REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1327/13

In the matter between:

XSTRATA COAL SA (PTY) LTD	**Applicant**
and	
Commissioner J NGOBENI N.O.	**First Respondent**
CCMA	**Second Respondent**
NUM	**Third Respondent**
BHEKA ZUNGU	**Fourth Respondent**

Heard: 12 February 2016

Delivered: 2 March 2016

Summary: Review – sexual harassment – gross irregularities in proceedings leading to unreasonable result – award set aside – dismissal fair.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Xstrata Coal, dismissed its employee, Bheka Zungu[1], for sexual harassment. He referred an unfair dismissal dispute to the CCMA.[2] Conciliation failed. He referred it to arbitration. The arbitrator, Commissioner Joseph Ngobeni[3], found that the dismissal was substantively unfair and ordered Xstrata to reinstate the employee with backpay for the time that he was unemployed. Xstata seeks to have the award reviewed and set aside. It argues that the dismissal was fair.

Background facts

[2] Zungu was a fulltime shop steward. A co-worker, Ms Yolanda Ngwenya, alleged that he placed his hand on her breast and touched her waistline in an inappropriate manner. She felt uncomfortable and made it clear that it was unwelcome. She sent an email to her HR manager complaining about the incident. Zungu denied it. At a disciplinary hearing, the chairperson found that he did commit the misconduct. He was dismissed.

The evidence at arbitration

[3] At the arbitration, Xstrata called four witnesses. Zungu testified on his own behalf and called another witness, Judas Matingane.

[4] The alleged victim, Ms Ngwenya, testified that Zungu and Matingane came to her office on 22 October 2012 to enquire about a meeting date. (Matingane is the chairperson of the NUM branch committee). Zungu came around her desk and put his hand on her breast. She pushed it away. He tapped her waist and asked her (in Zulu) if she was angry. Matingane, who was standing at the door, lifted his shirt and exposed his stomach while he was tucking his shirt into his trousers. After they had left, she sent her human resources manager an email:

[1] The fourth respondent. He was represented by his trade union, the National Union of Mineworkers (NUM), cited as the third respondent.

[2] Commission for Conciliation, Mediation and Arbitration (the second respondent).

[3] The first respondent.

> "Hi Lindiwe
>
> Bheka Zungu and Judas Matingane just walked into my office now to inquire about the next joint forum meeting. Bheka came to stand on my side of the table and he placed his hand on my chest out of nowhere, then I pushed it away and he went to tap my waistline as I was sitting down. He even had the nerve to say am I now angry at him. Judas Matingane also lifted up his shirt inside the office and his whole stomach was exposed. I am appalled by their behaviour and they made me feel uncomfortable."

[5] According to Ngwenya, Zungu realised that his conduct was unwelcome. He returned to her office to apologise.

[6] Pierre van der Heever conducted a polygraph test. Ngwenya passed (i.e. showed "no deception") and Matingane failed (i.e. his answers showed deception). Dickie Grobler, the chairperson of the grievance hearing, testified that Zungu refused to undergo a polygraph test. Cornelius du Preez testified that he counselled Ms Ngwenya. She was disturbed by the incident, even though he only saw her some four months later.

[7] Matingane confirmed that he went to Ms Ngwenya's office with Zungu. He denied that Zungu touched her breast or waist, or that he (Matingane) was fixing his trousers or had exposed his stomach.

[8] The employee, Zungu, confirmed the meeting. He went around Ms Ngwenya's desk to phone the HR manager, Lindiwe. He denied touching Ngwenya.

The award

[9] The arbitrator latched onto the contemporaneous email (quoted above) to find that "the tone of the above email (written after the incident) gives the impression that both employees (Zungu and Matingane) were harassing her". He then found that he had "difficulties coming to terms with the applicant's [i.e. Zungu's] evidence in this arbitration"; yet he found Ms Ngwenya not to be a credible witness for the following reasons:

9.1 She testified that she reported the matter immediately after Zungu and Matingane had left her office; yet the arbitrator found that she had reported it "an hour later".

9.2 Ngwenya could not recall any “nasty comments” that Zungu had allegedly made.

9.3 Ngwenya mentioned “policies and procedures” that employees must adhere to, yet she did not report the comments to management. [It is common cause that she did report the alleged sexual harassment].

9.4 In her examination in chief she did not mention Matingane exposing his stomach.

9.5 She testified that Matingane was not her focus; the alleged perpetrator (Zungu) was. To this, the arbitrator asked, “then why would she include his actions in her complaint?”

9.6 The arbitrator formed the view that she had “changed her version” because she mentioned Matingane’s conduct in the email complaining about Zungu touching her, but she did not mention Matingane in her evidence in chief.

[10] The arbitrator further found that Grobler’s conclusion that Zungu had refused the polygraph test because he probably “had something to hide” was not substantiated by any evidence.

[11] The arbitrator rejected Du Preez’s evidence that Ms Ngwenya was traumatised because he only saw her four months after the incident.

[12] The arbitrator found that it was probable that Zungu went to Ngwenya’s desk to make a phone call and not to harass her. He does not explain why.

[13] The Commissioner also found that, if the incident had happened, Ngwenya “would have screamed for help”.

[14] He concluded:

> “In the light of the evidence above I am persuaded to accept the version of [Zungu] to be more probable. As such I find that the [employee] did not touch [Ngwenya] in an inappropriate manner and accordingly find that the [employee] did not breach the rule rendering his dismissal substantively unfair.”

Review grounds

[15] Ms *Edwards* argued that the Commissioner committed a number of gross irregularities that resulted in a decision which a reasonable decision-maker could not reach, given the material before him.[4]

[16] She further argued that the commissioner did not come to a proper finding on the probabilities, having assessed the credibility of the witnesses; their reliability; and the inherent probabilities of the two conflicting versions.[5]

Evaluation / Analysis

[17] The commissioner's adverse findings with regard to Ms Ngwenya's credibility rested almost entirely on the fact that she did not mention Matingane's conduct – allegedly tucking his shirt in and exposing his stomach – in her evidence in chief. The commissioner drew an adverse inference because Ms Ngwenya had mentioned that in her contemporaneous email to the HR manager, Lindiwe.

[18] That is a wholly irrational conclusion. Ms Ngwenya's complaint was aimed at Zungu touching her, not Matingane, who was a bystander. The arbitration concerned Zungu, not Matingane. Zungu was the applicant. He had been dismissed. He complained that it was unfair; Ms Ngwenya was arguing the contrary. It is hardly surprising that she focused on him touching her inappropriately, rather than the lesser incident of Matingane, a bystander, allegedly exposing his stomach while tucking his shirt in. The arbitrator's credibility finding on this basis was irrational and unreasonable. That, in turn, tainted his ultimate conclusion on the probabilities.

[19] The commissioner's finding on the email – that Ms Ngwenya had sent it an hour after the incident, and that she "did not have any explanation why it took her an hour to report the incident" – is also without foundation. She testified that Zungu and Matingane had entered her office at about 11h50. It is clear from the email itself that she sent it at 12h00, ten minutes later.

[4] *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC) para [110]; *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA) para [25].

[5] *Stellenbosch Farmers Winery Group Ltd v Martell et cie* 2003 (1) SA 11 SCA para [5].

Rather than detracting from her credibility, the content of the contemporaneous email adds to it.

[20] The polygraph evidence is perhaps of lesser significance. Such evidence is not, in itself, indicative of credibility or otherwise.[6] But the arbitrator completely disregarded the fact that Zungu had refused to undertake such a test or to draw any adverse inference from it. That also tainted his reasoning and ultimate conclusion, making it unreasonable.

[21] The commissioner had no reasonable basis for completely disregarding the evidence of Du Preez, the counsellor. The mere fact that he spoke to the alleged victim a few months after the incident does not mean, without more, that his evidence that she was still traumatised should be disregarded. The victims of sexual harassment are often traumatised years after the incident.

[22] The same consideration is applicable to Ms Ngwenya not having screamed for help. Victims of sexual harassment often feel powerless at the time. As the LAC remarked in *Campbell Scientific Africa (Pty) Ltd v Simmers*[7]:

> "By its nature such harassment creates an offensive and very often intimidating work environment that undermines the dignity, privacy and integrity of the victim and creates a barrier to substantive equality in the workplace. It is for this reason that this Court has characterised it as "the most heinous misconduct that plagues a workplace".

Conclusion

[23] The misdirections by the commissioner; his failure to assess the credibility of the witnesses and the probabilities; and his failure to take relevant evidence into account, taken cumulatively, led to an unreasonable result. This is, in my view, one of those rare cases where the result is so unreasonable that no reasonable commissioner, acting reasonably, could have come to the same conclusion.

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[6] Cf *DHL Supply Chain (Pty) Ltd v De Beer NO* (2014) 35 *ILJ* 2379 (LAC) para [11] – [12].

[7] [2015] ZALAC 51 (23 October 2015) para [21].

[24] The applicant asked for the dispute to be remitted to the CCMA for a fresh hearing before another commissioner. I agree. Another commissioner will be in a position to consider the evidence relating to Zungu – as opposed to Matingane – properly, and to consider the credibility of the witnesses, their reliability, and the probabilities.

[25] The new commissioner will also have to take into account the amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace[8] which defines sexual harassment as –

> "' …unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:
>
> 4.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
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> 4.2 whether the sexual conduct was unwelcome;
>
> 4.3 the nature and extent of the sexual conduct; and
>
> 4.4 the impact of the sexual conduct on the employee.'

[26] In this case, the commissioner must decide, on the probabilities, if Zungu (a man) did touch Ngwenya (a woman) inappropriately; whether it was unwelcome, as she testified in the first arbitration; and although it was a single incident, whether she was traumatised, as she told the counsellor, Du Preez. If so, the commissioner must decide if dismissal was a fair sanction. The LAC in *Simmers* again:[9]

> "[T]he sanction imposed serves to send out an unequivocal message that employees who perpetrate sexual harassment do so at their peril and should more often than not expect to face the harshest penalty.

[27] Concerning costs, I take into account that the employee, Mr Zungu, had an award in his favour; that there is an ongoing relationship between his trade union, NUM (the third respondent) and the employer; and that the matter must be remitted for a fresh arbitration. Taking law and fairness into account, I do not consider a costs award to be appropriate.

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[8] GN 1357 of 2005, issued by the Minister of Labour in terms of s 54(1)(b) of the Employment Equity Act 55 of 1998.

[9] Above para [35].

Order

[28] I therefore make the following order:

28.1 The arbitration award of 17 May 2013 under case number MP 231-13 is reviewed and set aside.

28.2 It is remitted to the CCMA for a fresh arbitration before a commissioner other than the first respondent.

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Steenkamp J

APPEARANCES

APPLICANT:	Ms M E Edwards of Mervyn Taback Inc.
THIRD AND FOURTH RESPONDENTS:	Mr M S Molebaloa (attorney).