



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PA 6/15

In the matter between:

NATIONAL UNION OF METAL WORKERS OF

SOUTH AFRICA (NUMSA) OBO ABRAM MOTLOBA

Appellant

and

JOHNSON CONTROLS AUTOMOTIVE SA (PTY) LTD

First Respondent

MOTOR INDUSTRY BARGAINING COUNCIL

Second Respondent

RIAAN DE LANGE

Third Respondent

Heard: 15 September 2016

Delivered: 03 February 2017

Summary: Summary: The appellant employee - dismissed on account of misconduct: physical and verbal assault of the manager; serious disrespect, impudence and/or insolence; and/or threatening and/or intimidating behaviour towards the manager.

The arbitrator- assessing the misconduct on the basis of the decision of the Industrial Court in *FAWU v Harvestime Corporation (Pty) Ltd* (1989) 10 ILJ 497 (IC) as authority for the proposition that a shop steward when he approaches or negotiates with a senior official or management does so on virtually an equal level with the official or management and the ordinary rules applicable to the normal employer-employee relationship are then somewhat relaxed. The

Arbitrator - finding that the appellant's dismissal was procedurally fair but substantively unfair.

On review and cross-review to the Labour Court- The Court finding - that the arbitrator failed to apply his mind to the evidence and to assess the credibility and reliability of witnesses, including the probabilities. Further finding- that the arbitrator applied the incorrect "anything goes" approach enunciated in *Harvestime Corporation*. The Court - concluding that the award was incapable of being sustained and stood to be reviewed and set aside

On appeal to the Labour Appeal Court - The Court reaffirming the principle formulated in the considerable body of authority that a shop steward should fearlessly pursue the interest his/her constituency and ought to be protected against any form of victimisation for doing so. However, this was no licence to resort to defiance and needless confrontation. Assaults and threats thereof were not conducive to harmony or to productive negotiation. It was unacceptable to hold that when one acts in a representative capacity "anything goes".

Finding - that the incident complained of did not arise during the course of the negotiations or within the context of the collective bargaining process. Further finding- that the arbitrator misconceived the nature of the enquiry he was enjoined to undertake in holding that the incident was in relation to an issue of relevance to industrial relations. Further finding- that reliance by arbitrator on *Harvestime Corporation* was plainly wrong and had correctly been found by the Court *a quo* as amounting to a gross irregularity - the gross irregularities committed had a distorting effect on the outcome of the arbitration and vitiated the award.

The decision of the Labour Court confirmed on appeal.

The appeal dismissed with costs.

Coram: Coppin JA, Landman JA, Phatshoane AJA

JUDGMENT

PHATSHOANE AJA

- [1] This is an appeal by the National Union of Metal Workers of South Africa (NUMSA) or (the union) on behalf of Mr Abram Motloba, the appellant, against the whole of the judgment and order of the Labour Court (Van Niekerk J) dated 01 July 2015 dismissing its review application with costs and upholding with costs the cross-review filed by Johnson Controls Automotive SA (Pty) Ltd, the first respondent; setting aside the award issued under Case No: MICT 10138 by Mr Riaan De Lange, the third respondent, under the auspices of the Dispute Resolution Centre (DRC), a division of the Motor Industry Bargaining Council (MIBCO), the second respondent; and substituting same with an order that the dismissal of Mr Abram Motloba was substantively and procedurally fair. The appeal is with leave of the Court *a quo*.
- [2] Mr Abram Motloba (Mr Motloba) had been in the service of Johnson Controls Automotive SA (Pty) Ltd for a period of nine years. He was a shop steward at the workplace on an intermittent basis for a period of four years including on or about 23 June 2010, when he had a discussion with the payroll administrators of Johnson Controls and did not agree with their interpretation of the MIBCO's collective agreement regulating how the employees on night shift were to be paid for work performed on a public holiday. Ms Charlene Bezuidenhout (Ms Bezuidenhout), the regional payroll manager of Johnson Controls, informed Mr Motloba that the payment would be effected according to the management's understanding of the agreement. They agreed to disagree on this aspect and parted on amicable terms.
- [3] On the next day, 24 June 2010, some unhappiness emerged from a group of employees who accused Mr Motloba of having agreed with Johnson Controls' interpretation of the collective agreement on the method of calculating the public holiday payment. The dissatisfaction culminated into a two and half

minute incident which led to the disciplinary charges being preferred against Mr Motloba, formulated as follows:

- 3.1 Physical and verbal assault of Ms Charlene Bezuidenhout on Thursday, 24 June 2010; and/or
- 3.2 Serious disrespect, impudence and/or insolence towards Ms Charlene Bezuidenhout on Thursday, 24 June 2010; and/or
- 3.3 Threatening and/or intimidating behaviour towards Ms Charlene Bezuidenhout on Thursday, 24 June 2010.

[4] On the basis of the aforesaid charges Mr Motloba was dismissed from the services of Johnson Controls on 08 July 2010. In explaining the mayhem which precipitated the dismissal, Ms Feroda Faith January, a service centre supervisor, who testified in the case for Johnson Controls, says that Ms Bezuidenhout was at the entrance of her office when the group of employees accompanied by Mr Motloba accosted her. Ms January was inside Ms Bezuidenhout's office when she heard some noise outside that office and Mr Motloba loudly and in an aggressive tone uttering words, directed at Ms Bezuidenhout, to the following effect: "Don't lie to my people that I agreed to how they would be paid".

[5] Ms January says that she tried to intervene and informed Mr Motloba that the employees were merely told that he was informed of how they would be paid. Mr Motloba ignored her and kept his focus on Ms Bezuidenhout. He was very close to Ms Bezuidenhout "like in her face", approximately 30 cm away and kept repeating that Ms Bezuidenhout "must not lie to his people". She says that Mr Motloba did not afford Ms Bezuidenhout the opportunity to defend herself against the accusation.

[6] During the exchange referred to in the preceding paragraph Ms January says she saw Mr Motloba's finger passing her sight towards Ms Bezuidenhout's direction but did not observe where it landed. She then heard Ms Bezuidenhout's retort thereafter to this effect: "Excuse me." Ms January went on to say that Mr Motloba was disrespectful of Bezuidenhout and deeply

enraged. She intimated that she thought Mr Motloba “was going to hit” Ms Bezuidenhout. The crowd dispersed after Mr Martin Naas, the factory manager, came to the scene and requested that the issue be resolved elsewhere.

- [7] Later during the day in question, 24 June 2010, Ms Bezuidenhout reported to Ms January that she was unhappy with how Mr Motloba spoke to her and what had transpired. Ms Bezuidenhout went on to tell her that Mr Motloba “actually touched her”. Ms January did not witness when Mr Motloba touched Ms Bezuidenhout. Later during that day she saw Ms Bezuidenhout crying.
- [8] Ms Erna Scheepers was the HR manager at the time of the incident. On that eventful day, in her presence, Ms Bezuidenhout explained to Mr Shaun Govender, the plant manager, that there had been a concern regarding the way in which the overtime was paid and that there had been an episode wherein Mr Motloba shouted at her. During this discussion Ms Bezuidenhout did not mention that Mr Motloba had made any physical contact with her. However, Ms Scheepers observed that the incident had upset Ms Bezuidenhout who appeared nervous but was not crying.
- [9] Ms Scheepers was tasked to conduct an investigation into the incident by the Human Resource Director. She interviewed Ms Bezuidenhout on the next day, 25 June 2010, and noticed that she was distraught over the encounter and cried. Ms Bezuidenhout informed her that as a result of the episode she forgot to collect her husband from work. Ms Scheepers says that since the occurrence of the incident Ms Bezuidenhout was still visibly hysterical by the mentioning of it. Johnson Controls viewed the event as a personal attack on Ms Bezuidenhout’s integrity which could not be countenanced.
- [10] Ms Bezuidenhout disputed having approached any of the employees of Johnson Controls to inform them that Mr Motloba agreed with Johnson Controls’ interpretation of the collective agreement with regard to the payment for work performed on the public holiday. She intimated that on 24 June 2010, as she entered her office, she heard Mr Motloba shouting out her name. He hastily approached her, accompanied by the group of employees, and said

that she must not “use his name to lie to his people”. He was aggressive and enraged. Mr Motloba was very close to her to a point where she felt very intimidated. He pointed and prodded her in the chest with his finger at which point she exclaimed: “Excuse me”. She remained unwavering throughout the cross-examination that Mr Motloba touched her. She perceived the confrontation as a personal attack on her and said she could not defend herself as Mr Motloba did not afford her the opportunity to do so.

- [11] Ms Bezuidenhout intimated that, following the incident, she became petrified of people entering her personal space. She had some sleepless nights over it; dreamt of it, including Mr Motloba being at her home. She saw Ms Shelly Corrigan, a counselling psychologist and Mr Dennis Stigant, a clinical psychologist. She did not attend any counselling session because she thought that she could handle the situation on her own. Mr Motloba never apologised to her.
- [12] Mr Stigant, called as an expert in the case for Johnson Controls, diagnosed Ms Bezuidenhout, at the time of his assessment in January 2011, as suffering from Post-Traumatic Stress Disorder (PTSD), the probable cause of which was the altercation between Mr Motloba and Ms Bezuidenhout. He sets out in his report Ms Bezuidenhout's account of the events of 24 June 2010 and how this impacted on her physical and mental well-being. His findings indicated that Ms Bezuidenhout experienced the encounter as severely traumatic and still experienced the sequelae thereof in a manner that rendered her dysfunctional when confronted with thoughts or subsequent events that serve as reminders of the episode. He opined that Ms Bezuidenhout will have difficulty working in close circumstances with Mr Motloba in the future because if the condition is not treated it becomes chronic which can persist for as long as 30 years.
- [13] Mr Stigant conceded that an exposure to a severe traumatic experience may not in all cases result in a person suffering from any consequences. He further acknowledged that an exposure to a “mundane event” may in other cases result in a person suffering from PTSD.

- [14] Mr Motloba says that on 24 June 2010 he received a telephone call from Mr Xolani Mzeline, one of the shop stewards, requesting Mr Motloba to approach him over a crisis which Mr Motloba created in respect of the public holiday payment. He was accompanied by two union officials to Mr Mzeline, who was with Mr Mxoli, also a union official, and a group of at least 20 employees. These employees were up in arms that Mr Motloba agreed with management on the method of payment for work performed on the public holiday whereas the two shop stewards accused him of taking a decision on behalf of the employees without their mandate. They explained to Mr Motloba that the payroll, in particular Ms Bezuidenhout, referred them to Mr Motloba and said that he had agreed with Johnson Controls' interpretation of the MIBCO agreement with regard to the public holiday payment. In view of the fact that he disputed this allegation the employees requested him to accompany them to the payroll office to obtain clarification on the issue. Under cross-examination he contradicted this statement saying that he did not invite the group of employees to Ms Bezuidenhout's office they just joined him and the other shop stewards.
- [15] Mr Motloba and the group met Ms Bezuidenhout at the entrance of her office. She requested Mr Motloba to send the group of employees to their work station. He told her that the employees had the right to be there because there was confusion on how they would be paid. He enquired from Ms Bezuidenhout whether he had agreed on the method of calculating the payment for the wages or whether he had agreed to disagree with payroll. He says that the correct response was not forthcoming from Ms Bezuidenhout save to persistently state that the issue had been explained to him. He says that Ms January intervened and repeated what Ms Bezuidenhout articulated.
- [16] Mr Motloba says that he enquired from Ms Bezuidenhout why she lied to the employees that he agreed with management on the method of computing the payment of the wages. Although he used hands gestures during the confrontation he says he did not point at Ms Bezuidenhout or prodded her in the chest with his finger. He also denied having made himself guilty of any intimidation, insolence or disrespectful behaviour or used abusive language

towards Ms Bezuidenhout or words suggesting that he would assault her. He did not shout at Ms Bezuidenhout but conceded that he spoke in a loud voice because the group made noise and was addressing all present. He also conceded that the argument became heated.

- [17] On the next day, following the heated exchange, Ms Scheepers handed over to him a letter of suspension from duty with immediate effect. He was later subjected to a disciplinary hearing on charges already highlighted and dismissed. He referred his dismissal dispute to MIBCO for conciliation and thereafter, the arbitration.

The arbitration proceedings

- [18] The basis of the arbitrator's finding were in the main predicated on the following passage in *Food & Allied Workers Union v Harvestime Corporation (Pty) Ltd*:¹

'(A)n employee, when he approaches or negotiates with a senior official or management, in his capacity as shop steward, does so on virtually an equal level with such senior official or management and the ordinary rules applicable to the normal employer-employee relationship are then somewhat relaxed.'

- [19] The arbitrator determined that Ms Bezuidenhout felt intimidated by the group of employees who approached her. She had to endure the conversation with the visibly upset Mr Motloba and the group of employees. The arbitrator accepted the evidence of Mr Stigant that Ms Bezuidenhout suffered from PTSD and was of the view that the occurrences of 24 June 2010 subjectively caused her trauma.

- [20] On the charge of physical and verbal assault the arbitrator found that the evidence tendered by both parties was credible and reliable and their versions equally probable. He went on to state:

'(I)t seems as though the distinguishing factor was Mrs Bezuidenhout's perception of the situation she had to face. Her perception of what was busy

¹ (1989) 10 ILJ 497 (IC).

happening appears to have been removed from the actual event as a result of her psychological realm...'

The arbitrator was of the view that if Mr Motloba touched Ms Bezuidenhout the mere touching did not constitute assault. He found that Mr Motloba was not guilty on the charge because Johnson Controls did not succeed in proving that Mr Motloba acted intentionally and unlawfully.

[21] The arbitrator was of the view that Johnson Controls' basis of the charge of serious disrespect, impudence and/or insolence, alleged to have been perpetrated by Mr Motloba against Ms Bezuidenhout, was unclear. He held that Ms Bezuidenhout was approached by Mr Motloba accompanied by a number of shop stewards, including the shop stewards more senior to him and the group of employees. They required Ms Bezuidenhout to explain something that was relevant to industrial relations in the workplace. The arbitrator was of the view that Mr Motloba approached Ms Bezuidenhout in his capacity as a shop steward and that, under those circumstances, the principle articulated in *Harvetime Corporation supra* found application.

[22] The arbitrator found that Mr Motloba subjectively believed that Ms Bezuidenhout was a "liar". He held that Mr Motloba's undisputed testimony was to the effect that:

'Mrs Bezuidenhout had informed them (the group of employees) that he (Motloba) had agreed to her interpretation of the MIBCO agreement relating to the public holiday payment. Based on these advises he subjectively believed that she had told them a lie. He believed his integrity as a shop-steward was under attack and he reacted in response thereto. This incident was therefore in relation to his duties as a shop-steward. One cannot fault vociferous and determined shop-steward acting on behalf of his constituency. Obviously there are limits to his immunity as developed by the labour jurisprudence.'

[23] I must immediately point out that the arbitrator was not entirely correct in holding that Mr Motloba's evidence was undisputed. It is important to remember that Ms Bezuidenhout disputed having informed the group of employees that Mr Motloba agreed to Johnson Controls' method of calculating

the public holiday payment. Be that as it may, the arbitrator reasoned that the use of the word “liar” in the context of the incident although crass was not abusive.

- [24] The arbitrator further found that the fact that Ms Bezuidenhout was approached by a large group of employees did not entail that Mr Motloba was disrespectful, impudent or insolent towards Ms Bezuidenhout. Mr Motloba accompanied these employees on their request and there had been other shop stewards senior to Mr Motloba in that group.
- [25] In relation to the charge pertaining to the threatening and/or intimidating behaviour, the arbitrator found that there was no direct evidence to sustain the guilty verdict. He was of the view that Mr Motloba did not express any threat of harm or physical violence towards Ms Bezuidenhout. He held that Ms Bezuidenhout subjectively felt intimidated by the contingent and the determined approach by Mr Motloba but objectively it could not be said that the latter acted in an intimidating and threatening manner towards her and said “He was merely performing his duties as a shop steward”.
- [26] The arbitrator concluded that the dismissal of Mr Motloba was procedurally fair but substantively unfair in that Johnson Controls had failed to prove, on the balance of probabilities, the charges it levelled against him. With regard to the relief, he determined that the reinstatement or reemployment of Mr Motloba was impracticable in that, regard being had to the fact that Ms Bezuidenhout was the payroll manager of Johnson Controls, “there will still be a fair amount of interaction between Ms Bezuidenhout and Mr Motloba”. He then ordered that Johnson Controls pays Mr Motloba compensation equivalent to 12 months’ remuneration.

The review proceedings before the Labour Court

- [27] Mr Motloba filed an application to review and set aside the arbitration award on the basis that the arbitrator acted irrationally in not ordering that he be reinstated to his position pursuant to his finding that Mr Motloba’s dismissal was substantively unfair. Johnson Controls launched what was referred to as

a cross-review against the arbitrator's conclusion that the dismissal of Mr Motloba was substantively unfair.

[28] The Court *a quo* had regard to a number of authorities on the fairly established review threshold.² It then concisely set out the grounds of the cross-review and the review. It firstly disposed of the cross-review as its outcome could be dispositive of the main review.

[29] The Court *a quo*'s analysis of the evidence and argument on the first charge of physical and verbal assault was as follows. It found that the arbitrator failed to properly apply his mind to the evidence in finding that the probabilities were evenly balanced. The same applied to the arbitrator's finding on the credibility and reliability of the witness. The Court *a quo* held that it was not open to the arbitrator, having found that Ms Bezuidenhout was a credible and reliable witness and her evidence probable, to conclude that her "perception of what was busy happening appeared to have been removed from the actual event." It held:

'To extent that this suggest that Bezuidenhout's perception of what happened during the incident, as relayed by her in her evidence, was removed from reality, it would necessarily follow that she was not a credible witness, and that her evidence was unreliable and improbable.'

[30] The Judge *a quo* held that the arbitrator also failed to have regard to the evidence which demonstrated that Ms Bezuidenhout feared for her safety due to Mr Motloba's conduct. It reasoned that, in concluding that Johnson Controls failed to establish that there was an intention to assault, the arbitrator ignored the unchallenged evidence of Ms January to the effect that she had heard Ms Bezuidenhout exclaiming "Excuse me" shortly after witnessing Mr Motloba pointing his finger in Ms Bezuidenhout's direction and Ms Bezuidenhout's evidence to the effect that Mr Motloba had pointed his finger at her and that

² *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC); *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration and Others* (2014) 35 ILJ 943 (LAC); *Head of Department of Education v Mofokeng and Others* (2015) 36 ILJ 2802 (LAC).

she retorted: “Excuse me”, as a direct result of Mr Motloba’s finger having made physical contact with her.

[31] The Judge was further of the view that the arbitrator ignored the evidence which indicated that shortly after the incident, Ms Bezuidenhout told both Ms January and Scheepers about the physical contact by Mr Motloba. He also ignored the evidence by both Ms January and Ms Bezuidenhout that Mr Motloba was aggressive and angry on account of the accusation by members of the union that he had agreed to Johnson Controls’ method of computing the public holiday payment. The Judge held that Mr Motloba’s evidence was to the effect that he never pointed his finger at Ms Bezuidenhout. In finding that there was no evidence of intent to assault, the Judge found, the arbitrator afforded Mr Motloba the benefit of a defence to which he gave no evidence. It further found that the arbitrator had committed a reviewable irregularity in that he failed to assess the credibility and reliability of witnesses including the probabilities.

[32] With regard to the second charge of serious disrespect, impudence and/or insolence and the third charge of threatening and/or intimidating behaviour the Court *a quo* observed that the arbitrator correctly recognised that in certain circumstances the shop stewards enjoy a degree of immunity from discipline which is by no means absolute. The Court had regard to several decisions of the Labour Court and this Court on the test to be applied when striking a balance between the right of the shop stewards to exercise their functions as the representatives of the union and the right of the employers to discipline the shop stewards when exercising their duties as shop stewards for acts of misconduct.³

[33] The Court *a quo* held that to the extent that the arbitrator applied the incorrect “anything goes” approach, suggested in *Harvestime Corporation supra*, he committed a gross irregularity. The Court reasoned that the approach adopted

³ *National Union of Mineworkers and Others v Black Mountain Mining (Pty) Ltd* (2010) 31 ILJ 387 (LC) at 398 para 42; *Adcock Ingram Critical Care v CCMA and Others* (2001) 22 ILJ 1799 (LAC) at 1803-1804 para 15; *SA Clothing & Textile Workers Union and Another v Ninian & Lester (Pty) Ltd* (1995) 16 ILJ 1041 (LAC); *Mondi Paper Co Ltd v Paper Printing Wood & Allied Workers Union and Another* (1994) 15 ILJ 778 (LAC); *Banking Insurance Finance & Allied Workers Union and Another v Mutual & Federal Insurance Co Ltd* (2006) 27 ILJ 600 (LAC) at 608-609 paras 19-21

by the arbitrator led to his conclusion that Mr Motloba had not committed any physical and verbal assault on Ms Bezuidenhout or any serious disrespect, impudence or insolence or exhibited any threatening and intimidating behaviour towards her. The Judge was of the view that the arbitrator ought to have applied the principle enunciated in the judgments of this Court, which I revert to later, by recognising the status enjoyed by the shop stewards but rejecting the “anything goes” approach.

- [34] The Court *a quo* concluded that the only reasonable conclusion to be made on the facts was that Mr Motloba committed the acts of misconduct for which he was charged. It further held that Mr Motloba’s behaviour was entirely unnecessary. There was no need for him to shout and be aggressive towards Ms Bezuidenhout approximately 30 cm away from her. There was equally no need for him to prod her in the chest with his finger.
- [35] The Court *a quo* was critical of the union and Mr Motloba insofar as they sought to paint the entire incident as an innocuous exchange. Ms Bezuidenhout broke into tears and had been affected by Mr Motloba’s tirade to the extent that she was diagnosed as suffering from PTSD. In the final analysis, the Labour Court held that the arbitrator’s award was incapable of being sustained and stood to be reviewed and set aside.
- [36] On the above conspectus, it became *brutum fulmen* for the Court *a quo* to consider the merits of the review application. Consequently, it dismissed same with costs and upheld the cross-review with costs. It further substituted the award of the arbitrator with an order that the “The dismissal of the applicant (Mr Motloba) was substantively and procedurally fair”.

The grounds of appeal

- [37] The grounds of appeal were presented in the form of argument. In summary:

37.1 It was contended that the Court *a quo* failed to appreciate that the arbitrator preferred the version of Mr Motloba to that of Ms Bezuidenhout because, as found by the arbitrator, her version was less credible and reliable due to her subjective state of mind. It was argued

that the basis for this contention was foreshadowed in the arbitrator's finding that the distinguishing factor was that Ms Bezuidenhout's version was removed from reality. Mr Niehaus, for the union and Mr Motloba, further argued that, insofar as the arbitrator accepted that Ms Bezuidenhout was a credible and reliable witness, he made a mistake which was not reviewable in that the error did not have a distorting effect on the actual outcome of the arbitration award. Mr Niehaus went on to argue that the outcome of the award fell within the range of reasonable outcomes a reasonable decision-maker could have reached in the prevailing circumstances.

37.2 It was argued that on any proper and reasonable consideration of the evidence Mr Motloba's version that he did not touch Ms Bezuidenhout was more probable than that of Ms Bezuidenhout, alternatively, such a finding was reasonable and no basis existed to upset the award on review. It was further contended that Johnson Controls' version was destructive of the allegation of assault in that Ms Bezuidenhout's testimony was to the effect that Mr Motloba had done no more than touch her and that Ms January conceded that if that happened it was not done with the intention to assault Ms Bezuidenhout.

37.3 Mr Niehaus further argued that the Court *a quo* had no regard to the important parts of the evidence (inclusive of concessions) alternatively did not afford the evidence sufficient weight or failed to appreciate that the evidence rendered the award one that the reasonable decision-maker could make.

37.4 Mr Niehaus contended that the Court *a quo* incorrectly reasoned that Ms Bezuidenhout had claimed that she had feared for her safety. Such a claim, he argued, was made *ex post facto* in the context of her specific psychiatric condition and relevant to the prospects of Mr Motloba returning to work. In any event, it was argued, had such a claim been made in the context of the actual incident it would have been inconsistent with Ms Bezuidenhout's conduct and statements at the time.

- 37.5 The Court *a quo* incorrectly accepted the evidence by Ms January that she overheard Ms Bezuidenhout exclaiming “Excuse me” as corroboration that there had been physical contact despite the fact that it was highly improbable that Ms January would not have witnessed the physical contact had it occurred in front of her as alleged by Johnson Controls and Ms Bezuidenhout.
- 37.6 It was argued that the Court *a quo* placed emphasis on the fact that shortly after the incident Ms Bezuidenhout had claimed that Mr Motloba touched her whereas the claim was influenced by Ms January’s emotional comment to the effect that she thought that Mr Motloba would “hit” Ms Bezuidenhout. Mr Niehaus contended that the statement was inconsistent with Ms January’s evidence that Mr Motloba never intended to strike Ms Bezuidenhout. He further argued that the Court *a quo* incorrectly found that “shortly after the incident” Ms Bezuidenhout had told Ms Scheepers about the physical contact by Mr Motloba when Ms Scheepers’ evidence was that Ms Bezuidenhout made no reference to this during the meeting she had with Ms Scheepers and Mr Govender.
- 37.7 It was argued that the Court *a quo* incorrectly inferred that the probabilities favoured an interpretation that Mr Motloba made physical contact with Ms Bezuidenhout because Mr Motloba had been aggressive and angry. That even if it should be accepted, on the probabilities, that Mr Motloba made physical contact, he was genuinely not aware of it given the prevailing circumstances and the context.
- 37.8 Mr Niehaus contended that Johnson Controls did not make out a *prima facie* case of assault against Mr Motloba which required an answer from him.
- 37.9 Mr Niehaus further argued that the Court fundamentally erred in having substituted the award of the arbitrator as opposed to finding that the award remained one a reasonable decision-maker could have made.

He contended that the Court *a quo* had failed to draw a proper distinction between an appeal and a review.

37.10 In respect of the second and the third charges, it was argued that the Court *a quo* incorrectly found that the arbitrator had adopted the “anything goes” approach whereas the arbitrator specifically stated that there were limits to the leeway afforded to the shop stewards, on the manner in which they conducted themselves, during the interactive meetings between the union and management.

37.11 It was contended that it was incorrect for the Court *a quo* to hold that Ms Bezuidenhout’s psychiatric condition was unlikely to have arisen had she been confronted with a benign incident. Mr Niehaus further argued that the Court *a quo* ignored Mr Stigant’s evidence that some people may be exposed to major trauma and suffer no PTSD (post-traumatic stress disorder) whereas others may be exposed to mundane incidents and develop such a condition. The condition may also be triggered by a perception of a threat without exposure to the actual threat. Mr Niehaus submitted that Ms Bezuidenhout developed PTSD due to her failure to seek treatment for what was initially an insignificant stress related condition.

37.12 Mr Niehaus further contended that the Court *a quo* failed to have regard to the evidence by Ms Scheepers and Ms Bezuidenhout that the incident was different from the previous incidents, which did not result in charges being preferred against Mr Motloba, because Johnson Controls and Ms Bezuidenhout regarded it as a personal attack on Ms Bezuidenhout’s integrity. It was further argued that the Court *a quo* ought to have found that the event was blown out of proportion due to Johnson Controls and Ms Bezuidenhout’s over-sensitivity in respect of the personal element connected thereto.

37.13 It was argued that had the Court *a quo* properly considered the evidence it would not have dismissed the union and Mr Motloba’s

contention that the incident was relatively minor, “the proverbial storm in a teacup”.

The analysis of the grounds of appeal

[38] Following the decision of the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁴ on the review test this Court provided further guidance on the test in its number of decisions. In *Head of Department of Education v Mofokeng and Others*,⁵ this Court provided the following useful exposition on the test which needs to be quoted *in extenso*:

‘[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal (the SCA) in *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* [(2013) 34 ILJ 2795 (SCA)] and this court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* [(2014) 35 ILJ 943 (LAC)]; have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.

[31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependent on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in s 6 of the Promotion of Administrative Justice

⁴ 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) at 2439 para 110 the Court pronounced: “To summarise, *Carephone* held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?* Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.”

⁵ (2015) 36 ILJ 2802 (LAC) at 2811-2813 paras 30-33.

Act (PAJA); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously, etc. The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the light of the issues and the evidence. **Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the enquiry or undertake the enquiry in a misconceived manner. There must be a fair trial of the issues.**

[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted s 145 of the LRA, confining review to 'defects' as defined in s 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.

[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 enquiry, 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.’ (My emphasis)

[39] The question which arises for consideration in this appeal is whether Mr Motloba committed the three disciplinary offences with which he was charged viz: physical and verbal assault; serious disrespect, impudence and/or insolence; and lastly threatening and/or intimidating behaviour. Inextricably linked to this question is whether these charges were spuriously devised and actuated by the impact of the incident of 24 June 2010 on Ms Bezuidenhout psychological wellbeing. The parties’ versions were diametrically opposed on the question whether Mr Motloba misconducted himself as alleged.

[40] On the first charge of physical and verbal assault, Johnson Controls presented direct evidence by Ms Bezuidenhout that Mr Motloba pointed and prodded her in the chest with his finger to which she exclaimed “Excuse me”. Her evidence was corroborated by that of Ms January who testified that Mr Motloba shouted at Ms Bezuidenhout. He was at close quarters when he did so, approximately 30 cm “in her face” and quite aggressive and enraged. Ms January also saw Mr Motloba’s finger moving in the direction of Ms Bezuidenhout and heard her exclaim “Excuse me”. In my view, it matters not that Ms January did not observe the actual physical contact regard being had to the fact that the incident took place in the duration of two and half minutes and there had been some commotion. What is more is that, later on that

eventful day, Ms Bezuidenhout relayed to Ms January what had transpired and confirmed that Mr Motloba assaulted her by prodding her in the chest with his finger. She also gave the same consistent account to Ms Scheepers on the next day. It can hardly be argued that Ms Bezuidenhout's allegations against Mr Motloba grew over a period of time and were purely motivated by anger and misplaced feeling of humiliation as the union and Mr Motloba seek to project.

- [41] The Court *a quo*'s finding that the arbitrator failed to properly apply his mind to the evidence in concluding that the probabilities were evenly balanced and that the evidence presented by both parties was credible and reliable is unassailable. The arbitrator's conclusion that Ms Bezuidenhout's "perception of what was busy happening appeared to have been removed from the actual event" is at odds with his finding that she was a credible and reliable witness.
- [42] Mr Motloba conceded that the exchange was heated. When it was put to him that he was exceedingly angry and shouted he prevaricated but said that he was upset. On his own admission, Mr Motloba spoke in a loud voice because he says he was addressing the group of employees. On the probabilities, Mr Motloba shouted at Ms Bezuidenhout; he was aggressive and enraged on account of the accusation made by the group of employees that he had agreed with Johnson Controls' interpretation of the collective agreement without their mandate. It is also probable that, in a fit of anger, Mr Motloba pointed and poked Ms Bezuidenhout with his finger as a display of his aggression. His level of aggression was such that Ms January thought that he would strike at Ms Bezuidenhout. He had the intention to act as he did. Mr Motloba's downright denial that he did not point at Ms Bezuidenhout or poked her with his finger must be rejected. The Court *a quo* cannot be faulted in having found that the arbitrator afforded Mr Motloba the benefit of a defence to which he gave no evidence when he concluded that there was no evidence of intent to assault on the part of Mr Motloba. It also correctly concluded that the probabilities favoured the interpretation that Mr Motloba made physical contact with Ms Bezuidenhout.

- [43] With regard to the second charge of serious disrespect, impudence and/or insolence, Mr Niehaus contended that there had been no swearing or use of abusive language during the interaction between Mr Motloba and Ms Bezuidenhout. He further argued that the operational management regarded the matter as fairly normal. In addition, he contended that the disciplinary action taken against Mr Motloba had its genesis in the perceived personal attack on Ms Bezuidenhout's integrity by Mr Motloba which went no further than Mr Motloba saying to her "don't use my name to lie to my people".
- [44] There is no evidence in support of the argument that Johnson Controls regarded the incident as normal. On the contrary, it will be remembered that Ms Scheepers' testimony was to the effect that Johnson Controls viewed the encounter as a personal attack on Ms Bezuidenhout's integrity which could not be countenanced. Mr Motloba's outbursts were completely unacceptable and devoid of any respect. Mr Partington, for Johnson Controls, argued that the conduct displayed by Mr Motloba was in truth reminiscent of the kind of belligerence and militancy that has no place in industrial relations. I agree.
- [45] The utterance of the words to the effect that "don't use my name to lie to my people" should not be viewed in isolation. It must be seen in light that Mr Motloba was extremely aggressive and enraged. The accusation that Ms Bezuidenhout had "lied" to the group of employees was unjustified. Mr Motloba failed to place the evidence from any of these employees to prove that Ms Bezuidenhout had "lied" to them. Mr Motloba's argument that Ms Bezuidenhout created the conflictual situation by communicating in an irresponsible manner with the employees cannot avail him.
- [46] Insofar as the third charge is concerned, there was sufficient evidence which showed that Mr Motloba threatened and intimidated Ms Bezuidenhout. As already highlighted, he invaded Ms Bezuidenhout's personal space and shouted at her at a relatively short distance of approximately 30 cm. He also pointed and poked her with his finger.

- [47] As already alluded to, in arriving at the conclusion that the dismissal of decision of the Industrial Court in *FAWU v Harvestime Corporation (Pty) Ltd*⁶ where the Court held that in instances where a shop steward approaches or negotiates with a senior official or management he/she does so on virtually an equal level with such senior official or management and the ordinary rules applicable to the normal employer-employee relationship are somewhat relaxed.
- [48] The principle formulated in the considerable body of authority both in the Labour Court and in this Court⁷ is that a shop steward should fearlessly pursue the interest of his/her constituency and ought to be protected against any form of victimisation for doing so. However, this is no licence to resort to defiance and needless confrontation. A shop steward remains an employee, from whom his employer is entitled to expect conduct that is appropriate to that relationship.⁸ The fact that the bargaining meetings often degenerate does not mean that one should jettison the principle that, as in the workplace also, at the negotiations table the employer and the employee should treat each other with the respect they both deserve. Assaults and threats thereof are not conducive to harmony or to productive negotiation. It is unacceptable to hold that when one acts in a representative capacity “anything goes”.⁹
- [49] In my view, the incident complained of in this case did not arise during the course of the negotiations or within the context of the collective bargaining process. It simply erupted out of the accusations levelled against Mr Motloba by his constituency that he agreed with Johnson Control’s interpretation of the collective agreement. I am of the view that the arbitrator misconceived the nature of the enquiry he was enjoined to undertake in holding that the heated exchange was in relation to an issue of relevance to industrial relations and that Mr Motloba approached Ms Bezuidenhout in his capacity as a shop steward. Even assuming that the heated exchange was in the course of negotiations Mr Motloba’s conduct flies in the face of the ample authority

⁶ *(Pty) Ltd* (1989) 10 ILJ 497 (IC).

⁷ The authority is cited in the judgment of the Court *a quo* and appears at footnote 3 above.

⁸ *Mondi Paper Co Ltd v PPWAWU and Another* (1994) 15 ILJ 778 (LAC) at 780.

⁹ *Adcock Ingram Critical Care v Commission for Conciliation, Mediation & Arbitration and Others* (2001) 22 ILJ 1799 (LAC) at 1803 -1804 para 15.

referred to in the preceding paragraph. A vociferous and determined shop-steward should act in the best interest of his/her constituency and not in a manner that is improper and unbefitting of the office he/she holds. Reliance by arbitrator on *Harvestime Corporation* in this matrix was plainly wrong and had been correctly found by the Court *a quo* as amounting to a gross irregularity.

[50] There can be no question that the whole workplace feud had a damaging effect on Ms Bezuidenhout's psychological wellbeing. She became petrified of people entering her personal space; she had sleepless nights over it; and dreamt of it. The Court *a quo* correctly found that Mr Motloba did not dispute that "in consequence of the incident, Bezuidenhout broke down in tears and that she was affected by Motloba's tirade to the extent that she was diagnosed as suffering from post-traumatic stress syndrome." Mr Niehaus contended that there was no evidence that Ms Bezuidenhout broke down in tears at the time of the incident. I do not read the judgment of the Court *a quo* to be saying that she broke down in tears at the time of the incident. There was clearly evidence, by Ms January, to the effect that later on the day in question, following the discussion she had with Ms Bezuidenhout in which the latter expressed her unhappiness with Mr Motloba's outburst, she saw her crying. She also cried on the next day when she was interviewed by Scheepers concerning the acts.

[51] Mr Niehaus's submission that Mr Stigant had no means of stating that the PTSD Ms Bezuidenhout was suffering from related to the incident is irreconcilable with Mr Stigant's evidence that the PTSD was the direct result of the episode. To my mind, the fact that Ms Bezuidenhout did not undergo treatment for her condition cannot avail Mr Motloba as a defence. It is also of no moment that Mr Stigant's assessment was conducted six months following the event.

[52] I am not swayed that, on the objective consideration of all the facts, Johnson Controls' response to the episode was completely disproportionate and patently unfair. The argument that the charges were trumped-up and actuated by the impact of the incident of 24 June 2010 on Ms Bezuidenhout psychological wellbeing is unpersuasive.

[53] A simple apology may have resolved the issues. Instead, an obstinate trivialization of incident and the denial that the event was inappropriate pervades the record. The misconduct for which Mr Motloba was charged was serious. He showed no contrition. Although he intimated that he learned from this experience as a leader not to permit his constituency to approach matters in the manner that they did, he denied that he made a mistake in approaching Ms Bezuidenhout with the group of approximately 20 employees. I am satisfied that the sanction of dismissal meted out was appropriate in the circumstances of this case.

[54] To sum up, the Court *a quo* was right in holding that the arbitrator committed a gross irregularity by failing to properly apply his mind to the evidence and to the extent that he applied the incorrect “anything goes” approach propounded in *Harvestime Corporation*. These irregularities had a distorting effect on the outcome of the arbitration and vitiate the award. It follows that the appeal must fail.

[55] I am satisfied that it is in accordance with the requirements of law and fairness that NUMSA, the appellant, be ordered to pay the costs of this appeal. Resultantly, I make the following order:

Order

1. The appeal is dismissed with costs.

MV Phatshoane

Acting Judge of the Labour Appeal Court

Coppin JA and Landman JA concur in the judgment of Phatshoane AJA

APPEARANCES:

FOR THE APPELLANT:

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Instructed by Minnaar Niehaus Attorneys

FOR THE FIRST RESPONDENT:

Adv J Partington

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