

SOUTH AFRICA / JUDGMENT

Mukhari v Education Labour Relations Council and Others (JR2432/21) [2024]

ZALCJHB 291 (2 August 2024)

[2024] ZALCJHB 291

COURT

Labour Court Johannesburg

BEFORE

L de Haan

CASE / FILE NUMBER

JR2432/21

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THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR2432/21

In the matter between:

VONANI ARONE
MUKHARI
Applicant
and
EDUCATION
LABOUR RELATIONS COUNCIL
First Respondent
JEFFREY
NKUNA N.O.
Second Respondent
DEPARTMENT
OF EDUCATION: LIMPOPO
Third Respondent
Heard: 12 January 2024
Delivered: 02 August
2024

JUDGMENT

DE HAAN, AJ

Introduction

- [1] This is an application in terms of section 145, read with section 158(1)(g) of the Labour Relations Act[1] (LRA), to review the arbitration award dated 13 October 2021 by the second respondent (the arbitrator) under the auspices of the first respondent, the Education Labour Relations Council (the ELRC) under case reference ELRC 746-20/21 LP.

Background

- [2] The applicant has been employed by the third respondent as an educator since 1986. According to the applicant he taught grade 7 English, grade 4 and 5 Mathematics, and grade 4 to 7 History at the Nkuzana Primary School. It appears from the third respondent's Hlanganani Circuit June GET Exam Timetable (Exam timetable) that the grade 4 and grade 5 Mathematics examinations were both scheduled for 09:00 on 11 June 2018, the grade 7 English examination was scheduled for 09:00 on 12 June 2018, and the grade 4, 5, 6, and 7 History examinations were all scheduled for 09:00 on 13 June 2018.
- [3] The principal of the Nkuzana Primary School had compiled a management plan, in terms of which parent-teacher meetings were scheduled from 05 to 08 June 2018. On 06 June 2018 the principal issued Information Notice 8 of 2018, rescheduling the parent-teacher meetings to 12 and 13 June 2018 from 08:00 to 11:00. The applicant acknowledged receipt of Information Notice 8 by appending his signature thereto on 06 June 2018.
- [4] It would appear from a comparison of the Exam Timetable and Information Notice 8 (arbitration bundle page 3) that the rescheduled dates and times for the applicant's parent-teacher meeting conflicted with the applicant's grade 7 English examination.
- [5] The applicant freely admits that, on the morning of 12 June 2018, he refused to accept the curriculum package from the school administrator and to participate in the parent-teacher meeting. According to the applicant he refused to participate in the parental meeting as it clashed with his learner's examinations and he refused to accept the curriculum package from the school's administrator, thinking that it was paperwork relating to the parent-teacher meetings. In the applicant's view, the instructions to attend the parent-teacher meeting at the same time as the time scheduled for exams was unlawful because the exam timetable was a provincial instruction, which could not be trumped by the school's principal.
- [6] On 15 June 2018, TN Maluleke, the Head of Department (HOD) to whom the applicant reported, wrote a 'reflection' on the applicant's conduct, recording that on 12 June 2018 she had convened a meeting with the applicant, during which the applicant said that there was

no need for parent-teacher meetings, that the principal had not reminded him of the parent-teacher meeting, and that the principal had not discussed her management plan with him before implementing it. When the HOD reminded the applicant that he was in receipt of the management plan and of Information Notice 8 and that he had raised no objections to either, the applicant insisted that he would not participate in activities which were not discussed with him first. The applicant then also failed to participate in the parent-teacher meeting on 13 June 2018. This, according to the HOD, evidenced a lack of respect for authority for the school leadership.

- [7] On 20 June 2018 the third respondent's Circuit Manager for the Hlanganani Central Circuit wrote a letter to the applicant informing him that a complaint had been received from his school and inviting him to attend an internal disciplinary enquiry on 22 June 2018. I note that, although the applicant alleges that he was simultaneously suspended and refers in his founding affidavit to the Circuit manager's letter of 20 June 2018, that letter does not mention suspension.
- [8] At some time in June 2018 the chairperson of the Nkuzana Primary School Governing Body (SGB) wrote a letter to the third respondent's Circuit Manager complaining about the applicant's behaviour toward the HOD and his refusal to consider himself bound to the principal's management plan unless it was discussed with him first. The SGB requested that the applicant be replaced due to his disrespect towards his HOD and principal. This undated letter bears a Hlanganani Central Circuit stamp dated 21 June 2018.
- [9] On 27 November 2019 the third respondent's Superintendent General formulated formal charges against the applicant. These charges were handed to the applicant on 17 January 2020. The charge reads as follows:

"Charge 1

You contravened the provisions of Section 18(1)(t) of the Act in that between January 2018 and March 2018, or at any period incidental thereto, as or near Nkuzana Primary School, you displayed disrespect towards others in the workplace in that:

Count 1

You said to the principal that she is not "Alpha and Omega".

Count 2

You told the HOD, Mrs Maluleke T.N that the learners must be helped at home by their parents.

Count 3

You said that you were not going to abide by the Management Plan because it did not help you with anything.

Count 4

Your refused to accept the Curriculum Package from the School Administrator.”

[10] A disciplinary hearing was held on 02 March 2020, and, in a letter dated 06 August 2020 the third respondent's Acting Superintendent General informed the applicant that he had been found guilty of counts 2, 3, and 4 and that the sanction of a two months' suspension without pay, in addition to a final written warning, would be imposed. The final written warning, also dated 06 August 2020, was handed to the applicant on 02 September 2020.

[11] The applicant unsuccessful appealed the findings and sanction internally.

[12] On 01 March 2021 the applicant referred an unfair labour practice dispute under section 186 (2)(c) of the LRA to the ELRC. After the dispute remained unresolved at conciliation the applicant applied for arbitration, which commenced on 13 August 2021 and was concluded on 21 September

2021. The arbitrator found that the outcome and sanction was fair and that no unfair labour practice was committed. The applicant then brought the review application that is now before me.

[13] The applicant testified at arbitration while Ms Maluleke, the HOD, as well as one Walter Kubayi testified for the third respondent.

Grounds for review

[14] The applicant's stated grounds for review are that the arbitrator's award was unreasonable, as no reasonable person would arrive at the award; that the arbitrator did not apply his mind to the evidence before him, as he made the incorrect findings relating to the changes to the management plan that the principal had unilaterally implemented by way of Information Notice 8; that the arbitrator committed an irregularity in failing to consider Information Notice 8 and failing to require the HOD to provide proof of an alleged communication sent to the school's educators; that the arbitrator failed to give reasons for preferring the third respondent's version over that of the applicant; and that the arbitrator's conclusion that the applicant failed to comply with the management plan was not supported by evidence.

The Award

[15] In his award (pages 71 to 78 of the bundle) the arbitrator recorded the details of the hearing and that the applicant was represented by an attorney, while the third respondent was represented by its labour relations officer. In paragraphs 7 and 11 of the award the arbitrator identified the enquiry he was required to undertake, after which he proceeded to record and consider the evidence before him.

[16] In reference to the charges against the applicant, the arbitrator considered the applicant's testimony that the examinations were scheduled to start at 09:00 on 12 June 2018, while the management plan had been amended on 06 June 2018 by Information Notice 8 to postpone the parent-teacher meetings to 12 and 13 June 2018. It appears from the award that the arbitrator failed to consider that Information Notice 8 reflects that the parent-teacher

meetings were expressly scheduled from 08:00 to 11:00 on 12 June 2018. The arbitrator also failed to record that the applicant had testified that, while the examinations were scheduled for 09:00, they were only written at 12:00 because of the rescheduled parent-teacher meeting.

- [17] The arbitrator weighed the applicant's testimony against the testimony by the HOD that the examinations were scheduled for 09:00 and that it did in fact start at 09:00. The HOD did not deny that Information Notice 8 expressly states that parent-teacher meetings had been rescheduled for 08:00-11:00 on 12 June 2018. However, according to the HOD's testimony, the parent-teacher meetings had again been rescheduled for 12:00 by way of an internal communication so as to not interfere with the examinations. She did not state when this alleged communication was sent to staff, and in particular she did not specifically allege that it was sent to the applicant. During her cross-examination the HOD said that she had a copy of the message and offered to retrieve

it, but the arbitrator declined the offer and asked the HOD to continue her testimony without it. It was put to the HOD that her

version of an internal communication to reschedule the rescheduled parent-teacher meeting from 08:00 in the morning to 12:00 was never put to the applicant and that he therefore had not had the opportunity to respond to it. It does not appear from the award that the arbitrator considered this in his assessment of the weight to be attached to the HOD's testimony.

- [18] According to the HOD, the parent-teacher meetings would not interfere with the examinations, as the meetings would only start at 12:00. When she confronted the applicant about failing to meet the parents, he vehemently refused to attend the parent-teacher meetings, and he was defiant by stating that he would not follow the management plan as it was of no help to him. This testimony was not seriously challenged under cross-examination and some aspects of it were admitted by the applicant.
- [19] The third respondent's second witness testified that he was tasked with handing the applicant the curriculum package and that the applicant twice refused to accept it, saying in Xitsonga that he would not do those things. This testimony was not challenged, although the applicant testified that he had refused to accept the curriculum package because he expected the exam papers at the time and could not attend the parent-teacher meeting from 08:00 to 11:00 due to the exam he would invigilate.
- [20] In paragraph 14 of the award the arbitrator considered the conduct of the applicant as alleged in the charges as common cause. There does not appear to be any real issue with this finding. The arbitrator then considered the applicant's defense that he was justified in refusing to comply with the instructions on the basis as they were unlawful, as the exam timetable was a provincial instruction, which the principal had no authority to override.

- [21] At paragraph 16 of the award the arbitrator identified the issue to be decided as being whether the principal had changed the examination timetable. This was not the issue to be determined, as it was not the applicant's contention that the principal had changed the exam timetable. It was common cause that the principal had amended the management plan, not the examination timetable.
- [22] The arbitrator found that the examination had commenced at 09:00 as scheduled and that the applicant's version that the examinations did not start at 09:00 was improbable. According to the arbitrator, the parent-teacher meeting did not interfere with the examinations, as the parent-teacher meetings only started at 12:00. As I pointed out above, it was never the applicant's contention that the examination timetable had been changed, but he did testify that the exam was only written at 12:00, because of the parent-teacher meetings scheduled for 08:00 to 11:00.
- [23] It was, and still is, the applicant's contention that the parent-teacher meetings were rescheduled for 08:00 to 11:00 on 12 and 13 June 2018 in terms of Information Notice 8 and that there was no evidence that the parent-teacher meetings were to be held at 12:00 instead. I am satisfied that the arbitrator misdirected himself on this score, as Information Notice 8 (annexure VA3, bundle p. 21) clearly states that the parent-teacher meetings for grade 6 and 7 would be from 08:00 to 11:00 on 12 and 13 June 2018. Although the HOD testified that the exams were written at 09:00 and the parent-teacher meeting was held from 12:00, the arbitrator failed to consider that there was no documentary evidence before him to support the HOD's testimony that the parent-teacher conference was rescheduled by an internal communication, that this testimony was not corroborated, and that this version was never put to the applicant. What's more, there was nothing before the arbitrator to suggest that the applicant was aware of this unproven internal communication. The arbitrator therefore erred in preferring, without laying a proper foundation for doing so, the third respondent's single witness's version on this point.
- [24] The arbitrator then proceeded to conduct an enquiry into whether or not the applicant was entitled to refuse to comply with the management plan. Having found that the HOD's testimony was preferable to that of the applicant, the arbitrator held that, because he accepted that the parent-teacher meeting had been scheduled for 12:00 and that the examinations had started at 09:00, the instruction to the applicant in the school's management plan to attend the parent-teacher meetings were lawful, that the applicant's admitted refusal to accept the curriculum plan and to attend the parent-teacher meetings were disrespectful and insolent, and finally, that the sanction of two months' unpaid suspension and a final written warning was appropriate.
- [25] As alluded to above, the applicant is correct in his assertion that there were defects in the arbitrator's assessment of the evidence before him, upon which I expand below.

Evaluation

- [26] The test on review of an arbitration award is whether the decision is one that falls within the band of decisions to which the arbitrator could come on the evidence before him.[2]
- [27] Section 185 of the LRA provides that every employee has the right not to be unfairly dismissed or subjected to an unfair labour practice. An unfair labour practice is defined in section 186 (2)(b) of the LRA as, “any unfair act or omission that arises between an employer and an employee involving (b) the unfair suspension of an employee or any other disciplinary action short of dismissal in respect of an employee.”
- [28] Section 158(1)(g) of the LRA stipulates that, “(1) The Labour Court may - (g) subject to section 145, review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law;” This court’s jurisdiction to review arbitration awards is limited to the grounds for review set out in section 145 of the LRA. Section 145(2) of the LRA defines a reviewable defect as follows:
- “(2) A defect referred to in subsection (1), means-
- (a) that the commissioner-
 - (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
 - (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
 - (iii) exceeded the commissioner's powers; or
 - (b) that an award has been improperly obtained.”
- [29] The applicant did not seriously pursue his complaint of procedural unfairness before me. It appears from the transcribed record that the applicant’s main complaint on this issue was the SGB letter in June 2018 to the third respondent’s Circuit Manager asking for the applicant to be removed from the school. In this regard, I agree with the arbitrator that the SGB’s request to the HOD did not constitute disciplinary action, but a complaint. In reaction to the complaint by the SGB, the Circuit Manager initiated disciplinary steps, which culminated in the applicant’s disciplinary enquiry and his internal appeal. The applicant was given every opportunity to be heard, he was heard, and he took full advantage of all the rights afforded him in order to give effect to the audi alterem partem rule.[3] There was nothing before the arbitrator to suggest that there were any procedural defects in either the disciplinary enquiry or the internal appeal, nor can I glean any procedural defect in the arbitration proceedings from the award or the arbitration record.
- [30] The charges against the applicant were brought under section 18(1)(t) of the Employment of Educators Act[4] (the Educators Act). That section reads as follows:
- “18. Misconduct.
- (1) Misconduct refers to a breakdown in the employment relationship and an educator commits misconduct if he or she —

(t) displays disrespect towards others in the work-place or demonstrates abusive or insolent behaviour;”

[31] With reference to Commercial Catering and Allied Workers Union of SA and Another v Wooltru Ltd t/a Woolworths (Randburg)[5], the LAC defined insolence and insubordination in Palluci Home Depot (Pty) Ltd v Herskowitz and Others[6] as “conduct which is offensive, disrespectful, impudent, cheeky, rude (disrespectful in speech or behaviour), insulting or contemptuous,” and insubordination as “resistance to or defiance of authority; disobedience, and refusal to obey an order of a superior.”

[32] Although I agree with the applicant that the arbitrator came to the wrong finding as to some of the facts, it is clear that the arbitrator did apply his mind to the evidence before him.

[33] In Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)[7] the SCA held that, “This Court would ordinarily have been disinclined to entertain the appeal because the appellant principally attacked the factual findings of the LAC. And this court has made it clear that it will not interfere with a decision of the LAC only because it considers it to be wrong. Incorrect factual findings fall into this category. There must, in addition, be special circumstances that take it out of the ordinary.”

[34] After an analysis of the cases leading up to Sidumo and another v Rustenburg Platinum Mines Ltd and others[8] and those following it, the court in Herholdt[9] held that:

“[13] The distinction between review and appeal, which the Constitutional Court stressed is to be preserved, is therefore clearer in the case of the Sidumo test. And while the evidence must necessarily be scrutinised to determine whether the outcome was reasonable, the reviewing court must always be alert to remind itself that it must avoid 'judicial overzealousness in setting aside administrative decisions that do not coincide with the judge's own opinions'. The LAC subsequently stressed that the test 'is a stringent [one] that will ensure that ... awards are not lightly interfered with' and that its emphasis is on the result of the case rather than the reasons for arriving at that result. 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' and involves speculation by the commissioner.” (My emphases.)

[35] In view of the above passage from Herholdt, it falls to me to consider whether the result was unreasonable, rather than to only consider the arbitrator’s reasons for arriving at that result. I must therefore consider whether, on a conspectus of the evidence, the arbitrator’s

decision is not supported by any evidence.

[36] The HOD testified that the exams were written at 09:00 as scheduled and that the parents only started arriving at 11:00 or 11:30, because they had been invited to attend the parent-teacher meetings from 12:00. According to the HOD, the parent-teacher meeting had been rescheduled again by way of an internal communication to 12:00 because of the clash with the exam timetable. This version was never put to the applicant, no documentary proof or corroborating testimony was offered, and the principal was not called as a witness. In direct

contradiction of the HOD's testimony, the applicant testified that the exams were only written at 12:00 because the parent-teacher meeting was scheduled from 08:00 to 11:00. This testimony was corroborated by the express content of Information Notice 8.

[37] In resolving a question of fact where there are two directly opposing versions, the arbitrator should have determined the probabilities by applying the test in *Stellenbosch Farmers' Winery Group Ltd. and Another v Martell & Cie SA and Others*[10]. In my view the arbitrator erred in his application of the law of evidence and in his finding that the probabilities favour the third

respondent's version on the issue of the rescheduling of the parent-teacher meetings.

[38] I must accept the applicant's version after considering the failure by the third respondent's representative to put to the applicant the version that the parent-teacher meeting had been rescheduled to 12:00 by way of an internal communication, and the third respondent's failure to produce such communication even after the applicant's representative expressly raised the objection that that version was never put to the applicant. The applicant's testimony that the parent-teacher meeting had been rescheduled from 08:00 – 11:00 was confirmed by Information Notice 8, but the HOD's testimony stood alone and uncorroborated. She was the only witness for the third respondent on this point and, although the third respondent's

representative repeatedly said that the principal would come to testify, she was never called and no explanation for this failure was offered.

[39] In *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd*[11] the then Appellate Division held that:

"The failure of a party to call a witness is excusable in certain circumstances, such as when the opposition fails to make out a prima facie case. But an adverse inference must be drawn if a party fails to ... place evidence of a witness who is available and able to elucidate the facts as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him or even damage his case." This principle of the law of evidence applies equally to labour matters - in *Francois v Van Zyl Molahlehi J*, as he then was, held that, "It is trite that the court may draw an adverse inference against a party that fails to call a witness who is available and able to testify." and in *Francois v Van Zyl Molahlehi J*, as he then was, held that, "It is trite that the court may draw an adverse inference against a party that fails to call a witness who is available and able to testify."

[40] The arbitrator should have drawn a negative inference from the employer's failure to put the HOD's version to the applicant and then failing to call the principal to testify. In my view there was no basis in law to reject the applicant's version. It must be accepted as true. Applying the test in *Stellenbosch Farmers Winery*, the probabilities clearly favour the applicant. However, for the reasons set out below, this does not, in my view, render the award reviewable.

- [41] Accepting that the applicant had proven on a balance of probabilities that the parent-teacher meeting had been scheduled for 08:00 – 11:00 on 12 June 2018 and that the exams therefore were only written at 12:00, what remains to be considered is whether, on the evidence before the arbitrator, the applicant was nevertheless guilty of transgressing the provisions of section 18(1)(t) of the Educators Act, i.e. did the applicant display disrespect and/or insolence towards a colleague?
- [42] The applicant must fail on his own version. In paragraph 10.2 of his founding affidavit the applicant avers that the arbitrator failed to draw the correct conclusion from Information Notice 8, while in paragraph 10.3 he alleges that the arbitrator failed to consider Information Notice 8 at all. Then, in paragraph 10.4 of his founding affidavit, the applicant alleges that the arbitrator failed to consider that the examinations started at 09:00. There is no merit to the applicant's contentions in this regard. The reason advanced by the applicant as to why he refused to accept the curriculum package is contradicted by the applicant himself.
- [43] The applicant himself testified that the exams only started at 12:00 on 12 June 2018. It is common cause that the official timetable scheduled the examinations for 09:00 and the applicant's case is that, because the examinations started at 09:00 it clashed with the rescheduled parent-teacher meeting, which was scheduled from 08:00 to 11:00. At paragraph 8 of the award, the arbitrator recorded the applicant's testimony that the exams were scheduled to start at 09:00 and would last 45 minutes to an hour. On either version, be it that the examinations started at 09:00 and lasted for an hour, or that they only started at 12:00, the applicant could have attended the parent-teacher meetings. If the exam started at 09:00 he could have attended the parent-teacher meeting at least from 10:00 and if the exam only started at 12:00 there was no apparent reason for him not to attend the parent-teacher meeting from 09:00 to 11:45.
- [44] On the applicant's own version, which I accept as the more probable having had regard to the transcribed record, the parent-teacher meeting was scheduled from 08:00 to 11:00 on 12 June 2018 and the exam was written at 12:00. On these facts, the applicant simply refused to attend the parent-teacher meeting to make the point that he would not comply with instructions from the principal and the HOD. The applicant's reason is of lesser import - whether it be his insistence that he be consulted about the management plan first, or that he be reminded by the principal, or that it clashed with a higher authority's instructions - what remains clear is that the applicant's refusal to attend the parent-teacher meeting while no exams were actually being written at the time was a direct challenge to the authority of both the principal and the HOD.

- [45] The applicant's repeated refusal to comply, even after the HOD addressed the matter with him, serves as aggravation. The manner in which the applicant conveyed his refusal to comply with the management plan and the HOD's direct instructions was disrespectful to say the least. In my view, the facts before the commissioner show that the applicant was guilty of contravening section 18 (1)(t) of the Educators Act by being both insolent and disrespectful towards the HOD and his principal.
- [46] The sanction imposed on the applicant was a final warning and a two-month unpaid suspension. He was not dismissed. In my view, that was a lenient sanction and I can find no grounds in the papers or in law for interfering with it. I therefore cannot fault the arbitrator on this score.
- [47] In my assessment, although the arbitrator made an error in his assessment of the facts before him, the result is not one that falls outside the band of decisions to which a decision-maker, acting reasonably, could come on a conspectus of the evidence before him. In the result, the review application must fail.

Costs

- [48] Having considered that there is an ongoing employment relationship between the applicant and the third respondent and the requirements of law and fairness, together with the provisions of section 162 of the LRA, I am of the view that a cost order is not merited.
- [49] In the result, the following order is made:

Order

1. The review application is dismissed.
2. There is no order as to costs.

L. de Haan

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant : Adv D Matlatle

Instructed by : Richardsithi Attorneys

For the respondent : Ad M Mashiane

Instructed by : State Attorney

- [1] No. 66 of 1995, as amended.
- [2] See: Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and Others [2007] ZALC 66; [2014] 1 BLLR 20 (LAC); Quest Flexible Staffing Solutions (Pty) Ltd, a division of Adcorp Fulfilment Services (Pty) Ltd v Legobate (2015) 36 ILJ 968 (LAC).

- [3] Avril Elizabeth Home for the Mentally Handicapped v CCMA and others [2006] 9 BLLR 833 (LC) at 841H – 842E.
- [4] No. 76 of 1998.
- [5]
- (1989) 10 ILJ 311 (IC) at 314H-J.
- [6] [2015] 5 BLLR 484 (LAC) at para 20.
- [7]
- (2013) 34 ILJ 2795 (SCA) at para 6.
- [8] 2008
- (2) SA 24 (CC).
- [9] Herholdt (fn 7) at para 13.
- [10] 2003 (1) SA 11 (SCA).
- [11] 1979
- (1) SA 621 AD.
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