rumours and claimed he was indifferent to the question of whom else she slept with, but his manner towards her that day, was more consistent with him being displeased with

her because he had heard the rumours. NS's testimony about his offhand manner towards her that morning was not disputed in cross-examination, which lends credence to the inference that something was already amiss between them from the start that morning. Her version of not wanting to engage with him while he seemed to be in an angry mood, and that he confronted her when they were alone about the very subject of the circulating rumours, the existence of which he could not dispute, is consistent with their first interaction that day. NS's testimony was that they never had a consensual encounter at work except on one occasion in PR's car. She was only told that he claimed they had sex on various occasions at work. It was not put to her that they had sex a number of times in the toilet, nor was it put to her that they normally had sex at work in the same physical position they did on 5 January, in order to be minimise the chances of being surprised by other people. There was no dispute that NS contacted Jacobs as soon as possible after the incident and she appeared in an obviously traumatised state to both Jacobs and Floris. There was nothing to suggest she had built up resentment towards him after a number of prior occasions on which NS had pressed PR about leaving his fiancé, which culminated in a decisive rebuff on 5 January, causing her to instantly embark on an extremely vengeful path. The tenor of her evidence was that she enjoyed their sexual relationship and did not want others to interfere with it.

- [37] It is true that there was no evidence that PR had been violent with NS before. Indeed, her own evidence was that his actions had shocked her, in part, because it was not something she had expected from him.
- [38] What cannot be said is that the arbitrator's interpretation of the evidence before him, is not a plausible one, nor indeed that it is not a reasonably probable one, even if another interpretation might have been possible. In review proceedings, a court is not required to determine which interpretation is most probably correct, where the review primarily concerns the assessment of evidence.
- [39] In so far as it is claimed the arbitrator failed to take account of inconsistencies in some features of NS's evidence, the material aspects of

her evidence were coherent, and there was nothing to suggest her version had changed. The fact her brief written statement provided to Floris immediately after the incident was not as detailed as her full account of the event is not evidence of inconsistency. Similarly, discrepancies in how low her trousers were around her legs or the fact that she said she said nothing to Floris whereas he said she was rambling incoherently do not detract from key details she gave a consistent account of.

- [40] In relation to the arbitrator's handling of the evidence, I am satisfied his findings were tenable ones on what was before him, and not ones that no reasonable arbitrator could have reached.

Arbitrator's conduct of the proceedings.

- [41] It is true the arbitrator adopted a robust and interrogatory approach to the proceedings. It is not true that he led any witness in the sense of suggesting answers to them, except to the extent he was following up on their prior testimony. He did play an extensive role in questioning all witnesses, but always gave both representatives a proper opportunity to question the witnesses, which they did. At no stage did either of the representatives object to his conduct. From the record it is apparent that both representatives were clearly not novices who would have shrunk from challenging the arbitrator if they felt their case was being compromised in any way by his approach.
- [42] At times he did try to put NS at ease, which is understandable given the nature of the case, but equally he did not spare her difficult questions in testing her version.
- [43] NS's disclosure to the arbitrator of what she claimed transpired between PR and herself at the arbitration venue, was a difficult issue for the arbitrator to handle, but not because he had done anything wrong. As soon as the hearing reconvened, he reported what NS had told him on the record and asked her to confirm what she had told him. He clearly felt awkward that NS had raised the issue with him outside of the hearing itself. He held an open discussion with the representatives on whether it impacted on his conduct of hearing. They also had an opportunity to question NS about her claims.

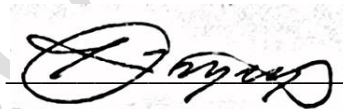
Importantly, PR's representative was satisfied that the arbitrator had not been compromised by the incident and did not ask for his recusal. This concession was rightly made because the arbitrator's handling of the unexpected incident could not be faulted.

[44] In conclusion, I am satisfied that the arbitrator's robust approach did not compromise either of the parties' right to a fair hearing.

Order

[1] The review application is dismissed.

[2] No order is made as to costs.



Lagrange J
Judge of the Labour Court of South Africa
(In chambers)

**Representatives (no
appearances)**

For the Applicant

N Geldenhys obo IMATU

For the First Respondent

L Witten from ZS Inc Attorneys