



**THE LABOUR COURT OF SOUTH AFRICA
PORT ELIZABETH**

Not reportable

Case no: C 1057 /2015

In the matter between:

SA METAL GROUP (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

STEPHEN BANA N.O

Second Respondent

NUMSA obo MPANGELE AND FOUR OTHERS

Third Respondent

Heard: 25 August 2016

Delivered: 22 September 2016

Summary: Review application. Arbitrator failed to consider inherent probabilities where he was confronted with conflicting versions. Award is reviewed and set aside and remitted for hearing *do novo*.

JUDGMENT

PRINSLOO, J

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award issued on 30 November 2015 wherein the Second Respondent (the arbitrator) found the dismissal of Mpangele and four others (the employees) substantively unfair and ordered that they be reinstated retrospectively.
- [2] The Third Respondent opposed the application.

Background facts

- [3] The background facts are herewith summarised as follows:
- [4] On 16 February 2015 the Applicant and NUMSA entered into an agreement in respect of picketing rules (the picketing agreement), in anticipation of the protected strike action that was to commence on 17 February 2015.
- [5] The employees were employed at the Applicant's Epping site and when the strike commenced on 17 February 2015, they participated in the strike action. Two of the employees namely Banathi Mpangele (Banathi) and Lamla Mandi (Mandi) were also shop stewards.
- [6] In April 2015, the employees were issued with notices to attend a disciplinary enquiry. The charges levelled against Simizelo, Guda and Mjanyelwa were in respect of acts of intimidation in that they intimidated fellow employees on several dates during the strike that commenced on 17 February 2015 and gross misconduct in that they broke the agreed picketing rules by intimidating fellow employees. They were found guilty of and dismissed for the misconduct as per the charges.
- [7] Banathi and Mandi were charged with intimidation and assault in that they, on several dates and on various occasions during the said strike intimidated and incited fellow employees to be violent towards other employees, that they were present and condoned assault when strikers assaulted fellow employees and that they broke the picketing rules by intimidating and assaulting fellow employees, which was serious as they had agreed to the picketing rules in their capacities as shop stewards. They were found guilty of and dismissed for intimidation and assault and breach of the picketing rules.

- [8] Although the charges were couched in broad terms, the misconduct for which the employees were dismissed, related to two specific incidents namely the Bishop Lavis incident and the Kraaifontein incident.
- [9] The Bishop Lavis incident involved all five of the employees. It was the Applicant's case that on 17 March 2015, a group of about 30 – 40 striking employees went to the residence of a co-employee, Cecil Baartman (Baartman), in Bishop Lavis and threatened to burn down the house if Baartman continued to work during the strike.
- [10] In respect of the Bishop Lavis incident, it was not disputed that a group of 30 plus individuals went to the residence of Baartman, but the employees denied and disputed that they were part of the group or that they were present at Baartman's house.
- [11] The Kraaifontein incident involved Banathi and Mandi. It was common cause that Banathi and Mandi drove to the Applicant's Kraaifontein branch on 25 February 2015 and that they spoke to the Applicant's employees. In the proceedings they were referred to as the 'casuals'. The Applicant's case is that Banathi and Mandi went to Kraaifontein and that they threatened the casuals to such an extent that they did not continue their work but left the site. The employees' version was that they approached the casuals and enquired from them whether they were aware of the fact that the Applicant's employees were on strike and when they responded that they were unaware, Banathi and Mandi informed them about the strike, but indicated that whether or not they support the strike was their own decision and thereafter they left. The casuals thereafter reported to the security supervisor that they had been threatened with death if they work during the strike and they left.
- [12] In respect of the Kraaifontein incident, it was not disputed that Banathi and Mandi went to Kraaifontein or that they spoke to the casuals. The issue in dispute was what had been said to the casuals.
- [13] It is evident from the charges levelled against the employees and for which they were dismissed, that the Applicant had to prove that the employees were present at Bishop Lavis and that Banathi and Mandi intimidated the casuals at Kraaifontein.

The arbitration proceedings:

The application for legal representation

- [14] Prior to the arbitration, the Applicant made a formal application for legal representation. The Application was motivated by the fact that the Applicant's representative and human capital manager, Marike Aaris (Aaris), has no legal training and no experience to present a case at arbitration, while in comparison, the employees were represented by an experienced trade union representative. The argument was that there would be a vast disparity in the parties' abilities to represent their respective cases. The Applicant also submitted that there was a demonstrable public interest in the outcome.
- [15] At the commencement of the arbitration proceedings on 21 September 2015, the request for legal representation was further motivated by the fact that the misconduct was committed in association with a group and that the Applicant would be required to lead evidence concerning collective and derivative misconduct and Aaris was unfamiliar with the law and was ill-suited to present a case based on the doctrine of common purpose. It was further motivated that the Applicant would seek to introduce hearsay evidence and the law surrounding hearsay was unknown to Aaris.
- [16] The Applicant argued that in two prior and recent arbitrations, the Applicant was allowed to be legally represented on similar grounds. The employees opposed the application for legal representation and submitted arguments as to why it should not be allowed.
- [17] On 21 September 2015 the arbitrator, after considering the arguments, made a verbal ruling wherein he refused the application for legal representation. The reasons provided by the arbitrator were that the matter was not complex as it was premised on the issue of identification. The issue of derivative misconduct could be dealt with in argument rather than evidence, Aaris was involved in the previous cases, albeit as a witness, thus she has some exposure to the same type of cases and how to deal with it and therefore the comparative ability is not that far apart. The arbitrator accepted that there was public interest but that was not a reason enough to allow legal representation.

- [18] The matter proceeded with Aaris representing the Applicant and Mr Mohammed (Mohammed) from NUMSA representing the employees.
- [19] The refusal to allow legal representation is the first ground for review raised by the Applicant and I deem it logical to deal with it prior to the merits of the case and the other grounds for review.
- [20] The Applicant's case is that the arbitrator committed misconduct or a gross irregularity because he unreasonably evaluated and refused the Applicant's application for legal representation.
- [21] The Applicant argued that it is clear from the arbitrator's ruling that he identified the relevant considerations outlined in Rule 25(1)(c)(ii) of the CCMA Rules and that he had a full appreciation of the enquiry he was obliged to undertake, but he failed to exercise his discretion in a judicial manner in disallowing legal representation. This is so as the most fundamental problem related to the relative experience and abilities of the representatives and the fact that it was unreasonable to expect Aaris to represent the Applicant when she was inexperienced whilst Mohammed was experienced in arbitration proceedings.
- [22] The Applicant's complaint is that Mohammed is a proficient cross-examiner, knowledgeable of the relevant case law and comfortable with concepts such as hearsay, negative inferences and *in camera* hearings. There were disputes relating to the admissibility of hearsay evidence and a significant number of witnesses and cross-examination was crucial given that the case turned largely on the identification of the employees.
- [23] The crux of this ground for review is that the decision not to allow legal representation impacted on the outcome of the arbitration as a whole as the Applicant did not have a full opportunity to be heard, the substantial merits of the case were not dealt with and a decision was reached without regard to the full picture of the relevant facts and law. In short, the Applicant was denied a fair hearing.
- [24] The employees' argued that the arbitrator has a discretion whether or not to allow legal representation and he made his decision after he allowed both

parties to make submissions, which decision is sound and not to be interfered with on review.

- [25] Ms Ralehoko for the employees submitted that the Applicant's complaint that it was denied a fair trial because it was not allowed legal representation is without merit. The Applicant's case is that Aaris was unable to present the alternative argument that if the identification process was found wanting, the Applicant would rely on the principle of collective misconduct and Aaris was not able to present that case. Ms Ralehoko argued that the concept of collective misconduct would only apply if it was established that the employees were part of the group that went to Baartman's house and since no reliable evidence was adduced to establish that the employees indeed formed part of the group, it could not be said that they acted in concert with a group with a common purpose.
- [26] Be that as it may, it was not necessary to adduce evidence on the issue of collective misconduct, as it was a matter for argument and Aaris submitted compelling arguments on the concept of collective misconduct. Ms Ralehoko submitted that the Applicant was not disadvantaged by the fact that Aaris did not know how to lead evidence on the concept of collective misconduct.
- [27] In short the employees' case is that there is no merit in the ground for review that the arbitrator failed to apply his mind to the question of legal representation.
- [28] I have to consider whether there is merit in the Applicant's complaint that the arbitrator unreasonably evaluated and refused the application for legal representation. Central to this is a consideration of whether the decision not to allow legal representation impacted on the outcome of the arbitration as a whole in that the Applicant did not have a full opportunity to be heard and a decision was reached without a full picture of the relevant facts and law. The crux of the Applicant's first ground for review is that it was denied a fair hearing because it was denied the right to be legally represented.
- [29] In my view there is no merit in this ground for review.
- [30] Firstly, a transcript of the arbitration proceedings shows that Aaris was quite capable to lead the Applicant's witnesses in presenting their evidence, in

cross-examination of the employees', she was able to apply for the admission of hearsay evidence to such an extent that the affidavit of Magaloza was admitted as hearsay evidence and that she was able to present the Applicant's case.

- [31] I cannot agree with the Applicant's notion that it did not have a full opportunity to be heard and that a decision was reached without a full picture of the relevant facts. The Applicant called six witnesses and Aaris was able to question them to the extent that the Applicant's case was presented and placed before the arbitrator. That is what an employer in an arbitration is entitled to do and the Applicant was afforded that opportunity.
- [32] The Applicant was afforded an opportunity to submit written closing arguments. Aaris submitted comprehensive closing arguments comprising 22 pages wherein she fully dealt with the general legal principles, an assessment of the evidence, case law in respect of hearsay evidence and collective misconduct.
- [33] The arbitrator exercised his discretion, based on the facts before him, and he exercised his discretion by not allowing legal representation. I am not satisfied that the way the discretion was exercised and the decision not to allow legal representation were unreasonable, as alleged by the Applicant.
- [34] I am further not satisfied that the Applicant was denied a fair hearing because legal representation was not allowed, as the transcribed record shows otherwise. I am not convinced that a case has been made out that the award should be reviewed and set aside for this reason alone, as submitted by the Applicant.
- [35] Having found that there is no merit in the first ground for review, I have to consider the other grounds for review as raised by the Applicant.
- [36] The Applicant's other grounds for review are related to the evidence and mistakes in law he made. In respect of evidence it is the Applicant's case that the arbitrator incorrectly considered irrelevant testimony and / or failed to consider relevant aspects of the testimony. The made mistakes in law the arbitrator made relate to his evaluation of the admissibility and weight of the

Applicant's hearsay evidence and his application of the cautionary rule to the testimony of Jassen.

- [37] The assessment of the merits of the remaining grounds for the review, calls for a consideration of the evidence that was adduced.

The evidence adduced

- [38] The arbitrator summarised the issues: the first being whether the employees were guilty of the allegations of intimidation and secondly, if they were indeed guilty, whether dismissal was an appropriate sanction. He made it clear that the onus was on the Applicant to prove on a balance of probabilities the charges for which the employees were dismissed and to show that the dismissal was fair.
- [39] The Applicant called six witnesses to prove the charges.
- [40] Aaris testified and she described the core operations of the Applicant, the strike history at the Applicant and the violent nature of the strikes and the negative impact the violent strikes had on the Applicant's operations and workforce.
- [41] Aaris made it clear that she was not involved in the process of identifying the striking employees.
- [42] Aaris referred to the letter of 17 April 2015 wherein the Applicant afforded employees who were given notices to attend disciplinary enquiries the opportunity to come forward and to make a full disclosure of their misconduct during the strike action and if such disclosure was made and the employee involved did not commit violent acts during the strike, the employee would not be dismissed. She testified that only Banathi came forward, but not to disclose anything, but merely to express his shock that he was called to a disciplinary hearing.
- [43] Aaris explained that the employees were dismissed as the misconduct of threatening and intimidation of others was serious and not in compliance with the picketing rules. It was conduct and behaviour the Applicant could not tolerate.

- [44] In cross-examination Mohammed dealt with the letter affording the employees the opportunity to come forward. He put to Aaris that it was common cause that the employees were not found guilty of or dismissed for violent acts, and despite the fact that they were not found guilty of acts of violence, they were dismissed whilst the employer stated in the letter that there won't be dismissal. Aaris responded that Mohammed misunderstood the letter and she explained the contents of the letter to mean that if an employee that committed misconduct, other than an act of violence, came forward and admit that, he or she would not be dismissed. She explained that it was very different from Mohammed's interpretation that no one would be dismissed if it was not a violent act. There was a condition attached to it namely that the employees had to come forward and no one did.
- [45] Mohammed stated that the employees did not come forward as they had nothing to disclose and Banathi came forward to disclose that he was not involved in any acts of misconduct. Aaris disputed that and denied that Banathi came forward, she testified that Banathi never indicated what happened, but just stated that he had not done anything and the Applicant viewed that the same as not coming forward.
- [46] The issue regarding Banathi's identification during the disciplinary hearing was dealt with in detail. Mr Esau (Esau) was the witness who identified Banathi at Baartman's house, however during the disciplinary hearing he was unable to identify Banathi. Only after the employer sought an adjournment and produced a photograph of Banathi with an arrow pointing to Banathi, was Esau able to identify him. Mohammed submitted that Esau was not able to identify Banathi based on his own recollection, but was only able to do so after he was shown a photograph of Banathi with an arrow with his name on, that he could remember and identify Banathi. Aaris explained that Banathi has a very distinct way of wearing his hair and he was wearing a cap during the disciplinary enquiry. Esau recognised Banathi by a combination of his face and his hairstyle and when one of those (the hairstyle) fell away because Banathi was wearing a cap, it confused Esau. Aaris did not dispute that Esau was unable to identify Banathi on his face. She confirmed that when Banathi took off his hat, Esau was able to identify him.

- [47] Mr Jassen (Jassen) testified that he is not an employee of the Applicant, but he resides with his uncle, Mr Esau, on the same premises as Baartman at Bishop Lavis.
- [48] Jassen testified that the crowd came to Esau's house on 17 March 2015 and they shouted "Baartman Baartman" and they entered the premises. Jassen told them that they cannot enter the premises and they asked where Baartman was. Jassen told them that he was at work and they said that Baartman should not go back to work or they would burn the house down. Jassen asked if that was a threat and they responded by saying that it was not a threat, but a promise.
- [49] Jassen testified that he specifically took notice to remember a few faces of the people in the crowd in case they would return the next day and execute their threat.
- [50] The next day Mr Smit (Smit) approached him and asked him if he was willing to identify the individuals who came to the house to make the threats. Jassen agreed and he explained the process followed to identify the individuals. He went to the Applicant's premises and Smit showed him live video footage on two monitor screens. He identified the individuals from the live feed video footage as well as by looking out at the window of the boardroom from where he observed the individuals and identified them.
- [51] Jassen was able to identify Mandi as vocal and Simizelo as the spokesperson who made the threat. He could also identify Banathi, Guda, Mjanyelwa as being present at the house on 17 March 2015.
- [52] In cross-examination Jassen confirmed that he pointed out and identified the individuals from the live feed video footage he saw and not from photos he was shown. Jassen explained that the individuals were identified on their faces and not the way they wore their hair. The photos used during the arbitration were snapshots taken from the live feed. Once Jassen identified an individual on the live feed, a snapshot was taken from the live feed. Jassen testified that the live feed was much more clear than the photos that were taken as snapshots from the live feed, after he pointed out the individuals.

- [53] Jassen confirmed that he made sure to remember the faces in case something happened in respect of the threat that was made on 17 March 2015.
- [54] In cross-examination it was put to Jassen that he could not have identified Simizelo correctly if he did not identify him by the scar on his face. Jassen testified that he knew Simizelo had a distinctive mark on his face, but he did not use that to identify him.
- [55] After the testimony of Jassen, the Applicant sought to introduce hearsay evidence pertaining to Jonathan Harry and Mzwabantu Magaloza on the basis that they were threatened and are scared for their lives and would therefore not testify *viva voce*.
- [56] The arbitrator considered the evidence of Jonathan Harry (Harry). Harry stays 20 metres from Baartman and his statement confirmed that he was told that there were people at the house who made threats. Harry's statement is in itself hearsay evidence and it merely confirms that a group of people was present at Bishop Lavis on 17 March 2015, an issue that was not in dispute. The issue in dispute was the identification of the individuals who were present and Harry was not present and could not assist in the identification of the individuals present at the house. The arbitrator made a ruling not to allow the hearsay evidence of Harry as his statement contained information he obtained from others, as he was not present and his statement was based on hearsay, it was irrelevant and was not going to assist in the determination of the matter.
- [57] In respect of the statement of Magaloza the arbitrator held that:
- “..I will allow the statement and any additional oral evidence that relates to this, but I'm going to put the caution on the record: it is hearsay evidence. I have not had sufficient explanation why he is not here and I will obviously bear that in mind when I now weigh the evidence in my deliberations. I'm putting this on the record to you, that this, I regard it as hearsay evidence without sufficient grounds for his absence, but I will allow you to present it, and it will feature in the award as and how it is relevant. Then you obviously need to understand that this will also be weighed against whatever direct evidence is going to come in support or against it.”

- [58] The Applicant called Mr Williams (Williams) as a witness. Williams is the human resources practitioner and he testified that he met with Magaloza, who confirmed his statement and told Williams that he was approached by Banathi at Kraaifontein during the strike and Banathi asked him not to work and told him that if he continues to work, they would kill him. Magaloza confirmed that he immediately informed his manager that he was not going to work because his life was threatened and he felt scared that something might happen to him. Magaloza was asked to attend the arbitration but he said he was scared and felt too threatened to come to the arbitration and would not testify if the Applicant was not able to protect him after the proceedings.
- [59] In cross-examination the evidence of Williams on behalf of Magaloza was attacked on the basis that the statement was produced late in the proceedings and that it was fabricated and issue was taken with the language in which the statement was taken and the language Mandi and Banathi spoke. Williams was able to explain why he disputed that the statement was a fabrication. Mohammed never put to Williams that Magaloza was not threatened by Mandi and Banathi, he merely put that the statement was a fabrication.
- [60] Mr Smit (Smit) testified for the Applicant in his capacity as risk manager in charge of security. He testified that he received a message that he should take Baartman to his residence as there were workers who invaded the yard and made threats. He took Baartman to Bishop Lavis and Baartman showed him where he stayed, but when they arrived there, there were no workers in the vicinity. He met with Jassen and Esau and they told him that there were a number of the Applicant's employees at the house and they threatened to burn down the house should Baartman go to work the following day. Smit left and went to Epping, where he reported this to his immediate head, who told him to get statements from Esau and Jassen. He asked Esau and Jassen whether they would be able to identify any of the people who were at the scene and they volunteered to go to the Applicant's premises and to show Smit who the individuals were.
- [61] Smit fetched Esau and Jassen and took them to the Applicant's premises in Epping. As they were driving to park, they passed by the strikers on the premises and Esau and Jassen started to identify the strikers as part of the group that went to Baartman's residence. He told them to clam down as he

could not drive and look around. Smit took Esau and Jassen to his office where he showed them live feed video footage of the strikers outside and as they pointed out individuals, Smit would zoom in on the screen and take a photo of what appeared on the screen.

- [62] Smit explained that live feed was video footage of events as they were happening.
- [63] Smit testified that he knew none of the individuals who were pointed out during the identification process, except Banati. He explained that prior to them being pointed out, he did not know them by face or by name that is why he had to take the screenshot photos, that were sent through to production where the individuals were identified by the people who work closely with them. He did not tell Esau and Jassen whom to identify or who to point out, as he did not know the individuals and it was impossible to tell them whom to identify.
- [64] Smit also testified that the individuals were identified through the window of the boardroom, which was close to where the strikers were standing and they were visible from there.
- [65] In cross-examination Smit made it clear that he assisted in the identification process only in respect of getting the video footage and taking the screenshot photos of the identified individuals. Esau and Jassen also did not know the names of the individuals, so he assisted in getting the names of the individuals who were pointed out, as he also did not know their names.
- [66] Smit testified that the individuals were not identified from photos, but from the live feed video footage and that the quality of the live feed is much better and more clear than the photos that were taken as screenshots from the live feed. Once the individuals were identified from the live feed and the screenshots taken from the live feed, more clear pictures were included as evidence.
- [67] Mr Olivier (Olivier) was the Applicant's security supervisor at Kraaifontein on 26 February 2015 and he testified about the events of that day. A strike was ongoing at the time and he was called to the gate and told that there was a blue car parked across the road. He knew Banathi and Mandi as two of the individuals that were standing across the road. He testified that they spoke to the casualties, but he was unable to understand the conversation. When Banathi

and Mandi left, the casuals told him that they were not coming to work, but they were going home as they were threatened.

- [68] In cross-examination Olivier conceded that they were talking loud, but it was not aggressive and Banathi and Mandi did not carry sticks or pangas and he did not know what was said as the conversation was in Xhosa and he was unable to understand it. Olivier conceded that it was possible that the casuals would not have told him that they were striking in support of the strike and they were not willing to take the strikers jobs whilst they were fighting for wages.
- [69] The last witness called by the Applicant was Baartman. Mr Baartman testified about how he felt because striking individuals went to his house. His evidence did not and could not contribute to prove the charges levelled against the employees as he made it clear that he was not at home when they went there and he could not identify the individuals who were present.
- [70] Despite the fact that Baartman's evidence made no contribution to prove the charges or to identify the individuals, Mohammed still saw the need to cross-examine him extensively to the extent of 43 typed pages in the transcribed record.
- [71] Mjanyilwa testified that he was on strike and participated in the picket on the day striking individuals went to Baartman's house (17 March 2015). He testified that he had no knowledge of the strikers that went to Baartman's house and only learnt about it the next day. His testimony was that he was not part of the group that went to Bishop Lavis, as he does not even know where Bishop Lavis is or where Baartman's house is. He went from the picket to Bonteheuwel to take a train to Khayelitsha and he went back to the picket the following day.
- [72] In cross-examination it was put to him that both Esau and Jassen identified him as part of the group that went to Baartman's house and there was no reason for them to lie about Mjanyilwa.
- [73] Simizela testified that he was not part of the group that went to Bishop Lavis. His testimony is that he participated in the picket in Epping at Bofors Circle and after they finished picketing, they dispersed and from there he went to Elsie's River to take a taxi home to Delft where he stays.

- [74] He testified that Jassen pointed him out during the disciplinary hearing as one of the individuals who were present at Baartman's house. He testified that he was not identified by reference to a prominent scar he has. It appears from the transcribed record that the transcriber had difficulty at times to transcribe the record as it was inaudible.
- [75] In cross-examination he testified that he was unaware of the group that went to Baartman's house, he only learnt of the incident the following day.
- [76] Guda testified that he participated in the strike and picketing, but did not go to Baartman's house as he went home after the picketing. He testified that Esau identified him during the disciplinary enquiry as the part of the group that went to Baartman's house and that he was the person who handed a letter to Esau. It appears from the transcribed record that the transcriber also had difficulty to transcribe the record in respect of Guda's evidence, as it was inaudible at times.
- [77] Guda testified that he was unaware of the group of people that went to Baartman's house until he received the notice to attend a disciplinary enquiry. Prior to that, he had no idea that a group went to Baartman's house.
- [78] In cross-examination it was put to him that he was identified as part of the group during the identification process, the disciplinary hearing and the arbitration proceedings and the witness was clear about him because he was the person who handed a letter to them at Baartman's house.
- [79] Mandi testified that he was not part of the group that went to Baartman's house on 17 March 2015. On that day he was picketing at Bofors Circle and when they were finished, they dispersed and went home. They visited Banathi's relative in Langa and only when they returned the following day, were they told about the group that went to Baartman's house.
- [80] Mandi testified that Esau and Jassen identified him during the disciplinary hearing as the person who spoke to them at Baartman's house. He however denied that he ever went to Baartman's house in Bishop Lavis.
- [81] In respect of the Kraaifontein incident Mandi testified that he went to Kraaifontein with Banathi and Chris, a shop steward and convenor during the

strike. They went to Kraaifontein as employees who were on strike approached them and informed them that whilst the strike was ongoing, others were working. They approached the casuals and asked them if they were aware that there was a strike ongoing. The casuals were unaware of the strike action and they did not tell them what to do, they merely informed them about the strike. Mandi denied that they intimidated or scared the casuals.

- [82] The cross examination of Mandi is not transcribed. It appears from the transcript that the arbitration proceedings continued on 13 November 2015, but the transcript of those proceedings does not exist or simply did not make it to the Court file. Be that as it may, two more witnesses testified for the employees and the transcribed record of their evidence is not before Court.

The arbitrator's findings

- [83] The arbitration proceedings were conducted over a number of days and a total of 12 witnesses were called. The incomplete transcribed record comprises of 455 pages. The arbitrator captured the issues and the evidence in almost 7 pages of the arbitration award. All this is indicative of the fact that a lot of evidence was adduced and that the issues to be decided called for a careful and comprehensive analysis of the versions presented, the evidence and the facts.
- [84] I found it most surprising that the actual analysis of the evidence and arguments were captured in only four paragraphs (paragraphs 45 – 48) of the award and a careful reading of the award shows that the actual analysis and findings were limited to two paragraphs. Paragraph 45 contains no assessment or analysis of the evidence and paragraph 48 deals with the appropriate remedy.
- [85] The arbitrator's findings are thus to be found in paragraphs 46 and 47 of the arbitration award. In paragraph 46 he made findings in respect of the Bishop Lavis incident and in paragraph 47 he made findings in respect of the Kraaifontein incident.
- [86] In respect of the Bishop Lavis incident, the arbitrator made the following findings:

- 86.1. The employees were all alleged to have been part of the group that went to Baartman's house and threatened to burn it down and they all denied being there;
- 86.2. The Applicant called one direct witness, Jassen, to support the allegation;
- 86.3. It was never explained why Esau was not called as a witness;
- 86.4. It was common cause that Esau had problems to identify Banathi at the disciplinary enquiry;
- 86.5. The evidence of a single witness must be treated with caution;
- 86.6. Jassen insisted that he focussed on the employees' faces in identifying them, yet he did not mention the clearly visible scars of two of the employees and he mentioned no distinguishing elements that allowed him to recognise them;
- 86.7. Jassen's evidence was opposed by corroborating testimony;
- 86.8. The Applicant did not provide the original video footage used to identify the employees;
- 86.9. Baartman's evidence was irrelevant in proving who was at the house;
- 86.10. The Applicant failed to prove on a balance of probabilities that the employees were guilty of the allegation relating to the incident at Baartman's house.

[87] In respect of the Kraaifontein incident, the arbitrator made the following findings:

- 87.1. Mandi and Banathi were alleged to have threatened and intimidated casual workers at Kraaifontein;
- 87.2. The Applicant brought no direct evidence to support its case;

87.3. Magaloza's statement was allowed as hearsay but the arbitrator was not convinced by the reasons for his absence and the sudden appearance of the statement;

87.4. The union's suggestion that the threat was a smokescreen to hide sympathy for the strike is not improbable;

87.5. The Applicant failed to provide any evidence from the other casual workers;

87.6. Olivier testified that he could not pick up aggression in the conversation;

87.7. The employees denied that they threatened or intimidated Magaloza or anyone else;

87.8. The Applicant failed to prove Mandi and Banathi's guilt.

[88] In view of the findings made, the arbitrator concluded that it followed that the employees' dismissal was substantively unfair and he ordered their retrospective reinstatement without loss of benefits.

Analysis of the arbitrator's findings and grounds for review

[89] The Applicant's grounds for review are that the arbitrator incorrectly considered irrelevant testimony and / or failed to consider relevant aspects of the testimony. Further that he made mistakes in law relating to his evaluation of the admissibility and weight of the Applicant's hearsay evidence and his application of the cautionary rule to the testimony of Jassen.

[90] The Applicant's case is that as a result of the aforesaid, the arbitrator failed to apply his mind, failed to determine the dispute fairly, failed to determine the case on the substantial merits and therefore made a decision no reasonable decision maker could reach.

[91] The grounds for review and the findings of the arbitrator should be considered in view of the Bishop Lavis and Kraaifontein incidents.

Bishop Lavis incident: 17 March 2015

- [92] The Applicant relied on the evidence of Jassen to identify the employees who were present at Baartman's house on 17 March 2015. The arbitrator found that the Applicant failed to prove on a balance of probabilities that the employees were guilty of the allegation relating to the incident at Baartman's house.
- [93] The arbitrator's finding was based on three main considerations.
- [94] The first consideration relates to Esau and the fact that it was never explained why Esau was not called as a witness whilst it was common cause that Esau had problems in identifying Banathi at the disciplinary enquiry.
- [95] The Applicant takes issue with this and submitted that the arbitrator drew an adverse inference from the fact that Esau was not called as a witness and in doing so he committed a material error of law and applied the relevant principles incorrectly, leading to an unreasonable decision.
- [96] The second consideration relates to Jassen. In respect of Jassen the arbitrator considered that Jassen was a single witness and the evidence of a single witness must be treated with caution. He further criticized Jassen for the fact that he insisted that he focussed on the employees' faces in identifying them, yet he did not mention the clearly visible scars of two of the employees and he mentioned no distinguishing elements that allowed him to recognise them. The arbitrator mentioned that Jassen's evidence was opposed by corroborating testimony of the employees.
- [97] The Applicant's case is that the arbitrator misapplied the cautionary rule applicable to a single witness and the application of this rule as a basis to reject Jassen's evidence, constituted a material error of law. The Applicant's case is that the cautionary rule does not find application in arbitration proceedings. Mr Bosch for the Applicant submitted that where an arbitrator applies caution to the extent that he or she fails to undertake a full analysis of the evidence, the process is excessively constrained and amounts to bias against the acceptance of the evidence of the single witness, which deprives the relevant party a fair opportunity to be heard. Ms Ralehoko submitted that the arbitrator correctly applied the cautionary rule.

- [98] The third consideration was the fact that the Applicant did not provide the original video footage used to identify the employees.
- [99] The Applicant's case is that the arbitrator relied on the absence of video footage used to identify the employees as a basis to reject Jassen's evidence. Mr Bosch submitted that it was an irrelevant consideration as it was evident from Jassen's evidence that no such video footage existed, as the identification happened from a live feed video and the insistence that the Applicant possesses such footage, was based on a misunderstanding.
- [100] In short the Applicant's case is that the arbitrator provided no proper basis for rejecting Jassen's evidence and preferring that of the employees.
- [101] In my view there is merit in this ground for review. The arbitrator was clearly faced with two conflicting versions. On the one hand the Applicant alleged that the employees were present on 17 March 2015 when a group of strikers went to Baartman's house and on the other hand the employees denying that they were present and part of the group.
- [102] The approach to be adopted by arbitrators when faced with two disputing versions was set out by Van Niekerk J in *Sasol Mining (Pty) Ltd v Ngeleni NO and Others*¹, where it was held that the arbitrator must conduct an
- '. . . assessment of the credibility of the witnesses, a consideration of the inherent probability or improbability of the version that is proffered by the witnesses, and an assessment of the probabilities of the irreconcilable versions before the commissioner. As Cele AJ (as he then was) observed in *Lukhnaji Municipality v Nonxuba NO and others* [2007] 2 BLLR 130 (LC), while the LRA requires a commissioner to conduct an arbitration hearing in a manner that the commissioner deems appropriate in order to determine the dispute fairly and quickly, this does not exempt the commissioner from properly resolving disputes of fact when they arise.'
- [103] The arbitrator, faced with two conflicting versions, had to follow the approach as set out by this Court and he had to conduct an assessment of the credibility of the factual witnesses, their reliability and overall assessment of the inherent probabilities of the irreconcilable versions before him.

¹ (2011) 32 ILJ 723 (LC) at 727C-F.

[104] In *Sasol Mining* the Court also held that it was one of the prime functions of a commissioner to ascertain the truth as to the conflicting versions before him. The Court held at paragraph 9 that:

'What he manifestly lacked was any sense of how to accomplish this task, or which tools were at his disposal to do so. The commissioner was obliged at least to make some attempt to assess the credibility of each of the witnesses and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability or improbability of each party's version. The commissioner manifestly failed to resolve the factual dispute before him on that basis. Instead, he summarily rejected the evidence of each of the applicant's witnesses on grounds that defy comprehension.'

[105] Glaringly absent from the arbitration award is an assessment of the credibility of the witnesses or the inherent probabilities of the versions presented. The arbitrator accepted the employees' version as corroborated and rejected Jassen's version as a single witness, without providing any reasons why the one version is to be preferred and the other to be rejected.

[106] I do not intend to deal with every aspect where the arbitrator failed to consider the evidence and the inherent probabilities and I deem this example sufficient to illustrate the arbitrator's failure in this regard: the arbitrator had to consider the prospects of partiality, prejudice or self-interest. Jassen is not employed by the Applicant, therefore he does not stand to gain or lose anything by testifying on behalf of the Applicant. The employees on the other hand were dismissed and sought reinstatement. Jassen explained how the employees were identified and his evidence in this regard is supported by Smit, who also did not know the employees, with the exception of Banathi. The arbitrator failed to consider crucial aspects of the evidence and the inherent probabilities.

[107] *In casu* the award contains a detailed summary of the evidence, followed by an analysis that is little more than a few remarks on the facts before the arbitrator. The essential ingredients of an assessment of the credibility of the witnesses and the inherent probability or improbability of the versions before him, is missing. In my view the arbitrator was wholly incapable of dealing with

the disputes of fact and he failed to perform one of his primary functions, namely to resolve disputes of fact.

[108] The question whether the cautionary rule applies in arbitration proceedings or not, is in view of my findings neither here nor there. One of the primary functions of the arbitrator, namely to resolve disputes of fact, was performed in a manner where he applied caution to the extent that he failed to perform a primary function in that he failed to undertake a full analysis of the evidence and the inherent probabilities, as he was required to do.

[109] The arbitrator did not undertake a full analysis of the evidence and the probabilities as they presented themselves during the arbitration proceedings. The arbitrator did not consider the employees' evidence in light of the probabilities, self interest and credibility of the witnesses. It appears that the arbitrator adopted a mechanical approach to accept the version of the employees simply because they were more than one and they corroborated each other.

[110] In *Sidumo and another v Rustenburg Platinum Mines Ltd and others*² Ngcobo J stated at 268:

'[W]here a commissioner fails to have regard to the material facts, the arbitration proceedings cannot, in principle, be said to be fair because the commissioner fails to perform his or her mandate. In so doing, in the words of Ellis the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings, as contemplated by s 145(2)(a) (ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.'

[111] The same considerations apply to a commissioner who fails properly to resolve an irreconcilable dispute of fact. For these reasons, the arbitrator's award falls to be reviewed and set aside.

[112] *In casu* the arbitrator failed to have any regard to the credibility and reliability of any of the witnesses, nor did he have regard to the inherent probabilities of the competing versions before him. That failure, and the fact that the award

² (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC),

may have been different had the arbitrator properly acquitted himself, renders the award reviewable on account of a gross irregularity committed by the arbitrator in the conduct of the arbitration proceedings.

[113] Having found that the arbitration award is to be reviewed and set aside, it is not necessary to deal with the remaining grounds for review.

[114] I canvassed with Mr Bosch the appropriate relief and he submitted that since the Applicant was denied a fair hearing, the matter should be remitted for a hearing *de novo*. I agree. Not only is the record not in a complete state for me to finally determine the dispute on the merits, I am also not in a position to make any finding based on demeanour or any other aspect that goes to the question of credibility.

Order

[115] In the premises I make the following order:

1. The arbitration award issued on 30 November 2015 under case number WECT7259-15 is reviewed and set aside;
2. The matter is remitted to the Commission for Conciliation, Mediation and Arbitration for a hearing *de novo* before another commissioner;
3. There is no order as to costs.

Connie Prinsloo

Appearances:

For the Applicant : Advocate C Bosch

Instructed by : Guy & Associates Attorneys

For the Third Respondent: Ms T Ralehoko of Cheadle Thompson & Haysom Attorneys