IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: D1475/2017

In the matter between:

WHIRLPOOL SOUTH AFRICA **Applicant**

and

SURYIA KUMAR PARMANAND N.O. **First Respondent**

THE METAL AND ENGINEERING INDUSTRY BARGAINING COUNCIL **Second Respondent**

MISTINAH B BUTHELEZI **Third Respondent**

Heard: **08 July 2021**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time of the hand-down is deemed to be 10h00 on 20 October 2021**

JUDGMENT

Hiralall AJ

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act[1] ("the Act") for a review and set aside of the award of the first respondent ("the arbitrator") under case number MEKN 8731, dated 4 September 2017 in the arbitration proceedings between the applicant and the third respondent ("the employee"). The application is opposed by the third respondent ("the employee").

Background

[2] The applicant is a company which manufactures refrigerators. The third respondent was employed by the applicant in the pre-assembly department.

[3] It was common cause that on 28 July 2015, a group of about 20 employees, including the third respondent, had approached the HR office during their tea break to demand a return of monies which were deducted from their wages on acknowledgments of debt signed by them earlier. Thereafter, they were marching through the company on an unprotected strike, singing and toyi-toying.

[4] According to Mangie Marimuthoo, the quality assurance manager who testified for the applicant, the managers were alerted to a possible unprotected strike that morning, and were positioned in various departments to manage the employees who were still working and to protect equipment. He was positioned between line 2 and the door manufacturing department, between 10h30 and 10h40 which was just after the tea break, when he saw a group of about 20 striking employees approaching the doors department. The third respondent was one of the front runners. She was blowing a whistle and moving around, her body language showed

[1] Act 66 of 1995

aggression. Those employees who were still working were scared and ceased work immediately when they saw the striking workers. They ran outside or hid behind their machines in order to safeguard themselves. The third respondent was about 500 m away from her own department at the time.

[5] The applicant presented two videos at the arbitration hearing. Marimuthoo identified the third respondent as one of the frontrunners in the group of striking employees. She was blowing a whistle. Another voice could be heard saying in isiZulu, 'Let's go and take people out'. According to Marimuthoo, there were two serious consequences which followed from the strike. Firstly, the applicant lost production on 5000 units on the day in question, this being a total loss to the company of approximately R10 million; and secondly, the strike portrayed the company in a poor light with its investors. The other employees who had committed the same offence were suspended and called to disciplinary enquiries. They were found guilty and dismissed.

[6] During cross-examination, it was contended on behalf of the third respondent that she was not a frontrunner as there were three people in front of her amongst the striking employees and that the blowing of a whistle in the workplace was not an offence. This was disputed by Marimuthoo stating that although there were about three people in front of the third respondent, she was a frontrunner in the strike, and although he did not know of any policy prohibiting it, that the blowing of a whistle was not allowed during working time. He was then questioned as to how he concluded that the third respondent was inciting other employees. He stated that it was the way she was blowing the whistle and her movement in the plant. He was also questioned as to whether the other employees who were present were dismissed. Marimuthoo stated that to his knowledge, all of the other employees who were identified as having committed the offence with the third respondent were dismissed.

[7] The third respondent, Mistinah Buthelezi, testified that she was dismissed for intimidating and inciting other employees, in particular Mrs Madide and Mr Hlabisa. On the day in question, they had been to the HR office and she returned via department 17 as it was a shorter route to her work station. She was marching with the other striking employees. On her way through department 17, she went to speak to Mrs Madide and Mr Hlabisa. She did not go into the department as Mrs Madide's workstation was right next to the path which she took to her own department. She went to ask her about her sick child. Mr Hlabisa worked in the same department but far away behind Mrs Madide. They were not called to the disciplinary enquiry to give evidence that they were intimidated. She denied that she incited or intimidated any employee. She blew the whistle while they were singing and chanting. She did not know that she was not allowed to blow a whistle during a strike because she also blew a whistle during singing in Church.

[8] During cross-examination, she agreed that she was in the department when she was spotted blowing the whistle during working time. She agreed that the employees there were working but stated that Mrs Madide and Mr Hlabisa were not working. She denied that she incited or intimidated the employees who were working

[9] Mrs Madide testified that she was at her workstation after the tea break when the third respondent approached her and asked after her sick child.

[10] The third respondent was charged with inciting and/ or alternatively intimidating other employees whilst they were performing their duties in the factory by walking to their workstations and demanding that they leave their work and participate in the unprotected strike, and that she did this with the sole intention of unreasonably and unlawfully disrupting the applicant's business operations.

[11] It was not in dispute that the sanction for both offences, inciting employees to participate in a strike and for intimidation, was dismissal.

The award

[12] The arbitrator's survey of the evidence and evaluation of the evidence was recorded as follows:

'Survey of evidence and evaluation

20. Respondent called S. Marimuthoo as the only witness to speak to the charge. According to him, and indeed the video footage, Applicant was definitely moving around during this misconduct. Marimuthoo testified that in the footage, illegal strikers are heard saying "let's go and take people out". On the contrary, the video did not demonstrate this. Nor was independent evidence called on this issue. Marimuthoo also stated that non-striking employees were scared and stopped work. While this was his perception, Applicant denied same. This meant one had to choose between two versions.

21. Respondent had every resource to call further evidence from affected employees to verify the charge. It did not do so.

22. Applicant called one Hlabisa (sic) who testified that Applicant never intimidated her. This was not necessary as there was no onus on Applicant. That Marimuthoo perceived Applicant's body language as aggressive at the material time, also did not prove the charge. Nor did the question as to whether Applicant blew the whistle during work hours or whether this conduct breached Respondent's rule, in any way flesh out the charge.

23. Of course, given the context and Applicant's conduct, she was blowing a whistle and toyi-toying leading a contingent of persons in the course of work hours and

during an illegal strike. But this is totally different to what she was charged with. What was the import/ intention of her conduct is open to speculation. Same is not enough to speak to the charge. On the other hand, Applicant was not charged with participation in an illegal strike.

24. Respondent bore the onus and failed dismally to discharge same.'

Grounds of review

[13] The applicant's grounds of review:

13.1 The award stands to be reviewed and set aside because the commissioner arrived at an unreasonable result in determining that Buthelezi was not guilty of inciting and/ or intimidating non striking employees into joining the strike.

13.2 The arbitrator's assessment and determination of the competing versions before him constitute an error of law through a misapplication of the balance of probabilities standards. The arbitrator further failed to properly assess competing versions according to all the evidence before him and his failure to complete this exercise properly renders his award reviewable.

13.3 The arbitrator made a finding that Buthelezi was not guilty of incitement or intimidation based only on the fact that she was only blowing a whistle, toyi-toying and leading a number of persons through the company's factory during an illegal strike. This finding is unreasonable and amounts to a gross irregularity and is reviewable for the following reasons:

13.3.1 At the inception of the matter, Buthelezi's representative advised the arbitrator that the employee's version was that she approached the other employees during the strike but not to intimidate but to discuss "something outside work" but when Buthelezi testified she said that she, and the group of other striking employees, were engaged in the strike and were marching through department 17 in protest;

13.3.2 Buthelezi's representative conceded that Buthelezi was 'leading' the strike and the arbitrator made a finding that Buthelezi was indeed leading a contingent of employees during working hours (whilst blowing her whistle and toyi-toying). This is consistent with the evidence of Marimuthoo that Buthelezi was one of the front runners of the group of striking employees, who were walking through the factory;

13.3.3 Marimuthoo further testified that the reaction of the non-striking employees, when they saw Buthelezi and the group of strikers, was to cease work immediately and some of them were scared and hid behind the machines to protect themselves. This evidence of Marimuthoo, which clearly implicates Buthelezi, was never challenged under cross-examination. Instead the primary issue raised by Buthelezi's representative with Marimuthoo was whether the other leaders, who committed the same offense, were disciplined;

13.3.4 Marimuthoo further testified that all the employees on the video, who incited the strike, were subjected to a disciplinary inquiry and dismissed;

13.3.5 Finally the arbitrator made a finding that although Marimuthoo testified that the video footage shows striking employees saying “let's go and take people out”, the video footage did not demonstrate this. In the course of showing the video footage, the interpreter was asked to interpret what was being said in Zulu on the video by the striking employees (and not by Buthelezi) and said that the striking employees said “let's go and take people out”. Immediately thereafter the arbitrator repeated “illegal strikers are heard to say “let's go and take people out””. This was confirmed (and not disputed) by Buthelezi’s representative whilst Marimuthoo was under cross examination.

Legal principles

[14] Section 145 of the Act provides that any party to a dispute alleging a defect in any arbitration proceedings may apply to the Labour Court for an order setting aside the arbitration award, and ‘defect’ is given the following meaning:

(a) that the commissioner

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
(iii) exceeded the commissioner’s powers; or

(b) that an award has been improperly obtained.

[15] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[2], the court held that '*the reasonableness standard should now suffuse s 145 of the LRA*'. The question to be asked is whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach.

[16] In *Herholdt v Nedbank Limited*[3] , the Supreme Court of Appeal stated as follows:

> '[25] … For a defect in the conduct of proceedings to amount to a gross irregularity as contemplated by section 145(2)(a)(ii), the arbitrator must have misconceived 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 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.'

[17] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[4], the Labour Appeal Court stated as follows:

> '[15] … What is required is first to consider the gross irregularity that the arbitrator is said to have committed and then to apply the reasonableness test established by Sidumo. The gross irregularity is not a self-standing ground insulated from or standing independent of the Sidumo test. That being the case, it serves no purpose for the reviewing court to consider and analyse every issue raised at the arbitration and regard failure by the arbitrator to consider all or some of the issues albeit material as rendering the award liable to be set aside on the grounds of process-related review.' …
>
> [20] Failing to consider a gross irregularity in the above context would mean that an award is open to be set aside where an arbitrator (i) fails to mention a material fact in his award; or

[2] (2007) 28 ILJ 2405 (CC).
[3] (2013) 34 *ILJ* 2795 (SCA)
[4] (2014) 35 *ILJ* 943 (LAC)

(ii) fails to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute; and/or (iii) commits an error in respect of the evaluation or considerations of facts presented at the arbitration. The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?' (Footnotes omitted)

[18] In Metrorail (PRASA) v SATAWU obo Tshabalala and others[5], the following was stated:

'[18] Therefore, the first step in a review enquiry is to consider or determine if an irregularity exists in the arbitration award or the arbitration proceedings, and this is done by considering the evidence before the arbitrator as a whole, as gathered from the review record, and comparing this to the reasoning of the arbitrator as reflected in such award. The review court must also at this stage apply all the relevant principles of law which may be applicable in the particular case. But this is only the first part of the review enquiry. In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* the Court said:

> `.... in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material'

[19] This means that the review enquiry has a second part, which entails a determination, based on all the evidence before the arbitrator, whether the

[5] JR483/13 [2015] ZALCJHB 422 (5 October 2015)

outcome the arbitrator arrived at can nonetheless be sustained as a reasonable, even if it may be for different reasons or on different grounds…

[19] The applicant contended that the arbitrator misapplied the balance of probability standards, that he failed to properly assess the competing versions according to all of the evidence before him, and that his failure to complete this exercise properly renders his award reviewable.

[20] The court was referred to the following in *Head of Dept of Education v Mofokeng and others* [6]

> '[33] … [P]rovided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.'

[21] The court was also referred to *IDWU obo Cyril Linda and 4 others v Super Group*[7] where the following was stated:

> '[28] The assessment is vexed by the arbitrator giving no clue as to why he believed the employees. This requires a review court and this Court to speculate in order to plumb the possibilities …'

[6] Head of Dept of Education v Mofokeng and others [2015] 1 BLLR 50 (LAC)
[7] [2017] 10 BLLR 969 (LAC)

[22] In *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others*[8], where the Labour Appeal Court upheld the finding of the Labour Court that the commissioner did not apply the appropriate test to evaluate the probabilities of the two irreconcilable versions before him, the court stated as follows:

'[11] The erroneous recordal or categorisation of an issue by the arbitrator will not justify the setting aside of the award unless such error is material to the outcome, caused unfairness or prejudice and where (as was the case in *National Union of Mineworkers v Samancor Ltd* where the arbitrator erroneously categorised the dismissal) it results in an award which is so unreasonable that it falls to be set aside.

[12] However, a resolution of factual disputes is at the core of the commissioner's task in arbitrating a dispute between 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*:

`*To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the other factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities she had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of the assessment of (a), (b) and*

[8] (JA43/2017) [2017] ZALAC 73; [2018] 3 BLLR 267 (LAC) (28 November 2017)

(c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.' (footnotes omitted)

[23] The Court went on to state as follows:

'[13] The Labour Court 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. In failing to approach the evidence in such manner, with no resolution of the factual disputes before him, the commissioner quite clearly arrived at a decision which was unreasonable.'

[24] I align myself with the views expressed in the authorities cited above and proceed to consider the review application.

Evaluation

[25] It was submitted by the applicant that the arbitrator appeared to have misunderstood the question which he was required to answer which was whether or not the third respondent incited or intimidated the non-striking employees. The court was referred to the following extract from the record in support of this contention:

'Commissioner: … I want you to address me on the law also. I haven't made up my mind about anything, but I just want you to address me on the law on the implications of an unprotected strike, participation, what are the …[intervention]'

[26] The court was also referred to paragraph 23 of the award which stated the following:

'23. Of course, given the context and Applicant's conduct, she was blowing a whistle and toyi-toying leading a contingent of persons in the course of work hours and during an illegal strike. But this is totally different to what she was charged with.

What was the import/ intention of her conduct is open to speculation. Same is not enough to speak to the charge. On the other hand, Applicant was not charged with participation in an illegal strike.'

[27] Having considered the record and the award, it appears that the arbitrator did not initially appreciate the distinction between the fact (which was common cause) that there was an unprotected strike by some employees, and that it was alleged that the third respondent committed certain misconduct during such strike. This issue seems to have resolved itself in the award.

[28] The arbitrator identified that he was required to determine whether the dismissal of the third respondent was substantively and procedurally fair, that in terms of the substantive fairness of the dismissal, the applicant bore the onus of proving the charge against the third respondent, and that having heard the evidence, he was faced with two opposing versions. It is his evaluation of the two opposing versions that is problematic.

[29] The applicant's version at the arbitration, testified to by Marimuthoo, was that it was after the tea break that he saw the group of about 20 striking employees approaching the doors department. The third respondent was one of the frontrunners and she was blowing a whistle. She was moving around and her body language showed aggression. He said that those employees who were still working were scared and ceased work immediately when they saw the striking workers. They ran behind their machines and hid in order to safeguard themselves, while others went outside. The applicant presented video footage which showed the third respondent amongst the frontrunners of the striking employees. Except for taking issue with the term frontrunner because there were three other people in front of the third respondent and questioning whether blowing a whistle in the workplace was aggressive behaviour or a disciplinary offence, the version that the non-striking employees were scared and ran to hide behind their machines was not challenged

or disputed in cross-examination. It was also not in dispute that a voice was heard saying “let’s go and take people out”.

[30] As a starting point, it should have been noted that Marimuthoo testified in relation to the third respondent’s movements during an unprotected strike where the striking employees were toyi-toying (according to Mr Mncube) inside the workplace, and her (third respondent) blowing the whistle in the department, that he provided video footage of a moving scene, and that his evidence was that the non-striking employees were scared and ran outside, or they hid behind their machines.

[31] The arbitrator states that Marimuthoo was a single witness, that the video footage does not support his version (either that people are heard to say “let’s go and take people out” OR that people were removed from their workstations), that no independent evidence was called on this issue, and that his version that the non-striking employees were scared and stopped work was his perception of what took place.

[32] An evaluation of Marimuthoo’s evidence should have entailed firstly an examination as to how his evidence was dealt with in cross-examination, and what evidence was admitted and what was disputed. The purpose of cross-examination and the effect of leaving evidence unchallenged was explained in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[9] as follows:

> ‘[61] The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness’s attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending

[9] 2000 (1) SA 1 (CC) at para [61]

his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.'

[33] It was stated in *S v Boesak*[10] that it is now settled that there is a rule of practice followed in trials to the effect that a cross-examiner is expected to clearly raise during cross-examination of the witness implicating his client, each and every point placed in issue on behalf of his client. The main purpose of the rule is to ensure that trials are fairly conducted, witnesses whose evidence is to be challenged are afforded a chance to respond to such challenge and the party calling them is alerted that it may be necessary to lead further evidence on the point in order to meet the challenge. See also *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others supra* at para 14.

[34] It was recorded by the arbitrator that Marimuthoo was the only witness to speak to the charge and that the applicant had every resource to call further evidence from affected employees but that it did not. If a proper analysis of Marimuthoo's evidence was conducted, the arbitrator might have considered the fact that much of Marimuthoo's evidence was not disputed and that it might therefor not have been necessary for the applicant to call its further witness. The applicant in the present case can hardly be criticized for not calling its further witness, a Mr Bissett who had testified at the disciplinary enquiry, and who it indicated on the first day of the arbitration hearing it intended to call.

[35] The point must be made that the video footage was not presented to this court with the record of the evidence. It would have assisted if there was a description in the record of what the parties and the arbitrator viewed on the video footage in terms of the people present, their activities, the surroundings, and whether the non-striking

[10] 2000 (2) SACR 5115 (SCA)

employees were still seated at their workstations or whether they had run away. In fact, it was necessary for the arbitrator to require the witness to describe what was being viewed on the video footage, or for him to describe it himself for completeness of the record.

[36] The following is an extract from the record of the evidence:

‘Respondent rep: Mr Commissioner, I would actually like the interpreter to interpret what's being said in Zulu. It's not said by the applicant, but it's said by the people who were actually walking in tandem with the applicant.

Interpreter: Let's go and take people out.

Commissioner: Hang on, so what shall we call them? The illegal strikers?

Respondent rep: Yes.

Commissioner: Are heard to say – Mr Mncube, if I'm taking it wrong tell me. Illegal strikers are heard to say ‘let's go and take people out’.

Respondent Rep: Okay, thank you.’

[37] In the award, the arbitrator dealt with this evidence as follows:

‘Marimuthoo testified that in the footage, illegal strikers are heard saying “let’s go and take people out.” On the contrary, the video did not demonstrate this. Nor was independent evidence called on this issue.’

[38] The applicant submitted that the arbitrator made a finding that although Marimuthoo testified that the video footage shows striking employees saying “let’s go and take people out”, the video footage did not demonstrate this, this despite the interpreter

interpreting the words during the hearing and the arbitrator repeating it. Clearly, the applicant's understanding of the award is that the arbitrator incorrectly found that the video footage does not demonstrate the striking employee as making the statement. I agree that the finding can be interpreted in this way but I will venture a guess that the arbitrator probably meant that the video footage did not demonstrate the striking employees taking people out of the workplace, hence the statement that followed which was that 'no independent evidence was called on this issue'. However, even on this interpretation, it appears that the fact that the statement was made and heard on the video footage was not in dispute.

[39] An evaluation of the evidence based on the credibility of Marimuthoo as a witness and his observations should have followed having regard to inter alia his candour and demeanour as a witness, his bias if any, internal and external contradictions, the probability or improbability of particular aspects of his version, the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events.[11] Likewise, the reliability of Marimuthu's evidence and his observations should have been evaluated[12]. If it was indeed only Marimuthoo's perception that the third respondent's conduct constituted incitement and intimidation, and that employees were scared and ran to hide behind their machines, then the process of making this finding should have been explained.

[40] The third respondent's evidence, together with that of Mrs Madide (and not Hlabisa as recorded in the award) should have been similarly evaluated for credibility and reliability, and finally there should have been an analysis and evaluation of the probability and improbability of each party's version on the disputed issues.

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11 (427/01) [2002] ZASCA 98 (6 September 2002)

12 (427/01) [2002] ZASCA 98 (6 September 2002)

[41] The third respondent's version was that she was merely returning to her workstation via department 17 which was a shorter route to her workstation which she even used in the mornings, and on her way, she stopped to speak to Mr Hlabisa and Mrs Madide, about her sick child. She went on to say that Mrs Madide's workstation was right at the walkway so it could not be said that she was walking inside the department. Mrs Madide was standing by her workstation and not working. It was only after intervention by the arbitrator that it was confirmed that this was during a protest march as described by the arbitrator. It should also be noted that it was in response to a question from Mr Mncube as to what happened about Mr Hlabisa, since it was contended by the employer that she had intimidated him, that the third respondent stated that Mr Hlabisa worked far from Mrs Madide in the doors department behind where Mrs Madide worked, this although Mr Mncube stated in his opening statement that they had been standing together. This was all that was said about Mr Hlabisa although the third respondent started by saying that she went to speak to both of them. According to the third respondent, she was blowing the whistle during the strike as she did in the Lutheran Church which she attended.

[42] The probabilities and improbabilities of these versions were not considered.

[43] Much was made about the question whether it was an offence to blow a whistle in the workplace. The arbitrator stated that the question as to whether the third respondent blew the whistle during work hours or whether this conduct breached the applicant's rule, did not in any way flesh out the charge. The record shows that he entered into the following discussion with Mr Mncube:

'Mr Mncube: So why you blowing the whistle during that strike?

Ms Buthelezi: It's because people were singing. Even in church when people are singing I would blow the whistle.

Mr Mncube: So. … [Intervention]

Commissioner: Just hang on. Mr Mncube, I don't know, I'm sorry to interrupt you, I'm asking both of you. Just as a matter of interest, I used to attend gospel services when I was living in the United States and they sing and so on. I've attended some services here. Do they blow whistles? I'm not questioning what the applicant is saying, I'm just interested. Do they blow whistles during the service, Mr Mncube? If you don't want to answer, don't answer. I'm just interested, not because I want to make a finding on that, just as a matter of interest. You don't have to answer me.

Mr Mncube: I did hear, Mr. Commissioner, at some of the churches they did blow the whistles.

Commissioner: You did? No, that's what I wanted to know. You've also heard?

Respondent Rep: I've never heard of that.

Mr Mncube: Vuvuzela?

Commissioner: Vuvuzela. Okay, no, no, I'm just interested. Look, proceed. I am not making a finding there.

Respondent Rep: You'd better, you'd better, Mr. Commissioner because- can I close this door?'

[44] Quite apart from such an exchange being highly irregular, although the arbitrator stated that he was not making a finding based on the discussion, it appears from the award that he considered the blowing of the whistle out of context. It was not a question of the third respondent breaching the company rules by blowing a whistle. That was not the test. The question was whether that together with her movements in the department, which were described as aggressive, and the mood or

atmosphere that prevailed, as indicated from the undisputed evidence, constituted incitement or intimidation.

[45] In Pailpac (Pty) Ltd v De Beer N.O and Others[13], the Labour Appeal Court stated as follows:

> '[25] The arbitrator stated that any item that is improperly used could constitute a weapon, including a stick, PVC rod, golf club and sjambok. She, however, concluded that there was little evidence that the dismissed employees were "brandishing or wielding" those weapons, as specifically referenced in the charge sheet. In her view, they were merely carrying these weapons. *Rather than construing these words in context, the arbitrator adopted an overly technical and formulaic approach to their interpretation - as well as to the framing of the charge - which our courts have consistently cautioned against*.' (my emphasis)

[46] What was lost sight of was that over and above the fact that the tea break was over, that this was an unprotected strike, and that the striking employees were unhappy about the issues which they had raised with HR, that they were toyi-toying and blowing a whistle inside the workplace and making their way through the departments. Added to this was the testimony that the third respondent's body language showed aggression, a voice was heard saying "let's go and take people out", and the non-striking employees left their workstations and ran to hide behind their machines.

[47] The arbitrator went on to state that given the context and third respondent's conduct, she was blowing a whistle and toyi-toying leading a contingent of persons in the course of work hours and during an illegal strike. This, according to the arbitrator, was totally different to what the third respondent was charged with and the import/ intention of her conduct was open to speculation, and was not enough to speak to the charge. An important fact is missing from this analysis and that is that the events

[13] (DA 12/2018) [2021] ZALAC 3; (2021) 42 ILJ 1038 (LAC); [2021] 6 BLLR 570 (LAC)

took place inside the workplace with Marimuthoo stating that non-striking employees had left their workstations and run outside or to hide behind their machines, a fact which was not disputed. It is further not acceptable to merely dispense with a witness's evidence by stating that it is mere speculation without there being a proper analysis of his evidence.

[48] What the arbitrator failed to do is evaluate the evidence that was presented at the arbitration hearing. This he was required to do by considering the credibility and reliability of the witnesses, and the probabilities and improbabilities of each parties' version, and as a final step, he was required to determine whether the party burdened with the onus of proof had succeeded in discharging it.

[49] According to the judgment of the Labour Appeal Court in *National Union of Mineworkers and Another v CCMA, supra*[14], the failure of the commissioner to employ this technique in his resolution of the irreconcilable versions before him resulted in the commissioner quite clearly arriving at a decision which was unreasonable.

[50] Having regard to the record, the award and the arguments presented, I find that the arbitrator committed a gross irregularity in the evaluation of the evidence. It was not for the arbitrator to arrive at a decision that the applicant had failed to discharge the onus to prove the fairness of the dismissal without a proper evaluation of the evidence. In failing to approach the evidence in the manner required by him, the arbitrator quite clearly arrived at a decision which is unreasonable.

[51] Having considered the provisions of section 145(4) of the Act, I am of the view that the matter should be referred back to the Metal Engineering Industries Bargaining Council for a hearing *de novo* before another commissioner.

[14] (JA43/2017) [2017] ZALAC 73; [2018] 3 BLLR 267 (LAC) (28 November 2017)

[52] In the result the following order is made:

1. The review application is granted.

2. The matter is referred back to the Metal Engineering Industries Bargaining Council for a hearing de novo before another commissioner.

3. Each party is to pay its own costs.

HIRALALL AJ

APPEARANCES

For the Appellant:	Mr Alexander
Instructed by:	Norton Rose Fulbright South Africa Inc.
For the Respondent:	Mr Mncube
Instructed by:	NUMSA