



(4) Reportable Yes
(2) Of interest to other Judges: Yes
(3) Revised

Signature

Date

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case Number: JR 2191/19

In the matter between: -

RAND REFINERY LTD

Applicant

and

CHARMAIN HALIAN STRIPP N.O.

First Respondent

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

Second Respondent

NUMSA obo JACOB MOKEBE & 2 OTHERS

Third Respondent

Heard: 2 July 2026

Delivered: 4 September 2026 (This judgment was handed down electronically by emailing a copy to the parties. The 4th September 2026 is deemed to be the date of delivery of this judgment).

JUDGMENT

VENTER, AJIntroduction.

- [1] The Applicant (*Rand Refinery*) launched a review application in terms of section 145 of the Labour Relations Act,¹ (*the LRA*). Rand Refinery alleged that the First Respondent (*the Commissioner*), in determining the dispute and in preparing her award, failed to properly apply her mind to the evidence presented to her and that she reached an unreasonable conclusion, amongst others. I shall deal with the grounds of review later.
- [2] The Third Respondent opposes the review application. I shall, for the sake of convenience, refer to the Third Respondent as (*NUMSA*) and the individual dismissed employees as (*Mokebe, Mogowe & Mantso*).

Narration of the facts.

- [3] Both parties accepted that the content of the award was quite sufficient in explaining the chronology and capturing the testimony of the witnesses. Nonetheless, a brief rendition, considering the record, suffices.
- [4] During arbitration Rand Refinery introduced three witnesses. Two of these were polygraph examiners, namely Mr. D S du Toit (*du Toit*) and Ms. N Coetzee (*Coetzee*). Their evidence did not assist insofar as explaining the material events that occurred at the workplace. Mr. J Maluleka (*Maluleka*) was the only other witness who could, to a degree, provide first-hand knowledge of the origin of the alleged misconduct.
- [5] Maluleke testified that on 18 February 2017 the control room contacted him whilst he was at home. He was alerted to an incident that took place involving the theft of gold. Upon arriving at work, he engaged a colleague, Mr. M. Mulafhi (*Mulafhi*), who advised him that two persons had been arrested for being in possession of 9 kilograms of gold.

¹ 66 of 1995 (as amended)

- [6] What is significant, for the purposes of this review, is the fact that Maluleka was not a material or first-hand witness to the events, save to take part in a site inspection after the arrest of certain individuals and him being involved in a few discussions with colleagues later. I pause at this juncture to add that large tracts of his evidence thus constituted hearsay.
- [7] It transpired that following the above incident, Maluleka was made aware of a list of names and that the names contained therein were (allegedly) persons that were involved in the planning of the removal of gold from Rand Refinery. It also bears mention that the list was not contained in any record before the Court.
- [8] Maluleka testified that the investigator mentioned to him that the gold product is intended to be channelled out of the operation to a point where it can be collected. In addition, he testified that he was aware of a statement that was prepared for the South African Police Service as well. That statement was also not before the Court, nor did the person who prepared the statement or investigated its contents present testimony either.
- [9] During the above process, Maluleka went to the service yard, and during this time he formed part of the interview, which was held with two individuals, namely “Sipho” and “Eric”. In short, the *modus operandi* was then explained to Maluleka. His evidence demonstrated that an act of misconduct took place and that it was suspected that the list of names pointed to who the perpetrators were.
- [10] During the proceedings before the Commissioner, it transpired that there was (could be) some type of video footage, which this Court was not privy to, that there were other security officers who were involved, but who did not testify, and there was no direct evidence that would show how Mokebe, Mogowe or Mantso may have played a role in the *modus operandi* or at what stage.
- [11] Two role players, namely “Mulaudsi” and “Moshweshwe”, were also not called to testify, one way or the other. Mention was also made by Maluleka of “blind spots” at the workplace, where the security cameras could not track movement, but these were also not pointed out to the Commissioner. In short, Rand Refinery mainly relied on the evidence of Maluleka and the support of

the two polygraph examiners, who, for their part, could only testify to the result of polygraph tests conducted on Mokebe, Mogowe and Mantso.

- [12] Once Rand Refinery completed its investigation, Mokebe, Mogowe and Mantso were charged and subsequently dismissed. Their date of dismissal was 5 July 2017, basically nine (9) years ago.

The review.

- [13] At the commencement of the hearing, I canvassed the following pressure points with Mr Posthuma:

- 13.1 The absence of a security bond, which ought to have been filed in compliance with section 145(7) of the LRA.
- 13.2 The disjointed composition of the transcript, which made preparation for this hearing extremely difficult.
- 13.3 The generic composition of the grounds of review listed in paragraphs 22 to 25 of the founding affidavit.
- 13.4 That the issue of hearsay was not raised by Rand Refinery in their opening statement and neither was a ruling on the admission of hearsay evidence requested upfront. Ultimately, this appears to be the main gripe in this review.
- 13.5 Considering that all the aforesaid was debated during the hearing, I also, for the sake of completeness, intend to firstly deal with that set out in paragraphs 12.1 and 12.2 above.

- [14] There is not much this Court can do (at this stage) insofar as Rand Refinery's failure to file a bond of security. The absence of compliance by legal practitioners with the provisions of section 145(7) of the LRA has been lamented by this Court, more so in the matter of *Panorama Park Retirement Village v Commission for Conciliation, Mediation & Arbitration & others*.²

- [15] In the matter before me, there is neither a prayer in the notice of motion that any execution proceedings be stayed pending an application in terms of

² (2020) 41 ILJ 1200 (LC) at paras 6 – 14.

section 145(3), nor was there any separate application by Rand Refinery to be absolved from putting up security or providing any measure of security at all. Whilst I accept the candid and forthright concession made by Mr. Posthuma on this score, I pause to add that Rand Refinery had a period of 9-years to comply therewith. I add to the concerns expressed in *Panorama* and remind practitioners to ensure that their clients comply with the provisions of section 145(7) of the LRA.

- [16] This then takes me to my concerns with the review record. Parties to a review have a duty to ensure that the record of the proceedings is arranged in such a manner that it presents a lucid, cogent and chronological flow of evidence, whether a reconstruction process was required or even where the entire transcript is available.
- [17] More so where a disjointed transcript exists, representing arbitration proceedings that took place over a few days. As will appear later herein, where – as in this case – a party alleges grounds of reasonableness, then the entire record must be presented to the review court.³ But the introduction of the arbitration record is only half the exercise. The record must be properly structured, and care must be taken to introduce it so that any risk of missing a crucial part of the evidence is eliminated.
- [18] In the circumstances, where I must decide the issue of hearsay evidence along with circumstantial evidence, I do not have any documentary record, save the disjointed transcript. The exclusion of the documentary bundles is the election made by Rand Refinery when it decided to close its pleadings, duly also considering that it did not elect to file any replying affidavit that may have explained the lack of relevant documents, the relevance of which will later be mentioned herein.
- [19] By way of example, where, for instance, the report on Mogowe was discussed, or where the Commissioner mentions that she is in possession of

³ See *Black Rock Mining* below at para 18, See also *SA Qualifications Authority v Mbeki & others* (2019) 40 ILJ 1646 (LC) at para 21; *Jiyane v Commission for Conciliation, Mediation & Arbitration & others* (2025) 46 ILJ 2649 (LC) at para 7.

Bundle R, these were not provided to me. When parties plan their review strategy and develop their review grounds, careful consideration must be paid to the review allegations and how the grounds are to be supported, when the record is introduced. A failure to include materially relevant documents and marry these to the transcript and review grounds comes at the peril of the party omitting to do so. Having concluded my views of the above, I proceed to determine the review.

Discussion.

[20] The review test requires no introduction.⁴ This judgment requires an application of that test, which both parties have also explained in their respective heads of argument. More recently, in *National Union of Mineworkers on behalf of De Jongh v Black Mountain Mining (Pty) Ltd & others*⁵ the review test was explained in simple terms as follows:

“This test has thus been applied as a two-stage review enquiry. Firstly, the review applicant must establish that there exists a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. Secondly, if this failure or error is shown to exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure, that is equally the end of the review application. In short, in order for the review to succeed, the error or failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable.”

[21] *Sidumo*⁶ further said that:

“To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.” (Footnotes omitted)

⁴ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) (Sidumo).

⁵ (2026) 47 ILJ 402 (LC) (Black Rock Mining) at para 17.

⁶ *Sidumo* supra at para 79.

[22] Insofar as evaluating an arbitration award, this Court must further be mindful of what *Sidumo*⁷ said, namely:

“It is a practical reality that in the first place it is the employer who hires and fires. The act of dismissal forms the jurisdictional basis for a commissioner, in the event of an unresolved dismissal dispute, to conduct an arbitration in terms of the LRA. The commissioner determines whether the dismissal is fair. There are therefore no competing 'discretions'. Employer and commissioner each play a different part. The CCMA correctly submitted that the decision to dismiss belongs to the employer but the determination of its fairness does not. Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view. An impartial third party determination on whether or not a dismissal was fair is likely to promote labour peace.” (Emphasis added; Footnotes omitted)

[23] In addition, one must keep in mind that the review test, where it is alleged that an arbitrator's decision is unreasonable, is stringent.⁸ The review court considers the award, in the round,⁹ and a review court must have regard to whether the arbitrator's conclusion is untenable and whether the result is egregious.¹⁰

[24] This review requires the consideration of a pertinent and crisp question of law, read with restrained facts and includes the admission of hearsay evidence coupled with a consideration of circumstantial evidence.

[25] It is necessary to return to paragraph 12.3 herein. I first consider what to do with the generic grounds of review. This aspect was discussed in the case of

⁷ *Sidumo* supra at para 75.

⁸ *Mbeje & others v Department of Health, KwaZulu-Natal & others* (2024) 45 ILJ 2681 (LAC):

“[21] Notwithstanding the generous approach to the collateral issues beyond the scope of the pre-arbitration minute, the arbitrator's finding in that regard is inconsequential. The review test of reasonableness is trite and the threshold is stringent. As such, a reviewing court should be extremely hesitant to disturb the arbitrator's findings of fact unless they result in a misconceived enquiry or unreasonable outcome.” (Footnotes omitted); See also *SA Municipal Workers Union on behalf of Malatsi v SA Local Government Bargaining Council & others* (2023) 44 ILJ 1317 (LC) at para [18]; *National union of Metalworkers of SA & another v Commission for Conciliation, Mediation & Arbitration & others* (2023) 44 ILJ 1575 (LC) at para [18]; *Mulaudzi v City of Tshwane Metropolitan Municipality & others* (2022) 43 ILJ 398 (LC) at para [139].

⁹ *Goldfields* at para [18]; *Herholdt v Nedbank Ltd* (Congress of SA Trade Unions as Amicus Curiae) (2013) 34 ILJ 2795 (SCA) at para [12].

¹⁰ *A J Charnaud & Co v SA Clothing & Textile Workers Union on behalf of Members & others* (2024) 45 ILJ 2257 (LAC) (A J Charnaud) at para [24].

Hamandawana v Dispute Resolution Centre and Others.¹¹ The stance adopted by the Labour Court in that case remains insightful. In that case, Lagrange J said that: -

“The Labour Appeal Court made it clear in the unreported case of Comtech (Pty) Ltd v Molony N.O. and Others (case number DA12/05 dated 21 December 2007) that it is not acceptable for a party to relate conclusions of law in the founding papers for a review application. The party must set out the factual grounds on which it seeks to base a particular ground of review. It might be excusable to state limited grounds of review in less detail in a founding affidavit, but once an applicant has the record of proceedings it must then make up for any deficiencies in the founding affidavit and set out the factual basis for its grounds of review in full. (Emphasis added)

25.1 The grounds stated in paragraphs 22, 23, 24 and 25 of the founding affidavit are broadly generic and amount to legal conclusions. In paragraph 26 of that affidavit, Rand Refinery reserved the right to supplement those grounds. Paragraph 5 of the supplementary affidavit is also generic but, as will appear later herein, that paragraph, when read with paragraphs 6, 7, 8 and 9 of the supplementary affidavit, forms one unique supplementary review ground. When reading the supplementary affidavit, the following is alleged:

25.1.1 Paragraph 6 accepts that it could be understood that Rand Refinery’s evidence may be construed as hearsay and circumstantial evidence and that there was a shifting onus.

25.1.2 In paragraph 7, it is alleged that the Commissioner accepted the evidence of a polygraph examiner and thus she accepted that Mokeba, Mogowe and Mantso were not telling the truth. This paragraph pertinently alleged that the Commissioner committed a material irregularity and reached an unreasonable outcome.

¹¹ (2014) 35 ILJ 1312 (LC) at para 8.

25.1.3 In paragraph 8, it is alleged that one of the employees worked in the electrical department and had access to insulation tape. It is then alleged that the Commissioner's determination of this point was irrational.

25.1.4 Lastly, in paragraph 9 it is alleged that the Commissioner failed to consider that Mokebe, Mogowe and Mantso only provided bare denials to the allegations and that it was not reasonable to find that Rand Refinery had not discharged its onus.

25.2 In applying *Hamandawana*, I hold the view that it is impermissible for a review court to on its own incorporate or allocate generic review references to other specified grounds of review or even facts alleged in any affidavit or part of the record. It is impermissible to match grounds of review where the reviewing party has failed to indicate which ground pertains to what fact or what paragraph in an arbitration award.

25.3 This Court cannot broaden, clarify or extend the scope of a party's generic review grounds, even less speculate where these may apply or fit in. In this case, Rand Refinery alleged limited (generic) review grounds in its founding affidavit. The only factual basis for the review complaints is that contained in the supplementary affidavit.

[26] Whilst I accept that a supplementary affidavit can expand, add to, clarify or even alter the grounds in a founding affidavit,¹² (as took place herein), the fact remains that a review court cannot link or allocate generic grounds contained in a founding affidavit to any separate ground in the supplementary affidavit. Paragraph 4 of the supplementary affidavit says that “...*I shall refer to the additional ground of review as the supplementary grounds of review*” (Emphasis added). This can only mean that an additional ground of review is introduced. The deponent appears to have incorporated this ground as a

¹² Association of Mineworkers & Construction Union on behalf of Simayile v Bargaining Council for the Civil Engineering Industry & others (2025) 46 ILJ 1339 (LC) at para 6.

distinct stand-alone ground. This is what a businesslike reading of the supplementary grounds allows as an inference.

- [27] In the circumstances, the additional (supplementary) ground of review falls to be decided.
- [28] There were three cases that were pertinently referred to and relied on by the parties in arguing their respective views. These were *DHL Supply Chain (Pty) Ltd v De Beer NO & others*,¹³ *Exxaro Coal (Pty) Ltd & another v Chipana & others*¹⁴ and *CTP Gravure (Pty) Ltd A Division of CTP Limited / The Statutory Council for the Printing, Newspaper and Packaging Industry & Others*.¹⁵
- [29] Rand Refinery contends that, duly considering the hearsay and circumstantial evidence, Mokebe, Mogowe and Mantso had to answer such evidence. In perusing the transcript and record, it transpires that they did. At paragraphs 27 to 29 of the award, the Commissioner summarised Mokebe's version. He testified that he heard rumours of stolen gold.
- [30] Paragraphs 30 to 32 of the award captured Mogowe's version. His explanation was that he was not at work on 18 February 2017 but only went there late in the afternoon. He denied being involved. Lastly, the Commissioner captured Mantso's version in paragraph 33 of the award. He testified that he was not at work on 18 February 2017. In paragraph 42 of the award, the Commissioner explains why she accepted Mogowe's evidence as to why he was at the workplace the afternoon of the incident. I return to this later herein.
- [31] In my view, the Commissioner correctly accepted his version, seeing that it was not denied during cross-examination. The (supplementary) review ground(s) in paragraphs 6 and 9 are closely tied. These allege that it was incumbent on the three dismissed employees to provide an explanation for the disappearance of the gold.

¹³ (2014) 35 ILJ 2379 (LAC) (DHL); Also referred to in paragraphs 43 and 46 of the arbitration award.

¹⁴ (2019) 40 ILJ 2485 (LAC) (Exxaro).

¹⁵ Case number DA04/2024, (CTP), heard 11 March, judgment on 20 March 2025, Van Niekerk JA, Waglay AJA and Mooki AJJA concurring; also reported in [2025] 10 BLLR 1015 (LAC).

[32] During the hearing of the matter, I debated with the parties the similarity of this case with the facts of *DHL*.¹⁶ The same type of facts and concerns regarding what an alleged offender's response may be was discussed therein. The Labour Appeal Court held the following view:

"Furthermore, the notion that they offered no real challenge to the facts adduced by the appellant and that this warrants an adverse inference is illogical. An innocent person in the position of the two respondents could be expected to do no more than deny guilt and express ignorance about how and why the losses occurred. Significantly, despite the ostensible best efforts of DHL itself, the means of misappropriation remain unknown and precisely when it occurred in the chain of handling could not be established. The proof that the respondents had the opportunity to steal is valueless without more and it could never be a burden on them to offer alternative theories for the misappropriation in order to achieve exoneration. "

[33] The above is basically on all fours with Rand Refinery's evidence. To that extent, these erstwhile employees did provide an answer, which was not refuted as their cross-examination progressed. Adv. Wagemaker, acting on behalf of NUMSA, contended that what Mokebe, Mogowe and Mantso did was provide an alibi in defence, as opposed to a bare denial. Considering what I have explained already, it cannot be said that they merely denied everything. They indeed provided answers as to their whereabouts on the day, which were not denied during their cross-examination. They were able to provide an excuse for where they were on the day the incident occurred.

[34] This then leads to a consideration of the value of polygraph evidence. Having grappled with pertinent authorities on the point, the Labour Appeal Court in *DHL*¹⁷ said that:

"These considerations beg the question about what a failed polygraph test really produces by way of usable information. Only the inference to be drawn from the failure of the test is useful as material to determine probabilities. In the absence of expert evidence to explain what that inference is, either generically, or within the bounds of the specific instance itself, and also to justify the explanation of what that is, there is nothing usable at all that might contribute to the probabilities. In this appeal, DHL's consent form, signed by the two respondents, states that the test would indicate that the worker was either involved or not involved in the stock loss.

¹⁶ DHL supra at para 15.

¹⁷ DHL supra at para 30.

That premise is questionable, and to belabour the point, required the kind of expert evidence mentioned above to render it worthy of consideration.”

[35] Considering the above, the testimony of du Toit and Coetzee only contributes to the probabilities. *DHL*¹⁸ also said:

“In summary, the respectability of polygraph evidence, at best, remains an open question, and any litigant seeking to invoke it for any legitimate purpose, must, needs be, adduce expert evidence of its conceptual cogency and the accuracy of its application in every given case.”

[36] To that extent, the ground alleged in paragraph 7 of the supplementary affidavit cannot stand. It fails on the application of the first leg of the test. The polygraph result does not clearly support an inference that the probabilities indicate their conclusive involvement. What the Commissioner did was to, having considered all the facts before her, treat the polygraph results with limited acceptance. This much appears from paragraph 45 of her award.

[37] *DHL*¹⁹ further said that:

“What both the arbitrator and the review court did was to pose the unavoidable question: what was polygraph evidence worth in the context of all the facts? The conclusion reached was that although it could, in the view adopted in both fora, be fairly inferred that failing a test could fortify a reasonable suspicion, a failure was not weighty in the absence of other evidence demonstrating, objectively, a case that called for a credible rebuttal. In both fora, the conclusion was reached that there simply was not enough evidence from which to infer guilt.

In our view, that finding was, on the body of evidence adduced, a reasonable stance to adopt.”

[38] This leads to paragraph 8 of the supplementary affidavit. Whilst Mogowe had access to insulation tape, it does not appear to me that he was the only employee who had exclusive access to insulation tape at the workplace. Mogowe was employed as an electrician, and he worked in maintenance. He only encountered gold when he used machines that may have gold on them. He testified that he did not speak to Sipho. That version was not denied during his cross-examination. He testified to assisting Sipho’s wife and how he drove

¹⁸ *DHL* supra at para 31.

¹⁹ *DHL* at paras 12 – 13.

her to the refinery. He also testified that he did not clock in on the day. In the circumstances, he was not at work during the morning. He was not challenged on the insulation tape issue at all during cross-examination. It was incumbent to have put a version to him that he had access to the insulation tape which was wrapped around the stolen gold or that it all probabilities, he was the one who supplied the tape to the syndicate, which was not done.

- [39] In returning to the review ground found in paragraphs 6 and 9 of the supplementary affidavit, it appears to me, having heard argument, that the thrust of Rand Refinery's application appeared to have centred around the Commissioner not making a ruling upfront on the admissibility of hearsay, as explained in *Exxaro*. As the evidence of Maluleka proceeded, the Commissioner became alive to the hearsay content of his testimony. She was prompted twice on this issue.
- [40] The first time was when Maluleka testified to Sipho and Eric mentioning the "names", and he also testified that when this information was mentioned to "Mulefhi", he was also not present. That is when the Commissioner said, "...Okay, so that is hearsay, hey."
- [41] Hearsay was not mentioned at the commencement of the arbitration during the opening statements either. Rand Refinery made no application for hearsay to be admitted. The relevant paragraphs in *Exxaro*²⁰ said:

"Those safeguards and precautions, duly adapted, also apply to the application of s 3 of the LEAA in civil proceedings. Because of the similarities between civil proceedings and arbitration proceedings, the overwhelmingly, adversarial nature of arbitration proceedings under the LRA, and the overarching requirement that such proceedings be fair, those safeguards and precautions, duly adapted, apply equally to arbitration proceedings to ensure fairness and serve as an invaluable guide for commissioners and arbitrators when confronted with hearsay evidence, and, particularly, when applying s 3 of the LEAA. Adapted they would include the following: (1) section 3(1)(c) of the LEAA is not a licence for the wholesale admission of hearsay evidence in the proceedings; (2) in applying the section the commissioner must be careful to ensure that fairness is not compromised; (3) a commissioner is to be alert

²⁰ Exarro supra at paras 24 – 25.

to the introduction of hearsay evidence and ought not to remain passive in that regard; (4) a party must as early as possible in the proceedings make known its intention to rely on hearsay evidence so that the other party is able to reasonably appreciate the evidentiary ambit, or challenge, that he/she or it is facing. To ensure compliance, a commissioner should at the outset require parties to indicate such an intention; (5) the commissioner must explain to the parties the significance of the provisions of s 3 of the LEAA, or of the alternative, fair standard and procedure adopted by the commissioner to consider the admission of the evidence; (6) the commissioner must timeously rule on the admission of the hearsay evidence and the ruling on admissibility should not be made for the first time at the end of the arbitration, or in the closing argument, or in the award. The point at which a ruling on the admissibility of evidence is made is crucial to ensure fairness in a criminal trial. The same ought to be true for an arbitration conducted in an adversarial fashion because fairness to both parties is paramount.

In this matter the timing of the commissioner's ruling on the admissibility of the hearsay evidence occurred so late that it was undoubtedly unfair to both the employer and the employee. It is apparent from the record of the arbitration proceedings that the commissioner was acutely aware from the outset that the main issue in dispute related to the admission of hearsay evidence at the disciplinary enquiry. Exxaro's representative, in her opening statement, conceded that Exxaro had relied on hearsay evidence at the disciplinary enquiry. Exxaro's representative proceeded to adduce hearsay evidence, through Messrs Steyn and Claasen, to prove the charges of misconduct. No objection was raised to this evidence being adduced, neither by Mr Chipana, who was forced to represent himself for the early stages of the arbitration, nor by the commissioner. Significantly, the commissioner appeared to adopt a passive attitude in that regard. Mr Chipana's legal representative appeared after Mr Steyn had given evidence-in-chief and he cross-examined Mr Steyn after consulting Mr Chipana, but he too did not raise any objection to the hearsay evidence." (Footnotes omitted)

- [42] Mr. Posthuma argued that the Commissioner did not alert Rand Refinery's representative to the application of hearsay evidence. He further contends that the admissibility of hearsay evidence was decided only after the proceedings, that Rand Refinery's case was dismissed solely on the strength

of hearsay evidence and that the review court should a hard look at the award.

[43] This causes me to return to Maluleka's evidence when asked about Mokebe's involvement. He testified that he did not dig deep into his activities on the day. As far as his version of Mogobe, he testified that he cannot specifically say what Mogobe did either.

[44] In my view, apart from the hearsay and circumstantial evidence, that alone signalled to the Commissioner that Maluleka cannot materially support the allegations levelled by Rand Refinery. The totality of the circumstances and the version presented by Mokebe, Mogowe and Mantso significantly dilutes the Rand Refinery's case.

[45] In line with what Mr. Postuma thus contended, I now consider *CTP*.²¹ The question before the Labour Appeal Court was amongst others:

"... the treatment of hearsay evidence in an arbitration proceeding and whether the failure to rule on the admission of such evidence at the outset of the arbitration proceedings constitutes a gross irregularity sufficient for the review of the arbitration award...". This is in essence what is alleged in paragraph 6 of the supplementary affidavit.

[46] In the *CTP* case, the employer made an application for legal representation, alleging that the dispute was complex and that it intended to rely on hearsay evidence. The arbitrator in that case dismissed the application for legal representation and *"...ruled that the parties would be allowed to submit hearsay evidence provisionally..."*.²²

[47] During the review application, *CTP* complained that *"...the arbitrator failed to comply with the principles expounded in the judgment of this Court, Exxaro ...in belatedly rejecting the admission of the evidence..."*. This appears to also have been the first ground of appeal in *CTP*.²³

²¹ *CTP* supra at para 1.

²² *CTP* supra at para 16.

²³ *CTP* supra at para 18.

[48] In *CTP*, as opposed to this case, the arbitrator made a provisional ruling on hearsay evidence. This was so as *CTP* was unable to secure the attendance of certain witnesses, as opposed to Rand Refinery's case. The arbitrator in *CTP* allowed further argument on the issue of hearsay evidence at the conclusion of the arbitration, as opposed to what took place in Rand Refinery's case. There are thus clear differences in *CTP* and Rand Refinery's evidence flow insofar as how and when hearsay evidence entered the fray.

[49] After thoroughly grappling with the cautionary views contained in *Exxaro and National Union of Metalworkers of South Africa obo Mokase v Nissan South Africa (Pty) Ltd and others*²⁴ the Labour Appeal Court, in paragraph 36 of *CTP*, said:

"However, a late ruling on the admissibility of hearsay evidence may not necessarily warrant the setting aside of the award and for the matter to be remitted back to CCMA or the bargaining council for a hearing *de novo*".

[50] In applying the reasoning of the Labour Appeal Court found in paragraphs 39 to 43 of *CTP*, one thing is clear, namely that each case is decided on its own merits. In deploying a strict approach to the review test, as cogently explained in *Black Rock Mining*, it appears that, on the face of it, there is an error on the part of the Commissioner, when measured against that said in *Exxaro*. Applying the first part of the test, Rand Refinery has been able to demonstrate an irregularity on the part of the Commissioner.

[51] But that is not the end of the test. If a defect is demonstrated on the first leg. The impugned award may still pass *Sidumo* muster on the second leg, to the extent that it may be found that the outcome was not unreasonable. On the merits, I defer to *DHL* and find that the evidence in support of the allegations of misconduct was quite sparse. The polygraph, although able to assist in the probabilities, does not take the issue further. What Rand Refinery relied on was Maluleka being told, twice, that Mokebe, Mogowe and Mantso were involved, that they failed a polygraph and that one of them had access to insulation tape.

²⁴ [2024] ZALAC 16; [2024] 9 BLLR 967 (LAC).

- [52] To join the dots, Rand Refinery had to outflank the uncontested version that these individuals were not at work. In addition, one is left guessing what part they would have played in the chain of events. In my view, what Rand Refinery sought to achieve was a bridge too far. One is inclined to surmise that when the three individuals failed the polygraph, those results were the catalyst for the dismissals. However, as *DHL* and the authorities referred to therein demonstrate, more corroboration is required than mainly relying on the test results and, as in this case, a purported list and gold wrapped in insulation tape.
- [53] That takes me back to the Commissioner being aware of the existence of hearsay when Maluleke testified, but not to an extent initiating what *Exxaro* requires. In line with *CTP*, the Commissioner herein embarked on a lengthy exposition of the Law of Evidence Amendment Act; she set out in quite some detail why she preferred certain parts of Maluleke's evidence over other parts.
- [54] Whilst she accepted the contents of certain conversations he had, she correctly discounted the parts that constituted uncorroborated hearsay. She correctly pointed out that of the four witnesses who could have supported Maluleka's evidence on the involvement of Mokebe, Mogowe and Mantso, none were called to testify.
- [55] This is significant, if one considers that the arbitration process was not a one-day event. I thus cannot fault the Commissioner's reasoning in paragraph 40 of the award. More to the point, despite arbitrators only being required to provide brief reasons in their awards, it is obvious that this award is not the proverbial one-pager. Quite the opposite.
- [56] Lastly, this application came before the review court just on 9-years following the dismissal of the three employees. It requires finalisation.
- [57] Thus, despite the Commissioner only making a ruling on hearsay evidence when preparing her award, she nevertheless, on a fair reading of the award thoroughly wrestled with both the facts and the legal question and produced an award which is quite capable of justification, and apart from that, enjoys review protection as her decision falls within a band of decisions that may be reached given the scant evidence relied on by Rand Refinery. In considering

the totality of the Commissioner's analysis, her award is not disconnected from the evidence that was available to her.²⁵

[58] Her deviation is not so great or egregious as to fall foul of that explained in *A J Charnaud*. I am of the view that the review application, advanced on the above ground, stands to fail. To that extent, the grounds mentioned in paragraphs 6 and 9 of the supplementary affidavit do not pass the second leg of the test.

[59] On the issue of costs, it is so that section 162 sets out the legal framework when this court is required to decide the issue of costs. In deciding whether to award costs, a discretion applies. It is so that when deciding to award costs, one of the considerations is that in the employment fraternity, parties must not be discouraged from approaching this court for relief, even more so where review applications are pursued.

[60] Given the unique questions that seized this court and considering that it appears that there is a relationship between the employer and a trade union and whilst the employer failed to comply with the provisions of s162 and where the state of the record requires no further mention, I am of the view that a cost order is not warranted.

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

The order.

1. The review application is dismissed.
2. There is no order as to costs.

F. Venter

Acting Judge of the Labour Court of South Africa

²⁵ Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate (2015) 36 ILJ 968 (LAC) at paras 12 to 13.

APPEARANCES:

For the applicant: Mr A Posthuma, instructed by Snyman Attorneys

For the third respondent: N Wagemaker, instructed by Serfontein Viljoen
Swart Attorneys

LABOUR COURT