

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

Case No. C720/2017

In the matter between:

PIONEER FOODS (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER JJ KITSHOFF

Second Respondent

FOOD & ALLIED WORKERS UNION (FAWU)

Third Respondent

EDWARD MOLOTSI

Fourth Respondent

Heard: 13 March 2019

Delivered: 20 March 2019

Summary: Review – misconduct – assault – reviewed and remitted.

JUDGMENT

STEENKAMP J:

Introduction

- [1] This is an application for review in terms of section 145 of the Labour Relations Act 66 of 1995 (the **LRA**) in which the Applicant (the **Company**) seeks to have reviewed, set aside and corrected the arbitration award made by the Second Respondent (the **Arbitrator**) on 22 October 2017.
- [2] The arbitration award found that the dismissal of the Fourth Respondent (**Molotsi**) was substantively unfair. The Company was directed to reinstate him with effect from 1 November 2017 and to pay him back pay retrospectively to 21 April 2017, the date of his dismissal.
- [3] The application is opposed by Molotsi and his trade union, the Third Respondent (**FAWU**). The Court has a full record of the proceedings before the Arbitrator, including the bundles of documents that served before him, as well as a verbatim transcript of the arbitration proceedings. I am also indebted to the parties' representatives for their comprehensive heads of argument, from which I have drawn to set out the common cause facts and some of the authorities relied upon.
- [4] The following facts appear to be common cause and uncontroversial:
- 4.1 On 7 March 2017, an incident took place at the Company's Bokomo Breakfast Cereals factory.
- 4.2 It was alleged that Molotsi had refused to perform the instructions that his direct supervisor (Ivan Davids) and the factory's production manager (Abraham Ryneveld (**Ryneveld**)) gave to him to clean the oven belt.
- 4.3 An altercation had then developed between Molotsi and Ryneveld that ultimately resulted in Molotsi striking Ryneveld on the head with an iron rod, causing him to suffer a six-centimetre head injury that required immediate medical treatment, including stitches.

- 4.4 Both Ryneveld and Molotsi attended at the Company's internal medical practitioner (Charlotte Samuels (**Samuels**)) and she referred them to a doctor for further assessment.
- 4.5 Both Ryneveld and Molotsi reported the matter to the Company's management and the Company took the view that Molotsi was the aggressor in the incident and that he should be subjected to formal disciplinary action.
- 4.6 Molotsi was charged with assault with the intent to do grievous bodily harm and, following a disciplinary hearing, was dismissed. The date of dismissal is recorded as 20 April 2017.
- 4.7 It is not clear whether any action was taken against Ryneveld. However, both he and Molotsi instituted criminal proceedings against one another in their personal capacities. Those proceedings were settled on the basis that Molotsi would pay for Ryneveld's medical expenses.
- [5] Molotsi referred an unfair dismissal dispute to the First Respondent (the **CCMA**) and an arbitration hearing took place on 30 August and 6 October 2017 before the Arbitrator. The Arbitrator delivered his award on 22 October 2017. He found that Molotsi had been dismissed unfairly.
- [6] Whilst the findings made in the arbitration award will be dealt with in greater detail below when I deal with the review grounds, the Arbitrator essentially found that Ryneveld was the aggressor during the altercation, and that he had violently attacked Molotsi and had severely assaulted him, thereby causing Molotsi to act in self-defence. The Arbitrator found that Molotsi had struck a single blow with the rod in order to prevent any further assault from Ryneveld. On this basis, he found that Molotsi was innocent of the charge preferred against him at the disciplinary hearing and accordingly that there was not a fair reason for his dismissal.
- [7] Given that the dispute turned on two competing versions of events, it is important to set out in some detail the respective versions of what took place during the altercation.¹

¹ I am grateful to Mr *Whyte* for his useful summary, which accords with the transcript.

The evidence before the Arbitrator*The Company's version*

- [8] The Company's case was presented by Ryneveld and Samuels, together with supporting evidence from the oven operator (Elizabeth Pretorius (**Pretorius**)).
- [9] Ryneveld's version of the incident can be summarised as follows:
- 9.1 Davids had instructed Molotsi to clean the oven belt in order to remove product that had become stuck to the belt. Molotsi had refused. Davids had thus requested Ryneveld to intervene as the manager responsible for production on the shift.
 - 9.2 Ryneveld had approached Molotsi and had instructed him to clean the oven belt at the end of the production cycle with his team. In Ryneveld's view, this behaviour was out of character, as Molotsi was typically the type of employee who readily complied with instructions.
 - 9.3 Molotsi repeated his refusal to obey Ryneveld's instruction and became angry and argumentative. At the time he was holding the iron rod in his hands and was approaching Ryneveld. He continued to be argumentative with Ryneveld.
 - 9.4 Ryneveld forcibly pushed Molotsi in the centre of his chest with his fingers. He had then turned his back on Molotsi in order to call Elizabeth Pretorius, who was the oven operator for the muesli line. He wished to report Molotsi's insubordinate conduct to Pretorius so that she could take further action.
 - 9.5 At this stage, Molotsi had climbed on top of a metal box containing the electrical workings for the extruder machine. Ryneveld assumed that this was because Molotsi had decided, albeit reluctantly, to comply with Ryneveld's instruction. In reality, Molotsi had done so in order to gain a height advantage over Ryneveld (who is much taller) and proceeded to strike Ryneveld from behind with the iron rod.
 - 9.6 Ryneveld swung around and grabbed at the bar which Molotsi was using, to attempt another strike. Ryneveld's vision was partially blocked due to the blood that was running into his eyes.

- 9.7 Ryneveld succeeded in wrestling the rod away from Molotsi, who then ran away.
- 9.8 Ryneveld proceeded immediately to Samuels and reported the incident with Davids. Due to the severity of his injury, he had been referred to a doctor for stitches. When he returned to the factory, he noticed that Molotsi, together with another employee, Thinal Adendorf, were coming out of Samuels' office.
- 9.9 Ryneveld had thereafter lodged a criminal case against Molotsi and this had ultimately been settled on the basis that Molotsi would pay for Ryneveld's medical expenses.
- [10] Samuels's evidence can be summarised as follows:
- 10.1 Ryneveld had approached her with an iron rod in his hand and he was covered in blood. She cleaned the injuries on his head and noticed that there was a single long laceration that was bleeding profusely. She was unable to stop the bleeding and accordingly she bandaged it and sent Ryneveld immediately to a Dr Lucas for stitches.
- 10.2 She thereafter completed the incident on duty form. She recorded the time of her assessment as 12h57, and the time of the incident as 12h55.
- 10.3 After Ryneveld had left, Molotsi had arrived by himself at 13h20 and had complained only of a chest injury.
- 10.4 Samuels had inspected the injury and noted in her incident investigation report that the mid-chest area was slightly red and was reported as being painful.
- 10.5 She confirmed on several occasions that no other complaints had been raised by Molotsi during her examination.
- 10.6 She confirmed that approximately five minutes after Molotsi had arrived, two further co-workers and FAWU shop stewards entered her office (namely Adendorf and Eugene April) who insisted that Molotsi should be referred to a doctor.
- 10.7 Given their insistence, she gave Molotsi a referral letter to attend at a Dr Munro. It appears that Molotsi was examined by Dr Munro at 15h30 on the

same day and that he had reported, in addition to the chest injury, contusions to the shoulder areas and right glute area. Samuels confirmed that these additional injuries had not been reported to her during her examination of Molotsi.

- [11] Pretorius gave evidence as to what she could see and hear during the altercation. She was only able to state that she could hear screaming, but could not see what was happening as her view was obstructed. She was also in the same vicinity as Albert Molotsi, thereby confirming that he was unlikely to have witnessed the incident visually.

Molotsi's version

- [12] Molotsi gave the following evidence at the arbitration:

- 12.1 Molotsi confirmed that shortly before lunch on 7 March 2017, he was running production as normal and that product on the apple strudel line was sticking in the extruder. He had been approached by Ryneveld, who said to him that after the production was finished he must clean the belt. There had then been a discussion as to when Molotsi was going to do this and whether he would obtain assistance.
- 12.2 Molotsi testified that this discussion had developed into an argument and that Ryneveld had pointed to him with his finger. When Molotsi objected to this, Ryneveld had pressed him hard with two outstretched fingers in his chest. He confirmed that these are the injuries reflected in the incident report and that provided by Dr Munro.
- 12.3 He then claimed that he had climbed up onto the extruder and that Ryneveld had followed him, shouting insults as he went. Ryneveld had then grabbed him around the waist, causing him to fall onto his buttocks on the workshop floor. The iron rod had rolled behind the linear machine.
- 12.4 He then alleged that Ryneveld had grabbed him around the neck whilst he was partially unconscious and had proceeded to punch him on the face on several occasions. Molotsi had succeeded in locating the iron rod, which he then used to strike Ryneveld on the head as a means of stopping the assault. Ryneveld had continued to punch Molotsi and had grabbed him,

causing him to fall down. Ryneveld had grabbed the rod and went "to the back".

12.5 He had thereafter proceeded to wash his face as it was, in his words, "red" (presumably with blood).

12.6 During cross-examination, Molotsi's further expanded on his version of events. He claimed that when Ryneveld had grabbed him around the waist, he had fallen onto the factory floor and had knocked his head. This had nearly caused him to die.

12.7 Ryneveld had punched him on at least five occasions.

12.8 Ryneveld had grabbed him for a second time, causing him to fall and bang his head. This was after he had struck Ryneveld with the iron rod.

12.9 He could not however explain why he himself was not covered with Ryneveld's blood as a result and simply sought to evade the questions put to him by the Company's representative.

12.10 He had then proceeded to see Samuels who was angry with him and would not listen to his complaints. Eugene April had then taken him to Dr Munro.

12.11 Molotsi confirmed that the shop stewards (Adendorf and April) had arrived sometime after he had been busy with Samuels and that they had berated her for not referring Molotsi to a doctor. He did however receive a referral from her in order to meet with Dr Munro.

12.12 Molotsi was referred to two photographs, which he alleged set out the nature of the injuries sustained during the altercation. The photographs showed only the red marks on his chest.

12.13 Molotsi confirmed that he did not have any blood on his clothing as a consequence of the altercation.

[13] Albert Molotsi (who for convenience shall simply be referred to as Albert) is Molotsi's cousin and gave evidence regarding the incident. This is summarised as follows:

- 13.1 He was standing next to Pretorius and had witnessed a significant part of the assault perpetrated by Ryneveld and, in particular, Ryneveld punching Molotsi.
- 13.2 During cross-examination, it was put to Albert that this version was highly improbable given Pretorius's evidence that the altercation was not visible and due to his failure to intervene in the altercation which, on his own version, was extremely serious. In any event, as Mr *Whyte* pointed out, the version presented by Albert was completely at odds with that presented by Molotsi.
- [14] The balance of Molotsi's case concerned evidence presented by the shop stewards regarding the meeting with Samuels and the photographs that they had allegedly taken of Molotsi's injuries. These only indicate that Molotsi had been struck on the chest and that his cap had been torn. There were no photographs taken of the other alleged injuries and no explanation was forthcoming as to why this was the case.

The arbitration award

- [15] In his award, the Arbitrator made the following material findings:
- 15.1 The version presented by Molotsi was to be preferred and, as a consequence, he could not be found guilty of the offence of assaulting Ryneveld with the intention of doing grievous bodily harm. The Arbitrator concluded that Molotsi had acted in self-defence in circumstances where he was being subjected to a serious assault by Ryneveld.
- 15.2 Ryneveld's version regarding where Molotsi was standing when he was struck on the head was improbable, given the location of the electrical box.
- 15.3 Given that Ryneveld was larger than Molotsi, it was more probable that Molotsi had sustained the injuries contained in Dr Munro's report. These injuries included damage to Molotsi's "*head and face, his sides, shoulders and his buttocks*". These injuries "could not be explained" by Samuels.
- 15.4 It was probable that Molotsi was repeatedly punched and kicked in the ribs.
- 15.5 Pretorius's evidence was to be rejected in its entirety, as she was supposedly afraid to testify.

15.6 The evidence of Samuels was to be rejected in its entirety because she was either under an instruction not to check the injuries, or she had an inherent bias which caused her to side with the Company's management against Molotsi.

[16] As a consequence of these findings, the Arbitrator found that Molotsi's version was to be preferred over that of the Company's witnesses and that he was accordingly not guilty of the offence proffered against him by the Company. The Arbitrator also found that the Company had acted in an inconsistent fashion by disciplining Molotsi but not Ryneveld.

The Company's grounds of review

[17] Mr Whyte submitted that the award should be reviewed and set aside for the following main reasons:

17.1 The Arbitrator's assessment and determination of the competing versions before him constituted an error of law through a misapplication of the balance of probability standard. He contended further that the prevailing legal position requires arbitrators to properly assess competing versions according to all of the evidence before them, and their failure to complete this exercise properly renders their awards reviewable.

17.2 The conclusions reached by the Arbitrator based upon the evidence before him are not those that a reasonable arbitrator could reach.

Legal principles

[18] The relevant legal principles have by now become fairly well accepted and summarised. The Supreme Court of Appeal in *Herholdt*² stated:

"In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived

² *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA).

the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.” (emphasis added).

[19] In *Mofokeng*³, the LAC clarified earlier misconceptions regarding its judgment in *Goldfields Mining*⁴ such that it was emphasised that an arbitrator may not “misconceive the inquiry or undertake the inquiry in a misconceived manner”. Further, that “there must be a fair trial of the issues”. It is thus not an absolute requirement that a misconceived inquiry must result in an unreasonable **result**, although this would almost invariably be the case.

[20] Thus whilst mere errors of fact may not be enough to vitiate the award, something more would be required, namely whether the arbitrator has undertaken the wrong enquiry **or** has arrived at an unreasonable result.

[21] Thus,

“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.”⁵

³ *Head of the Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC).

⁴ *Goldfields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & others* [2014] 1 BLLR 20 (LAC).

⁵ *Mofokeng* at para 33 (emphasis added).

[22] And in *DENOSA*⁶, the LAC found that⁷,

a material error of law committed by an arbitrator may, on its own without having to apply the exact formulation set out in Sidumo, justify a review and setting aside of the award depending on the facts ...

[23] In *MacDonald's Transport*⁸, the LAC postulated that⁹,

"... there is much to be said for the proposition that an arbitrator in the CCMA ... who wrongly interprets an instrument commits a reviewable irregularity as envisaged by section 145 of the LRA; ie, a reasonable arbitrator does not get a legal point wrong."

[24] The Court did not express a view on whether 'correctness' was a distinct test, or whether it was simply unreasonable for an arbitrator to get the law wrong.

[25] Much the same approach was adopted in the civil administrative jurisdiction under the Promotion of Administrative Justice Act 3 of 2000 (**PAJA**)¹⁰. In *Genesis Medical Scheme* an administrator's decision was set aside by the Constitutional Court on the basis of error of law, even where the administrator had applied the law as it existed at the time of the decision.

[26] Finally, the SCA found in *Pistorius*¹¹ that the failure by the trial court to consider certain evidence led to a violation of its duty to properly evaluate all of the evidence before it, and thus to commit an error of law.

[27] This authority also highlights the point that conducting an assessment of the decision maker's analysis of the evidence does not collapse the distinction between an appeal and a review. The SCA referred to the decision of the

⁶ *Democratic Nursing Organisation of SA on behalf of Du Toit & another v Western Cape Department of Health & others* (2016) 37 ILJ 1819 (LAC).

⁷ At para 23, per Davis JA (emphasis added).

⁸ *Macdonald's Transport Uptington (Pty) Ltd v Association of Mineworkers and Construction Union (AMCU) and others* [2017] 2 BLLR 105 (LAC).

⁹ At para 30, per Sutherland JA.

¹⁰ See *Genesis Medical Scheme v Registrar of Medical Schemes and Another* (CCT139/16) [2017] ZACC 16; 2017 (9) BCLR 1164 (CC); 2017 (6) SA 1 (CC) (6 June 2017).

¹¹ *Director of Public Prosecutions, Gauteng v Pistorius* [2016] JOL 34806 (SCA).

Canadian Newfoundland Court of Appeal in *R v Roman*¹², where it was held that:

There is a distinction between reassessment by an appeal court of evidence for the purpose of weighing its credibility to determine culpability on the one hand and, on the other, reviewing the record to ascertain if there has been an absence of appreciation of relevant evidence. The former requires addressing questions of fact and is placed outside the purview of an appellate tribunal . . . the latter enquiry is one of law because if the proceedings indicate a lack of appreciation of relevant evidence, it becomes a reviewable question of law as to whether this lack precluded the trial judge from effectively interpreting and applying the law."

[28] These principles were applied by the LAC in *NUM & another v CCMA & others*¹³ where the Court found as follows:

"... [a] resolution of factual disputes is at the core of the commissioner's task in arbitrating a dispute between the parties. For compelling reason, the same technique to be employed by a Court is to be employed by the commissioner when faced with irreconcilable versions, as was set out in [SFW Group Limited & another v Martell et cie and others 2003(1) SA 11 (SCA)].

"The [Court a quo] correctly determined that the commissioner had failed to employ this technique in his resolution of the irreconcilable versions before him. It was not for the commissioner to arrive at a decision that one version was probable and another not, without careful regard had to the evidence in the manner set out above."

¹² *R v Roman* (1987), 38 CCC (3d) 385, 66 Nfld. & PEIR 319, 204 APR 319.

¹³ [2017] ZALAC 73; [2018] 3 BLLR 267 (LAC) per Savage AJA.

[29] Although the LAC went on to find that the commissioner's failure rendered the outcome unreasonable, the point is simply that an arbitrating commissioner who fails to conduct the required factual analysis commits an error of law or misconducts him/herself, thereby rendering the award reviewable.

[30] To summarise, where a CCMA arbitrator simply refuses to evaluate a party's evidence, or to state in rational terms why it should be rejected, he or she commits a reviewable irregularity **both** because it constitutes a gross irregularity (in that the arbitrator does not determine the issue placed before him or her) **and** because it constitutes an error of law (in that the arbitrator has not applied the required test of the balance of probabilities).

Evaluation

[31] Given the Arbitrator's obligation to evaluate the competing versions presented by Ryneveld and Molotsi on a balance of probabilities, I agree with Mr *Whyte* that the more probable findings that the Arbitrator could have made were as follows:

31.1 An altercation had developed between Ryneveld and Molotsi regarding an instruction that had been given to Molotsi by two members of the Company's management¹⁴. Whether Molotsi was aggrieved by this instruction was irrelevant, as the evidence was clear that he was obliged to comply with it.

31.2 An argument had developed between Molotsi and Ryneveld during which Molotsi had resisted compliance with Ryneveld's instruction. Molotsi was holding an iron rod and Ryneveld had forcibly pushed him away with his fingers by applying pressure to Molotsi's chest area.

31.3 This incident was confirmed by Molotsi and is furthermore substantiated by the incident report prepared by Dr Samuels, the medical report submitted by Dr Munro and the photograph taken by the shop stewards.

¹⁴ The Arbitrator did not dispute that the instruction was both lawful and reasonable.

31.4 Ryneveld's conduct in pushing Molotsi away was not done in an effort to initiate an assault but to create space between them, given that Molotsi was acting out of character and was gesturing towards Ryneveld's face with the iron rod.

31.5 Ryneveld had then turned to report the matter to Pretorius whereupon Molotsi (who had climbed onto the extruder) struck Ryneveld with the rod, thereby causing a serious injury which resulted in Ryneveld bleeding profusely, such that his clothing was covered in blood. The nature of this blow and its consequences is not in dispute.

31.6 In response, Ryneveld swung around and managed to wrestle the rod away from Molotsi, who was attempting to strike Ryneveld for a second time.

31.7 It is improbable that Ryneveld had followed Molotsi onto the extruder box and had then tackled him round the waist, causing him to fall onto the floor. It is even less probable that Molotsi was punched on several occasions in the face, that he was throttled or that he struck his head with such violence that he was almost rendered unconscious.

31.8 Had these injuries in fact occurred, these would have been reported to Samuels and would have been photographed by the shop stewards. It is also improbable that the altercation could have taken place in the manner described by Molotsi without his clothing having become covered with blood.

31.9 Whilst it is true that certain additional injuries are reflected on Dr Munro's report, there is no indication of the injuries allegedly suffered by Molotsi to his face and head. This is particularly perplexing given how serious those injuries must have been. Even on Molotsi's own version, there is no evidence of any injury to his head or face.

31.10 There is no evidence of the alleged injuries that Molotsi claimed to have suffered after having been kicked in the ribs by Ryneveld.

[32] In summary, there is no evidence to support the contention that the incident took place in the manner described by Molotsi, as opposed to that described by Ryneveld and subsequently confirmed by Samuels during her examination.

- [33] There was no basis for the Arbitrator to find that Samuels was not a credible witness. Her evidence was not seriously placed in dispute during cross-examination and the findings of her examination are entirely consistent, both with the photographs taken by the shops stewards, as well as Dr Munro's report (apart from the marks on Molotsi's shoulder and buttocks). I can find no basis for the Arbitrator's finding that Samuels was somehow biased in favour of the Company, refused to examine Molotsi or sought to hide the true nature of Molotsi's injuries.
- [34] In any event, had Samuels intended to cover up the incident, she would hardly have agreed to refer Molotsi to Dr Munro. In this regard, her initial reticence to refer Molotsi to a doctor was for the simple reason that the only injury that he had presented to her was the swelling in the chest area. Self-evidently, this did not require the attention of a medical specialist.
- [35] The alternative hypothesis is far more probable, namely that the shop stewards had sought to elevate the nature of Molotsi's evidence as an effort to build a defence against serious disciplinary charges which were inevitably to follow.
- [36] Dr Munro was not called as a witness, and the Arbitrator was accordingly not entitled to proceed upon the assumption that Dr Munro's analysis of Molotsi's injuries were more believable than those referred to by Samuels. In any event, Dr Munro did not report the existence of any injuries to Molotsi's head, face or ribs. In that regard, the Arbitrator's findings are supported by no evidence other than Molotsi's fanciful version and are thus irrational and misconceived. I will return to the question whether the parties should be given the opportunity to call further witnesses, such as Dr Munro.
- [37] The Arbitrator's rejection of Pretorius's evidence is also not based on any rational grounds. There was no evidence that Pretorius's testimony had been altered as a consequence of bias in the Company's favour or that she was scared to give open and honest testimony. Rather, she simply truthfully confirmed that she was unable to witness the incident directly, but heard that there was a serious altercation. Had Pretorius been inclined to lie on behalf of the Company, she would simply have confirmed the version of events presented by Ryneveld.
- [38] In summary, the Arbitrator committed an error of law by failing to properly evaluate the competing versions placed before him and in failing to determine

those versions based on the balance of probabilities. This failure constitutes a reviewable irregularity and warrants the arbitration award being reviewed and set aside. The Arbitrator's failure is compounded by reliance on completely unsubstantiated evidence of alleged injuries that were not supported either by Dr Munro's report or the photographs taken by the shop stewards.

- [39] Furthermore, the outcome reached by the Arbitrator is not one that a reasonable arbitrator could reach. Given the totality of the evidence, the more probable conclusion was that Molotsi had violently assaulted a member of the Company's management who had attempted to give him a lawful and reasonable instruction (albeit that Ryneveld had pushed Molotsi on the chest).

Conclusion and relief

- [40] I find that the award made by the Arbitrator must be reviewed and set aside, both on the basis of error of law, and because it is irrational to the extent that it could not have been made by a reasonable arbitrator.
- [41] That leaves the question of the appropriate relief. Despite my findings above, based on the evidence before the arbitrator, I do not agree that this is a matter where the Court should substitute its decision for that of the arbitrator.
- [42] Firstly, the inspection *in loco* played a big part in the arbitrator's finding that Ryneveld's decision was improvable. The Court has not had that opportunity. It may be that another arbitrator comes to the same conclusion, once he or she had had the same opportunity, or to a different one. That is for an arbitrator with first-hand knowledge to decide.
- [43] Secondly, it may well be that the parties choose to call further witnesses – such as Dr Munro – to clear up some of the discrepancies highlighted above.
- [44] Thirdly, the question of consistency – i.e. whether the company took disciplinary steps against Ryneveld – may need to be cleared up through further evidence and argument.
- [45] For these reasons, the dispute should be remitted to the CCMA for a fresh arbitration.
- [46] With regard to costs, I take into account that the upshot is that the dispute is not finalised. I also take into account the continuing relationship between FAWU and

the company, as well as the following sentiments recently articulated by the Constitutional Court in *Long v SAB*:¹⁵

“It is well accepted that in labour matters, the general principle that costs follow the result does not apply. This principle is based on section 162 of the LRA, which reads:

“(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.

(2) When deciding whether or not to order the payment of costs, the Labour Court may take into account—

(a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and

(b) the conduct of the parties—

(i) in proceeding with or defending the matter before the Court; and

(ii) during the proceedings before the Court.”

The relationship between the general principle of costs and section 162 was considered and settled by this Court in *Zungu*¹⁶:

“In this matter, there is nothing on the record indicating why the Labour Court and Labour Appeal Court awarded costs against the applicant. Neither court gave reasons for doing so. It seems that both courts simply followed the rule that costs follow the result. This is not correct. In the result, the Labour Court and the Labour Appeal Court erred in not following and applying the principle in labour matters as set out in *Dorkin*. The courts did not exercise their discretion judicially when mulcting the applicant with costs. This Court is therefore entitled to interfere with the costs award. Taking into account the considerations of the law and fairness, it will be in accordance with justice if the orders of costs by the Labour Court and Labour Appeal Court are set aside and each party pays his or her own costs.”

¹⁵ *Long v South African Breweries (Pty) Ltd* [2019] ZACC 7 (19 February 2019) par [27] – [29].

¹⁶ *Zungu v Premier of the Province of KwaZulu-Natal* [2018] ZACC 1; (2018) 39 ILJ 523 (CC); [2018] (6) BCLR 686 (CC) at para 24 referring to *Member of the Executive Council for Finance, KwaZulu-Natal v Dorkin NO* [2007] ZALAC 41; (2008) 29 ILJ 1707 (LAC) at para 19.

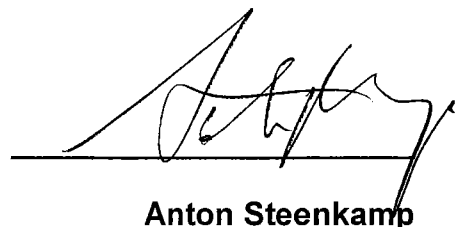
It is clear that when making an adverse costs order in a labour matter, a presiding officer is required to consider the principle of fairness and have due regard to the conduct of the parties.”

[47] In law and fairness, each party should pay its own costs in this matter.

Order

[48] I therefore make the following order:

- 48.1 The arbitration award under case number WECT 7532-17 of 22 October 2017 is reviewed and set aside.
- 48.2 The dispute is remitted to the CCMA for a fresh arbitration by a commissioner other than the second respondent.
- 48.3 There is no order as to costs.

A handwritten signature in black ink, appearing to read 'Anton Steenkamp', is written over a horizontal line.

Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: Jason Whyte of Norton Rose Fulbright.

THIRD and FOURTH RESPONDENTS: Sipho Mhlalo of FAWU.