REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 2475 / 2010

In the matter between:

MALAKO WOULDRIEN KOK **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

JOSEPH TSABADI N.O. (AS COMMISSIONER) **Second Respondent**

ABSA BANK LTD **Third Respondent**

Heard:16 October 2014

Delivered: 20 February 2015

Summary: CCMA arbitration proceedings – review of proceedings, decisions and awards of arbitrators – test for review – section 145 of LRA – requires the arbitrator to rationally and reasonably consider the evidence as a whole and arrive at reasonable outcome – determinations of arbitrator compared with

evidence on record – arbitrator's decision not irregular and constitutes a reasonable outcome – award upheld

Evidence – consideration of contradictions – principles stated – consequences to credibility

Misconduct – sexual harassment committed by employee – probabilities support conclusion of such misconduct

Arbitration proceedings – allegations of misconduct and bias on the part of the arbitrator – provisions of section 138 considered – conduct of arbitrator proper – no misconduct or bias shown

Practice and procedure – conclusion of arbitrator on substance sustainable – award upheld – review application dismissed

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter concerns an application by the applicant to review and set aside an arbitration award of the second respondent in his capacity as a commissioner of the CCMA (the first respondent). This application has been brought in terms of Section 145 of the Labour Relations Act[1] ('the LRA').

[2] The applicant was dismissed by the third respondent for misconduct relating to sexual harassment. The applicant then pursued his dismissal as an unfair dismissal dispute to the first respondent. The matter came before the second respondent for arbitration on 18 August 2010, and in an award dated 26 August 2010, the second respondent determined that the dismissal of the applicant was

[1] No 66 of 1995.

substantively fair and dismissed his dispute referral to the first respondent. The applicant was dissatisfied with this finding of substantive fairness by the second respondent and brought the current review application to the Labour Court on 29 September 2010.

Background facts

[3] The background facts in this matter are straight forward. The applicant was employed by the third respondent as the branch manager of its Silverton branch. Also working at the branch was one Susan Tshabalala ('Tshabalala'), being a contract cleaner employed by Kalanga Cleaners CC, a cleaning contractor engaged to render cleaning services to the third respondent at the branch.

[4] It appears from the evidence that the applicant developed a particular liking for Tshabalala. In the period between February and March 2010, the applicant actively solicited the affections of Tshabalala. In February 2010, the applicant approached Tshabalala in the ground floor kitchen at the branch and touched her buttocks, saying to her that "I must have you'. In March 2010, the applicant called Tshabalala to the boardroom. In the boardroom, the applicant touched Tshabalala's breasts, buttocks and private parts, and told her that he was unable to hold himself back anymore. The applicant also exposed his penis to Tshabalala and forced her to touch it. After the fact, the applicant told Tshabalala that if she revealed anything that happened, he would ensure she would be dismissed.

[5] Another incident took place in the boardroom kitchen in March 2010. The applicant, after calling Tshabalala to the kitchen, again proceeded to touch Tshabalala inappropriately and proceeded to rub himself against her until he ejaculated on her uniform. Again, the applicant told Tshabalala that he could not hold himself back and needed to 'relieve' himself.

[6] On 8 March 2010, the applicant called Tshabalala to the office and in the office he suggested to her that she would be 'safe" in her job for 12 months, and that after this period, he would 'make a plan' for her. When Tshabalala tried to leave, the applicant locked the door, told Tshabalala not to make any noise, and proceeded to touch Tshabalala's private parts and said he wanted to have intercourse with her. Tshabalala told the applicant she was menstruating, and the applicant insisted on checking this, which he, to the great embarrassment of Tshabalala, then did. Realizing what Tshabalala said was true the applicant then again proceeded to rub himself up against Tshabalala until he ejaculated. The applicant then let Tshabalala out of the office and offered her taxi money, which Tshabalala refused.

[7] It was this last mentioned incident that drove Tshabalala over the edge, so to speak. She broke down and began to cry. After she composed herself and changed her clothing, she reported what had happened to her at the hands of the applicant to Simon Mahlangu at the branch, and the matter was escalated to the regional office. Tshabalala was asked to give a statement, which she did.

[8] On 12 April 2010, the applicant was then notified to attend a disciplinary hearing to be held on 28 April 2010, on a charge reading 'It is alleged that you acted in a manner unbecoming of an ABSA branch manager (employee) by sexually harassing Susan Tshabalala, not an ABSA employee but a cleaner at the branch'. The disciplinary hearing ultimately took place over two days on 29 and 30 April 2010, pursuant to which the applicant was found guilty of the charge against him and was dismissed on 30 April 2010, on one months' notice. As stated above, the applicant took issue with his dismissal, and pursued the same as an unfair dismissal dispute to the CCMA, and it is this dispute that came before the second respondent for determination.

<u>The award of the arbitrator</u>

[9] The second respondent, as arbitrator, found against the applicant based on a number of considerations. The first consideration was that, according to the second respondent, the probabilities where overwhelmingly against the applicant. In particular, the second respondent considered that there was simply no cause or reason for Tshabalala to fabricate a case against the applicant, the most senior person at the branch, and she simply could gain nothing by doing so.

[10] The second respondent then also made a credibility finding, preferring the evidence of Tshabalala which the second respondent considered to have remained largely intact despite grueling cross examination by the applicant in the arbitration. As to the evidence by the applicant, the second respondent concluded that he in essence offered nothing else but a bare denial as opposition to the evidence of Tshabalala.

[11] The second respondent considered a further probability on the evidence, being the fact that there were two other contract cleaners from Kalanga Cleaners at the branch, other than Tshabalala, and that these other cleaners did not receive the same 'opportunities' from the applicant as Tshabalala did. The second respondent further considered that the applicant made an average of nine telephone calls to Tshabalala, but none to the other cleaners, and that the applicant had also promised to advantage Tshabalala. The second respondent concluded that none of this evidence was challenged by the applicant under cross examination, and thus had to be accepted.

[12] The second respondent came to the ultimate decision that the applicant had indeed sexually harassed Tshabalala, and considering his particular position of trust as a branch manager, determined that his dismissal was entirely justified. The second respondent held that the applicant's dismissal was substantively fair. The question now is whether all the above reasoning and ultimate conclusion by the second respondent is reviewable, in terms of the review application brought by the applicant.

The applicant's review application

[13] In considering the applicant's review application, I must decide if the award of the second respondent is, in short, reasonable. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[2] Navsa AJ held that the threshold test for the reasonableness of an award as: 'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'. What the Constitutional Court meant in *Sidumo* was a review test based on a comparison by a review court of the totality of the evidence that was before the arbitrator as well as the issues that the arbitrator was required to determine, to the outcome the arbitrator arrived at, in order to ascertain if the outcome the arbitrator came to was reasonable.[3] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[4] applied the *Sidumo* test as follows:[5]

> '*Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator… In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision maker could come to on the available material'

Any review grounds advanced by the applicant must therefore pass muster based on the review test as set out above.

[2] (2007) 28 *ILJ* 2405 (CC) at para 110.
[3] See *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 964 (LAC) at para 96; *Herholdt v Nedbank Ltd and Another* [2013] 11 BLLR 1074 (SCA) at para 25.
[4] [2014] 1 BLLR 20 (LAC) per Waglay JP.
[5] Id at para 14.

[14] The principal review ground of the applicant, as advanced in the founding and supplementary affidavits, is that the second respondent committed misconduct in the manner in which he conducted the arbitration proceedings. This case of misconduct is founded on a contention that the second respondent, at the start of the arbitration, told the applicant that he would refuse to consider the evidence of the applicant's witnesses if they did not have first hand knowledge of the events giving rise to the applicant's dismissal. According to the applicant, the second respondent also had an issue with the fact that because the applicant intended to call so many witnesses, this would cause the arbitration to take too long. The applicant complained that because of these approaches adopted by the second respondent at the outset, this then influenced (or even compelled) him not to call the seven witnesses he had subpoenaed to attend at the arbitration, and intended to call. The applicant further submitted that these witnesses would have 'discredited' the testimony of Tshabalala, and were thus relevant and important witnesses. The applicant makes a final point that he had the '*bona fide'* belief that the second respondent actually tampered with the recording of the arbitration to disguise his transgressions.

[15] The next review ground raised by the applicant is that he was not afforded the opportunity to ask Tshabalala relevant questions during cross examination. The applicant contends that the representative of the third respondent 'attacked' him during cross examination and stopped him from asking questions, and the second respondent did nothing to intervene. According to the applicant, the second respondent's failure to intervene caused a disruption of his cross examination which prevented him from properly dealing with the merits of the dispute.

[16] The applicant raised a third ground of review that there were contradictions between the evidence given by Tshabalala in the arbitration, and the statement she had written at the time when this matter was investigated by the third

respondent before disciplinary proceedings were instituted. This applicant said that statement was in evidence before the second respondent, but the second respondent did not consider the contradictions. The applicant also did question Tshabalala on these contradictions, and according to him, these contradictions and the answers given by Tshabalala when being question about this, showed that her evidence was not true. The thrust of the applicant's complaint is that the second respondent failed to consider this, and this was completely irregular. In short, the applicant's case was that because of the contradictions, Tshabalala's version should not have been accepted.

[17] The remainder of the review grounds by the applicant, in summary, effectively all relate to his dissatisfaction about the credibility findings made by the second respondent, and his contention that the second respondent committed a reviewable irregularity in not finding that the evidence of Tshabalala lacked credibility per se.

The issue of the misconduct by the arbitrator

[18] I will first deal with the review ground raised by the applicant with regard to the alleged misconduct of the second respondent, in the form of the second respondent having unduly influenced or coerced against him calling the witnesses he wanted to call. The point of departure in determining this ground of review is simply whether the second respondent actually did this. I have little hesitation in rejecting this ground of review as entirely unsubstantiated and spurious. The transcript of the arbitration proceedings provides no support of any kind for such a case. In fact, a proper consideration of the transcript shows completely the opposite to what the applicant is seeking to contend, as I will now elaborate on.

[19] Considering the transcript from the very point of the start of the arbitration, and once introductions were done on the record, the proceedings commenced with a

short opening statement by the second respondent. The second respondent firstly recorded that he established from the parties beforehand that the existence of a dismissal was not in dispute. And because dismissal was not in dispute, the second respondent recorded that it had been agreed that only substantive fairness of the dismissal was in issue, and he need not consider the issue of procedure. The second respondent made no mention of any other limitation of issues or any prior discussion about witnesses being called, or not being called for that matter. The second respondent however, does say that the applicant has asked to make an opening address, and then handed over to the applicant to say his piece.

[20] The applicant immediately starts with his opening address. This address was a lengthy and emotive affair, containing a plethora of entirely irrelevant information. However, and of direct relevance to the consideration of the review ground raised by the applicant, are a number of statements the applicant actually made in his opening address about the calling of witnesses. Of importance is the fact that these statements made by the applicant in his opening address is irreconcilable with any proposition of him having been discouraged from or coerced into not calling witnesses. I will touch on the following pertinent examples where the applicant dealt with the issue of the calling of witnesses:

20.1 The applicant, after a lengthy introduction as to his background, informs the second respondent: 'However I am not trying to tell you through this opening statement in front of you this morning what the evidence is, it is not (inaudible) the witness and the exhibits will do that.' To my mind, the applicant was clearly intending, when making his opening statement, to call witnesses, and was informing the second respondent accordingly.

20.2 Further, the applicant said: 'I am going to cross examine some of the witnesses to show that the evidence the employer relied upon …is not true'. The applicant added that 'I will also cross examine some of the

witnesses to prove that some crucial evidence that proves my innocence was not considered …'. Again, such statements are simply irreconcilable with a litigant that was discouraged from calling witnesses and has decided not to do this;

20.3 The applicant next refers to what he is going to raise with two specific witnesses he intends to call, being Masinga and De Wee, both of whom he subpoenaed, when they testify. As to the other witnesses he intended to use, the applicant says he had to subpoena all of them to get them to testify, and they are all there to testify. Now if this was the case, based on the applicant's own opening address, then how can there be any merit in any proposition that the applicant had been discouraged from calling witnesses and as a result had decided not to call them, before the arbitration even started? It simply makes no sense.

20.4 The applicant, in the latter part of his opening address, deals with some of the background facts of this case. The applicant submitted that some of the staff had a vendetta against him, and then says that the ABSA HR and the person who investigated the allegations against some of these staff, who were there to testify, would testify about this. The applicant refers to a meeting held on 15 February in this regard and confirms that 'the same HR business partner' would testify about this meeting.

20.5 In dealing with the incident with Tshabalala itself, the applicant submitted there were witness statements from other witnesses that had disappeared under circumstances he considered 'highly suspicious'. The applicant said this submission would be proven through 'witness testimony'. The applicant in fact says that "I will leave it to my witnesses to prove those statements …." and that this would show his innocence. Surely there can be no other inference drawn from such statements than the applicant always being of the intention to call witnesses to testify on his behalf.

20.6 Then, and towards the end of his opening address, the applicant says 'I was told telephonically by one of the witnesses present today and they will testify to that that the ER consultant who investigated the case … re-interviewed some of the witnesses again after the disciplinary hearing.' (sic)

20.7 The applicant concludes with the following statement: '…. I feel and believe that the employer actually manipulated the process in order to find me guilty and I will try though witnesses who are here uhm to show that …..'.

In short, the applicant's opening address makes it clear that he intended calling witnesses to present evidence in support of his case. He even referred to what these witnesses would testify about. The applicant never said in what was an extensive opening address that anything stood in his way to the calling of his witnesses. But also, not once is the applicant contradicted or interrupted by the second respondent when talking about his witnesses, which would certainly have been expected if the second respondent has such an issue with this. In short, if the applicant had been coerced before the arbitration even started into not calling witnesses, then surely he would never say in his opening address that he would do so. I also mention one final issue where, and in the course of the applicant cross examining Tshabalala, the applicant actually put to her that Janette de Lange was going to testify about the content of what he was putting to her under cross examination.

[21] I am quite confrontable in concluding that the applicant had fabricated this whole issue of being discouraged to call witnesses to try and provide some substantiation for his review application, because he had decided not to call these witnesses, thinking his own testimony, after he had testified, was sufficient. When it turned out that the applicant's confidence in his own credibility was misplaced, the applicant simply used the fact that he had subpoenaed all those

witnesses to fabricate a review case. But then, and in going down this road, the applicant has a problem, being that which is contained in the transcript of his very own opening address. The applicant then tries to get around this obstacle by alleging that the second respondent had tampered with the record. When I pointed out to the applicant that a holistic reading of the transcript showed a complete record without any possible tampering, the applicant then submitted that the exchange between him and the second respondent about the calling of witnesses took place before the recording started, and that is why nothing was recorded.

[22] I will swiftly dispose of the allegation that the second respondent tampered with the record. It is just not true. There are no gaps or inconsistencies or any kind of deviations in the transcript that could point to tampering. In fact, and accusing an arbitrator of tampering with a record without any substantiation for such a contention, is simply scandalous. As to the belated contention by the applicant that the exchange between him and the second respondent about witnesses took place before the recording started, the simple answer is that the applicant's own opening address contradicts this. The same considerations I have already referred to above, being that the applicant would simply not have said what he said about the calling of witnesses in his opening address if this was indeed the case, equally holds true. I have no hesitation in rejecting these issues raised by the applicant on the basis of being entirely devoid of any substance or merit. I am satisfied that these contentions were an afterthought by the applicant to try and substantiate a review case about having his right to call witnesses being interfered with, which never had merit.

[23] For the sake of completeness, I explored with the applicant as to what all these witnesses that he had subpoenaed could say and contribute to the arbitration, even if they had been called. I my view, none of these witnesses could contribute anything material. In essence, and as the second respondent actually

appreciated, this was a case of two mutually destructive versions between two individuals, who were the only persons present when the events happened. The matter is, in short, between the applicant, and Tshabalala, and they both testified. There was no other witness that could contribute to this enquiry.

[24] I will next deal with the applicant's second review ground relating to the alleged interference with his cross examination of Tshabalala. Again, the simple answer to this case of the applicant is found in the record itself, which in my view provides no support whatsoever for such a case. The instances where the third respondent's representative objected to the cross examination were limited, was entirely justified, and the manner in which the second respondent dealt with these objections was proper and even handed. The key events in this regard emanating from the record are the following:

24.1 At the outset of cross examination, the applicant sought to put a statement made by the 'decision maker' at his disciplinary hearing to Tshabalala to establish if she was able to understand Afrikaans and English. The third respondent's representative objected, contending it not relevant. The second respondent sought to explain the purposes of cross examination to the applicant. The applicant thanked the second respondent and decided not to proceed with the question.

24.2 The applicant later in the course of his cross examination sought to put a statement by one "Joan" to Tshabalala to comment on. The third respondent's interjected and asked if this person would be called to testify to confirm the statement and the applicant answered that he did not intend calling this person. The third respondent's was still in the process of articulating a further objection because of the applicant not intending to call this witness, when the applicant the simply moved on to another question, and the matter was left there.

24.3 The applicant sought to question Tshabalala about some of the contents of the statement she had made during the investigation of the incident, and the third respondent's representative objected on the basis of the questions having been asked and answered already. Before the second respondent could even decide on the objection, the applicant said that he was going to step off the question.

24.4 In the end, and in the entire transcript of the cross examination of Tshabalala spanning some 25 pages, there were a total of four further interjections by the third respondent's representative, other than those already set out above, none of which interjections were unreasonable or irregular. In in particular, in most of these instances, the applicant did not even wait for the objection to be concluded or dealt with, before simply moving on to another question.

[25] I can simply find no indication that the applicant's cross examination had been unduly interfered with. The applicant mostly did not even wait for the objection to be dealt with before simply moving on to the next question. In fact, and in conducting his cross examination, the applicant was given virtual free reign by the second respondent. The limited number objections raised by the third respondent were mostly justified, and did not constitute undue or unreasonable interference. Any contention by the applicant of the existence of misconduct on the part of the second respondent, in this respect, is entirely devoid of any merit.

[26] In terms of section 138(1) of the LRA, a commissioner may conduct arbitration proceedings in any manner that a commissioner deems fit, provided the commissioner acts overall fairly and comes to grips with the substantial merits of the dispute.[6] As the Court said in *CUSA v Tao Ying Metal Industries and Others:*[7]

[6] Section 138(1) reads 'The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.'

> 'Consistent with the objectives of the LRA, commissioners are required to 'deal with the substantial merits of the dispute with the minimum of legal formalities'… Thus the LRA permits commissioners to 'conduct the arbitration in a manner that the commissioner considers appropriate'. But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do.'

In my view, and *in casu*, a proper consideration of the transcript of the arbitration exhibits no conduct on the part of the second respondent in the conducting of the arbitration that can be considered to be inconsistent with the above objectives. At the commencement of the arbitration, the second respondent first established on what grounds the applicant challenged the fairness of his dismissal. The second respondent established that procedural fairness was in fact conceded by the applicant, and that this issue need not be dealt with in evidence. And then, in the course of the arbitration, the second respondent hardly interfered in the conduct of the proceedings by either party.

[27] In *County Fair Foods (Pty) Ltd v Theron NO and Others,*[8] the Court said:

> 'For there to be misconduct, it has been held that there must be some 'wrongful or improper conduct' on the part of the decision maker, in this instance the commissioner. … Misconduct has also been described as requiring some 'personal turpitude' on the part of the decision maker. … The basic standards of proper conduct for an arbitrator are to be found in the principles of natural justice, and in particular the obligation to afford the parties a fair and unbiased hearing. …'

There is, in my view, no evidence or indication of any personal turpitude on the part of the second respondent. I am satisfied that a proper consideration of the transcript

[7] (2008) 29 *ILJ* 2461 (CC) at para 65.
[8] (2000) 21 *ILJ* 2649 (LC) at para 7.

of the arbitration clearly shows that the applicant received a fair and unbiased hearing. I am equally satisfied that the applicant could lead whatever evidence he wanted, and asked whatever questions he wanted. I am equally satisfied that the applicant himself chose not to call witnesses, despite saying in his detailed opening address that he would. Accordingly, there is no merit in any ground of review that the second respondent committed any kind misconduct in the course of and in the conduct of the arbitration, and any such contention must be rejected.

The merits of the award

[28] As the second respondent correctly appreciated, he in essence had two mutually contradictory versions before him, as presented by two individual persons. It was then the duty of the second respondent to decide which version to accept. As was said in *Sasol Mining (Pty) Ltd v Ngqeleni NO and Others:*[9] 'One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him...' The second respondent went about discharging this function by way of a determination of the probabilities, as well as the credibility and reliability of the two witnesses that testified before him. As the Court said in *SFW Group Ltd and Another v Martell et Cie and Others,*[10] which would be equally applicable in arbitration proceedings such as those before the second respondent:

> '…To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities...'

[29] In dealing with the issue of the probabilities, the second respondent concluded that the probabilities were overwhelmingly against the applicant. A reading of the

[9] (2011) 32 *ILJ* 723 (LC) at para 9.
[10] 2003 (1) SA 11 (SCA) at para 5.

award of the second respondent shows that he was motivated in coming to this conclusion by in essence three considerations, being: (1) there was simply no reason or cause for Tshabalala to fabricate such an elaborate version against the applicant, and she had nothing to gain by doing this; (2) Even on the applicant's own version, these was clearly a marked difference in the interaction between the applicant and Tshabalala, as opposed to the applicant and the other two cleaners; and (3) the applicant made a number of telephone calls to Tshabalala when there simply was no basis for doing so. These are indeed important considerations. In *Gaga v Anglo Platinum Ltd and Others,*[11] the Court said the following on the very issue of the absence of any cause for fabricating such a version:

> 'The complainant had no discernible reason to be dishonest about the pattern of behaviour and her discomfort. Both she and the appellant confirmed that in all other respects they had a good working relationship. … For the court to accept the appellant's total denials as truthful, we would be required to believe that the complainant and Ms Mogaki, with unknown motives, had conspired to falsely accuse the appellant of serious misconduct. Neither witness displayed bias against the appellant of that order...'

In my view, the same considerations equally apply *in casu*, and was in fact properly and reasonably appreciated and considered by the second respondent as well. I must further say that I find it simply inexplicable why a branch manager such as the applicant would telephone a contract cleaner (who does not even work for the third respondent) on nine occasions, and even after hours. And also, why would the applicant take the kind of interest in Tshabalala as he did, but took no similar interests in any of the other cleaners. To say that these issues constitute probabilities against the applicant is undoubtedly correct.

[30] In *National Union of Mineworkers and Another v Commission for Conciliation,*

[11] (2012) 33 *ILJ* 329 (LAC) at para 36.

Mediation and Arbitration and Others[12] the Court said the following as to the establishment of probabilities:

> 'The locus classicus on this issue is the judgment in *Govan v Skidmore* where the court held that it was trite law that 'in general, in finding facts and making inferences in a civil case, the court may go upon a mere preponderance of probability, even though its so doing does not exclude every reasonable doubt, so that one may, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one'.

In casu, I am satisfied in accepting that the most natural and plausible conclusion to be drawn from the evidence in this case is that the applicant indeed sexually harassed Tshabalala. The second respondent's finding that this was indeed the case is thus entirely sustainable, and certainly not irregular. It is, in short, a reasonable outcome.

[31] The second respondent, as said, also specifically dealt with the issue of the credibility of the witnesses, and on this basis accepted the evidence of Tshabalala. The reasons the second respondent gave for this is that he considered Tshabalala's version to have remained largely intact following gruelling cross examination. The second respondent said she remained "steadfast and unshaken'. As opposed to this, the second respondent reasoned, the applicant simply offered a bare denial. In my view, there is simply no basis to interfere with the second respondent having preferred the evidence of Tshabalala. The reasons he gave are in my view actually correct, and certainly substantiated by the transcript. No case has been made out by the applicant, in his founding of supplementary affidavits, as to why such a preferring of evidence by the second respondent should be interfered with this instance. In *National*

[12] (2013) 34 *ILJ* 945 (LC) at para 37.

Union of Mineworkers[13] the Court said:

> 'The issue of the importance of credibility findings made by the commissioner being accepted in this court on review was made by Mr *Snider*, who represented the third respondent. He submitted that it was the commissioner who sat in the arbitration proceedings, looked at the witnesses, listened to them, and assessed their credibility, and on review, this court should not readily interfere with this, as the commissioner was in the best position to make these findings. I agree with these submissions. This court should not readily interfere with credibility findings made by CCMA commissioners, and should do so only if the evidence on the record before the court shows that the credibility findings of the commissioner are entirely at odds with or completely out of kilter with the probabilities and all the evidence actually on the record and considered as a whole. Findings by a commissioner relating to demeanour and candour of witnesses, and how they came across when giving evidence, would normally be entirely unassailable, as this court is simply not in a position to contradict such findings. Even if I do look into the issue of the credibility findings of the second respondent in this case, I am of the view that the record of evidence in this case, if considered as a whole simply provides no basis for interfering with the credibility findings of the second respondent. There is simply nothing out of kilter between the evidence by the witnesses on record and the credibility findings the second respondent came to. The evidence on record in my view actually supports the second respondent's credibility findings. The credibility findings of the second respondent therefore must be sustained.'

A consideration of the evidence presented by the witnesses as contained in the transcript matter convinces me that the same reasoning equally applies *in casu*. There is simply nothing on the transcript to show that the credibility finding of the second respondent is completely out of kilter with the evidence or the probabilities. The second respondent's credibility finding remains unassailable.

[13] (*supra*) at para 31.

[32] According to the applicant, his 'trump card', so to speak, was the existence of several contradictions between the contents of the statement given by Tshabalala when this matter was first investigated, and the evidence she ultimately presented in the arbitration. The applicant placed considerable emphasis on these contradictions as a basis for contending that the second respondent committed a reviewable irregularity in not preferring his evidence over that of Tshabalala. In essence, the applicant was subscribing to the maxim *falsus in uno falsus in omnibus* - false in one thing false in all. But, and unfortunately for the applicant, this maxim has been soundly rejected by the courts as unreliable and illogical[14]. Whilst it is of course true that such contradictions are indeed a consideration when assessing the credibility of witnesses overall,[15] it is simply not the be all and end all the applicant contends it to be. Further factors for consideration, as specifically set out in *SFW Group*[16], are the witness's candour and demeanour, the witness's bias (latent and blatant), internal contradictions in the evidence, the probability or improbability of particular aspects of the version, and the calibre and cogency of the witness' performance compared to that of other witnesses testifying about the same incident or events.

[33] The simple answer to the applicant's contradictions argument is that Tshabalala was open and honest about the contradictions, up front, and when giving evidence in chief. Therefore, this is not a situation where Tshabalala was confronted with the contradictions in her statement under cross examination and then sought to explain away the contradictions between her testimony and that which is contained in the statement. She identified all the contradictions, and sought to explain it simply on the basis that there was a misunderstanding between her and the person that was assisting her in recording the statement. But more importantly, these contradictions all relate to what can comfortably be

[14] See *R v Gumede* 1949 (3) SA 749 (A) at 756; *Mkize v S* [2010] JOL 26473 (GSJ) at para 58(c).
[15] See *SFW Group* at para 5.
[16] Id at para 5.

called peripheral issues, such as whether Emily (another cleaner) was in her presence when one incident occurred, whether one incident happened in the kitchen which is part of the boardroom and not the boardroom itself, and finally which persons had seen her crying. These discrepancies are of very little moment in the consideration of this matter. I am satisfied that on all the critical and central aspects of her version, the testimony of Tshabalala was entirely consistent with her statement and more importantly, there were no internal contradictions in her evidence in the arbitration itself. Having considered Tshabalala's evidence as it appears from the record, I believe it to be comparable to the following *dictum* from the judgment in Gaga[17]:

> '… The probabilities overwhelmingly support a finding that the complainant was the more credible witness. She offered her testimony with candour, conceding a measure of ambivalence and honest recognition that she had been less than forceful in rejecting his advances. The possibility that she was flattered, as I have intimated, cannot be discounted. But there is one consistent, incontrovertible thread which runs throughout her evidence; and that is her allegation that the appellant regularly and repeatedly made suggestive remarks and propositioned her sexually. …'

The aforesaid *dictum i*s in effect similar to what the second respondent was saying in his award. And I agree with him.

[34] However and even considering the fact that these contradictions undeniably exist, one can do little better than to refer to the following *dictum* from the often quoted lecture by Nicholas J on "Credibility of Witnesses" at the 1984 Oliver Schreiner Memorial Lecture, which was published in the *South African Law Journal*[18] :

[17] Id at para 35.
[18] Referred to in *The President of the RSA and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at para 124.

> 'A witness is proved to be in error where his statements are contradicted by the proved facts or where he is guilty of self-contradiction. Where he has made contradictory statements, since both cannot be correct, in one at least he must have spoken erroneously. Yet error does not in itself establish a lie. It merely shows that, in common with the rest of mankind, the witness is liable to make mistakes. A lie requires proof of conscious falsehood, proof that the witness has deliberately misstated something contrary to his own knowledge or belief.'

[35] The lecture given by Nicholas J followed on his own judgment in *S v Oosthuizen*[19] where the learned Judge said:

> 'The argument on behalf of the accused would seem to be this: the evidence of Broodryk is contradicted (whether by other witnesses, or by himself in this trial, or by himself in previous statements); *ergo* his evidence should be rejected. The conclusion is a *non sequitur*. There is no reason in logic why the mere fact of a contradiction, or of several contradictions, necessarily leads to the rejection of the whole of the evidence of a witness. …'

The learned Judge further said:[20]

> '… Plainly it is not every error made by a witness which affects his credibility. In each case the trier of fact has to make an evaluation; taking into account such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence. Two specific cases must be considered: the case of deliberate falsehood; and the case of honest mistake. …'

The learned Judge concluded as follows, even in the case of a deliberate falsehood:[21]

[19] 1982 (3) SA 571 (T) at 575H-576A.
[20] Id at 576G-H.
[21] Id at 577A-B.

> 'All that can be said is that where a witness has been shown to be deliberately lying on one point, the trier of fact *may* (not *must*) conclude that his evidence on another point cannot safely be relied upon. …'

[36] The above reasoning in my view still holds true, and is still applied when considering these kinds of contradictions and their effect on the credibility of a witness. A recent example is the judgment in *Mkize v S*[22] where the Court applied the above principles and concluded:

> '….There is no proof of conscious falsehood on the part of the complainant or Captain Motshoane. In order for a court to reject the complainant's evidence, more is required than the pointing to this contradiction; there must be proof that this contradiction was the result of a deliberate and conscious falsehood. Such proof does not exist. In the absence of proof of deliberate fabrication a court cannot find that the complainant or Captain Motshoane were mendacious and reject their evidence on this basis. Their contradictions on this aspect are of such a nature that they are in all likelihood the result of an honest mistake.'

And similarly, I believe that where it comes to the four contradictions between the statement made by Tshabalala and her evidence in the arbitration before the second respondent, the same reasoning applies and it just cannot be said that there exists deliberate and conscious falsehoods on the part of Tshabalala. There was simply no evidence of any kind of a deliberate fabrication of events of Tshabalala to suit her purposes. Tshabalala acknowledged the contradictions, and gave an honest explanation for it. There is simply no basis to reject her evidence with regard to the crucial events in this matter, simply because of these contradictions. The applicant's trump card is thus not what he thought it was, and simply cannot serve as basis to interfere with the credibility finding the second respondent had made.

[37] Therefore, I conclude that the second respondent's decision to accept the

[22] [2010] JOL 26473 (GSJ) at para 58.

evidence of Tshabalala was entirely reasonable, and all considered, actually correct. Once the evidence of Tshabalala prevails, that is the end of the matter for the applicant. He thus sexually harassed Tshabalala which is entirely indefensible misconduct. In *F v Minister of Safety and Security and Another (Institute for Security Studies, Institute for Accountability in Southern Africa Trust and Trustees of the Women's Legal Centre as Amici Curiae)*[23] the Court said that:

> 'The abuse of women and girl-children is rife in this country. …. This was aptly articulated in *Carmichele*:
>
> '"Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women." . . . South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights. …'

The situation is made even worse by the fact that the conduct was perpetrated by the applicant in his capacity as the *de facto* superior of Tshabalala at the branch.[24] There simply can be no acceptable or plausible explanation that could serve as justification for what the applicant did. In my view, he certainly earned his dismissal, and the second respondent's conclusion to this effect is entirely sustainable and reasonably arrived at.

[38] Considering that the second respondent's award must be sustained on the grounds set out above, it is simply not necessary for me to consider the other reasoning of the second respondent that the applicant simply offered a bare

[23] (2012) 33 *ILJ* 93 (CC) at para 37.
[24] See *Gaga* (*supra*) at para 43; *SA Metal Group (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 *ILJ* 2848 (LC) at para 15.

denial and did not put certain aspects of his case to Tshabalala under cross examination to respond to. What I am however, compelled to refer to is the applicant's entirely unacceptable conduct in the course of being cross examined in the arbitration. He was most insulting towards the IR representative of the third respondent, being Mr Venter, and consistently called him a liar, when this was entirely unnecessary and unwarranted. Although there are numerous examples of this on the record, two bear specific mention. On one occasion, Venter sought to simply refer the applicant to an e-mail, and before a question could even be put by Venter to the applicant, the applicant says 'You are lying man sies man, you are lying sies'. The second example is that when it was put to the applicant by Venter that the applicant's recordings he sought to rely on had been shortened by him (which I may point out he in the end actually conceded to be the case) the applicant said to Venter: 'That you are saying, you are a dishonest man.' This is the kind of conduct that is certainly a consideration, in the light of the *dictum* in *SFW Group*, that would detract from the credibility of the applicant as a witness. In my view, this is the kind of conduct by a witness that goes on the offensive to try and avoid answering proper questions about the merits of his case. Most certainly, and if I was the arbitrator, this behaviour would not do the applicant any favours.

[39] In conclusion, the applicant's review application, even if considered on the merits thereof, thus has little prospect of success. The second respondent's finding of substantive fairness was substantiated by the evidence and is not in any way irregular. This finding must accordingly be upheld.

Costs

[40] When it comes to the issue of costs, and in terms of sections 162(1) and (2), I have a wide discretion. When exercising this discretion, I consider a costs award against the applicant to be entirely justified. I say this for a number of reasons. Firstly, the applicant filed heads of argument consisting of 155 paragraphs of

mostly irrelevant and emotive contentions, and containing references to evidence that was not even before the second respondent. There were also detailed references and complaints about the conduct of his erstwhile attorney, which could make no contribution to the determination of this matter. Further, I also regard the applicant's conduct with regard to the third respondent's attorney, Mr Yeates, to be an important consideration. The applicant filed extensive papers accusing Mr Yeates of impropriety, when there was simply no basis for such an accusation. Quite frankly, Mr Yeates was trying to assist the applicant, who was representing himself. This led to a further lever arch file of process, which I had to read, and which was entirely unnecessary, and on occasion defamatory and insulting. Finally, and as I have dealt with above, the applicant persisted in Court with making submissions entirely unsupported by the record and accused the second respondent of tampering with the record when there was no basis for such a contention. Overall, and even in the arbitration proceedings, the manner in which the applicant chose to conduct his case was entirely unacceptable. The third respondent asked for a punitive costs order. If the applicant was not a lay person, I may well have considered it, but I *in casu* do not intend to go so far. I believe that this is however, an appropriate instance for a costs award to be made against the applicant.

Order

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

The applicant's review application is dismissed with costs.

Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant:	Appearing in person
For the Third Respondent:	Advocate F A Boda
Instructed by:	Cliffe Dekker Hofmeyr Inc Attorneys