IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA 37/2012

In the matter between:

MEC FOR EDUCATION (NORTH WEST PROVINCIAL GOVERNMENT) **Appellant**

and

J M K MAKUBALO **Respondent**

Heard: **23 November 2016**

Delivered: **3 February 2017**

Summary: Respondent, a school principal, dismissed for the sexual assault of fellow teacher and financial mismanagement of school. At first arbitration hearing respondent's dismissal found substantively unfair and respondent retrospectively reinstated into his employment with the appellant. On review Labour Court set aside arbitration award and remitted matter to Education Labour Relations Council for hearing *de novo* before another arbitrator. Following second arbitration hearing, respondent's dismissal found substantively fair. Respondent sought review of the second arbitration award. On review - Labour Court set aside arbitration award and substituted it with a finding that his dismissal was substantively unfair with respondent's retrospective reinstatement ordered. On appeal - appeal upheld. Orders of Labour Court set aside and substituted with order that review application

dismissed with no order as to costs.

Coram: Waglay JP, Ndlovu JA *et* Savage AJA

JUDGMENT

SAVAGE AJA:

Introduction

[1] This is an appeal, with the leave of the Court *a quo*, against the judgment of the Labour Court (Francis J) in which an arbitration award issued by the Education Labour Relations Council (ELRC) on 10 September 2009 was set aside on review and the respondent, Mr J M K Makubalo, retrospectively reinstated into his position as school principal with full back pay and costs. The respondent initially instituted a cross-appeal against the judgment but subsequent to the set down of the appeal in November 2015, withdrew his cross-appeal.

[2] The respondent commenced teaching in 1983 and was appointed as principal of Bafokeng High School on 1 May 1998. On 27 March 2003, he was dismissed by the Department of Education in the North West province following a disciplinary hearing at which he was found to have contravened both s17(1)(b) of the Employment of Educators Act 77 of 1998 (EEA) in that he had sexually assaulted a fellow teacher, Ms Dora Monegi; and s18(1)(b) in that he had mismanaged the finances of the school. Aggrieved with his dismissal, the respondent referred a dispute to the ELRC. On 26 July 2005, his dismissal was found by an arbitrator of the ELRC to be unfair and he was reinstated into his employment with the appellant. The appellant successfully sought the review and setting aside of the first arbitration award in the Labour Court and the matter was referred back to the ELRC for a hearing *de novo* before another arbitrator.

[3] The matter was initially set down for a *de novo* hearing on 12 July 2006. After the respondent had failed to attend the arbitration hearing, the matter was

dismissed. In due course, the decision to dismiss the dispute was rescinded and the matter proceeded before the arbitrator who found the dismissal of the respondent to have been substantively fair. The arbitrator, having had regard to the evidence before him, found that the respondent had sexually assaulted Ms Monegi during visits to her home in 1998 and 2000. The evidence showed that at the end of the year party in December 1998, the respondent had held Ms Monegi by the cheeks, kissed her and touched her genitals in the lounge in front of other guests. In the 2000 incident, the respondent was found to have "*grabbed Monegi around her buttocks and attempted to drag her out of the kitchen*". The arbitrator found that in conducting himself in the manner he had, the respondent had abused his position of power as principal over Ms Monegi as his subordinate.

[4] Turning to the complaint of financial mismanagement, the arbitrator accepted the "*clear unwavering testimony*" that the respondent had given unauthorised loans to staff and that he had committed serious irregularities in the manner he had handled school funds. The arbitrator found that the disciplinary rules breached were valid and reasonable, were known by the respondent and were consistently applied by the appellant.

[5] Given that the respondent's serious misconduct had irretrievably severed the trust relationship, the sanction of dismissal was determined to be appropriate.

Judgment of Labour Court

[6] Aggrieved with his dismissal and the outcome of the arbitration proceedings, the respondent applied for the review and setting aside of the award in the Labour Court. While noting that there were "*some deficiencies in the* [arbitration] *record*", the Court correctly took a practical view that, for review purposes, the matter could be dealt with in spite of these deficiencies. The award was found to have been "*well reasoned*" with it "*clear from the transcript of proceedings that the* [respondent] *had sexually assaulted Monegi*". The Court found however that the arbitrator had failed to deal with the common cause facts which included "*the settlement reached before the Queen Mother*" on 11 June 2002 when, according to Ms Monegi, the Queen

asked the respondent if the allegations against him were true, and he acknowledged his wrongdoing and apologised. The respondent's version at arbitration was that he had denied the allegations in the meeting with the Queen Mother but told Ms Monegi to "*please forgive me if I have wronged you in the past and I forgive you if you have wronged me in the past*". In the pre-arbitration minute, the parties recorded that the "*the allegations of sexual assault or harassment were discussed and amicably resolved*". This led the Labour Court to find that in light of the parties exchanging apologies and agreeing that the matter had been amicably resolved, the arbitrator "*should have found that the matter was settled between Monegi and the* [respondent]".

[7] In addition, the Labour Court found that the arbitrator had not applied his mind to the issue of inconsistency when the parties had agreed in the pre-arbitration minute that no disciplinary steps were taken against a teacher by the name of Mr Khutswane following allegations that he had sexually assaulted female learners in 1996. The Court took the view that the arbitrator "*could not go beyond the agreed facts on the issue of inconsistency as agreed in the pre-arbitration minute*". In doing so, the arbitrator was found to have exceeded his powers when he should have found that the appellant had acted in an inconsistent manner. The Court found that the arbitrator should have set aside the Department's findings on the basis that the matter was settled and given the lack of consistency, on the part of the Department, in applying discipline among its employees.

[8] The Labour Court took no issue with the arbitrator's finding that the respondent had acted in contravention of s18(1)(b) of the EEA with "*clear evidence of the existence of financial mismanagement at the school*". This misconduct had however not been shown to be of a sufficiently serious nature to warrant dismissal. The Labour Court, therefore, ordered that the respondent be retrospectively reinstated into his position with full back pay and costs.

Condonation

[9] The appellant filed an incomplete record in the appeal to this Court against the judgment and orders of the Labour Court and on 3 November 2015, the appeal was, for this reason, struck from the roll. Thereafter the respondent withdrew his cross-appeal. Following settlement discussions between the parties, the appellant's attorneys sought to obtain a copy of the record of the arbitration proceedings, which was missing from the Labour Court's file; and was ultimately provided by the respondent's attorneys. The appellant seeks that this Court condones the appellant's delay of more than 10 months in filing a complete appeal record. The respondent opposes the application for condonation on the basis that an extensive period of time elapsed before the record was filed, with portions of the delay not explained by the appellant.

[10] Rule 5(8) of the Labour Appeal Court Rules requires that the record in an appeal be delivered within 60 days of the date of the order granting leave to appeal. Given that both an appeal and a cross-appeal were initially before this Court, both parties were obliged to ensure that the record was filed in the appropriate manner and in accordance with provisions of Rule 5(8). There is no dispute that the first record filed was incomplete. It follows that with no proper appeal record before the Court, the appeal in terms of Rule 5(17) is deemed to have been withdrawn unless a consent to extension of time has been granted by the respondent and, if refused, a substantive application is made to the Judge President in chambers for the extension of time. Following the withdrawal of the cross-appeal, no consent or permission was granted either by the respondent or the Judge President to extend the period within which the record could be filed.

[11] In support of its application for condonation the appellant relied on the fact that the transcript of the arbitration proceedings was missing from the Labour Court's file and was ultimately obtained from the respondent's attorneys in circumstances in which it transpired that it had been in their possession but had not been made available by them to the appellant. Furthermore, the appellant recorded the unsuccessful attempts made over an extended period

of time to settle the matter and relied on these negotiations to explain a period of the delay in filing a proper record.

[12] It is trite that the Court has a discretion to condone the late filing of the record and that in exercising that discretion it must consider the degree of, and reasons or explanation for, the delay; the prospects of success; the prejudice that the parties will suffer if condonation is granted or refused; and whether it is in the interest of justice to grant the condonation sought.[1] In *NEHAWU and Others v Charlotte Theron Children's Home,*[2] this Court held that in an exceptional case, even where a delay is substantial, the explanation for it less than adequate and the prospects of success indeterminable, it is sometimes nevertheless in the interest of justice to grant condonation.

[13] Although the imperative is placed upon the speedy and expeditious resolution of disputes, each application must be decided on its own facts. While it is so that a full explanation was not provided by the appellant for each portion of the delay in filing the complete record, it is material that the initial appeal record, although inadequate, was filed within the 60-day period. Furthermore, the respondent's attorneys must take some responsibility for the fact that, although they were in possession of the missing transcript, no steps were taken to alert the appellant or his attorneys to this fact or provide this transcript timeously. The extended settlement discussions which took place in the matter provided an adequate explanation for portions of the delay given that such discussions had the potential to resolve the matter finally. There is, in addition, little before this Court to suggest that the respondent was prejudiced unduly by the appellant's delay in filing a complete record.

[14] Having regard to the extent of the delay, the explanation provided for it, issues of prejudice and the prospects of success, I therefore consider it to be in the interest of justice that the late filing of the complete record be condoned and that the appeal be reinstated.

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[1] *South African Post Office Ltd v Commission for Conciliation Mediation and Arbitration and Others* [2012] 1 BLLR 30 (LAC); (2011) 32 ILJ 2442 (LAC); *NEHAWU obo Mafokeng and Others v Charlotte Theron Children's Home* [2004] 10 (BLLR) 979 (LAC).
[2] [2004] 10 (BLLR) 979 (LAC).

Evaluation

[15] In is trite that in its review of an arbitration award the Labour Court is required to determine whether the decision reached by the arbitrator was one that a reasonable decision-maker could not reach.[3]

[16] The Labour Court concurred with the arbitrator that it was "*clear from the transcript of proceedings that the* [respondent] *had sexually assaulted Monegi".* Having reached such a finding, s17(1)(b) of the EEA mandates that:

> '17(1) An educator must be dismissed if he or she is found guilty of –
>
> …(b) committing an act of sexual assault on a learner, student or the employee…'.

[17] The Labour Court diverged from the arbitrator's finding that dismissal was appropriate on three bases: that the pre-arbitration minute had recorded that the sexual assault dispute had been amicably resolved between the respondent and Ms Monegi before the Queen Mother; there had been an inconsistent application of discipline insofar as another teacher had in 1996 not been disciplined for allegations of sexual assault; and the sanction of dismissal for financial mismanagement was not appropriate.

[18] In *NUMSA and Others v Driveline Technologies (Pty) Ltd and Another,*[4] this Court recognised a pre-trial agreement as –

> '…*a consensual document which binds the parties thereto and obliges the court (in the same way as the parties' pleadings do) to decide only the issues set out therein. In particular, a party who agrees to claim only limited relief would be bound by his agreement (Shoredits Construction (Pty) Ltd v Pienaar NO & others [1995] 4 BLLR 32 (LAC) at 34C–F).*"'

[19] Although the pre-arbitration minute in this matter recorded that the issue of sexual assault had been amicably resolved, the respondent's evidence at

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[3] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) at paras 105 and 110.
[4] [2007] ZALC 66; [2000] 1 BLLR 20 (LAC) at para 16.

arbitration did not accord with the contents of the minute signed. On his version, he denied the allegations of sexual misconduct in the meeting with the Queen Mother and asked Ms Monegi only to "*please forgive me if I have wronged you in the past and I forgive you if you have wronged me in the past*". The testimony of the respondent was that he had not sexually assaulted Ms Monegi and that the pre-arbitration minute did not evince an admission that he had done so. In the circumstances, the pre-arbitration agreement stating that the matter was settled between the appellant and Ms Monegi was according to the appellant not a settlement that related to the complaint that was before the arbitrator. Mr *Mathipa* in his submissions for the respondent in this appeal did not contend differently. The arbitrator cannot therefore be faulted for finding that the pre-arbitration minute as it stood did not exclude the hearing of the charge that the respondent had sexually assaulted Ms Monegi on two occasions.

[20] It stands to be noted that even had there been a resolution of the issue between the respondent and Ms Monegi, workplace rules regulate the standard of conduct required within the context of the employment relationship. An employer is therefore entitled to take disciplinary action against an employee whose conduct falls short of such rules or standards. An amicable resolution of a dispute between two employees does not in itself resolve the workplace misconduct from the perspective of an employer, nor does it prevent the employer from taking disciplinary action against the employee for such misconduct.

[21] Turning to the issue of consistency, the respondent takes issue with the fact that although a complaint was lodged with the South African Council of Educators (SACE) against Mr Khutswane, no disciplinary action was taken against Mr Khutswane concerning allegations in 1996 that he had sexually assaulted female learners.

[22] In *SACCAWU and Others v Irvin and Johnson Ltd,*[5] this Court determined disciplinary consistency to be the hallmark of progressive labour relations with the "parity principle" requiring that every employee must be measured by the

[5] (1999) 20 ILJ 2302 (LAC)

same standards. While discipline is not to be capricious and any perception of bias must be absent, it is to be individualised with the unique facts and circumstances relevant to each matter being evaluated.

[23] In *Absa Bank Limited v Naidu and Others,*[6] this Court stated that while the parity principle is an important factor to take into account in the determination of the fairness of a dismissal –

> '*it is only a factor to take into account* …[and] *is by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss…the fact that another employee committed a similar transgression in the past and was not dismissed cannot, and should not, be taken to grant a licence to every other employee, willy-nilly, to commit serious misdemeanours, especially of a dishonest nature, towards their employer on the belief that they would not be dismissed. It is well accepted in civilised society that two wrongs can never make a right. The parity principle was never intended to promote or encourage anarchy in the workplace*.'[7]

[24] The respondent was aware as to the seriousness of his misconduct borne out by his own involvement in the referral of the complaint against Mr Khutswane to SACE. His misconduct in sexually assaulting a colleague more than once and on different occasions, was of a serious nature, more so given his position of authority and responsibility as school principal. S17(2) of the EEA obliged the employer to institute disciplinary proceedings against the respondent:

> '17(2) If it is alleged that an educator committed a serious misconduct contemplated in subsection (1), the employer must institute disciplinary proceedings in accordance with the disciplinary code and procedures provided for in Schedule 2.'

[25] Although the EEA was not in force at the time of Mr Khutswane's alleged misconduct, the appellant's failure to take action against him does not permit

[6] [2015] 1 BLLR 1 (LAC); (2015) 36 ILJ 602 (LAC) at para 42.
[7] *Absa Bank Limited v Naidu and Others* (supra) at para 42.

the respondent to profit from a reliance on the principle of parity and disciplinary consistency. This is more so where on the face of it the failure to discipline Mr Khutswane appears to have been manifestly wrong.[8] Were the respondent to be entitled to rely on the failure to discipline Mr Khutswane to avoid the consequences of his own misconduct, this would have the result that no subsequent dismissal for sexual assault within the workplace would be fair given the past failure to discipline Mr Khutswane. Such a finding would be manifestly unjust, having regard to the nature of the misconduct and the workplace within which it was committed, and would be contrary to the provisions of the EEA.

[26] It follows that there existed a fair and objective basis for taking disciplinary action against the respondent and his reliance on the inconsistent application of discipline as a basis on which to contend that his dismissal was unfair is unfounded.

[27] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,* it was emphasised that –

> '*In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.'*[9]

[28] On the material before the arbitrator, the arbitration award fell within the ambit of reasonableness required. The respondent's misconduct was of such a serious nature as to make continued employment intolerable. The arbitrator properly applied his mind to the appropriateness of the sanction in finding the dismissal of the respondent to have been fair and the Labour Court erred in finding differently.

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[8] *SACCAWU v Irvin & Johnson Ltd* [1999] 8 BLLR 741 (LAC).
[9] [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) at para 79.

[29] In the circumstances, the appeal must succeed. Having regard to considerations of law and fairness, there is no reason as to why costs should be ordered in this matter.

Order

[30] In the result, an order is made as follows:

1. The application for condonation of the late filing of the appeal record is granted and the appeal is reinstated.

2. The appeal succeeds with no order as to costs.

3. The order of the Court *a quo* is set aside and replaced as follows:

> "The application to review and set aside the arbitration award issued on 10 September 2009 under case number PSES541-03/04NW is dismissed with no order as to costs."

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Savage AJA

Waglay JP and Ndlovu JA agree.

APPEARANCES:

FOR THE APPELLANT: Mr M G Heitge

Instructed by the State Attorney, Mafikeng

FOR RESPONDENT: Mr M K Mathipa

Instructed by Lebea & Associates Attorneys