THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR2076/17

In the matter between:

PALABORWA MINING COMPANY (PTY) LTD **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER MOGANAFASE NEGROES NONYANE *N.O.* **Second Respondent**

NUM obo SALMA MALATJI **Third Respondent**

Heard: 14 November 2023

Delivered: 06 March 2024 (This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 06 March 2024.)

JUDGMENT

PHEHANE, J

<u>Introduction</u>

[1] The applicant brings an application in terms of section 145 of the Labour Relations Act[1] (LRA) to review and set aside the arbitration award by the second respondent in which he found the dismissal of the third respondent (Ms. Salma Malatji, to whom I refer as "SM") to be procedurally fair but substantively unfair and ordered retrospective reinstatement.

[2] The history of this application reveals a long and tedious account of missing arbitration records and a reconstruction thereof from the notes of the second respondent.[2] At a point, the third respondent filed an application in terms of rule 11 to dismiss the review application – this application was not pursued when the matter was heard.

[3] The review application is opposed by the third respondent.

Brief factual background

[4] SM was employed by the applicant as a pension officer. She was dismissed on 29 November 2016 for dishonesty and the abuse of her position for soliciting and receiving a bribe from Ms. Dikeledi Malatji (DM)[3], the widow of a deceased employee of the applicant, Mr. Marupeng David Munisi. In addition, SM was dismissed for sending an incorrect benefit schedule to Sanlam, which was not approved by the applicant's board of trustees, resulting in the deceased's mother being underpaid her due benefit.

[5] For clarity, the charges of misconduct against SM read:

> '**Dishonesty and/or Abuse of a Privileged Position** – in that, in your capacity as a Pension Officer:
>
> 1. On or about 22nd of May 2013, you solicited and received money from Ms Dikeledi Malatji for payments made to her in terms of Mr Maropeng David Munisi's accident fund insurance;

---

[1] Act 66 of 1995, as amended.

[2] Strangely, no record of the disciplinary hearing exists, owing to a theft at the applicant's offices and the offices of NUM, which are adjacent to the applicant's offices. However, documents that were used in the disciplinary hearing were placed before the second respondent in the arbitration proceedings – see: Record, pp 5 to 6.

[3] DM and SM are not related.

And

2. On or about 6th August 2013 you submitted an unauthorised the benefit distribution form to Sanlam in respect of Mr. Marupeng David Munisi.'[4]

[6] Pursuant to a dismissal, SM referred a dispute to the first respondent, the outcome of which is the subject matter of this application.

Arbitration proceedings

[7] At the arbitration hearing, the applicant called four witnesses, namely, DM, Mr. Sydney Kopong, who chaired the internal disciplinary enquiry, Mr. William Laing, an elected trustee of the pension fund and initiator of the disciplinary hearing of SM and Ms Elena van Huysteen, the financial planner at First National Bank (FNB), Phalaborwa. The applicant's main witness, DM, then gave evidence in chief but failed to present herself to be cross-examined as the arbitration proceedings progressed. The witnesses for the employee party were SM, Ms. Precious Ndobe (also a pension officer of the applicant at the time), and Mr. Jabulane Makhubela, a member of the pension fund board of trustees.

[8] The evidence of DM insofar as the first charge is concerned, is that SM and her colleague, Ms. Ndobe, solicited a bribe from her in the amount of R100 000,00 each in order that she could receive the pension benefit of the deceased, as she was not in possession of a marriage certificate. SM assisted DM in obtaining funds from the Road Accident Fund (RAF). Once the funds were deposited in DM's bank account, she proceeded to the bank, First National Bank (FNB) to withdraw R100 000.00, but she was not permitted to draw this amount of money as it had recently been deposited. SM contacted her to enquire if she had withdrawn the money. She explained that she did not. SM then advised her to return to the bank the next day and to approach a different teller, which she did and she successfully withdrew the R100 000.00. SM phoned her while she was inside the bank to ask if she had withdrawn the money, to which she answered in the affirmative. SM told her to meet her

[4] Record, p 244.

outside the bank. She later handed the cash to SM in SM's car. During her evidence, DM stated that she had attended at the bank to withdraw bribe money of R100 000.00 for Ms. Ndobe. When the applicant's representative sought clarity as to whether it was SM or Ms. Ndobe who gave her instructions to withdraw the bribe money, the second respondent and the representative for SM stated that he must wait for cross-examination to ask questions for clarity.[5]

[9] DM's evidence was that, at a later stage in September 2015, she went to the applicant's offices and SM informed her that she should withdraw R40 000.00 and pay it into the applicant's account. She explained that Ms. Ndobe instructed her to change her bank account from Standard Bank to FNB to receive her pension payout because Standard Bank "*interrogates a lot*". She did. She proceeded to state that Ndobe demanded the R100 000.00 bribe, but the bank did not permit her to withdraw it. As a result, she did not pay Ms. Ndobe the bribe money. She then changed her version and stated that Ms. Ndobe visited her at her home and informed her that her mother-in-law was underpaid and she instructed DM to pay R40 000 to the applicant. Her evidence was that the pension money she received in the approximate amount of R280 000.00 was reversed.[6]

[10] When the arbitration proceedings continued, DM did not present herself for cross-examination. The further witnesses of the applicant testified.

[11] The evidence of Mr. Laing is that, before the disciplinary hearing of SM commenced, he discussed the facts of the case with DM, who informed him that SM assisted her in obtaining insurance funds from the applicant arising from the death of the deceased. He stated that the deceased died in a motor vehicle collision, drove off the road and drove into a tree. SM told DM that DM would not receive the insurance funds as the accident happened off the road and she could alter the records to make it appear as though the accident occurred on the road for DM to receive the insurance payout from the applicant. SM wanted bribe money for this "assistance". DM was married to

[5] Record, pp 17 to 29.
[6] Record, pp 515 to 518.

the deceased customarily. SM also informed DM that she would not receive the pension benefits of the deceased, as she was not in possession of a marriage certificate and the benefits would be received by the deceased's mother. SM wanted bribe money from DM to 'assist' her with this. The bribe money SM wanted was R100 000.00.

[12] The insurance payout was deposited in DM's bank account held at Standard Bank. DM could not withdraw R100 000.00 on her first attempt. She told SM, who told her to return to the bank the following day. Mr. Laing referred to the Standard Bank records of DM that reflect R100 000.00 was withdrawn by her on 22 May 2013. SM contacted her and they met, at which point, DM handed the R100 000.00 cash over to SM in SM's car.

[13] Mr. Laing stated that DM also told him that Ms. Ndobe demanded R100 000.00 bribe money from DM when the pension fund money was paid into DM's FNB account. She did not succeed in withdrawing this amount from FNB, as she disclosed to the FNB bank officials that the applicant's pension officers wanted the money and they discouraged her from withdrawing it.

[14] Much is made in the transcribed record by SM's representative about Mr. Laing's evidence being that R200 000 was paid by DM to the pension officers or to SM. Mr. Laing corrected his evidence with reference to DM's Standard Bank records and clarified that the second R100 000.00 that was demanded as bribe money by Ms. Ndobe was not paid due to the interception by the FNB bank officials who reported the incident on the applicant's hotline through a platform called "speak out".

[15] SM's representative made several attempts to confuse Mr. Laing by referring to a payment to SM of R80 000.00. Mr. Laing was consistent in his evidence. (Ms. van Huysteen's evidence clarifies the facts surrounding the bribe of R80 000.00 by the pension fund officers. I deal with this below).

[16] Mr. Laing's evidence in relation to the second charge, is that SM and Ndobe's role as pension officers is to compile a resolution for the approval of the applicant's board of trustees on the distribution of pension benefits to beneficiaries of a deceased employee. The pension officers prepare a

benefits schedule that forms part of the resolution. They present the resolution to the board for approval. As is required by the Pension Fund Act[7], the board of trustees apply their mind to the resolution and benefits schedule and distribute the benefits in a responsible manner. Thereafter, the pension officers send the resolution to Sanlam, the administrator of the applicant's pension fund, to pay the funds.

[17] Mr. Laing confirmed that SM was at training and did not make a presentation to the board on the resolution and benefits schedule, but maintained that both SM and Ms. Ndobe prepared the resolution.

[18] The board approved the benefit schedule of the payment of R50 000 for the deceased's mother. SM sent an incorrect and unapproved schedule for the payment of R10 000 to Sanlam, the administrator of the applicant's pension fund. This resulted in an underpayment to the deceased's mother.

[19] The pension payout ultimately was reversed, as well as the benefit that was paid to the trust for the minor children of the deceased. The necessary corrections were effected and the deceased's mother was paid the correct amount from the reserves of the applicant, as the R40 000 underpayment could not be recovered. The benefit of the minor children was also paid out to the trust.

[20] His evidence is that SM's submitting the unapproved benefit schedule to Sanlam was not an error – it was a calculated move on the part of SM and DM. Such conduct is reputational for the applicant, as it requires its employees to conduct themselves with utmost trust in rendering their services as they serve members of the community with death benefits. He stated that there was no basis for preparing two benefit schedules – the rules of the Pension Fund Act and the applicant's processes permit only one benefits schedule to be prepared. Following this incident, the applicant has tightened up the manner in which resolutions are prepared and authorised to prevent unapproved schedules from being submitted to Sanlam.

[7] Act 24 of 1956.

[21] Mr. Laing was referred to DM's written undertaking to refund the R40 000 and confirmed that she did not pay this money back to the applicant.[8] Mr. Laing's evidence is that when DM was told to return the pension fund money, she complained that she already made payment to SM and Ms. Ndobe.

[22] The evidence before the second respondent shows that the deceased's mother was paid from the applicant's reserves due to DM having "*squandered*" the pension payout.

[23] The further evidence before the second respondent in relation to the second charge is the evidence of Ms. van Huysteen, who stated that DM approached her for financial advice following the pension payout. SM phoned Ms. van Huysteen to enquire why DM was unable to withdraw cash from the bank tellers. Ms van Huysteen told SM she did not know the reason and would follow up. On the following day, she enquired from the operations manager at FNB about the withdrawal, and she was informed that DM wanted to withdraw funds in excess of the amount of R50 000 to hand it over to the applicant's pension officers, SM and Ms Ndobe. The bank did not permit the withdrawal as the requisite 24-hour notice for the withdrawal of funds in excess of R50 000.00 was not provided by DM. The operations manager, at a later stage, informed Ms. van Huysteen that the applicant wanted to withdraw R80 000.00 from FNB.

[24] The further evidence of Ms. van Huysteen is that it was not uncommon for clients to withdraw large amounts of money after receiving pension payouts. Her evidence was that widows presented themselves to withdraw funds to pay pension officers for obtaining pension payout speedily. She had enquired from a client (Mrs. Sodi) on a previous occasion as to whether pension officers had solicited a bribe in the amount of R80 000.00 from her. Mrs Sodi hung up the call and SM phoned Ms. van Huysteen thereafter and lambasted her for asking customers such questions.[9] Thereafter, Ms. van Huysteen reported the suspicious conduct to "speak out",[10] the applicant's hotline, and was

[8] Record, p 85. The written undertaking by DM appears at p 486 of the Record.
[9] Record, p 115.
[10] Record, p 338. On p 129 of the Record, Ms van Huysteen refers to the document on p 338 of the record as her tip off (speak out) on the applicant's hotline.

subsequently interviewed by forensic investigators. She received no feedback from the investigators but was a witness in SM's disciplinary hearing.

[25] Ms. van Huysteen stated that DM told two FNB officials that she had paid money to SM and she confirmed this with one of them. In her evidence, Ms. van Huysteen mentioned a withdrawal of R100 000.00 by DM from her Standard Bank account and a failed attempt by DM to withdraw R80 000.00 from her FNB account for the pension officers.

[26] It transpires from the reconstructed and typed record of the second respondent's notes containing the evidence of SM, that SM denied soliciting and receiving a bribe from DM and denied contacting DM while she was at the bank. It is noteworthy that she denies meeting DM near FNB[11] when on the facts, the bribe money was handed over to her near Standard Bank. Her evidence was that both she and Ms. Ndobe drafted the recommendation to the board containing the deceased's beneficiary schedule. Two schedules were drafted. Ms. Ndobe conducted the presentation to the board while she was attending training. On her return from training, she collected the board resolution from Ms. Ndobe's desk and sent the resolution to Sanlam. She later discovered the wrong beneficiary schedule was sent to Sanlam. The board was subsequently informed that an error had been made and SM was penalized in her performance reviews that followed and the correct payment to the deceased's mother was made.

[27] Ms. Ndobe's evidence was that two distribution schedules of R10 000 and R50 000 were prepared. She presented the recommendation to the trustees who approved the amount of a R50 000.00 payment to the deceased's mother. There was no need to present the lesser amount because the higher amount was approved. As she was busy with work, she left the file on SM's desk and forgot to remove the unapproved benefits schedule. SM submitted the file to Sanlam containing both unapproved and approved benefits schedules. She later found out, after SM informed her that Ms. van Huysteen was querying their conduct, that the deceased's mother was paid the lesser

[11] Record, p 519.

amount. She reported the error. She was penalised in her next performance rating for this ‘error’.

[28] One of the trustees of the pension fund, Mr. Makhubela, testified that the conduct of the pensioners in submitting two recommendations to the board of trustees was an honest mistake. The evidence Mr. Makhubela was missing and it is reconstructed from the typed notes of the second respondent. It is scant and his evidence does not deal with Mr. Laing’s detailed and consistent evidence that the conduct of SM and Ms. Ndobe in submitting two recommendations was improper and submitting an unapproved benefits schedule to Sanlam bearing the signatures of the trustees was deceptive and serious.

[29] On the documentary evidence before the second respondent, the same page bearing the signatures of the trustees appeared on both distribution schedules, although the evidence of Mr. Laing and Ms. Ndobe was that only one schedule was signed. The reason for this was not explained by SM or Ms. Ndobe. The applicant accordingly contends that the reasonable inference is that both pension officers did this with the intention “*to fabricate the error*” so that DM was overpaid as they solicited a bribe from her.

[30] The second respondent was of the view that the applicant had not proved the second charge against SM, at best, she was guilty of negligence. He found that the error was corrected and dismissal was not the appropriate sanction. In respect of the first charge, the second respondent found that the failure of DM to present herself for cross-examination without any reasonable explanation deprived SM of her right to cross-examination. The evidence of DM was untested. The second respondent found that DM was the only witness to provide direct evidence in relation to the first charge. In the circumstances, he disregarded the evidence in *toto* and found that the applicant failed to prove its case against SM on the first charge.

<u>Grounds of review and opposition</u>

[31] The applicant pleads four grounds of review.

[32] The first is that the second respondent committed a gross irregularity by failing to consider material evidence and arrived at an unreasonable finding that the submission of the incorrect beneficiary distribution schedule was a genuine error and was not calculated to deceive.

[33] The second and third grounds of review are that the second respondent committed a gross irregularity in totally disregarding the evidence of DM for the reason that her evivence-in-chief could not be tested in cross-examination owing to her failure to appear at the arbitration hearing for cross-examination. The applicant contends that the second respondent should have admitted and considered the hearsay evidence of Mr. Laing and Ms. van Huysteen as the documentary evidence of the phone and bank records in substantiating the charges against SM.

[34] SM denies that the bank withdrawal by DM proves that she solicited a bribe and she denies that there are any phone records to prove she had contact with DM at the time DM made the withdrawal at Standard Bank.

[35] The fourth ground of review, linked to the last two, is that the second respondent committed a gross irregularity when he failed to consider hearsay and circumstantial evidence to determine whether a solicitation of a bribe took place. In this regard, the applicant contends that the second respondent, in addition to failing to consider Ms. van Huysteen's evidence and the phone and Standard Bank records, failed to consider the evidence of Mr. Laing regarding the payment of the R100 000.00 bribe by DM to SM after she withdrew the money from Standard Bank.

[36] The applicant contends that a reasonable commissioner would have had regard for the applicant's attempts on several occasions to contact DM and would not have disregarded DM's evidence in *toto*. The applicant avers that DM had been through a significant ordeal and was afraid to return for cross-examination. This is denied by SM, who contends that no explanation was

proffered for the failure of DM to attend the arbitration hearing for cross-examination and the applicant speculates that DM was afraid to return. SM contends that had the second respondent considered the untested evidence of DM, SM would have been denied her right to cross-examine DM and this would have resulted in an unfair hearing.

[37] In essence, SM contends that the second respondent committed no irregularities and his decision is reasonable.

Legal framework

[38] It is trite that a review Court is tasked, in adjudicating a review application, to consider whether the decision of the commissioner is one that a reasonable commissioner could not arrive at on the totality of evidence that was before him or her.[12] To have an appreciation of the totality of evidence that was before the commissioner, the review Court considers the mechanical and non-mechanical record of the arbitration proceedings filed by the body under whose auspices the arbitration proceedings were held.

[39] It is now settled in our law, that for a decision to be reviewed and set aside on the grounds of an irregularity committed by the commissioner, the irregularity, if found to exist, is insufficient to set the decision aside – the irregularity must distort the outcome. If this is found to be the case, the review succeeds. The review, in short, is outcome-based, entailing a stringent test aimed at ensuring that arbitration awards are not lightly interfered with.[13]

[40] The concept of 'gross irregularity' in review applications was explained by the Labour Appeal Court (LAC) in *Head of Department of Education v Mofokeng and Others*[14] as thus:

[12] *Sidumo and another v Rustenburg Platinum Mines and Others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as* amicus curiae) [2013] ZASCA 97; [2013] 11 BLLR 1074 (SCA) (*Herholdt*).
[13] *Ellerines Holdings Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2008] ZALAC 6; (2008) 29 ILJ 2899 (LAC); *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and others* [2007] ZALAC 12; [2008] 3 BLLR 197 (LAC); *Herholdt, supra.*
[14] [2014] ZALAC 50; [2015] BLLR 50 (LAC) at para [33].

> 'Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.'

<u>Evaluation</u>

[41] The grounds of review in the main, are that the second respondent committed gross irregularities that render his decision unreasonable.

[42] From the transcribed record (including the typed notes of the second respondent), DM's evidence is riddled with inconsistencies.

[43] Initially, she stated that she went to FNB to withdraw R100 000.00 for SM after SM assisted her in receiving money from the RAF. She succeeded in withdrawing the cash on the second attempt and handed it over to SM. She then muddies the waters and says the R100 000.00 cash was intended for Ms. Ndobe, which funds she attempted to withdraw from FNB after the

pension funds were paid into the FNB account, but the bank officials at FNB discouraged her from withdrawing the money. At a later stage, Ms. Ndobe visited her at her home and said that her mother-in-law's money, in the amount of R40 000.00, was paid into her bank account by mistake and she must withdraw it from the money she received and pay it into the applicant's bank account.

[44] She is unclear as to who instructed her to attend at which bank to withdraw what amount of money.

[45] From the transcribed record, it transpires that DM was not taken through any documentary evidence that the applicant relies on, being her Standard Bank account reflecting the withdrawal of R100 000.00 on 22 May 2013 and the phone records reflecting a series of phone calls from SM to herself in that time frame.

[46] The second respondent was enjoined by section 136 of the LRA to resolve the dispute through arbitration. Section 138(1) of the LRA provides:

> '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.'

[47] The second respondent states that DM was the applicant's key witness on the first charge and the only witness who could provide direct evidence on the bribe and the evidence of Mr. Laing and Ms. van Huysteen in respect of the first charge constitutes hearsay evidence.[15] He states that once DM completed her evidence-in-chief , the hearing adjourned to a later date for the purposes of her cross-examination, but she failed to appear. The matter stood down to the following day, but again, without explanation, she failed to appear and the applicant closed its case after the testimony of Mr. Laing and Ms. van Huysteen.[16] The second respondent proceeds to state that the failure of DM to present herself for cross-examination deprived SM of her right to cross–

[15] Arbitration award, at para 81, on p 25.
[16] *Ibid* at para 83.

examine her; he concludes that her evidence is thus untested for any probative value. He accordingly rejects it and finds that the applicant failed to substantiate the first charge.

[48] SM agrees that the evidence of DM is untested and that the second respondent was correct to disregard it totally; had he not done so, her right to cross-examine would have been infringed. In this regard, SM relies on the matter of *President of the Republic of South Africa and others v South African Rugby Football Union and thers*[17] that, if a point in dispute is left unchallenged in cross-examination, the party calling that witness is entitled to assume that the unchallenged witness' testimony is accepted as correct.

[49] From the transcribed record, it transpires that the applicant explained that the whereabouts of DM could not be ascertained as she could not be traced. The second respondent suggested that the applicant proceed with its next witness. This was agreed.[18] On the next occasion when the proceedings resumed, DM could still not be located and the matter stood down until the following day in order to locate the whereabouts of DM. When the hearing resumed, it was postponed for this purpose.[19] The transcribed record ends with the evidence of Ms. van Huysteen on p 146. At the conclusion of Ms. Huysteen's evidence, the second respondent enquires if the next witness for the applicant is present. The applicant asks for ten minutes to confirm. He is granted the indulgence. The Record does not reveal any discussions thereafter. The proceedings conclude on that day (14 August 2017). The record is incomplete. It does not reflect what the discussions were after the applicant requested time to establish if his next witness was present, presumably DM. Nothing is reflected in the Record pertaining to how it was resolved that the arbitration proceedings would continue in the absence of DM and how her evidence-in-chief would be treated and no ruling is made on the hearsay evidence of Mr. Laing and Ms. van Huysteen on charge one.

[17] [1999] ZACC 11; 2000 (1) SA 1 (CC).
[18] Record, p 30.
[19] Record, pp 104 to 105.

[50] The record moves on to the evidence of the second witness for the employee party. However, SM was the first witness for the employee party and her evidence is contained from p 518 of the Record. Even the second respondent's typed notes do not shed light on what was discussed at the conclusion of the proceedings on 14 August 2017.

[51] In view of the aforegoing, it is not correct that the applicant gave no explanation for DM's failure to appear for cross-examination – the explanation was she could not be found.

[52] Our Courts enjoin an arbitrator to admit hearsay evidence if it is in the interests of justice to do so, taking into consideration the factors listed in section 3 of the Law of Evidence Amendment Act[20] (LEAA) which reads:

> '3. Hearsay evidence
>
> (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—
>
> (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
>
> (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
>
> (c) the court, having regard to—
>
> (i) the nature of the proceedings;
> (ii) the nature of the evidence;
> (iii) the purpose for which the evidence is tendered;
> (iv) the probative value of the evidence;
> (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
> (vi) any prejudice to a party which the admission of such evidence might entail; and

[20] Act 45 of 1988.

(vi) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

(4) For the purposes of this section—

'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

'party' means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.'

[53] In *Makhathini v Road Accident Fund,*[21] the Court stated as follows regarding the admission of hearsay evidence:

'[27] The purpose of the Act is to allow the admission of hearsay evidence in circumstances where justice dictates its reception. In *Metedad v National Employers' General Insurance Co Ltd* 1992 (1) SA 494 (W) it was stated as follows at 498I–499G:

"It seems to me that the purpose of the amendment was to permit hearsay evidence in certain circumstances where the application of rigid and somewhat archaic principles might frustrate the interests of justice. The exclusion of the hearsay

[21] [2001] ZASCA 120; [2002] 1 All SA 413 (A) at paras [27] and [28].

> statement of an otherwise reliable person whose testimony cannot be obtained might be a far greater injustice than any uncertainty which may result from its admission. Moreover, the fact that the statement is untested by cross-examination is a factor to be taken into account in assessing its probative value… There is no principle to be extracted from the Act that it is to be applied only sparingly. On the contrary, the court is bound to apply it when so required by the interests of justice."
>
> In each case the factors set out in section 3(1)(c) are to be considered in the light of the facts of the case. The weight to be accorded to such evidence, once it is admitted, in the assessment of the totality of the evidence adduced, is a distinct question.
>
> [28] The factors set out in section 3(1)(c)(i)–(vii) should not be considered in isolation. One should approach the application of section 3(1)(c) on the basis that these factors are interrelated and that they overlap. See *Hewan v Kourie NO and another* 1993 (3) SA 233 (T) at 239B–C and Schmidt and Rademeyer's Bewysreg (supra) at 481…'

[54] In *Exxaro Coal (Pty) Ltd v Chipana and Others*[22] *(Exxaro)*, the LAC held that a commissioner is to rule at a stage in the arbitration hearing when the question of hearsay evidence arises, whether or not such evidence will be admitted in order that the opposing party has an opportunity to deal with that hearsay evidence. A ruling is not to be made at the conclusion of the hearing. This is what the commissioner did in *Exxaro*, in addition to misapplying the rules of evidence relating to the admission of hearsay evidence in terms of section 3 of the LEEA. The LAC remitted the matter to the CCMA to be heard afresh.

[55] From the record (with all its missing pieces and scant reconstruction), it is unclear whether the second respondent made a ruling on the admission of hearsay evidence taking into consideration the factors in section 3 of the LEAA when the issue arose at the failure of DM to appear for cross-examination. The missing Record and his typed notes do not shed any light on what discussions took place at the arbitration hearing. In my view, given

[22] [2019] ZALAC 52; [2019] 10 BLLR 991 (LAC).

the grounds of review, this missing piece is crucial to determine what the second respondent ruled on the progress of the arbitration proceedings from this point. There are no closing arguments contained in the record to shed light on this. None of the parties before me could assist with what transpired when Ms. van Huysteen concluded her evidence and what occurred when it was clear that DM would not arrive. It is seen from the Record that the applicant's representative requests time, at the conclusion of Ms. van Huysteen's evidence, to enquire as to whether his next witness is ready. This is a classic limping Record of the arbitration proceedings.

[56] What is clear from the Record is that no submissions were made by SM during the arbitration hearing that the evidence of Mr. Laing and Ms. van Huysteen that constituted hearsay evidence should not be admitted. I emphasize that the charge against SM is one charge with two parts. Certain aspects of Mr. Laing and Ms. van Hususteen's evidence do not constitute hearsay evidence. I find that the second respondent committed a gross irregularity in rejecting their evidence in *toto* as opposed to assessing it and making a decision on what probative value he would add to that evidence in light of all the overwhelming documentary evidence that was before him and in light of SM's bare denials.

[57] It transpires from the Record that SM, who was legally represented, had a fair opportunity to deal with the hearsay evidence of both Mr. Laing and Ms van Huysteen and this is apparent from their cross-examination. Nowhere is it stated that any argument will be made that their hearsay evidence should not be admitted. The failure to admit the hearsay evidence and to assess it is a reviewable irregularity that resulted in the second respondent making an unreasonable decision.

[58] I also find that there was no basis for the second respondent to reject the evidence-in-chief of DM in totality. Although her evidence is untested by cross-examination, its probative value is of a lesser weight and he ought to have made this assessment. This too, is an irregularity.

[59] The second respondent does not deal with the circumstantial evidence that arose from the evidence of Ms. van Huysteen, nor does he engage with the overwhelming documentary evidence that was placed before him on both charges. A further irregularity.

[60] In *Cooper and another NNO v Merchant Trade Finance Ltd,*[23] the Supreme Court of Appeal set out the test for the reliance of circumstantial evidence as follows:

> 'If the facts permit of more than one inference, the Court must select the most 'plausible' or probable inference. If this favours the litigant on whom the onus rests he is entitled to judgment. If, on the other hand, an inference in favour of both parties is equally possible, the litigant will not have discharged the onus of proof.'

[61] The cumulative effect of all items of evidence was not considered by the second respondent to draw a reasonable inference that there was a motive for SM and Ms Ndobe to prepare a second benefits schedule which SM sent to Sanlam, all for a hefty bribe, which SM received and the R40 000.00 underpayment to the deceased's mother remains unaccounted for.

[62] Mr. Laing's evidence on the applicant's processes regarding the preparation, presentation and approval of the resolution and benefits schedule is not hearsay evidence. There was accordingly no basis to exclude his evidence.

[63] The probative value of Mr. Laing's evidence carries greater weight than that of the duo (i.e. SM and Ms. Ndobe) – he is a trustee and his evidence was consistent and unchallenged with regard to the process of the board approving benefits. The evidence of the duo is inconsistent as to whether SM collected the file containing both approved and unapproved benefit schedules from Ms. Ndobe's desk or whether Ms. Ndobe left it on SM's desk. They also play the blame game and point fingers at each other in terms of whose responsibility it was to check the file and remove the unapproved resolution. On the evidence of Mr. Laing, there was simply no need for a second benefit

[23] [1999] ZASCA 97; 2000 (3) SA 1009 (SCA) at para [7], cited with approval in *National Union of Mineworkers and Another v Mogale Gold, A Division of Mintails (SA) (Pty) Ltd* (2015) 10 BLLR 1016 (LAC) at para [23].

schedule – the rules of the pension fund and of the applicant permit only one benefit schedule to be prepared. His evidence, that the preparation of the second benefit schedule without any explanation from the duo why it was submitted with the signed board resolution was intended to deceive, is more probable. On the totality of the evidence before the second respondent, tallied with his finding that it is striking that the duo failed to explain why an unapproved document was accompanied by the signatures of the trustees, his decision that the SM committed an error in submitting the unapproved benefits schedule to Sanlam is unreasonable.

[64] The manner in which the second and unapproved benefits schedule was prepared and submitted to Sanlam with the signatures of the trustees is tantamount to corruption, is a serious offence and is reputational for the applicant.[24]

[65] The duo does not challenge Ms. van Huysteen's evidence that she contacted SM to ask if pension officers demand money from widows who receive pension payouts. They skirt over the issue of such a serious allegation such as this. It is clear as day that following this call by Ms. van Huysteen, the duo attempted to cover their tracks, report an "error" to their superiors and require DM to repay the R40 000.00, which has not been recovered.

[66] Had the second respondent admitted the hearsay evidence of Mr. Laing and Ms. van Huysteen in the interests of justice and had he considered the circumstantial evidence and documentary evidence before him, he would not have found that the first charge was unsubstantiated and that the submission of an unapproved benefits schedule was an error.

[67] I, therefore, find merit in the grounds of review.

[68] A number of factors, which are not necesssary to elaborate, have contributed to the delay in disposing this review application.

[69] Remitting the matter to the first respondent for a hearing *de novo* in light of the irregularities above serves no purpose, as the record before this Court is

[24] Record, pp 41 to 42.

sufficient for this Court to make an order substituting the decision of the first respondent.

[70] From the Record, it transpires that SM gives bare denials to serious allegations of soliciting and receiving a bribe from DM. She conveniently denies receiving the bribe money near FNB, when the full conspectus of the evidence is that she received the bribe money near Standard Bank. She does not deny receiving the money near Standard Bank. She gives a bare denial and says she did not phone DM when DM was inside Standard Bank, withdrawing the bribe money. This, in light of a number of calls from her work phone to DM days before and on the day when DM was at Standard Bank. SM does not deny 'assisting' DM to get insurance money and amending the accident records of the deceased in return for money. She does not deny a phone call by Ms. van Huysteen making a serious enquiry with her regarding pension officers soliciting bribes. She made no attempt to refute Ms. van Huysteen's version that she lambasted her for making such a query.

[71] There is no remorse whatsoever shown by SM. She cannot be trusted in an environment such as that of the applicant that requires utmost trust due to the nature of the services it renders to the community in times of human loss and financial need for surviving family members, especially women and children.

[72] In view of the aforegoing, the following order is made:

<u>Order</u>

1. The arbitration award by the second respondent dated 24 August 2017 under case number LP9680-16 is reviewed and set aside and is substituted with the following order:

   '1.1 The dismissal of the third respondent, Salma Malatji is substantively fair.'

2. There is no order as to costs.

M. T. M. Phehane

Judge of the Labour Court of South Africa

<u>Appearances</u>:

For the Applicant:	Mr. Andries Kruger of Webber Wentzel Attorneys
For the Third Respondent:	Adv. Charles Tshepo Malatji
Instructed by:	Ndekwe Attorneys