



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR673/23

In the matter between:

NUM obo MOTSHEGETSI, M & 1 OTHER

Applicant

and

ASSMANG LTD (BLACKROCK MINE OPERATIONS)

First Respondent

LEON JOUBERT N.O.

Second Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Third Respondent

Heard: 26 June 2025

Delivered: This judgment was handed down electronically by circulation to the parties and/or their legal representatives by email. The date for handing-down is on 12 August 2025.

JUDGMENT

VENTER, AJ

Introduction

[1] This is an opposed review application. The applicant (NUM) seeks to review an arbitration award dated 21 February 2023 with case number NC766-22 made under the auspices of the third respondent (CCMA).

[2] In the arbitration award, the second respondent (Commissioner) held that the dismissals of two employees (Eden & Gilfred) were substantively fair. Once the Commissioner made that finding, he held that dismissal was appropriate.

[3] NUM takes issue with the Commissioner's award, hence launching this review application premised on section 145 of the Labour Relations Act¹ (LRA). The review is opposed by the first respondent (Assmang).

[4] This court extends its gratitude to the respective representatives for their well-prepared heads of argument (Assmang's heads prepared by Adv. M van As) and for the very professional way the representatives advanced their clients' cases.

[5] NUM advanced six grounds of review.

[6] Apart from that, NUM also sought condonation for the late filing of the review application. After hearing the argument, both for and against the condonation application, the matter was stood down so that I could consider the respective submissions. I then proceeded to hand down an *ex tempore* ruling in which I granted condonation. I do not intend to revisit those submissions or the ruling made. Once condonation was granted, did the parties proceed to argue the review?

¹ Act 66 of 1995, as amended.

[7] The further grounds of review are better expressed in NUM's supplementary affidavit. This approach is in line with the recent case of the *Association of Mineworkers & Construction Workers Union on behalf of Simayile v Bargaining Council for the Civil Engineering Industry and others*.²

Summary of the review grounds

[8] Ground 1 (Supplementary affidavit): Material irregularity, neglect of duties. NUM alleges the Commissioner failed to consider the evidence in respect of whether the workplace was safe or not.

[9] Ground 2 (Supplementary affidavit): Material irregularity, trust relationship. NUM alleges that the Commissioner unreasonably found that the trust relationship had broken down. NUM said that (Marius) was unsure whether the applicant's engaged in misconduct.

[10] Ground 3 (Supplementary affidavit): Material irregularity, length of service and sanction. NUM alleges that the Commissioner failed to consider the length of service of the applicants.

[11] Ground 4 (Supplementary affidavit): Material irregularity, inconsistent version by Assmang. Here, NUM complains about the lack of corroboration between (Box) and Marius. NUM says that had the Commissioner considered the documentary evidence he would have realised the differences in who said what, as far as what they saw.

[12] Ground 5 (Supplementary affidavit): Material irregularity, failure to consider probabilities. This ground overlaps with what I have listed as Ground 6. It is alleged that the Commissioner failed to consider material factors relating to various probabilities.

[13] Ground 1 (Founding affidavit): Listed as the first ground, conflating the test of acquittal with that of balance of probabilities. Here, NUM says that the Commissioner, in saying "...*reasonably possibly true*..." incorrectly applied, or

² (2025) 46 ILJ 1339 (LC) at para 6.

considered the test that he had to deploy, and that he in fact, did not undertake the inquiry along the lines of probabilities. NUM says that herein *inter alia* the Commissioner committed an error in law.

The review test

[14] The review test (summary) was recently best described in *Department of Correctional Services v Kutu & others*.³ Paragraphs 20 and 21 of this judgment are to the point:

[20] The review test is trite and need not be restated, save to reiterate that in a reasonableness review, the reviewing court is not asked to undertake a de novo analysis of the issue or cogitate on what the correct decision would have been. On the contrary, the enquiry must be directed at the decision en bloc, including the reasons provided and the outcome that was reached by the arbitrator.’ (Own emphasis; footnotes omitted)

[15] A review judge thus considers the evidence “...in the round...”.⁴ In review applications a party must refrain from adopting a microscopic approach. To do so compromises the divide between a review and an appeal.⁵ In its heads of argument, NUM referred me to the case of *Duncanmec (Pty) Ltd v Williams Itumeleng NO and others*⁶ which said, amongst others that if the award is disconnected from the evidence, it may be set aside. In other words, there must be a connection, and a rational one at that, between what was found and as supported by the record. In addition, as was said in *Nama Khoi Local Municipality v SA Local Government Bargaining Council & others*:⁷

[19] But in addition to the aforesaid, there is another issue at stake in this case. That issue is whether the second respondent, in deciding this matter, committed a material error of law. In *National Union of Metalworkers of SA v Assign Services & others* the court said:

³ (2025) 46 ILJ 1331 (LAC); [2025] 6 BLLR 551 (LAC) (*Kutu*).

⁴ *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* 2013 (6) SA 224 (SCA); (2013) 34 ILJ 2795 (SCA) at para 12.

⁵ *Cox v Commission for Conciliation, Mediation & Arbitration & others* (2001) 22 ILJ 137 (LC); [2001] 2 BLLR 141 (LC) at para 13.

⁶ [2020] 7 BLLR 668 (LAC); [2020] 7 BLLR 668 (LAC).

⁷ (2019) 40 ILJ 2092 (LC); [2019] 8 BLLR 830 (LC).

‘An incorrect interpretation of the law by a commissioner is, logically, a material error of law which will result in both an incorrect and unreasonable award. Such an award can either be attacked on the basis of its correctness or for being unreasonable.’ (Footnote omitted)

[16] Lastly, more recently, the Labour Appeal Court, in the case of *A J Charnaud & Co v SA Clothing & Textile Workers Union on behalf of Members & others*⁸ said:

‘[24] Where an arbitrator undertakes a factual enquiry into the issue of guilt on a balance of probabilities, the reasonableness threshold requires that in any assessment of fact, arbitrators must necessarily be accorded a margin for error, at least where all of the material facts have been placed in the balance and a proper assessment of the facts undertaken. 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.⁹ The applicable test was recently restated by this court in *Makuleni v Standard Bank of SA (Pty) Ltd & others*¹⁰ where Sutherland JA said the following:¹¹

‘The court asked to review a decision of a commissioner must not yield to the seductive power of a lucid argument that the result could be different. The luxury of indulging in that temptation is reserved for the court of appeal. At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only if the conclusion is untenable is a review and setting aside warranted.’

And further:

‘To meet the review test, the result of the award has to be so egregious that, as the test requires, no reasonable person could reach such a result.’¹²

[17] The Commissioner’s award, under the heading ANALYSIS OF EVIDENCE AND ARGUMENT, commences with what I shall refer to as the stock standard LRA referencing point, namely, quoting the LRA, the CCMA Guidelines and the like. When commissioners quote case law or legal principles, it may be assumed that

⁸ (2024) 45 ILJ 2257 (LAC); [2024] 10 BLLR 1016 (LAC) (*A J Charnaud*).

⁹ *Herholdt supra*; *Head of the Department of Education v Mofokeng and Others* [2014] ZALAC 50; (2015) 36 ILJ 2802 (LAC).

¹⁰ [2023] ZALAC 4; (2023) 44 ILJ 1005 (LAC).

¹¹ *Ibid* at para 4.

¹² *Ibid* at para 13.

they have considered such references as being applicable to the case facts they must decide.

[18] It has been held that commissioners cannot merely pay lip service to case law references.¹³ There must thus be a connection between the case law the commissioners include in their awards and how this is applied to the unique set of facts before them. Lastly, awards are not expected to be written akin to elongated judgments. They must be brief. I am mindful of *County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others*¹⁴ that said:

[39] I agree with Conradie JA that the commissioner should not be held not to have applied his mind to a particular facet of the matter merely because it is not explicitly dealt with in the award. Nor do I quarrel with the proposition that awards are expected to be brief. Section 138(7)(a) of the LRA says so. Though desirable it may be, it is not expected of commissioners to write well researched and scholarly awards. Awards must be brief and the proceedings before commissioners must be dealt with expeditiously. See s 138(1) read with s 138(7)(a). However, failure to deal with an important facet may, depending on the circumstances of the case, provide evidence that the commissioner did not apply his or her mind to that particular facet. (Own emphasis; footnotes omitted)

[19] I have included the latter as this award was incredibly brief. The COMMENT section of this award spans but four paragraphs. The inference that the Commissioner did not grapple with all the facts of this case, or at least, incorrectly considered those, is irresistible. Mindful of *Kutu*, I do not proceed to re-arbitrate the merits. I shall deal with each ground of review in its distinctly pleaded form and apply context to what is embodied in the review complaint.

[20] I now deal with the various grounds.

Review ground 1 (Founding affidavit)

¹³ *Reinhardt Transport Group (Pty) Ltd v National Bargaining Council for the Road Freight & Logistics Industry & others* (2023) 44 ILJ 172 (LAC); [2022] ZALAC 115, *Eskort Ltd v Mogotsi & others* (2021) 42 ILJ 1201 (LC); [2021] 8 BLLR 811 (LC) at para 14.

¹⁴ (1999) 20 ILJ 1701 (LAC); [1999] 11 BLLR 1117 (LAC).

[21] In paragraph 36 of the award, the Commissioner stated that there are two versions before him, and that he must decide the version that is more probable. This allows for an inference that the Commissioner was at least aware of the applicable test. Paragraphs 37 and 38 of the award incorporate cases that endorse the appropriate test.

[22] Paragraph 45 onwards essentially sets out the factual evaluation. One is unsure whether this was compared with the case law references. At paragraph 48, the Commissioner then said that the version of the employer is “*reasonably possibly true*” and “...*proven on a balance of probability*”. The wording – as will appear later – is significant. That leads me to considering the case referred to in paragraph 36 of NUM’s heads of argument.¹⁵

[23] In paragraph 10 of *Amandelbult* it was said that “...*The commissioner said that he had to look at the crucial parts of their testimonies and analyse same to see whether it was reasonably possibly true...*”. The same reference in paragraph 12 of *Amandelbult* appears in paragraph 48 of the Commissioner’s award.

[24] I am not going to second guess the thinking of the Commissioner. I can only consider that which he said in the award, i.e. a fair reading of what he said. As mentioned, the Commissioner’s assessment and application of the authorities spans four paragraphs. If the Commissioner intended to only apply the test of a balance of probabilities, he most likely would have only referred to such test. He unfortunately did not. He, in no uncertain terms, joined the two. If it was not his intention to conflate the tests, or apply them together, he would not have used the word “...*and...*”.

[25] I intend to align myself with the views expressed and the approach adopted in *Amandelbult*. Premised on a plain reading of the award, the Commissioner was either muddled or got the evidence assessment wrong. The incorporation of and reference to the phrase “...*reasonably possibly true...*” compromises the award.

[26] In reading the award, at least the COMMENT part, I did not get the impression that the Commissioner had copied and pasted this part. In other words,

¹⁵ *Rustenburg Platinum Mines Ltd (Amandelbult Section) v Commission for Conciliation, Mediation and Arbitration and Others* (JR1044/08) [2009] ZALC 71, a judgment by Francis J, heard 19 June 2009 and delivered 28 July 2009 (*Amandelbult*).

the words and phrases inserted in paragraphs 45 to 48 were inserted by design. If the phrase “...*reasonably possibly true* ...” was not supposed to be there, it most likely would have been omitted. The same goes for the word “...*and*...”. NUM alleges that the Commissioner committed a gross irregularity, in the form of a latent defect and that he thus also committed an error in law.

[27] Errors in law are “...*discrete substantive ground for review under s 145 of the LRA*...”.¹⁶ I do not need to interpret any statute or even less the case law on this point,¹⁷ as *Amandelbult* has already done so.

[28] My view is that this ground must succeed. Despite my findings on this ground, I nevertheless proceed to determine the other grounds for the sake of conducting a comprehensive evaluation of all the grounds I am required to determine in this application.

Review ground 1 (Supplementary affidavit)

[29] The question is this: Were the applicant’s supposed to be working? NUM says that the working area was not declared safe, thus, the applicants could not have worked. By implication, they then could not have been negligent. Marius said that Eden was not supposed to be at Main West 81 South. He said that “...*there was not supposed to be any workers in that specific area*...”.

[30] It is common cause that Eden was on shift. It was put to Marius that Eden “...*went to look for the miner to declare his area safe so that he can continue to work* ...”. Marius denied this. Marius said that “...*the bolting machines was in the location with the rest of the operators*...”. That version was not denied. When Marius accosted Eden, the latter did not inform him that he was looking for the miner.

[31] In his statement, Box said that “...*we left to go and look for the Miner, so that he/she may come and declare the place safe for employees*... He said he is waiting for the Miner... to declare his area safe”.

¹⁶ *National Bargaining Council for the Road Freight & Logistics Industry v Deyssel NO & others* (2025) 46 ILJ 1679 (LAC); [2025] 8 BLLR 790 (LAC).

¹⁷ *Public Investment Corporation v More & others* (2025) 46 ILJ 1775 (LC); [2025] ZALCJHB 159 at para 43.

[32] This version aligns with what was put to Marius during his cross-examination. In paragraph 46, the Commissioner said that the affidavit provided by Box could not be tested under cross-examination, and that little weight was attached to it. In any event, when Eden referred to the statement by Box, his representative objected on the basis that the author could not be cross-examined.

[33] In his statement, Marius said that “...*We drove on with main west 92 North. We turned into main west 92 North we saw two woman employees, ...Gae, ...Gaseutlewe. Eden...who was with the two employees...*”. At the same token, the statement of Marius indicates that “...*loaders that were operating at the area...*”. In other words, work was being done. Eden testified that “...*the bolt tech was ahead of us...*”. In paragraph 50 of the award, the Commissioner did not make a finding on any (particular) charge (of which there were four). The Commissioner endorsed, what appears to be, a guilty finding on all charges.

[34] This ground of review is focused on charge 2. That charge reads as follows: *Dereliction of your duties – due to your act and neglect of the plan for the shift, the machines were standing and the mine incurred losses in terms of production*. Marius testified that work was planned for the day, that Eden was not supposed to be there when he (Marius) saw him and that “...*They were given instructions to install support in different areas*”. That was not denied.

[35] During cross-examination, Marius was asked what he meant by (dereliction), to which he answered, “...*Because the instruction was that they had to be in one specific area and he was not there*”. Marius said that other bolt tech operators were at their machines. This could only mean that they were ready to work, and considering the circumstances, work in an area designated for production.

[36] Marius held his version during cross-examination. He also said that Eden’s shift was in a different location. But of equal significance is the version that Eden had to attend to operations during his shift at a different location. So, whether that location was declared safe or not must be seen in context.¹⁸ The context is, that

¹⁸ *Inxuba Yethemba Municipality v Msweli & others* (2025) 46 ILJ 1725 (LC); [2025] 7 BLLR 710 (LC) at paras 20 – 21.

Eden was not supposed to be where he was found. I am satisfied that in the round; the Commissioner's finding was reasonable, as it is supported by the facts contained in the transcript. This ground of review is dismissed.

Review ground 2 (Supplementary affidavit)

[37] Here the attack on the award is twofold. Firstly, Marius's evidence must be considered in its entirety. The sequence during cross-examination is this: He was asked how the relationship was, to which he responded that "...It was *mining orientated*...". He was then asked whether he would work with (Motshegetsi), if he was ordered to go back to work, to which he replied "...no...". The Commissioner then asked Marius "...you're *not willing to work with him*...", to which he also answered, "...no...".

[38] Marius was then asked "...Why not?..." to which Marius answered "...I would *rather prefer him to work in a different section under someone else's supervision*...". There is no room for second-guessing what Marius said. His overall view was that he does not want to work with Eden.

[39] Secondly, that leaves me to consider whether it can be said that Assmang was unsure whether the misconduct had occurred. Yet again, the whole version of Marius must be understood in such a context. During cross-examination, he testified that when he confronted Eden, he wanted him (Eden) to climb onto the Fermel. He then said that he wanted to take Eden to the waiting place. He said that he (Marius) wanted to contact the mine overseer and then phone security. He then said that "...So *after everything that was cascaded through the whole shift, we went back to the bolt tech where Motshegetsi was supposed to work ... and we reported him to security*...". Marius also said that Eden was not supposed to be in the area where he was accosted. That version was not denied.

[40] Thus, I disagree with NUMS's argument. Marius's evidence cannot be construed along the lines of what NUM seeks to argue. Marius's evidence cannot be seen as him (Assmang) being unsure as to what had occurred. On being asked why someone did not stay with Eden, while the other called security, Marius said "...I *made the decision... to go down... to ensure that there's no more... of our*

employees in that area...". Marius made a priority decision. It may be gleaned from Marius's evidence that he made the decision to secure the area, which cannot be construed as being unsure as to whether the misconduct occurred.

[41] It is also obvious that steps were taken to engage the security and that he (Marius) was conscious of safety. Marius was able to provide answers on the activities he engaged in and what he considered at the time, as well as explaining that he also wanted to avoid immediate conflict. In considering Marius's evidence, it becomes readily apparent that he engaged role players and he did not abandon the situation. Ultimately, Marius, upon being asked by the Commissioner whether it matters if Eden goes back to the mine, said that it does matter to him.

[42] Considering the overall version testified to by Marius, this ground of review is dismissed.

Review ground 3 (Supplementary affidavit)

[43] Mitigation is one factor to consider in the overall determination of whether a dismissal was fair or not. One of the factors that requires consideration where the appropriateness of sanction is in issue is an employee's length of service.¹⁹ It is so that long service may be a reason to retain an employee. It is also true that an employee with long service, and who commits a serious offence, or an offence involving an element of dishonesty, most likely will not find refuge in his or her long service.²⁰

[44] NUM complains that it appears as if the Commissioner only relied on a limited number of factors. Commissioners are required to consider the factors referred to by NUM; however, they are not expected to list every factor. If a commissioner omits to mention but one factor, it cannot equate to a reviewable defect outright. That would defeat the intention of s 138(7)(a). It would ultimately so evolve and cause arbitration awards to constitute a tick-box construction. Attacking

¹⁹ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) (*Sidumo*) at para 78.

²⁰ *National Union of Mineworkers & another v Commission for Conciliation, Mediation & Arbitration & others* (2011) 32 ILJ 1189 (LC) at paras 28 and 29.

but one omission, would be tantamount to piecemeal litigation. I have mentioned that the evidence and award are considered en bloc.

[45] Thus, what a commissioner is called upon to do is consider the entire factual matrix. Consideration is key. In paragraph 45 of his award, the Commissioner said that Marius stood the test of cross-examination. Marius's evidence was not materially gainsaid during cross-examination. In considering this ground of review, I am directing my thinking to whether Marius was cross-examined on any mitigating factor, or whether Eden presented any evidence on this score.

[46] Paragraph 46 could not have included any reference to mitigation.

[47] Paragraph 47 of the award refers to the allegation that Marius fabricated evidence. This could not have included any consideration of mitigation. I have already dealt with what was said in paragraph 47. NUM referred me to the case of *PSA obo Rae v General Services Sectoral Bargaining Council and Others*.²¹ I have read this case. In paragraph 38 thereof, Snyman AJ referred to and incorporated the case of *Maepe v Commission for Conciliation, Mediation & Arbitration & another*²² and in applying *Maepe* Snyman AJ in paragraph 40 said:

[40] Applying the above dictum in *Maepe*, it would have been necessary for the second respondent to set out all his considerations on an appropriate sanction in his award, and it is therefore clear that the second respondent has failed to consider most of the factors he was required to consider, and certainly had no regard to the factual matrix as a whole. This failure is tantamount to the second respondent not discharging the duty that rested upon him to decide whether dismissal was a fair sanction. This would be the kind of gross irregularity contemplated by the review test I have articulated above...'

[48] At the time when Marius was cross-examined on his relationship with Eden, it was put to him that he (Eden) had ten years' service. Marius was asked whether he was "...a problematic employee..." to which the transcript indicates that Marius

²¹ [2017] ZALCJHB 410.

²² (2008) 29 ILJ 2189 (LAC); [2008] 8 BLLR 723 (LAC) (*Maepe*).

said that he was just like other employees. Thus, Marius was asked limited questions on mitigation. The record does not indicate whether any re-examination took place.

[49] In short, the trust relationship questions were part of the mitigation proposition. The Commissioner reflected on the trust component, as found in paragraph 50 of the award, but not on the mitigation component. This is so as the trust issue dominated any mitigation proposition. During his evidence-in-chief, Eden did not introduce any evidence on mitigation. It does not seem to have played a major role in the evidence, save what I have mentioned.

[50] In short, one mitigating factor was put to Marius, along with numerous questions on the relationship. The award does not reflect any consideration of this factor, probably on account of Eden's ten years not being vigorously pursued as a mitigating factor. Parties introduced a written closing argument. NUM did not mention or press the issue of mitigation or any factor surrounding the applicant's length of service therein either.

[51] One does not know whether the Commissioner evaluated the mitigation issue against a possible dishonesty fact, and thus discounted mitigation, or the like. Respectfully, the award is bereft of any mention, even less consideration of whether years of service were factored into the Commissioner's thinking at all or how mitigation fared against the overall charges. However, paragraph 8 of *Maepe* must be understood in the context of what was said, namely *"...If the commissioner had considered such a critical factor, he definitely would have mentioned this in his award. In my view the fact that the commissioner did not mention this very critical factor in his award justifies the drawing of the inference that he did not take it into account. Furthermore, his award is very comprehensive and cannot be said to have been intended to be brief."* (Own emphasis)

[52] As I have indicated, this award is very cryptic, as opposed to what this court was confronted with in *Maepe*. Was the length of service such a critical factor as the main issue for determination? I doubt it was. It was a factor to be considered, but the case did not turn on this singular aspect.

[53] In other words, it was not the burning or even the decisive issue that demanded a pertinent mention, as opposed to the length of the cross-examination on the issue of trust. In light of what was found and what the burning issue for determination was, the Commissioner's failure to mention it does not amount to a reviewable defect.

[54] This ground of review is dismissed.

Review ground 4 (Supplementary affidavit)

[55] Box did not testify during arbitration. Largely, his statement was also discounted. NUM says that the Commissioner failed to consider whether the information contained in the two witness statements (which I have referred to herein) were consistent with one another.

[56] I have indicated that the Commissioner in paragraph 46 said that he "...attach little weight to it...". This ground of review is thus neither here nor there and stands to be dismissed.

Review ground 5 (Supplementary affidavit)

[57] This ground of review is closely aligned with the ground contained in the founding affidavit, yet it is distinct and requires its own evaluation. To that extent, I shall not repeat what I have already said as far as the test(s) deployed. But on the probabilities, two principles find application. The first is the well-known test, which is referred to in paragraph 39 of the award, i.e. the *Stellenbosch*²³ test.

[58] Quite often, when the versions of two witnesses are not precisely aligned, it follows that one may automatically assume that the witnesses are to be labelled as not being credible. But that is not always the case.

²³ *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et cie and Others* 2003 (1) SA 11 (SCA).

[59] There is also room to consider that a witness may either (i) be deliberately false, or (ii) make an honest mistake. In the case of *Kok v Commission for Conciliation, Mediation and Arbitration and Others*²⁴ the following was said:

[32] According to the applicant, his “trump card”, so to speak, was the existence of several contradictions between the contents of the statement given by T... when this matter was first investigated, and the evidence she ultimately presented in the arbitration. The applicant placed considerable emphasis on these contradictions as a basis for contending that the second respondent committed a reviewable irregularity in not preferring his evidence over that of T. In essence, the applicant was subscribing to the *maxim falsus in uno falsus in omnibus* - false in one thing false in all. But, and unfortunately for the applicant, this maxim has been soundly rejected by the courts as unreliable and illogical. Whilst it is of course true that such contradictions are indeed a consideration when assessing the credibility of witnesses overall, it is simply not the be all and end all the applicant contends it to be. Further factors for consideration, as specifically set out in *SFW Group*, are the witness's candour and demeanour, the witness's bias (latent and blatant), internal contradictions in the evidence, the probability or improbability of particular aspects of the version, and the calibre and cogency of the witness' performance compared to that of other witnesses testifying about the same incident or events.' (Own emphasis; footnotes omitted)

[60] *Kok* further said that:

[35] The lecture given by Nicholas J followed on his own judgment in *S v Oosthuizen* where the learned Judge said:

“The argument on behalf of the accused would seem to be this: the evidence of Broodryk is contradicted (whether by other witnesses, or by himself in this trial, or by himself in previous statements); *ergo* his evidence should be rejected. The conclusion is a *non sequitur*. There is no reason in logic why the mere fact of a contradiction, or of several contradictions, necessarily leads to the rejection of the whole of the evidence of a witness.”

The learned Judge further said:

“... Plainly it is not every error made by a witness which affects his credibility. In each case the trier of fact has to make an evaluation; taking into account

²⁴ (JR2485/2010) [2015] ZALCJHB 45 (20 February 2015) (*Kok*).

such matters as the nature of the contradictions, their number and importance, and their bearing on other parts of the witness's evidence. Two specific cases must be considered: the case of deliberate falsehood; and the case of honest mistake. ...”

The learned Judge concluded as follows, even in the case of a deliberate falsehood:

“All that can be said is that where a witness has been shown to be deliberately lying on one point, the trier of fact *may* (not *must*) conclude that his evidence on another point cannot safely be relied upon. ...” (Own emphasis; footnotes omitted)

[61] Having considered the statements made by Box and Marius, I readily conclude that they were not dishonest and, as found by the Commissioner, Marius certainly did not fabricate the whole incident. There is no evidence that will allow for an inference that Box had an axe to grind with the applicants and thus colluded with Marius to concoct a dramatic version. Thus, the issue of a deliberate falsehood does not, in my view, exist. It leaves me to consider this aspect of the strength of *Kok*. I thus consider paragraphs 21.1, 21.2 and 21.3 of the supplementary affidavit. I briefly do so.

[62] Paragraph 21.1: This complaint is premised on a suggestion. Marius testified that the specimens were in a 5-litre paint can. So, the evidence was not that the can, whether it was 5 litres or 25 litres, was filled to the brim. The evidence is that there was a specimen of rock therein. To speculate on Gae's power of perception and the like is a bridge too far. Next, I hold the view that the evidence of the witnesses best describes the underground environment.

[63] Marius said that there was a lot of smoke in the area, it was obviously underground, and not as well-lit as above surface, and there was quite some activity, with the tramming operations, vehicles moving, and space was restricted. Marius said that they almost bumped into Eden. These factors must be considered to be able to determine who saw what.

[64] Paragraph 21.2: I do not agree with this argument. No one testified to how much approximately a soccer ball-sized wesselite specimen could weigh. There is no

empirical data or evidence on what the approximate weight is, was or could have been. When Marius was cross-examined, he was asked whether he tested the stone and whether he assumed it was wesselite, but nothing about its weight. Marius said that Eden was holding the specimen in one hand. That was not denied. It means that in not denying his version; it must be accepted that the particular specimen could be held with one hand. This issue does not take the review further. What both Box and Marius said however, is that Eden ran away. When Marius was cross-examined, that version was not denied.

[65] Paragraph 21.3: As mentioned, Marius said that the size of the paint can was 5 litres. His version was not denied. Thus, it means the can was 5 kilograms. Box said that Eden “...*was holding 25 litre paint cans...*”. But Box said that Eden was holding the cans with a cloth in both hands. In other words, a can in one hand and a cloth in the other. Marius, during his evidence-in-chief, also said “...*and also paint cans with specimens inside...*”. It reflects the party's own observations.

[66] I hold the view that this is a nitpicking ground of review. Even if it can be said that they made a mistake, premised on their observations, they cannot be said to lack credibility or that the mistake in describing what they saw, taints the award, and in the circumstances I am not persuaded that this ground of review has mileage, and in applying *Kutu*, it stands to be dismissed.

Conclusion

[67] NUM is partially successful in the review. It has succeeded on one ground, and a crucial one at that. I do not intend to comment on whether, overall (the case as a whole), the fairness and merits of the dismissal were proven by Assmang, or not. In other words, I am not sitting as an arbitrator commenting on whether the facts support a fair dismissal, or not. A decision on the merits of a dismissal referral falls with the province of an arbitrator, not this court.

[68] I have mentioned that paragraph 48 of the Commissioner's COMMENT part of the award, which is (on a plain reading), the analysis of the evidence, mentions the test(s) deployed, and says that “...*reasonably possibly true and proven on a balance of probability...*”. Use of the word (and), joining the two considerations,

cannot be countenanced by this court and thus, fails in terms of *A J Charnaud*. They cannot co-exist at the arbitration level, more so at the time when an arbitrator evaluates the facts. I hold the view that it is best to remit this matter for fresh hearing, and a proper deployment of the only test that finds application, namely the test of probabilities. To that extent, this court cannot substitute its own finding on the merits. To do so will cause this court to venture into the arbitration merits domain, which is reserved for arbitrators.

[69] In the premises, the following order is made.

Order

1. The arbitration award issued by the second respondent under case number NC766-22, dated 21 February 2023, is reviewed and set aside.
2. The matter is remitted to the third respondent for arbitration *de novo* before a senior commissioner, as the case may be, other than the second respondent.
3. There is no order as to costs.

F. Venter

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant:

Ms R Makgamatha from Cheadle Thompson & Haysom Inc.

For the first respondent:

Mr B Madisa from Cliffe Dekker Hofmeyr