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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 447/2017

In the matter between:

Monde Chris SATANI **Applicant**

and

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

EDUCATION LABOUR RELATIONS COUNCIL **Second Respondent**

PIERRE VAN TONDER N.O. **Third Respondent**

Heard: 26 February 2019
Delivered: 6 March 2019
Summary: Review – unfair labour practice – LRA ss 145 and 186(2)(b).
Award not unreasonable.

JUDGMENT

STEENKAMP J

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Introduction

[1] The applicant, Mr Satani, is a teacher. As long ago as 2012, he was disciplined for making inappropriate remarks of a sexually suggestive nature to a learner, a girl in Grade 6 at Bardale Primary School in Mfuleni (Blue Downs), Cape Town. He was given a final written warning and had to pay a fine of R6000, 00, payable over 12 months. He was unhappy. He referred an unfair labour practice dispute in terms of s 186(2)(b) of the LRA[1] to the Education Labour Relations Council[2]. A panellist, Ms Bella Goldman, found that the Department of Education of the Western Cape[3] had not committed an unfair labour practice. He took the award on review. This Court upheld the award[4]. He appealed. The Labour Appeal Court overturned the judgment on the basis that Ms Goldman had entered the arena and deprived the applicant of a fair hearing[5]. It held that the award must be reviewed and set aside because the scope, nature and effect of the arbitrator's interventions and dominance were such that she failed to afford the parties a fair hearing. The outcome, it held, was irrelevant. It remitted the dispute to arbitration. The second arbitrator, Mr Pierre van Tonder[6], again found that there was no unfair labour practice. Mr Satani now seeks to have the second arbitration award reviewed and set aside. Hence the delay of seven years.

Background facts

[2] The applicant was issued with a notice to answer the following charges:

> 'Charge 1: It is alleged that you are guilty of misconduct in terms of section 18 (1) g of the Employment of the Educators Act 76 of 1998 (the Act) in that during the third term of 2012, you behaved badly in an improper and

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[1] Labour Relations Act 66 of 1995.

[2] The second respondent.

[3] The first respondent.

[4] *Satani v Educational Labour Relations Council* [2015] ZALCCT 13 (10 February 2015).

[5] *Satani v Department of Education, Western Cape* [2016] ZALAC 38; (2016) 37 *ILJ* 2298 (LAC) (13 June 2016).

[6] The third respondent.

unbecoming manner towards learner A, a learner at Bardale Primary School:

- By asking her for her cell phone number and/or
- By asking if you could meet and talk to her and/or
- By suggesting that she meets you in a forest or bush and/or
- By asking her if she had a boyfriend.'

[3] A second charge was dropped prior to the disciplinary hearing.

[4] The learner[7] was 13 years old but had only progressed to Grade 6 at the time of the incident. She was among other learners who did poorly in Mathematics and English. During September or October 2012, the applicant who was the class teacher (but not the subject teacher for these subjects) called them to his desk to discuss their marks. According to the learner, he called them individually to his desk. His version was that he called them as a group to his desk. According to the learner, Mr Satani asked her if she knew that she was beautiful, and asked for her cellular phone numbers. She claimed that the next day he called her again to his desk and asked her for her cellular phone numbers again. He also asked her if she had a boyfriend, if she went out walking at night and if she would meet him in the bush. She refused to give him her cellular phone numbers. On both occasions, the incident happened in class where there were other learners.

[5] The learner reported the incident to another learner as well as to her aunt with whom she was staying. The aunt in turn reported what she was told to the school principal. The latter called all the affected parties to her office. The applicant denied the incident. He mentioned that he only asked the learner for her mother's telephone number in order to discuss poor marks in the affected subjects. The learner's aunt, the school principal and another learner testified about the reports she made to them respectively. There were however, some discrepancies on the actual report to them. The applicant, in addition to his evidence called two other learners as

[7] Referred to as "learner A" to protect her identity.

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witnesses. The tenor of their testimony was that the appellant called the leaners as a group to his desk and not individually.

[6] The first arbitrator concluded that the evidence of the appellant and his witnesses was not credible as opposed to that of the learner and her witnesses, that the appellant was guilty of the misconduct complaint and that the sanction imposed did not constitute an unfair labour practice in terms of s 186(2)(b) of the LRA.

The second arbitration award

[7] At the second arbitration, learner A again testified. Another learner, referred to as learner G, was called as a witness by the applicant, who also testified. He also called the deputy principal, Mr Andile Mangali. Apart from the complainant (learner A), the Department called the principal, Ms Mangcoto, as a witness.

[8] The applicant testified that 15 learners in the class were performing poorly. There was a "phase meeting" on 9 October 2012 where it was decided to call the parents of those learners in. The school has "learner profiles" that should include their parents' phone numbers, but sometimes they are incomplete or outdated. He called the learners to his desk (in a group) to ask them for their parents' phone numbers. Learner A did not provide a phone number. At the next phase meeting Mr Mangali, the deputy principal, said that he would write a letter for the class teacher to give to each learner. A copy of such a letter, dated 18 October 2012 and written in isiXhosa, reads (translated into English):

> "Dear parent, you are requested to come to school tomorrow morning at 8 am regarding your child."

[9] Satani testified that he gave copies of these letters to the pupils whose parents' phone numbers were outstanding. Learner A was one of them. One 30 October there was another phase meeting. Mr Mangali told the teachers to call all "those learners" to sign next to their names on a sheet containing "pre-progression information". He called those learners as a group again. They signed the form, including learner A and learner G. He denied the allegations in the "charge sheet". He said that he could not

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have a private conversation with a learner at his desk due to the classroom layout and the close proximity of the desks.

[10] The other learner, G, testified that Satani called the learners to his desk as a group. He also asked them to sign the "pre-progression" sheet on another occasion. On that occasion he called them to his desk one by one, and not as a group.

[11] The deputy principal, Mr Mangali, testified that a standard letter is sent out every year to the parents of poorly performing learners. The arbitrator recorded:

> "Despite very leading questions by Mr Bosch, I never heard the witness saying that he did tell applicant and other teachers in 2012 or any other time to ask learners for the phone numbers of their parents."

[12] Mr Mangali did recall signing the letter of 12 October 2012 requesting parents to come to school. The way in which to engage parents was normally through written communication.

[13] The complainant, learner A, testified that Satani had called the poorly performing learners to his desk one by one. He asked her if she knew she was beautiful. He also asked her if she has boyfriends and if she goes out at night. He asked her for her cell phone number. She told him she only knew her mother's number. He suggested that they meet in the bush. She laughed. He told her not to make a noise. He then told her not to tell anyone else what they had spoken about but to get him her cell phone number.

[14] The following day, Satani again asked her for her phone number. She said that she had forgotten. She reported the incident to her mother[8] when she got home. Her mother reported it to the principal. The principal called her, her mother, another learner (also a complainant), and Satani in. She recalled that Satani showed her a document. She thought it was a class list. He had a ruler with which he covered the names of other learners. He did not call them as a group. And she could not recall him giving her a letter to give to her parents.

[8] It appears that she referred to her aunt, who acted *in loco parentis*, as her mother.

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[15] Under cross-examination, Mr *Bosch* – who represented the applicant at arbitration and in this application – pointed out to the complainant that, at the previous arbitration five years earlier, she had acknowledged that the applicant had given her a letter to give to her parents. She responded that that was indeed correct and that she was confused because it was such a long time ago.

[16] The principal, Ms Mangcoto, testified that the complainant's mother reported the incident to her. When she called those involved to her office, Satani denied the allegations.

The arbitration award

[17] The arbitrator's award spans 58 pages. He starts off by setting out the well-known technique for resolving factual disputes enunciated by Nienaber JA in *SFW*[9]*.* He also noted that the onus in terms of s 186(1)(a) of the LRA rests on the applicant. And he took the single witness rule into account. He noted that "even if the rule is not applicable in civil proceedings or arbitration proceedings, a presiding officer or arbitrator must nevertheless be satisfied that the evidence of a single witness is reliable and trustworthy before relying on it".[10]

[18] The arbitrator carefully considered the evidence before him. He disagreed with Mr *Bosch* that the applicant was more credible and reliable than the complainant, or that his version was more probable than hers.

[19] The arbitrator summarised those inconsistencies that did appear from the complainant's evidence when compared to her evidence in the previous arbitration five years earlier. He found that "not every error made by a witness affects her credibility"[11]. And he was satisfied that none of the contradictions and inconsistencies had negatively impacted the credibility of the Department's two witnesses.

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[9] *Stellenbosch Farmers' Winery Group Ltd v Martell et cie* 2003 (1) SA 11 (SCA) 14 I.

[10] Referring to *Ngozo v RAF* [2013] ZAGPJHC 390 at par [68] and *Daniels v General Accident Ins Co Ltd* 1992 (1) SA 757 (C) at 759 I – 760 B.

[11] Referring to *S v Oosthuizen* 1982 (3) SA 571 (T); Nicholas "Credibility of witnesses" 1996 *SALJ* Vol 102 at 32; *Kok v CCMA* [2015] ZALCJHB 45 par [34] ff.

[20] Also, having carefully assessed the nature of the aspects in the evidence of the Department's witnesses which its representative did not put to the applicant, the arbitrator was satisfied that although he could not take these aspects into account against the applicant (as he was not given the opportunity to respond to them), they did not negatively impact on the credibility of its witnesses either. Many of them were peripheral.

[21] In assessing the evidence of the complainant, the arbitrator also took into account that her evidence was corroborated on a material aspect by that of the applicant's own witness, learner G. Whilst Satani insisted that he invariably called learners to his desk in a group, and never individually, G testified that, when Satani called them to sign the sheet, he did so individually and not in a group.

[22] In assessing the applicant's evidence, the arbitrator took into account that his version was in certain respects not corroborated by his own witnesses. One of those was the issue of calling learners to his desk as a group, and never individually. His other witness, Mr Mangali, did not really assist his case, despite leading questions being put to him by counsel.

[23] Having carefully assessed the evidence and probabilities, the arbitrator found that the applicant's version that he called learners to his desk was improbable. And he found that there was no plausible reason why the complainant would have fabricated her evidence. By the time of the second arbitration she was 18 years old, had long left Bardale Primary School, was living in the Eastern Cape and had nothing to do with Bardale or Satani. Even when she reported the incident in 2012 she had no ulterior motive to fabricate it.

[24] After evaluating all the evidence, the arbitrator took a step back to consider "the entire mosaic of evidence" before him.[12] He was unable to find that the applicant was telling the truth and the complainant was lying. He was satisfied that the probabilities did not favour his version and that he did commit the misconduct complained of.

[12] Applying the dictum, in the context of criminal law, in *S v Hadebe* 1998 (1) SA 422 (SCA) 426 e-h; and *S v Govender* [2004] 2 All SA 259 (SCA).

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[25] Turning to the sanction of a final written warning valid for 6 months and a fine of R6000 payable over 12 months, the arbitrator commented that the applicant's counsel, Mr *Bosch,* was wise in not challenging the fairness of the sanction. The sanction was not too harsh.

[26] In conclusion, the arbitrator found that there was no unfair labour practice.

Review grounds

[27] Mr *Bosch* submitted that the arbitrator's award was not one that a reasonable decision-maker could reach[13] for the following reasons:

27.1 There were contradictions and inconsistencies in the evidence of the Department's witnesses.

27.2 He failed to properly evaluate the evidence and to come to a reasonable finding.

27.3 He should have applied the cautionary rule to the complainant's evidence.

27.4 There were other learners who could have been called to testify. That should lead to an adverse inference against the complainant.

27.5 The complainant should have called other learners as witnesses.

27.6 The failure to do so relates to uncertainty on the complainant's part.

27.7 The arbitrator did not properly consider the layout of the classroom.

27.8 The complainant was not a good witness.

27.9 Learner G corroborated the applicant's evidence in all material respects.

27.10 Ms Mangcoto advised teachers not to deal with pupils one on one.

27.11 He should have attached more weight to Satani's evidence.

27.12 He did not make a proper finding on the two mutually destructive versions.

27.13 His own experience was irrelevant.

[13] i.e. the well-known test articulated in *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC) and *Herholdt v Nedbank Ltd* (2013) 34 *ILJ* 2795 (SCA).

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Evaluation / Analysis

[28] Although many of the review grounds are more akin to an appeal, I shall deal with each of the broad grounds in turn.

Contradictions and inconsistencies

[29] The arbitrator accepted that there were contradictions and inconsistencies in the evidence of the Department's two witnesses. And as he stated, referring to the relevant case law, "not every error made by a witness affects her credibility". He evaluated the evidence carefully and weighed it up. He was satisfied that none of the contradictions and inconsistencies had negatively impacted on the Department's two witnesses. In short, he did exactly what a trier of fact should do. His conclusion is one that another reasonable decision maker could reach, even though someone else may have found differently. This is a review, not an appeal. His conduct does not amount to misconduct and is not open to review.

Evaluation of evidence in toto

[30] The arbitrator carefully analysed and dealt with the evidence before him. The test in *Sidumo*[14] was formulated thus:

> "One of the duties of a commissioner in conducting an arbitration is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason. In my judgment where a commissioner fails to apply his or her mind to a matter which is material to the determination of the fairness of the sanction, it can hardly be said that there was a fair trial of issues".

[31] In this case, the arbitrator applied his mind to the material facts. And he came to a conclusion that another arbitrator could (not would) reach. This broad review ground must also fail.

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[14] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) at paras 266-267.

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Cautionary rule: single witness

[32] The arbitrator was alive to the fact that the complainant was a single witness. He also took into account that he was sitting in an arbitration, dealing with the matter with the minimum of legal formalities[15], and not in a criminal trial. He took the single witness rule into account. And, having regard to the leading cases, he noted that "even if the rule is not applicable in civil proceedings or arbitration proceedings, a presiding officer or arbitrator must nevertheless be satisfied that the evidence of a single witness is reliable and trustworthy before relying on it". He was so satisfied. That is the analysis that can be expected of an arbitrator. And his conclusion is a reasoned and a reasonable one.

Other learners

[33] It may well be that the Department could have called other learners to testify; but it would have been nigh impossible. This arbitration took place more than five years after the original incident. The learners were then in Grade 6. By the time of the arbitration, all of them had left Bardale Primary School; in the case of learner A, for example, she was now 18 years old and living far away in the Eastern Cape. This review ground smack of grasping at straws.

Classroom layout

[34] The arbitrator specifically dealt with the classroom layout and recorded the applicant's allegation that it would not have been possible to have a private conversation with a learner without others overhearing it. But having considered all the facts ("the mosaic of the evidence", as he put it) he concluded on the probabilities that the complainant's evidence was more probable than Satani's. It is a conclusion that another arbitrator could reach.

[15] LRA s 138.

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Learner G's evidence

[35] The arbitrator carefully considered and evaluated G's evidence. One aspect of that evidence is that she contradicted Satani, who called her as a witness, in a material respect: she testified that he did, on occasion, call learners to his desk one by one. It is a proper and reasoned analysis and not reviewable.

Mangcoto's evidence

[36] The principal, Ms Mangcoto, testified that she had advised teachers not to engage with pupils individually. But whether that was the principal's advice or not, the arbitrator found on the probabilities that Satani did so. That is a finding that another arbitrator could reach on the evidence.

Own experience'

[37] In my view, the only review ground that has some merit is the fact that the arbitrator brought his own experience to bear in the matter. That was not a proper way to deal with the evidence and is open to criticism. But it does not vitiate the award as a whole. As the Constitutional Court stated in *Herholdt*[16]:

> "'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."

[38] In this case, the arbitrator arrived at a reasonable result on the evidence before him. The award is not open to review, as opposed to appeal.

[16] *Herholdt v Nedbank Ltd* 2013 (6) SA 224 (SCA); (2013) 34 *ILJ* 2795 (SCA) at par 25.

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Conclusion and costs

[39] The arbitrator arrived at a conclusion on the evidence before him that another arbitrator could reach. The award is not reviewable.

[40] This matter has dragged on for seven years at considerable cost to the fiscus. It goes against the very aim of the LRA, namely expeditious dispute resolution. It should, at the very latest, have stopped after the second arbitration. Yet Mr Satani chose to continue litigating, attorney and counsel at his side, even in the arbitration process (which is meant to be quick and informal, and usually without legal representation). The costs far exceed the R6000 fine that he could pay off over a year, and the final written warning would have lapsed more than six years ago. Not only was he ultimately unsuccessful, I can see no reason in fairness while the Department should have continued to pay his costs after the second arbitration award – a lengthy, well considered and well-reasoned one – had been handed down. Taking into account the considerations of both law and fairness[17], the unsuccessful applicant should pay the costs of this application.

Order

The application for review is dismissed with costs.

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Anton J Steenkamp

Judge of the Labour Court of South Africa

[17] LRA s 162.

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APPEARANCES

APPLICANT:	Craig Bosch Instructed by Funeka attorneys.
FIRST RESPONDENT:	André Coetzee Instructed by the State Attorney.

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