IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case No: D209/2022

In the matter between:

THANDUKWAZI MAXWELL MAGCABA	**Applicant**
and	
TRANSNET RAIL ENGINEERING	**First Respondent**
COMMISSIONER ASHA SEWPERSAD	**Second Respondent**
TRANSNET BARGAINING COUNCIL	**Third Respondent**

Heard: **4 July 2024**

Delivered: **15 July 2024 (This judgement was handed down electronically by emailing a copy to the parties. The 15 July 2024 is deemed to be the date of delivery of this judgement).**

JUDGMENT

TSHANGANA, AJ

Introduction

[1] The Applicant was dismissed by the First Respondent pursuant to a pre–dismissal arbitration held in terms of section 188A of the Labour Relations Act[1] (LRA), read with the Transnet Disciplinary Code.

[1] Act 66 of 1995, as amended.

[2] The Second Respondent issued an arbitration award dated 23 March 2022 (the award) under case number TNBC 43. In terms of paragraph 50 of the award, the Applicant was found guilty of sexual harassment and recommended that he be dismissed. The First Respondent then dismissed the Applicant in terms of the award.

[3] The applicant has filed this application under the provisions of section 145, read with section 158 (1)(g) of the LRA. In terms of which he seeks the following orders:

3.1 That the late filing of the Applicant's review application be and is hereby condoned;

3.2 That the Second Respondent's award under case number TNBC43 dated 23 March 2022 be reviewed and set aside;

3.3 That the award be substituted with a finding that the Applicant's dismissal was unfair;

3.4 Alternative to prayer (3), the matter be remitted back to the First Respondent (sic) for hearing *de novo* by a different Commissioner other than the Second Respondent;

3.5 Costs of the suit

Condonation late filing of review

[4] In terms of section 145 (1) of the LRA the application for review must be launched within 6 weeks from the date of receipt of the award.

[5] I will not delve into the specifics of the delayed filing of the application for review. However, it is important to note that it is widely acknowledged that the application for review was submitted 13 days past the deadline. The primary reason cited by the Applicant was that their union official was still studying the award, which was the main factor contributing to the delay.

[6] The test for condonation is set out by Holmes JA in *Melane v Santam Insurance Co. Ltd*[2].

[2] 1962 (4) SA 531 (A) at 532 C - F.

> 'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts and, in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion...'

[7] I have considered the test set out in (*Melane supra*), and I am of the view that the delay of 13 days in the circumstance of this matter is not excessive and it is in the interest of justice that condonation be granted. Therefore, the late filing of the application for review is hereby condoned.

[8] Nevertheless, I caution litigants that relying on excuses such as union officials or legal representatives causing delays is becoming stale and is not an acceptable excuse.

Grounds for review

[9] The grounds for review are listed in paragraph 40 of the Founding Affidavit and supplemented from paragraph 6 to paragraph 40 of the Supplementary Affidavit, however, I will not deal with them individually. The Applicant has dealt with the grounds of review under the following headings:

9.1 Attaching undue weight to hearsay evidence;
9.2 Failure to properly evaluate the evidence;
9.3 Improbability of the Complainant's version;
9.4 Inconsistencies with the evidence tendered.

Attaching undue weight to hearsay evidence

[10] In this aspect of the review, the Applicant contested the evidence concerning voice recordings, telephone calls, and text messages mentioned by Malimela. The Applicant's argument was that the recordings, messages, or voice clips referred to by the complainant were not presented before the Arbitrator. Cynthia Dube testified

regarding the sms message related to charge 1.3, while Zanele Mabaso testified about the recording of one of the telephonic incidents. The Applicant's conspiracy theories aimed at discrediting the evidence of these witnesses are unsupported.

[11] Furthermore, the Applicant was charged with 13 counts, 1.1 to 1.13 and only counts 1.3, 1.5, 1.6, and 1.10 related to telephone calls, sms or recordings. The rest of the charges are related to direct interaction between the Applicant and Malimela.

[12] Therefore, even in the absence of the telephonic recordings, sms and records of calls, there were still other charges against him. Therefore, this ground of review fails.

Failure to evaluate Evidence

[13] In this regard, the Applicant relied on what he terms *"Two mutually destructive versions"* and referred to *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others*[3]. In this regard, his submission was that the arbitrator failed to evaluate credibility, reliability and probabilities in relation to the version of the Applicant and Malimela.

[14] He expressed concern that Malimela's testimony was based on a single witness account and therefore should be approached cautiously. Additionally, he argued that there were two mutually destructive versions of events, and the arbitrator failed to adequately address the handling of the evidence.

[15] Firstly, on page 171 of the transcript, Malimela testified that the Applicant ensured they were always alone when making unwelcome sexual advances, thereby preventing any potential witnesses. The absence of witnesses should not be held against Malimela, as the nature of such offenses typically involves ensuring privacy to avoid detection. The First Respondent's Counsel referenced multiple instances in the record where the timing of these advances was deliberately planned to avoid

[3] [2002] ZASCA 98; 2003 (1) SA 11 (SCA).

witnesses. Therefore, to penalize Malimela for the lack of witnesses would be a travesty of justice.

[16] Furthermore, there were witnesses who testified that Malimela was visibly emotional and crying, and when questioned about the reason, she attributed it to mistreatment by the Applicant. In response, the Applicant's representative suggested that *"ill-treatment"* could encompass various forms, not necessarily sexual harassment. However, the testimony of these witnesses refutes the assertion that the mistreatment could have been anything other than sexual harassment. Lorraine testified that Malimela told her that the Applicant was proposing a love relationship and she turned him down, he was persistent hence she was crying. Cynthia testified about the smses in relation to charge 1.3. The Applicant's Legal Representative contested her testimony, stating that she did not see who the message was from. The First Respondent's Counsel referred to the transcript which indicated that the message was from a contact saved as *"Magcaba"*.

[17] The incidents recounted by the witnesses occurred over an extended period, and dismissing their testimonies by claiming they all had personal grievances against the Applicant is unfounded. These individuals are from the organization, many of whom are not personally friends with Malimela. The arbitrator addressed the issue of fabricated allegations, and her conclusions were not irrational or unreasonable to warrant review. Therefore, this ground for review also does not succeed.

Improbability of the Complainant's version

[18] In paragraph 43 of the arbitration award, the arbitrator dealt with the issue of fabrication and the two competing versions. The Applicant's version mainly was that the sexual harassment allegations were a fabrication and that Malimela was retaliating due to poor performance and the fact that at some stage she was reprimanded for selling tracksuits and takkies at work. Malimela had reported her sexual harassment to various people over a long period of time, including Cynthia, Zanele Mabaso, Lorainne and Dlamini the union official. In addition to that she attended EAP, and reported to Figg and the psychologist.

[19] Her version has been consistent that she did not report earlier because she was scared to lose her job as one employee was once dismissed without an apparent reason. She further stated more than once that she did not want anybody to lose their jobs.

[20] She also acknowledged feeling dirty and expressed regret that she had not reported the matter sooner. The policy clearly stipulates that sexual harassment should be reported promptly and addressed swiftly. However, blaming the victim for reporting late would only further victimize them.

[21] However, Lorainne in her position as HR failed Malimela, she should have done more. It is not enough to just say the victim did not want to report, HR should have offered counselling and created a conducive environment for the victim to report the case. However, the evidence of the witnesses and Malimela cumulatively considered the probabilities are in her favour in this matter. The arbitrator applied her mind, and her finding is not unreasonable Therefore, this ground of review also fails.

Inconsistencies with the evidence tendered

[22] In this regard, the Applicant deals with issues of the timeline, as to when exactly the alleged incidents took place. The incidents go back to 2011 therefore, it is expected that the time frames might not be accurate in terms of the years. It is acknowledged that over time, the accuracy of specific years may become blurred. This underscores the importance of promptly reporting incidents when they occur. Delay in reporting has the potential to prejudice the accused employee, as memories of incidents may fade, and relevant evidence or witnesses may no longer be accessible or able to recall details accurately.

[23] I posed this question to the First Respondent's Counsel regarding the delay in reporting the incidents and its impact on the evidence and the accused. In response, she cited instances where the Applicant recalled the facts clearly, even highlighting one incident where he spoke to someone, he later discovered was an ex-boyfriend of Malimela. Thus, according to her, the Applicant remembered the incidents but simply denied the allegations against him.

[24] The Arbitrator addressed these denials and referred to them as *"bare denials"*. The Applicant failed to present any conspiracy theories or alternative versions when Malimela was cross-examined. His denials lacked substantiation, and therefore, on the balance of probabilities, the arbitrator's findings were reasonable.I have considered the alleged inconsistencies between what was conveyed to the investigator and what was stated during the arbitration hearing. While some of these discrepancies may have merit, they do not undermine the core allegations. For instance, discrepancies regarding the timeline of when the Applicant acted at Kiner Park and returned to Bayhead Centre may exist, with the year possibly being incorrect, but the essence of the incidents remains the focal point of concern.

[26] The issue regarding whether Malimela expressed fear for her life, or her job was clarified during the hearing; she stated that she feared losing her job. I informed the parties during the hearing that the reviewing court does not have the authority to make credibility findings on witnesses, as those determinations are reserved for the trial court. Therefore, my remarks regarding the alleged inconsistencies were confined to assessing their relevance and impact on the final decision.

[27] *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*[4], read with *Sidumo*[5], the test is whether or not the ultimate result reached by the Arbitrator is that which a reasonable Arbitrator would have reached.[6]

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[4] (2013) 34 ILJ 2795 (SCA); [2013] 11 BLLR 1074 (SCA).

[5] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC).

[6] In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA); [2013] 11 BLLR 1074 (SCA), the Supreme Court stated that the review test involved the reviewing court examining the merits of the case *"in the round"*. This is done by determining whether in light of the issue raised by the dispute under arbitration, the outcome reached by the commissioner is not one that could reasonably be reached on the basis of the evidence and other material properly before the commissioner. In doing this, the reasons provided by the commissioner in reaching his decision are to be considered. In the event that the court finds that the reasons provided by the Arbitrator are erroneous and do not assist the court in determining whether the decision reached is one a reasonable decision-maker would reach, then the court must still consider whether apart from those reasons, the decision is one that could be reasonably reached in light of the issues and evidence in the matter. The effect of the *Herholdt* decision is that, even where the reasons given by a commissioner are clearly wrong and there has been some irregularity, such a decision may not be set aside if on the basis of the issues raised and the evidence presented to the commissioner, the outcome was a reasonable one. The *Sidumo* test will, however, justify setting aside an award on review if the decision is *"entirely disconnected with the evidence"* or is *"unsupported by any evidence"*

[28] Therefore, following the precedent set in the *Herholdt* decision (*supra*), I conclude that this ground of review also fails because it would not alter the Arbitrator's final decision. The matter involves 13 counts of sexual harassment incidents, and according to policy, even a single incident is sufficient to constitute sexual harassment.

[29] Once the accused employee has been found guilty of sexual harassment, dismissal is an appropriate sanction. That is also common cause as the Applicant conceded that in paragraph 54 of his Replying Affidavit.

[30] I have considered the authorities referred to by both parties and I will not go through them is in this judgment.

[31] The court is indebted to the Legal Representatives of both parties for their well prepared and presented submissions.

[32] In the premises, I make the following order:

Order

1. Application for review is dismissed.
2. Each party to pay its own costs.

S. Tshangana
Acting Judge of the Labour Court

Appearances:
For the Applicant: Mhlanga Incorporated
Per: Mr. Hlongwane

For the First Respondent: Adv. Jabu Thobela - Mkhulisi

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and involves speculation by the commissioner. The *Sidumo* test, the Labour Appeal Court expanded on *Herholdt.*

Instructed by: Hughes – Madondo Inc.