IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO: D537/07 & D166/10

NOT REPORTABLE

In the matter between:

The MEC for Education for the Province

KwaZulu Natal Applicant

And

The Education Labour Relations Council First Respondent

M.M Mbuli N.O Second Respondent

J.M Tshazi Third Respondent

JUDGMENT

PATHER AJ.

Introduction

[1] This is an application to:-

(a) Condone the late filing of an application to review the Second Respondent's Award ("the award"); and

(b) Review the Second Respondent's Award which ordered that:-

"1. The respondent, Department of Education is ordered to re-instate Msawenkosi J. Tshazi in its employ on the same terms and conditions that prevailed prior to his dismissal.

2. The respondent, Department of Education is also ordered to pay back pay to Mr Msawenkosi J. Tshazi in the amount of R170 409-00 which is an amount equivalent to twelve months remuneration calculated at R14 200-75 per month which is an amount that the applicant earned at the date of his dismissal.

3. The respondent will re-instate the applicant Msawenkosi J. Tshazi within (14) fourteen days of the respondent becoming aware of this award and the respondent will pay the amount referred to in paragraph 2 to the applicant within (30) thirty days of the respondent being notified of this award."

Condonation

[2] The late filing of the review application, which was not opposed, is condoned.

Review

[3] The Applicant, the M E C for Education for the Province of KwaZulu-Natal, challenges the Second Respondent's award. The Third Respondent ("Tshazi") had subsequently and under case no. D166/10 filed an application in terms of Section 158 (1) (c) of the LRA 66/1995 in which he seeks to have the award made an order of court. As is the practice, both matters were heard simultaneously.

Background Facts

[4] Mr Tshazi is employed as a Principal of Mfulamhle Junior Secondary School ("the school") at Umzimkhulu, KwaZulu-Natal. The area of Umzimkhulu and its schools formed part of the Eastern Cape Province until its incorporation into KwaZulu-Natal during 2007. On 26 July 2004, the Umzimkhulu Magistrate's Court found Tshazi guilty of indecent assault. He was sentenced to pay a fine of R6 000,00 or in default of such payment, to undergo 12 months' imprisonment, half of which was suspended for 2 years on condition that he was not convicted of indecent assault during the period of suspension. Evidence presented to the Umzimkhulu Magistrate's Court was that Tshazi had during 2002, indecently assaulted a learner at the school, Anele Luswazi.

[5] Disciplinary proceedings against Mr Tshazi commenced on 26 August 2004. He was subsequently found guilty and the findings read as follows:

5.1 "misconduct in terms of Section 17(1)(b) of the Employment of Educators' Act No.76 of 1998 in that on or about June 2002 you forced a learner, Anele Luswazi to have sex with you." and

5.2 “misconduct in terms of Section 18(1) (f) of the Employment of Educators’ Act No.76 of 1998 in that on or about June 2002 you unjustifiably prejudiced the administration, discipline and efficiency of the Eastern Cape Education Department by forcing a learner, Anele Luswazi to have sex with you.” As a result of this conviction, Mr Tshazi was dismissed and his services were terminated with effect from 31 December 2004.

[6] Mr Tshazi then referred a dispute of unfair dismissal to the Education Labour Relations Council, which was arbitrated by the Second Respondent (“the arbitrator”) on 2 March 2007. The arbitrator, finding that the dismissal was unfair, made the order referred to in paragraph [1] above.

Grounds for review

[7] The applicant challenges the award on the grounds that the arbitrator misdirected himself in not considering the finding of guilt made by the Umzimkhulu Magistrate’s court. It was contended that the arbitrator failed to give consideration to the provisions of the Employment of Educators’ Act No.76 of 1998, (“the Act”) particularly Section 17(1) (c), which states that:

“17. (1) An educator must be dismissed if he or she is found guilty of –

(a)…….

(b)…….

(c) having a sexual relationship with a learner, student or other employee;”

Reference was made also to Section 17(2) of the Act which provides that:

> **"(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."**

It was contended in this regard, that the indecent assault being an established fact, the arbitrator ought to have considered Mr Tshazi's conviction in determining his findings. It was further contended that it is absurd for the arbitrator to make a finding based on the balance of probabilities while knowing that Mr Tshazi had contravened a common law offence which was proved beyond a reasonable doubt in a court of law.

The further grounds of attack against the award are that the arbitrator misdirected himself by not taking into account the special trust relationship that exists between educators and learners, and the fact that Mr Tshazi, as school principal/educator, had occupied a position in which a high standard of morality applied. Such grounds however, are based on the premise that the magistrate's court finding of guilt is an established fact and that seemingly, the further evidence heard need not be considered too closely.

[8] Mr Tshazi opposes the application on the basis that, in directing a letter dated 16 March 2007, five months prior to this application, to the effect that the award be implemented, the applicant had acquiesced in the award. In the alternative, it was submitted that the arbitrator had correctly found that the

content of the criminal trial was not automatically admissible and that the arbitration hearing is a hearing de novo.In respect of the evidence led, it was contended that the arbitrator:

8.1 had dealt with the evidence of the applicant's witnesses Mrs Msenti and Mrs Mbhele and had found it to be hearsay.

8.2 had approached Anele Luswazi's evidence with caution as he was a single witness, a minor at the time, whose evidence was disputed by other witnesses.

8.3 was concerned that the allegations of sexual abuse had only been reported at a time when Anele Luswazi ("Anele") was in trouble at school and had stayed away.

The award

[9] In his award, the arbitrator identified the issue in dispute as being whether Tshazi had contravened a rule or standard regulating conduct in or of relevance to the workplace. In deciding the issue, he compared the evidence presented on behalf of the applicant to that presented in support of Tshazi and concluded that on a balance of probabilities, the applicant had failed to discharge its onus of proving that the dismissal was fair; Tshazi had not contravened the rule (or standard).

[10] The arbitrator rejected the evidence of the applicant's witnesses, Mrs Msenti and Mrs Mbhele, on the grounds that their evidence was hearsay and did not corroborate Anele's. He also rejected Anele's evidence because, according to

him, it was largely disputed by the witnesses. The arbitrator considered Anele's testimony that although he had accompanied Tshazi to places such as Kokstad and Pietermaritzburg on more than one occasion from April 2002, yet the incidence of sexual abuse had taken place (only) during November 2002. This, according to the arbitrator, was improbable as Tshazi had had opportunity to have attempted sexual assault prior to November 2002 during such journeys. Furthermore, the arbitrator found it "surprising" that Anele had not reported the abuse until the issue of his outstanding school assessments was raised, and at a time when he had stayed away from school. The arbitrator further drew an adverse inference from the applicant's failure to call Anele's grandmother as a witness; according to Anele, Tshazi had gone to his grandmother's home to request that he (Anele) return to school.

Evaluation

[11] Regarding Tshazi's argument of acquiescence in the award, the letter referred to and dated 18 March 2007 is addressed to the District Director: Mzimkhulu District. Bearing the subject line "IMPLEMENTATION OF AWARD – NATU OBO TSHAZI JM PSES 125 – 06/07 EC", the letter reads as follows:-

"The above matter refers.

You are hereby requested to implement the Arbitration Award in respect of Mr J.M.Tshazi P/N 53012216 in his employ on the same terms and conditions of service as those that prevailed prior to his dismissal. The department is further ordered to pay Mr Tshazi an amount of

R170 409 – 00. (Attached is the award)

As you are aware in terms of Section 143 of the Labour Relations Act 66 of 1995 as amended, that the award is final and binding and may be enforced as if they are an Order of the Labour Court.

Your compliance is appreciated."

(signed)

"Director: Labour Relations"

[12] In terms of Section 3 of the Act:-

"(1) Save as is otherwise provided in this section –

(a) …….; and

(b) the Head of Department shall be the employer of educators in the service of the provincial department of education in posts on the educator establishment of that department for all purposes of employment."

It is not disputed that Tshazi is employed by the provincial Department of Education; the Province of the Eastern Cape and its Department of Education having been incorporated into the Kwazulu-Natal province. The Head of Department as employer employs educators and terminates their contracts of employment where necessary. It follows therefore that only the Head of Department can determine the provincial department's response to an award. The Director in the Department of Labour Relations is a functionary, responsible for, among other duties, managing the relations between the

employer, namely, the Head of Department, and educators in the provincial department's employ. The Director of Labour Relations cannot in the ordinary course, determine whether awards are implemented or otherwise dealt with, without reference to or the express authority of the employer, the Head of Department. If that were the case, a situation could arise where the Head of Department may not be able to properly account for the number of educators in the provincial department, or for the control of its budget.

In the circumstances, the contention that the applicant had acquiesced in the award is rejected for the reason that no evidence exists to prove that the author of the letter, the Director of Labour Relations was authorised to give the instruction that the award be implemented.

[13] In terms of the well-known decision in **Sidumo & another v Rustenburg Platinum Mines Ltd & others [2007] 12 BLLR 1097 (CC)**, the arbitration hearing is a hearing de novo and the test to determine whether to interfere with an arbitration award is whether the decision of the arbitrator is one which a reasonable decision-maker could not reach.

[14] In **Randburg Town Council v National Union of Public Service Workers & Others (1994) 3 LCD 184 (LAC)**, it was held that the Council was not entitled to rely merely on the fact of the conviction in the magistrate's court. The facts in that case are briefly that the employee had not been given an opportunity to state his case, neither had his representative been given an opportunity to lead the employee's or any other evidence. Furthermore, the chairperson of the

inquiry had believed that the finding of the magistrate rendered it unnecessary to hear any further evidence. Such facts are different from those before the court in this case; Tshazi **was** given the opportunity to state his case and to present the evidence of witnesses to the inquiry and the arbitration hearing before the Education Labour Relations Council.

[15] Was the arbitrator's decision one that a reasonable decision-maker could not have reached? He preferred Tshazi's evidence which he found to be "clear, coherent and not affected by doubts and contradictions". He accepted Tshazi's explanation that Anele had wanted to be promoted, but that because of his (Tshazi's) refusal to do so, Anele had accused him of sexual abuse. In this regard, Tshazi had testified that "Anele approached me and I rejected him". It is improbable that an educator would use such language in respect of a learner who is seeking a special favour, particularly not an educator who was regarded by all in the school community, as being a firm disciplinarian.

[16] While on the one hand rejecting Anele's evidence as being that of a single witness to be treated with caution, the arbitrator has no difficulty in accepting the evidence of Tshazi, himself a single witness. In any event, apart from his suggestion that Anele was bitter because he did not get his way, Tshazi's evidence amounts to nothing but a bare denial. In **S v Snyman 1968 (2) SA 582 (A) at 585B-H,** referring to the cautionary rule that has developed in sexual cases, Holmes JA said: "In this connection I respectfully agree with the observations of Macdonald AJP in the Southern Rhodesian Appellate Division cases **of R v J 1966 (1) SA 88 (SR) at page 90** to the effect that, while there is

always need for special caution in scrutinising and weighing the evidence of young children, complainants in sexual cases, accomplices and, generally, the evidence of a single witness, the exercise of caution should not be allowed to displace the exercise of common sense." In my view, the arbitrator failed to exercise common sense. Even from his approach to the arbitration hearing, dealing as he did within the context of paragraph 7 of schedule 8 of the Labour Relations Act, the arbitrator displays a lack of common sense; it is absurd in my view to approach such serious allegations amounting to criminal conduct in the context of schedule 8 of the Labour Relations Act. Such an approach is similar to the "mechanical, "checklist" kind of approach" against which the court in **Johnson & Johnson (Pty) Ltd v CWIU [1998] 12 BLLR 1209 (LAC)** at paragraph 29, warned. The court in that case dealt with a dismissal based on the employer's operational requirements, and not as in the present case, a dismissal for misconduct. However in my view, the remarks are equally relevant to the application of any aspect of the Labour Relations Act to a set of facts in which an alleged unfair dismissal is being scrutinised.

[17] The arbitrator rejected the testimonies of Mrs Msenti and Mrs Mbhele as being hearsay, although it was substantially consistent with the evidence they had presented to the Magistrate's court. In any event, both witnesses testified to being shocked at the allegation, because they had regarded Tshazi as a good man. There was therefore no reason for the arbitrator to reject their evidence in totality. Both had testified about the reports received from Anele. As educators who until then had respected Tshazi for being a "good man" and strict "in a

positive way", they had a duty of care towards learners at the school, and each had sought to establish the reason for Anele's sudden and unexplained absence from school.

[18] While alluding to the fact that Tshazi had had opportunities to have sexually abused Anele in the seven-month period during which they travelled together and interacted, yet one incident of sexual abuse was reported, the arbitrator proceeds, in a subsequent paragraph of the award, to refer to Anele's evidence of "continuous abuse". In any event, the arbitrator's reasoning is not clear; he seems to suggest that only if the abuse had occurred more than once should weight be attached to the victim's (Anele's) testimony. Moreover, as stated, the arbitrator drew an unfavourable inference from Anele's not having immediately reported the matter but had only done so when he, Anele was in trouble at school for staying away. This indicates that the arbitrator applied the criminal standard to interrogating Anele's conduct rather than focusing on whether there was a valid reason for Tshazi's dismissal. Furthermore, he ignored the seriousness of the allegations against Tshazi, an educator and principal of a school in whose care parents had entrusted their children.

[19] The arbitrator failed to consider:

19.1 Anele's testimony that he had not at first reported the incidents of sexual abuse because he had been afraid and further that he had wanted to avoid his grandmother, with whom he had been staying, becoming aware of the incidents. It is well documented that some victims of sexual

abuse only report allegations of such a nature many years later perhaps when they are able to seek assistance in dealing with the trauma associated with sexual abuse;

19.2 Anele's further evidence that when he returned to school after being absent for three days, he had reported to Tshazi's office "because that was the law at the school". This is reasonable and probable, in the light of the evidence that Tshazi was a hard task master. Tshazi was also the principal whose station and office the learners would have had to obey. The arbitrator found Anele's conduct inconsistent with one who alleges sexual abuse by the very person to whom he had reported;

19.3 that Anele was a minor at the time of the incident and had already testified in the magistrates' court in 2002 and at the departmental inquiry two years later. It was therefore likely that he was battle-weary by the time the arbitration hearing was held;

19.4 that the incidents had occurred almost five years before the arbitration hearing, and that accordingly it was understandable that the witnesses would not have remembered every detail precisely; and

19.5 the possibility that Anele's absence from school was linked to the sexual abuse by Tshazi, and which was corroborated by a report dated 25 August 2004 included in the bundle as part of the applicant's closing argument presented to the arbitrator, of SINANI, the "KWAZULU-NATAL PROGRAMME FOR THE SURVIVORS OF VIOLENCE".

[20] In the context of the right of a child to be protected from maltreatment, neglect, abuse or degradation, an arbitration involving an educator who has been found guilty under Sections 17 (1) (b) and (c), and 17 (2) of the Act must be approached with due regard to the learner as victim. It is absurd, as argued on behalf of the applicant, to equate an employee convicted of other common law crimes with the case of an educator as employee, who has been convicted of assault of a sexual nature allegedly perpetrated against a learner of the school. An arbitrator must balance the interests of the alleged victim with those of such an employee when considering the evidence before him or her. While the arbitration hearing is a hearing de novo, if an educator has been found guilty under the Act as stated above and in other forums, an arbitrator must consider and give due weight to the evidence presented at any criminal proceedings in the magistrates' court, where the burden of proof is greater than that required at an arbitration hearing, as well as to the record of the internal inquiry. An arbitrator must be conscious of the sensitive nature of the evidence and the fact that with the passage of time, some of the non-material details may be forgotten. This ensures added protection to vulnerable learners who in a school environment may fall prey to educators who abuse their authority over them. However, any finding of guilt against an educator under Section 17 (1) (a) to (f), whether it be in a court of law or at an internal disciplinary inquiry, cannot be said to automatically lead to that educator's dismissal. The Act is the equivalent of an internal Disciplinary Code and provides the possible sanctions for a range of transgressions of the code of conduct prescribed for educators.

As has been stated in the **Randburg** case above, magistrates, like other judicial officers, can make mistakes. An aggrieved but convicted educator is entitled to appeal against any decision of the magistrates' court, or the High court for that matter. Similarly, the Labour Relations Act 66 of 1995 as amended, protects an educator who, feeling aggrieved at an alleged unfair dismissal after being found guilty under sections 17 (1) (a) to (f) at an internal departmental inquiry, is entitled to refer such a dispute to the bargaining council for arbitration. Therefore, the applicant's contention that once the magistrates' court had made a finding of guilt against Tshazi, that such fact was then established and that dismissal under Section 17 (1) of the Act should follow automatically, cannot be sustained.

[21] In view of the finding that the arbitrator had failed to apply his mind to and properly consider the evidence before him which in turn resulted in a gross irregularity in that a fair trial of the issues did not occur, the award stands to be reviewed and set aside. It is in the interests of justice and the effective resolution of the dispute, that an order be substituted rather than remitting the matter for hearing before another arbitrator, given that the dismissal occurred more than 6 years ago. However, as the applicant's primary ground for attacking the award has not been successful, it would not be fair that the costs order should follow the result.

[22] In the premises, the following order is made:

1. The award is reviewed, set aside and substituted with the following:

"The dismissal of Tshazi, the Third Respondent, is fair."

2. The Third Respondent's application under case no.D166/2010 for the award to be made an order of this court is dismissed.

3. There is no order as to costs of both applications.

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Pather AJ

Appearances :

For the applicant: B. Macgregor

Instructed by: Macgregor Erasmus Attorneys

For the Respondent: R.Naidoo

Instructed by: State Attorney

Date of hearing: 28 April 2011

Date of Judgment: 02 June 2011