THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case: C 160/2021

OF INTEREST TO

OTHER JUDGES

In the matter between:

SAMWU obo MOIPONE AGNES MACHESA **Applicant**

And

MANGAUNG METROPOLITAN MUNICIPALITY **First Respondent**

SURIA VAN WYK N.O **Second Respondent**

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL (SALGBC) **Third Respondent**

Date of Hearing: 26 April 2023

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 14h00 on 4 May 2023.

Summary: (Review – Relevance of arbitrator not making credibility findings when faced with conflicting versions of two witnesses – arbitrator correctly considering the overall probabilities – Misdirection on procedural fairness – result would have been the same if correct approach followed)

JUDGMENT

LAGRANGE J

Introduction

[1] The applicant, Ms M Machesa, wishes to review and set aside an arbitration award in which the arbitrator found that her dismissal by the first respondent, the Mangaung Metropolitan Municipality was substantively and procedurally fair.

[2] On 19 February 2019, Machesa was found guilty on five charges relating to the issuing of a permit to occupy (PTO) municipal land. The first charge was that she directly or indirectly committed or assisted in committing fraud and corruption by defrauding a member of the community, Ms N Qinisile, of R 30,000 in promising to issue her with a PTO, which she did not have authority to issue. Secondly, she had been accused of failing to act in the best interest of the municipality by withholding material information from it. Further, it was claimed she had indirectly or directly intended to take part in activities financially detrimental to the municipality, had acted contrary to the municipal Finance Management Act, 56 of 2003, and used her working time for illegal activities. Machesa's internal appeal on 16 July 2019 was unsuccessful.

[3] Machesa was a senior housing officer earning approximately R 57,000 at the time of her dismissal and had worked for the municipality for approximately twenty years.

[4] Machesa was involved amongst other things in the administration of PTOs which give the holders the right to occupy a portion or municipal property. Once the requirements for issuing a PTO had been satisfied, Machesa would make a recommendation to her superior, Ms M Machesa, and the general manager to issue the permit. The permit was supposed to be issued only to indigent persons earning below a certain income threshold. The issuing of PTOs is a municipal function which does not require the involvement of third parties, like estate agents. A PTO could also not be transferred to anyone else, with a few exceptions. PTOs could not be sold. Once a permit holder no longer required the land, a new permit could be issued to the next person on the waiting list. According to Machesa, the

manager of informal settlements, no holder of a PTO could transfer it to another person, but if a permit holder died and minor dependants were living on the site, the municipality would try and arrange for a PTO to be issued to the person responsible for looking after the children.

[5] However, Machesa claimed there was a practice, which appears to have been an unofficial one and at odds with municipal policy that land that became unoccupied should be made available to the next person on the housing waiting list, that a person who had occupied a site for six months but wanted to move to another site could request the site permit to be reassigned to a relative, subject to the new occupier also being indigent. In terms of this alleged informal practice, the person wishing to have the PTO reassigned was asked to set out their motivation in an affidavit. The affidavit would be attached to the declaration form signed by the prospective occupier in which they acknowledged their limited occupational right. According to Machesa, she would present this to Makhetha for approval.

[6] Machesa admitted hearing the testimony of her general manager, Ms T Pitso, who had categorically denied that a site would be transferred from one family member to another, and that this evidence was not challenged, but insisted that it was a practice at Hostel 1 where she worked. She could not explain why Pitso's account had not been challenged by her or why Pitso was not challenged when she disputed there was a practice of obtaining affidavits in such cases. In her testimony, Machesa went so far as to say that the instruction to obtain an affidavit actually came from Pitso, which was also not put to her.

[7] The particular events giving rise to the charges were a matter of some dispute.

[8] The origin of the impugned transaction is somewhat unclear. However, it seems to be common cause that the original occupier of the site, Ms P Siyane, approached Machesa and asked to be allocated a different site

because she was having difficulties with her boyfriend who was staying with her after he had been released from prison. There was some hearsay evidence that Machesa had told Siyane she would have to pay R 3000 Rand as there were three people who needed to be compensated, but apparently Siyane did not have the money. This version was presented by Makhetha and disputed by Machesa. Makhetha appears to had no direct knowledge of what transpired initially so her evidence on this was of no value.

[9] Whatever the impetus was for Siyane to move to another site, Qinisile testified that she saw a newspaper advertisement for the sale of a site in Kgotsong. She phoned the number which belonged to someone who appears to have been an estate agent, known as 'Smangele'. She viewed the site with him and he told her he was selling it for R 30,000. They were supposed to go to Hostel 1 where Machesa worked, but the visit had to be postponed because the person 'assisting with the admin' was not present. A few days later they went again and that is when she met Machesa. Smangele dropped her off at Hostel 1, but did not accompany her to Machesa's office. However, his assistant, known as 'Tanki' did. Tanki asked Machesa about other site permits and Machesa told him that they were ready and the owners of the permits could come and collect them. Qinisile surmised from this that Machesa was familiar with Tanki and Smangele. At a later stage, Machesa had even spoken on Qinisile's phone to Tanki when Qinisile came to query the outstanding permit. In addition, Smangele had identified Machesa as the person at the office dealing with administration.

[10] Machesa made copies of Qinisile's and Siyane's ID documents. Machesa took the permit from Siyane and filled in another form, after which she told Qinisile she would call her after two weeks and she could fetch her permit after she had the signatures of her superiors. According to Qinisile, she then asked if Machesa was sure she could now pay the amount on the Smangele's account and start building on the site. Machesa assured her she could because the site would be in her name. It was not disputed that

Qinisile made payment of R 30,000 into an account in the name of Phunyeletso Investments, which Qinisile said was Smangele's company. Qinisile testified that it was Machesa's assurance that she could make the payment that led her to do so. She trusted her because she was the municipal official. Qinisile testified that she did not occupy the site because Machesa told her later that 'there was some case' related to the stand, namely that the 'owner' had complained she had been tricked to part with the site. When Qinisile followed up with Siyane, the latter told her that Smangele had not paid the money over. Qinisile communicated with Smangele who referred her back to Machesa. When she in turn spoke to Machesa, the latter expressed surprise that Smangele had referred Qinisile to her, because Machesa said he knew that the matter was not finalised because there was a case pending.

[11] During the course of Qinisile's cross examination, the version of Machesa that was put to her changed between an assertion that Machesa merely processed the application to change the permits and was under the impression that Qinisile and Siyane were sisters, to a denial that Qinisile ever came to her office at Hostel 1 and that Machesa only saw her for the first time at the arbitration. Machesa claimed never to have met Qinisile before the arbitration and denied that she had come to see her at her workplace together with an agent and that she had assisted them. Though she could not specifically recall Qinisile, if she had come to her office with an issue, she agreed she would have made a copy of her ID document. She disputed that she showed her the display on her computer and told her to go and pay the amount for the site as alleged by Qinisile. In re-examination Machesa's representative went to great lengths to get her to clarify what she had meant when she testified she did not 'know' Qinisile. Eventually she indicated that she meant she did not have any prior relationship with her.

[12] It had been put to Qinisile that the reason the 'transfer' of the site to Puleng could not take place was that Machesa was waiting for the signature of her two supervisors. When Machesa testified she claimed it

was only Makhetha's signature that was needed. She claimed the documents never reached Makhetha because someone arrived at Machesa's office from the fraud and corruption office. Machesa testified that was the first time she became aware of this case. She also mentioned the visit by the fraud and corruption unit to her manager but Makhetha was not asked to verify this when she testified. Machesa denied knowing of four of her subordinates who had also been dismissed for the unlawful sale of municipal sites, though she conceded they had also been charged.

The arbitrator's award

[13] The arbitrator correctly identified that the essence of the charges against the applicant concerned whether she was directly or indirectly involved in the fraudulent and corrupt activity of sites being 'sold' to members of the community, and that there was no direct evidence of the applicant's involvement but only circumstantial evidence. She concluded that:

13.1 Siyane, had approached Machesa to obtain another site but when she was unable to pay R 3,000 as Machesa had asked her for, an agent offered to pay the money.

13.2 Qinisile saw the advertisement and wanted to buy the site but wanted to be sure that would be transferred to her before she paid the money. This led to the meeting between Machesa, Siyane, Qinisile and Tanki, the agent's assistant.

13.3 The evidence showed that Machesa was familiar with Tanki and she conveyed to him that other permits were ready for collection.

13.4 Machesa completed a form, took the site permit from Siyane, copied the ID documents of Siyane and Qinisile and said she would send the documents to her supervisors for approval.

13.5 The evidence of Machesa that she had asked Qinisile to get an affidavit for the transfer of the site because she and Siyane said they was sisters was rejected because it was never tested with Qinisile. This undermined a critical element of Machesa's defence based on claimed that there was such a practice.

13.6 There was no evidence to suggest that there was going to be any site verification before the transaction was submitted for approval.

13.7 The presence of an agent at the meeting in Machesa's office was inexplicable if it was indeed simply a transfer of a permit between siblings. The undisputed evidence was that Siyane was looking for a new site and Qinisile was responding to the sale advertisement.

13.8 The fact that Qinisile made the payment after the meeting showed that she had gone to Machesa's office to obtain confirmation of the legitimacy of the sale transaction.

13.9 The evidence of the interactions between Machesa, Smangele, Qinisile and Siyane confirmed that Qinisile and Siyane had both anticipated the conclusion of a sale transaction and had nothing to do with transferring the permit between suppose siblings.

[14] The arbitrator found that the disputed facts concerned the representations Machesa allegedly made to Qinisile about paying over the money and starting to build on the property, which could have been clarified by either party summonsing Siyane to testify. In any event, she found that the chain of events favoured the employer's version and that Machesa was involved in the unlawful transaction from the time Siyane approached her to the defrauding of Qinisile. She characterised Machesa's limited evidence as to what transpired in her office as a bare denial which was not sufficient to rebut the employer's *prima facie* case, particularly as she failed to put important elements of her defence to the employer's witnesses.

[15] On the question of procedural fairness relating to the unsuccessful attempts to deliver the charge sheet to her home on three occasions when she was not there, the arbitrator accepted that she did not receive proper notification of the hearing, but found that the arbitration hearing had cured any procedural defect she might have suffered. She concluded that Machesa's dismissal was substantively fair but procedurally unfair, but because she did not suffer any prejudice as a result of the procedural defect no compensation was due to her.

Grounds of review and evaluation

[16] In relation to the findings of substantive fairness, the primary ground of review is that the arbitrator gave no reasons for preferring the employer's evidence against that of Machesa. In particular, the applicant complains the arbitrator failed to assess the credibility of Qinisile's and Machesa's testimony. Further, Machesa argues that Makhetha's version that Qinisile was told to pay R 3,000 at the time of the transaction and not the R 30,000 mentioned by Qinisile herself showed that the employer's version was not coherent and the arbitrator failed to deal with this in her assessment of the evidence. Lastly, the arbitrator failed to acknowledge that even Makhetha acknowledged there was a practice of 'transferring' a PTO between family members which accorded with Machesa's testimony.

[17] In respect of the arbitrator's finding that the arbitration hearing cured any procedural prejudice suffered by the Applicant arising from not receiving the notice of the enquiry, the applicant rightly contends this was a misdirection by the arbitrator, who had to evaluate if the employer had acted fairly, irrespective of subsequent proceedings. In addition, it was argued that the arbitrator wrongly construed that an *in limine* ruling by a previous arbitrator had dispensed with issue of whether the long delay in instituting disciplinary action after nearly three years was procedurally unfair.

Substantive fairness

[18] While credibility findings can be decisive considerations in certain instances, they should not be first resort for any adjudicator and must only be considered in the broader context of assessing probabilities[1]. The following citation in the judgment in *Solidarity on behalf of Van Zyl v Kpmg Services (Pty) Ltd & others* (2014) 35 *ILJ* 1656 (LC) is instructive on the relationship between the overall probabilities and credibility findings:

> "[14] In my view, the correct approach to assessing credibility findings at the stage of review applications, is as set out by Redding AJ in the unreported decision of *Transnet Ltd v Gouws & others*:[2]
>
> '[11] The proper approach of a court (or arbitrator) which is called upon to determine which of two mutually destructive versions should be accepted was related in the judgment of *Stellenbosch Farmers' Winery Group Ltd & other v Martell et Cie & others* 2003 (1) SA 11 (SCA) at 14J-15E….
>
> [12] That judgment emphasises the interrelationship of credibility of the witnesses, their reliability and the probabilities. However, it is to be borne in mind that the ultimate decision which a court, or an arbitrator (as the case may be) must determine is whether on the issue in question the party which bears the onus has discharged it. In cases concerning the fairness of dismissals under the LRA, the party which bears the onus of justifying the dismissal is the employer. *The question which the arbitrator must ask in discharging its duties as such is where the probabilities lie*. If the probabilities favour the employer, it may well discharge the onus of proving the dismissal was fair. If they do not, the employer may fail.

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[1] *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) at 589, para [5] [also reported at [2004] 2 All SA 23 (SCA)]

[2] Unreported, Labour Court (JR 206/09), 25 April 2012.

[13] *The importance of credibility has sometimes been over-estimated. An assessment of evidence on the basis of credibility only, without regard for the underlying probabilities, is inappropriate — indeed, it constitutes a misdirection*. (See *Medscheme Holdings (Pty) Ltd v Bhamjee* 2005 (5) SA 339 (SCA) at 345A.)

[14] The proper approach was expressed by Eksteen J in *National Employers General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440D-H, which is to the following effect:

> "It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged with adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether the evidence is true or not, the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes

him and is satisfied that his evidence is true and that the defendant's version is false." ...

[18] ….

[19] As I have indicated above, the important question which had to be tackled by the arbitrator was whether the employer, on a preponderance of probability, had established that the first respondent had received cash bribes from Nu-Liner. The key question for him was which version was more probable. He was able to reach a decision on the probabilities without having to have regard to the credibility of each witness . It is quite possible for evidence to be assessed purely on its probability, assuming for the purposes of that assessment that the witnesses who testified were credible. It is not necessary for a judicial officer or arbitrator to find a witness not to be credible in order to find that his evidence is not probable. In this regard, there is an informative and authoritative article by the former judge of the Appellate Division, H C Nicholas "Credibility of Witnesses" (1985) 102 SALJ 32.

[20] In my view, *the failure by the arbitrator to make a pertinent finding on credibility does not demonstrate that he failed to understand the proper approach to the assessment of conflicting evidence. The arbitrator appears clearly to me to have understood that his primary task was to resolve the conflicting versions by having regard to the balance of probability*. He applied the correct judicial technique in this regard. Accordingly, his failure to address the credibility of each witness and comment thereon is not a fatal flaw which would entitle the applicant to review of his award.'"

(original footnotes omitted – original emphasis replaced with new emphasis)

[19] In this case, Makhetha's evidence of what transpired between Machesa, Siyane and Qinisile was of minimal or no relevance as she was not present when the critical interactions occurred. Qinisile's direct knowledge of what transpired inevitably must bear far more weight when weighed up against Machesa's version. Qinisile indisputably paid R30,000 to an agent for a transaction which in truth would have resulted in nothing more than the cancellation of Siyane's permit and the issuing of a new one to Qinisile. The likelihood that she would have sought some independent reassurance that the transaction carried some official sanction is high. Machesa as the public face responsible for handling permits could provide a semblance of that, and the agent specifically brought Qinisile to Machesa for that purpose. Unless Qinisile had come to Machesa's office there was no reason for her to have known of Machesa. The only version of Machesa which admitted of an encounter with Qinisile and Siyane was her version that they had told her they were sisters. Yet that is completely at odds with the undisputed evidence that the site was advertised for sale and that Qinisile paid a significant sum for it, and that they did not know each other before the transaction. Machesa's version cannot explain the sale advertisement or the payment of money. The incidental details of Qinisile's version about Tanki being recognised by Machesa, which she took to indicate there was some kind of relationship between the agent and Machesa were plausible and it was never suggested they were part of an elaborate fabrication by her. In my view this case is a good illustration of a situation where the inherent probabilities clearly favoured Qinisile's version, leaving aside the fact that Machesa vacillated between denying such a meeting took place at all and offering another explanation based on a recollection that Qinisile and Siyane presented themselves as siblings, and that it was never put to Qinisile that she had been asked to sign an affidavit to support a transfer of the permit to her 'sister'.

[20] In the circumstances, it was perfectly reasonable for the arbitrator to conclude that Machesa played an instrumental role in misleading Qinisile to believe that she was obtaining real ownership of the site.

Procedural fairness

[21] Previously another arbitrator had dismissed the same argument raised by Machesa to the effect that the employer's failure to act timeously in taking disciplinary action had actually deprived the bargaining council of jurisdiction.

[22] The respondent argues that the question of the delay in the proceedings was not an issue placed before the arbitrator to decide, but it clearly was raised before the arbitrator at the start of proceedings as an *in limine* issue and she rightly indicated that she considered this a matter of procedural fairness. On the other hand, it is true that no evidence was led in the course of the proceedings about the extent to which Machesa had suffered any prejudice as a result of the delay. For example, there was no evidence that she could no longer recollect details because of the passage of time. If anyone's evidence appeared to have suffered as a result of the long delay it was Makhetha.

[23] While the arbitrator was plainly wrong in deciding that the arbitration hearing cured any procedural unfairness that might have occurred, she failed to consider that Machesa had an appeal hearing. It seems Machesa failed to submit a statement as required for that proceeding. In any event, she had a second opportunity to defend herself before the employer, so even though the arbitrator's finding was flawed because she considered the arbitration hearing instead of the appeal hearing, had she considered the appeal process instead, as she ought to have, she would have arrived at the same outcome. In the result there is no reason to believe the finding on procedural unfairness would have been different.

Order

[1] The review application is dismissed.

[2] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

Appearances/Representatives

For the Applicant:	T du Preez instructed by Kramer Weihmann Inc Attorneys
For the First Respondent:	Z Ngwenya instructed by Phatsoane Henney Attorneys.