

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR 1910/20

In the matter between:

SIBANYE GOLD LIMITED t/a SIBANYE STILLWATER

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

NASIMA RAFFEE N.O.

Second Respondent

AMCU obo MBHEKI MLOBELI

Third Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 19 January 2024

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

- [1] In this opposed application, the applicant (Sibanye) seeks an order reviewing and setting aside the arbitration award issued by the second respondent (Commissioner) acting under the auspices of the first respondent, the Commission for Conciliation Mediation and Arbitration (CCMA). In the award, the Commissioner found that the dismissal of the individual third respondent, Mr Mbheki Mlobeli (Mlobeli) was substantively unfair and further ordered his reinstatement together with back-pay.

Background:

- [2] Mlobeli is a member of the Association of Mineworkers and Construction Union (AMCU). He commenced his employment with Sibanye on 17 April 2007 and had occupied the position of a Winch Driver. On or about 21 May 2019, he was served with a notice to attend a disciplinary enquiry to answer to allegations of misconduct. The allegations were;

‘Gross Misconduct and/or acting with common purpose to commit such acts in that on or about 23 and 26 November 2018, you:

- (1) Attempted to assault an employee due to his union affiliation and the fact that he was reporting for work.
- (2) Committed unlawful acts designed to intimidate and harass non-striking employees in that he threatened to kill an employee due to his union affiliation and unless he joined AMCU.’

- [3] Mlobeli was found guilty and dismissed. Following an appeal hearing, Mlobeli’s dismissal was confirmed on 22 July 2019. AMCU on his behalf referred an alleged unfair dismissal dispute to the CCMA. When the dispute could not be resolved at conciliation, it came before the Commissioner for arbitration, resulting in the impugned arbitration award.

The proceedings and evidence before the Commissioner:

- [4] It was common cause before the Commissioner that members of AMCU had embarked on a protected strike action which commenced on 21 November 2018. NUM did not take part in the strike. The strike action that had lasted about five months was characterised by violence including acts of intimidation, assault, murder, arson, and general malicious damage to property. At the commencement of the strike, and in anticipation of how the strike action might turn out, Sibanye’s management had issued briefs warning employees against acts of intimidation, violence, and assault whether verbal or physical

during the strike. Due to the on-going union rivalry, it is alleged that AMCU members committed acts of intimidation towards those of NUM, who were in certain instances reported to have been assaulted and murdered. This had resulted in NUM members not reporting for duty out of concern for their safety.

[5] The applicant had relied on the evidence of Mr Thozamile Simolonjane (Simolonjane) and his nephew, Mr Sibusiso Jeke (Jeke) to prove the allegations of misconduct against Mlobeli. Jeke is not employed by Sibanye. Simolonjane and Mlobeli were colleagues and lived in the same premises (compound) in different rooms for over two years. Simolonjane was a member of the National Union of Mineworkers (NUM), and he and Mlobeli agreed in their testimony that despite being members of rival unions, they generally had an amicable relationship prior to the strike and the alleged incident leading to the dismissal.

[6] Simolonjane in his evidence in chief relied on his written statement in which he stated that on 26 November 2018 in the morning, Mlobeli arrived at his place and told him that he was going to kill him since he was a 'rat' (*igundwane*) and a member of NUM. Another incident took place on 22 November 2018 when Mlobeli came to his room whilst he was playing cards with Jeke. Simolonjane testified that Mlobeli insulted him, told him that he should leave NUM and join AMCU. When Simolonjane refused, Mlobeli left and came back carrying a stick with which he attempted to assault him. He however managed to avoid the assault by repossessing the stick from him. Simolonjane, was then told that he was not allowed to stay in the premises because he was an NUM member, and that he will be killed if he continued to stay in the premises. Simolonjane further testified that the incidents of threats and intimidation on 22 November 2018 took place on no less than five occasions in the presence of Jeke.

[7] According to Simolonjane, and still in reference to the events of 22 November 2018, he and Jeke were on their way back from a shop to their premises. They were confronted by Mlobeli who appeared to have been intoxicated and

was holding a stick, and who had without provocation, had assaulted Simolonjane with that stick. A scuffle ensued and they (Simolonjane and Jeke) were able to wrestle the stick from Mlobeli causing them to fall to the ground.

- [8] Simolonjane had the following day reported the matter to the police station and presented the stick to the South African Police Service (SAPS) as evidence. The SAPS came to the premises and warned Mlobeli not to contact Simolonjane. Mlobeli's however continued with his threats and attempts to assault Simolonjane on 26 November 2018. Simolonjane again approached the SAPS and made a statement. This had resulted with Mlobeli's arrest. Simolonjane further testified that because of the incidents, he had also reported them to his landlord who did not want to get involved. He and Jeke ended up moving to another place of residence out of fear of the repeated threats and harassment.
- [9] Under cross examination, Simolonjane denied that he made the allegations against Mlobeli for the sole purpose of justifying his absence from duty during the strike, or for the purposes of claiming a reward for reporting alleged perpetrators of acts of violence and intimidation during the strike. He testified that after the initial threats, he had called the police who came to his residence and took him to a police station where he opened a criminal case against Mlobeli. He confirmed that he did not report for duty from 22 November 2018 until 26 November 2018.
- [10] Simolonjane was cross-examined at length about the contradictions in the dates on which the incidents took place arising from his statements and his evidence before the Commissioner, and about the specific dates as recorded in the charges as formulated by Sibanye. In this regard the incidents were alleged to have taken on 23 and 25 November 2018, and whilst he (Simolonjane) had only testified regarding events having allegedly taken place on 22 and 26 November 2018. Further contradictions were raised with him to the extent that the Police documents recorded that Mlobeli was arrested on 25 November 2018, and had appeared in court on 26 November 2018, with the

latter date being the date on which Mlobeli had allegedly assaulted and threatened him. His response was to insist that the incidents took place between on 22 and 26 November 2018, and attributed the confusion regarding the dates to Sibanye when formulating the charges, errors on the part of the members of SAPS when they took a statement from him, and when the docket was prepared.

[11] Jeke testified that he had visited Simolonjane for a week and left on 23 November 2018. He testified regarding the events of 22 November 2018. His version was that Mlobeli came to Simolonjane's residence and found them sleeping. He kicked the door open and said that he was there to fetch him (Simolonjane) to sign up for AMCU membership, further telling him that he must stop being a 'sell-out' as 'sell-outs' would be killed. Mlobeli left and came back after some time and told Simolonjane that there was a vehicle waiting outside to take him to join AMCU. Simolonjane refused to go with him. Mlobeli then left and returned at some point whilst he and Simolonjane were playing cards. He was carrying a stick and intended to assault Simolonjane, and continued telling him that he should join AMCU. Other people that saw Mlobeli restrained him and he left. Again, on the same day at about 18h00, and as Simolonjane was coming out of a toilet, Mlobeli stopped him from going to his room by blocking his path and placed his hands on him. When Somolonjane told him not to touch him, Mlobeli swore at him and went to his room. .

[12] Jeke also testified that at some point during 22 November 2018, he and Simolonjane were going to a shop when Mlobeli confronted them in the street holding a stick and was about to strike Simolonjane with it when he (Jeke) intervened. All three of them were jostling to grab the stick and Mlobeli fell on the ground face first in the process after the stick was again taken from him. Jeke and Simolonjane then went about their business and upon returning to their room/residence, they reported the matter to the landlord. Because the landlord did not want to get involved, Simolonjane and Jeke then decided to sleep at a friend's room that night.

- [13] On 23 November 2018, Simolonjane went to the police to report the previous day's events to obtain a protection order. He later came back with the police, who went to Mlobeli and warned him that he would be arrested should he persist in harassing Simolonjane. Jeke then left on that day to his own residence and could not testify regarding events beyond 23 November 2018.
- [14] After Jeke had testified, and Mlobeli's new representative from AMCU made an application to recall Simolonjane, and the Commissioner allowed it despite Sibanye's representative strenuous objections. Simolonjane was again re-examined at length about the specific dates on which the alleged incidents took place and as recorded in charges preferred against Mlobeli, the contents of the police docket, and in particular the incidents of 26 November 2018 as he had testified. It was put to him that he had in fact only reported the incident at the police station at 17h10 on 26 November 2018 after he had been absent from duty between 22 and 25 November 2018. It was put to him that he only went to the police station on that date because he was looking for an excuse to justify and explain his absence from work after Sibanye had enquired about the reasons for his absence. Again, Simolonjane repeated his assertions that Mlobeli was arrested because of the case he had opened against him, and he could not explain the reason why the docket and the charge sheet issued to him at work had different dates. He denied any contention that he opened the case at the police on 26 November 2018 and solely for the purpose of explaining his absence from work. He further denied when it was put to him that it was, he and Jeke that had attacked and assaulted Mlobeli and took his stick hence he (Mlobeli) had sustained injuries.
- [15] Mlobeli was the sole witness in his case. He confirmed that he and Simolonjane previously occupied the same residential premises. He denied all the allegations against him as made by Simolonjane and Jeke. He testified that on 22 November 2018 he was on his way to the shops carrying his stick when he met Simolonjane and Jeke. Simolonjane then told Jeke that he (Mlobeli) always 'abused' him and it is at that point that the two had without provocation, grabbed his stick from him and assaulted him. He sustained injuries on his arm and between his eye and ear. He denied that he had ever

harassed Simolonjane or had gone to his room on various occasions. He conceded that he had consumed alcohol when his alleged assault took place. After the assault they took his stick and he thereafter went to his room to sleep.

[16] Mlobeli testified as a result of the injuries he had sustained he admitted himself at a hospital on 23 November 2018 for treatment. On 24 November 2018, the SAPS had arrived at his residence to question him about the incident of 22 November 2018. He conceded that the police arrived at his place and asked him what had happened and after he had explained to them and showed them his injuries they left. He further testified that members of the SAPS came back to his premises on 25 November 2018 and arrested him. He was detained at the police station until his first court appearance on 26 November 2018. He was granted bail in the amount of R2 000.00, and was only released from custody on 28 November 2018 when he secured the bail amount.

[17] Under cross-examination, Mlobeli conceded that at no stage had he had issues with Simolonjane or with Jeke. He further conceded that he did not report his alleged assault by Simolonjane and Jeke, despite his injuries being of a serious nature hence he went to hospital. He further conceded that he was intoxicated on 22 November 2018 when he was allegedly assaulted by Simolonjane. He recalled that he fell to the ground during a scuffle when Simolonjane and Jeke took his stick.

[18] He denied that he ever went to Simolonjane's room where he found him and Jeke playing cards. He confirmed that it was Simolonjane that had called the police, and that they came to his room on 24 November 2018 to arrest him as Simolonjane had complained to them that he (Mlobeli) was harassing him. The police had left and came back on 25 November 2018 to arrest him. He disputed the record of the internal disciplinary enquiry that indicated that he had blamed the incident of 22 November 2018 on the fact that he was under the influence of alcohol

The Commissioner's findings:

- [19] The Commissioner accepted that there were mutually destructive versions regarding the allegations against Mlobeli. The Commissioner however concluded that based on a balance of probabilities, Mlobeli was not guilty of the charges against him in the light of the contradictions, inconsistencies, and untruths in the versions of both Simolonjane and Jeke. The Commissioner concluded that their evidence was not precise regarding the dates and place when the alleged assault and harassments took place; that they had consistently changed their versions; lied; and that Simolonjane sought to apportion blame on the SAPS for his confusion regarding the dates when the alleged incidents took place.
- [20] The Commissioner accepted that Mlobeli could not have intimidated Simolonjane on 26 November 2018 as he was in jail at the time until 28 November 2018. She drew a negative inference from the fact that Simolonjane only made the allegations against Mlobeli when he returned to work on 26 November 2018 following his absence since 22 November 2018. She further concluded that Simolonjane had a motive to frame Mlobeli to explain his absence from duty between 22 and 25 November 2018, despite not having participated in the strike action.
- [21] In respect of Mlobeli's evidence, the Commissioner found his evidence to be honest, clear, and consistent, and that his injuries supported his version that he was attacked by Simolonjane and Jeke whilst on his way to a shop. On the other hand, Simolonjane did not have any injuries to support his version that it was Mlobeli that had assaulted him. In the end, the Commissioner concluded that the balance of probabilities did not favour a finding that Mlobeli had committed the alleged misconduct.

The legal framework:

- [22] The test on review is well-known. The primary enquiry before the reviewing Court is whether the conclusion arrived at by the commissioner is one that a reasonable decision-maker could not have reached based on the material

before him or her.¹ In *Herholdt*, the SCA reaffirmed the need to preserve the distinction between review and appeal. The SCA appreciated that inasmuch as the reviewing court must necessarily scrutinise the evidence to determine whether the outcome was reasonable, it must guard against 'judicial overzealousness' in setting aside administrative decisions that do not coincide with the judge's own opinions. The SCA further reaffirmed that the test on review is stringent, as it ensures that awards are not lightly interfered with, and that emphasis is on the result of the case rather than the reasons for arriving at that result. The SCA reiterated that on the *Sidumo test*, there would be justification to set aside an award on review if the decision was 'entirely disconnected with the evidence or was unsupported by any evidence' and involved speculation by the commissioner².

- [23] To the extent that the Commissioner had accepted that she was confronted with mutually destructive versions, it is accepted that the approach in resolving this conundrum is that as set out in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others*³, which entails an

¹ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) at para 110. See also *Herholdt v Nedbank Ltd and Congress of South African Trade Unions (Amicus Curiae)* (701/2012) [2013] ZASCA 97; 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA) at para 25, where it was held;

"... A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145 (2)(a) of the LRA. For a defect in the conduct of proceedings to amount to a gross irregularity as contemplated in section 145 (2)(a) of the LRA, the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.

² At para 13.

³ [2002] ZASCA 98; 2003 (1) SA 11 (SCA) at para 14I – 15E, where it was held that;

"To come to a conclusion on the disputed issues a court makes findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probabilities and improbabilities of each party's version on

assessment of the evidence in relation to the credibility of the various factual witnesses; their reliability; and the probabilities.

The grounds of review and evaluation:

- [24] The applicant contends that the Commissioner committed a gross irregularity in making probability findings without having applied her mind to the material facts placed before her. In this regard, it was contended that despite her findings, it was never the applicant's case or the charge against Mlobeli that he had assaulted Simolonjane, as the charge that led to his dismissal was one of attempted assault. This therefore implied that the issue of whether Simolonjane was assaulted and had not sustained injuries was irrelevant to the enquiry.
- [25] It was contended that the Commissioner further failed to consider the probabilities that Mlobeli sustained his injuries after falling to the ground during his altercation with Simolonjane and Jeke when he attempted to assault Simolonjane with his stick, particularly since he had conceded that he was intoxicated at the time. In this regard, it was further submitted that at the internal disciplinary inquiry, at no stage did Mlobeli contend that he was assaulted by Simolonjane. Furthermore, it was submitted that despite his injuries, Mlobeli did not report his alleged assault, whilst on the other hand, Simolonjane had reported the incidents of harassment, intimidation, and attempted assault to the SAPS, resulting in a warning to Simolonjane and his subsequent arrest.
- [26] In regards to the above ground of review, it was submitted on behalf of Mlobeli that the applicant's review application was a disguised appeal as the Commissioner's reasoning and conclusions were unassailable. It was submitted that the Commissioner's findings in regards to whether there was an assault are also supported by the applicant's averments in the founding

each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when the court's credibility findings compel it in one direction and evaluation of the general probabilities in another. The more convincing the former, the less convincing will be latter. But when all factors are equipoised probabilities prevail."

affidavit that Mlobeli had on 23 and 26 November 2018, assaulted and threatened to kill Simolonjane due to his union affiliation, and that the latter had in fact testified at the arbitration proceedings that Mlobeli had assaulted him. It was contended that it was relevant that Simolonjane had not sustained injuries in that it was not disputed that Mlobeli on the other hand had suffered injuries, and there was no need for him to provide documentary evidence in that regard.

- [27] In considering whether the Commissioner committed a gross irregularity in regards to the findings on the allegations against Mlobeli, it is trite that an enquiry into substantive fairness of a dismissal requires an examination of what the essence of the charges proffered against him were, and whether the employer had discharged its onus in that regard. Thus, the question to be answered is what were the allegations against Mlobeli⁴. This approach had long been stated in *Fidelity Cash Management Service v CCMA*⁵ as follows;

“It is an elementary principle of not only our labour law in this country but also of labour law in many other countries that the fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal.”

- [28] Mlobeli as per the charge sheet and the reasons for the dismissal was that on or about 23 and 26 November 2018, he had attempted to assault an employee (Simolonjane) due to his union affiliation. He was further charged with having committed unlawful acts designed to intimidate and harass non-striking employees in that he threatened to kill an employee (Simolonjane) due to his union affiliation, and unless he joined AMCU.

- [29] Clearly from the charges, the issue before the Commissioner was whether it was proven that Mlobeli had attempted to assault Simolonjane, and whether

⁴ *Stokwe v Member of the Executive Council: Department of Education, Eastern Cape and Others* (2019) 40 ILJ 773 (CC); 2019 (4) BCLR 506 (CC); [2019] 6 BLLR 524 (CC) at para 57

⁵ (2008) 29 ILJ 964 (LAC) para 32.

he had conducted himself in a manner that was meant to intimidate and harass Simolonjane coupled with threats to kill him due to his union affiliation. The Court accepts from the evidence led by Simolonjane that he had testified that at some point between 22 and 26 November 2018, Mlobeli had assaulted him. This however was not what Mlobeli was charged with.

- [30] Crucially however is that the Commissioner was required to assess all the incidents of misconduct testified to by Simolonjane and Jeke against Mlobeli holistically, without being bogged down by minute details as if a trial court was being conducted. It has long been stated in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others*⁶, that a commissioner is to deal with the matter with the minimum of legal formalities, and is required to act fairly in the determination of unfair dismissal disputes, by affording the parties a fair trial in the sense that they are accorded their right to have their cases fully and fairly ventilated.
- [31] Stripped off of all the minute details, and bar the contradictions in dates arising from Simolonjane's testimony, the facts of this matter which are hardly in contention were that the latter and Mlobeli had a harmonious relationship in the premises and at work until the strike action commenced. Simolonjane as a member of NUM was not on strike, which was characterised by violence, intimidation and harassment. From the rivalry between NUM and AMCU, it is apparent that those NUM employees who were not on strike invariably found themselves at cross-hairs of the violence and intimidation. This is in view of the evidence that did not appear to be disputed before the Commissioner, that certain members of NUM were assaulted and even murdered during the strike.
- [32] Simolonjane and Jeke's evidence was that on 22 November 2018, Mlobeli had on no less than five occasions arrived at their residence uninvited, had threatened Simolonjane, insulted him, called him a 'rat' for belonging to NUM and attempted to recruit him to join AMCU. At some point during Mlobeli's

⁶ [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at para [20]

visits, he came to their room armed with a stick and threatened Simolonjane. Simolonjane and Jeke had further testified that at some point during that day, they were on their way to or from the shop when they came across Mlobeli, who with stick in hand, approached them and had without provocation, attempted to assault Simolonjane with it. A scuffle had ensued, resulting with the stick being retrieved from Mlobeli who even on his own version was inebriated, and had conceded that his stick was taken from him. In the course of the scuffle and as the stick was being retrieved from him, Mlobeli fell face first to the ground.

[33] Against the above evidence, even if Simolonjane contradicted himself on the details of the specific dates, all that Mlobeli did on the other hand was to offer a bare denial to the essential details of the allegations against him. Other than denying all of these allegations, Mlobeli simply proffered a clearly improbable version of events, mainly being that when he came across Simolonjane and Jeke on his way to the shop, the former accused him of having 'abused' him and the two started assaulting him hence his injuries. This version was clearly improbable in view of Mlobeli's earlier contentions that before the strike, he and Simolonjane had had an amicable relationship over a period of two years. As to the reason Simolonjane would have started to 'abuse' Mlobeli as he had alleged, and suddenly decided to assault him is not clear. Mlobeli's version clearly did not make any sense, and as to how the Commissioner would have found that he was innocent of any wrong doing is equally unclear.

[34] As to how the Commissioner could have arrived at the conclusion that the versions of Simolonjane and Jeke were inconsistent, or that they had on the whole testified to untruths is not clear in the face of the clearly improbable version of event as attested to by Mlobeli. This is further in view of Simolonjane's version, notwithstanding much being made about the inconsistencies in dates, that after Mlobeli's persistent threats, intimidation and harassment, he had reported the matter to the SAPS. Mlobeli confirmed that the SAPS came to his room on 24 November 2018 and questioned him about the incident of 22 November 2018 as reported by Simolonjane. He had further conceded that members of the SAPS came back to his premises on 25

November 2018 and arrested him. On the other hand, despite allegedly having been assaulted and sustaining serious injuries inflicted by Simolonjane and Jeke there was no evidence of Mlobeli having reported the matter to the police or to Sibanye. Worst still, he did not even mention any of the alleged assault at the internal hearing. That version suddenly came up before the Commissioner.

[35] Against these factors, there was no basis upon which Jeke's version of events of 22 November 2018 could be found to be improbable or lacking credibility to the extent that it corroborated that of Simolonjane in relation to the specific incidents of misconduct on the part of Mlobeli . The fact that Simolonjane could not give an exact date of events and could not explain discrepancies in the dates in his statement at the police or the dates on the charge sheet is in my view inconsequential, and could not have been the basis for the commissioner to reject his entire evidence as having been fabricated. The essential features of his version in regards to the allegations against Mlobeli (i.e., attempted assault on Simolonjane due to his union affiliation, and unlawful acts designed to intimidate and harass him by threatening to kill him due to his union affiliation and unless he joined AMCU), were more probable than the latter's version of events.

[36] Any contention that Simolonjane could have fabricated his version in order to justify his absence from work for three days during the strike action by AMCU members is equally without foundation. This is so in the light of the fact that no evidence was led to the effect that he was required by Sibanye to explain his absence during the strike. All that was done during Simolonjane's cross-examination was simply to put that version and proposition to him, without any foundation or supporting evidence. To the extent that Simolonjane denied that proposition, which was in any event not supported by any other evidence, there was no basis for the Commissioner to draw negative inferences from that denial that he was untruthful.

[37] Furthermore, it was Simolonjane's evidence that during the course of the violent strike, NUM members were targeted and threatened for going to work.

Whether that was the reason for his absence from work on the days in question was irrelevant to the material enquiry before the Commissioner. Other than this fact, this was not a case where Simolonjane had raised the allegations against Mlobeli only when he reported for duty on 26 November 2018. There was no gainsaying that he had reported Mlobeli to the SAPS on 23 November 2018, some three days prior to going back to work, and his complaints led with the SAPS warning Mlobeli and ultimately arresting him. It follows that the conclusion by the Commissioner that Simolonjane made the allegations to give an excuse for his absence was clearly based on conjecture.

[38] In view of the probabilities having been in favour of the applicant that the misconduct was proven, it was not even necessary for the Commissioner to consider the issue of whether evidence was led to demonstrate that the employment relationship had irretrievably broken down as a result of Mlobeli's conduct. It is trite flowing from *Impala Platinum Ltd v Jansen and Others*⁷, that where an employee is found guilty of gross misconduct, it is not necessary to lead evidence about a breakdown in the trust relationship as it cannot be expected of an employer to keep a delinquent employee in its employ. Furthermore, it must therefore be implied from the gravity of the misconduct that the trust relationship had broken down and that a dismissal was the appropriate sanction⁸.

[39] In this case, the invariable conclusion in the light of the evidence before the Commissioner was that during a violent strike action, Mlobeli had persistently intimidated, harassed and attempted to assault and force Simolonjane to join AMCU. His version of events was improbable particularly in the light of his bare denials in relation to the specific incidents of his misconduct. At the commencement of the strike, Sibanye had warned its employees against such conduct, and clearly Mlobeli did not heed that warning. Given the gravity of the misconduct, especially within the context of the violent protracted strike

⁷ [2017] 4 BLLR 325 (LAC).

⁸ At paragraphs 13 and 15.

action, that was sufficient to make any employment relationship unsustainable.

[40] Against the above conclusions, it follows that the award of the Commissioner based on what was placed before her, falls outside the band of reasonableness, as the findings made therein are disconnected with the evidence and involved speculation by the Commissioner. It follows that the award ought to be set aside. I also agree with the contentions made on behalf of the applicant that in the light of the full record of the arbitration proceedings and the pleadings relied on in this application, the Court, in the light of the conclusions reached in this judgment, is placed in a position where it is able to substitute the Commissioner's award with its own order.

[41] I have further had regard to the requirements of law and fairness in regards to costs. AMCU was indeed entitled to mount a defence against this review in the light of its favourable award. There is no basis for any conclusion to be reached that in opposing the review, AMCU acted *mala fide*. In this regard, it is my view that each party must be burdened with its own costs. Accordingly, the following order is made;

Order:

1. The arbitration award issued by the second respondent under case number GAJB17587-19 is reviewed, set aside and substituted with an order that;

‘The dismissal of Mr Mbheki Mlobeli by Sibanye Gold Ltd t/a Sibanye Stillwaters was fair’

2. Each party is to pay its own costs.

Edwin Tlhotlhemaje
Judge of the Labour Court of South Africa

REPRESENTATION:

For the Applicant:

P. Moll, instructed by Solomon
Holmes Incorporated.

For the Third Respondents:

A. Cook, instructed by Larry Dave
Incorporated.