REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR2259/11

In the matter between:

SHOPRITE CHECKERS (PTY) LIMITED **Applicant**

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **First Respondent**

LERATO SIKWANE N.O. **Second Respondent**

RETAIL AND ALLIED WORKERS UNION **Third Respondent**

LIZZY MOFOMME **Fourth Respondent**

Heard: **31 May 2013**

Delivered: **13 February 2014**

Summary: **Review application: application of the *Sidumo* test; relevant issues in relation to hearsay evidence and its admissibility**

JUDGMENT

GAIBIE, AJ

Introduction

[1] This is a case in which an employee was found guilty of misconduct and in relation to which the employer had almost in its entirety secured her conviction on the basis of hearsay evidence. This judgment therefore traverses the admissibility of hearsay evidence in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988 ("The Hearsay Act")

Background

[2] Lizzy Mofomme, the fourth respondent ("Mofomme") was employed by the applicant as a receiving clerk at the time of her dismissal on 31 March 2011. In this position, she was responsible for receiving goods on behalf of the applicant. Thereafter, Lerato Aphane ("Aphane") a double checker was responsible for double checking the goods received by Mofomme. Unlike Mofomme, Aphane was employed by International Business Intelligence ("IBI"), an external security company who rendered services to the applicant.

[3] On 8 February 2011, Joey Molefe ("Molefe"), a security officer employed by IBI, informed Mr Johannes Mynhardt ("Mynhardt"), the area manager for IBI that he saw Aphane taking money from a supplier of the applicant. The following exchange between the Commissioner and Mynhardt captures the thrust of his evidence.

> 'Mynhardt: On the 8th of February when one my employees called me Joel Molefe he was the LCM the Loss Control Manager working in that shop
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> .....
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> Mynhardt: Okay, he informed me that day that he noticed the double checker working for us.
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> ……
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> Mynhardt: Lerato Aphane
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> ……

Mynhardt: And the receiving clerk Lizzy Mofomme on the sales floor of the shop.

Commissioner: On the what?

Mynhardt: On the sales floor of the shop, because they are normally working at the back at receiving so he saw them on the sales floor.

Commissioner: Sales floor?

Mynhardt: Sales floor of Shoprite Queenswood. Okay, he also noticed the employee supplier of Clarabelle's also on the sales floor and he saw the double checker Lerato taking money from the supplier.

Commissioner: Taking money from Clarabelle?

Mynhardt: The supplier of Clarabelle.

Commissioner: Yes[1]

[4] Under cross-examination, Mynhardt's evidence in regard to this matter was amplified. The following exchange is informative:

'Respondent representative: Did maybe Joel testify that maybe she - he saw the supplier giving the money to Lizzy or to Lerato, the two of them who was receiving the money from the supplier?

Mynhardt: Lerato was receiving the money.

Respondent representative: So how did Lizzy benefit on that?

Mynhardt: How did who benefit?

Respondent representative: How Lizzy benefit on that money that Lerato was receiving?

Mynhardt: How did Lizzy benefit?

[1] Pages 224 to 225 of the record.

Respondent representative: Ja.

Mynjardt: I can't answer I don't how did she benefit.

Respondent representative: Is it? But when you look at the charge, I know you didn't write the charge sheet, am I right?

Mynhardt: Ja.

Respondent representative: It is saying that she benefited on participating on that thing, so what proof did you get besides Joel that she was benefitting?

Mynhardt: That she was benefitting?

Respondent representative: Ya. Lizzy?

Mynhardt: No, I have got no proof."[2]

[5] Upon receipt of the information from Molefe, IBI undertook an investigation and although Aphane was initially unwilling to co-operate, she later made two statements to IBI. She also confirmed the information recorded in the statements ('the affidavits') on video and apparently undertook a polygraph test.

[6] In consequence of the information received from Aphane, Mofomme was issued with a notice to attend a disciplinary hearing in respect of the following charges of misconduct:

> 'Serious misconduct in that on but not limited to 27/07/2010, 15/11/2010, 17/11/2010 and 25/11/2010 –
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> 1) You did not follow company receiving procedures by short receiving stock leading to a financial loss to the company; and/or
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> 2) You financially benefited by participating in contact that lead to financial/potential financial loss to the company; and/or

[2] Pages 233 to 234 of the record.

3) You did not report contact of supplier and/or service provider that lead to a financial/potential financial loss to the company'.[3]

[7] Pursuant to the disciplinary hearing, the chairperson found Lizzy guilty of the charges of misconduct and she was summarily dismissed on 30 March 2011.

[8] It appears that the only witness who gave evidence on behalf of the applicant in the disciplinary proceedings was Mynhardt. Through his evidence, the applicant relied on the statements made by Aphane for the purposes of securing a conviction of guilt against Mofomme.

[9] Much the same evidence was led during the arbitration proceedings, and neither Molefe nor Aphane were called as witnesses on behalf of the applicant. No explanation was tendered as to why Molefe was not called to give evidence, and insofar as any explanation was tendered in relation to Aphane, it was sparse and lacked cogency. It was Mynhardt who contended that Aphane was simply reluctant to get involved in the arbitration proceedings, but he stopped short of indicating whether any steps were taken to secure her presence at the arbitration proceedings either by way of subpoena or any other alternative means.

[10] In her first affidavit, signed on 8 February 2011 at 16h30, Aphane contends that she was in collusion with Mofomme in a scheme that was aimed at receiving deliveries for the applicant less than what had been ordered, that arrangements were made with the driver's assistant of various suppliers including Sunbake, Blue Ribbon and Clarabelle, to retain some of the stock, to sell such stock and to share the proceeds of such sales between her, Mofomme and the relevant driver's assistant of the suppliers. She also indicated in some detail the manner in which the deals were done and the process that was involved in extracting a financial benefit for each of them from the scheme. According to Aphane, and in contradiction with the evidence of Mynhardt, once the stock was sold, the truck driver and his assistant would return to the applicant's premises and hand a certain percentage of the money made from the sale of such stock to Mofomme. According to her,

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[3] Page 112 of the record.

Mofomme was the one who shared the takings for the day with her. The nature of the benefit and the extent of the theft was described by Aphane as follows:

> 'We stole stock approximately twice per month from each supplier, and on average approximately sixty (60) loaves of bread, and approximately thirty (30) 2 liter, ten (10) 1 liter, and one hundred (100) I liter sachets of milk on each occasion. I received between R40.00 and R70.00 (depending on the amount stolen) as my share. The driver's assistants with whom the deals were done are THAMI (Sunbake), MOSS (Blue Ribbon) and NATHI (Clarabelle).'[4]

[11] It is apparent from her affidavit that Aphane had no direct knowledge of the nature or the extent of the involvement of another employee, Lucky Mahlangu ("Mahlangu"), the Trio Data Loss Control Manager, in the scheme. However she makes the following assertion, in her affidavit, in relation to the relationship between Mofomme and Mahlangu:

> 'I also noticed that Lizzy and Lucky seemed to be very involved with the driver's assistants of TFD who delivers the Canderel, and RTT who delivers the Vital products. These are high risk items which are only checked by the Shoprite Receiving Clerk (LIZZY) and the Loss Control Manager (LUCKY), and as such I in my position as a double checker never checked these items. It is possible that LIZZY and LUCKY had deals with them of which I was excluded from sharing in.[5]"

[12] It is evident from this affidavit that Aphane, to the extent that she had information relating to this scheme, she was incredibly vague about Mofomme and Mahlangu's involvement in the scheme in relation to the high risk items and it was unclear on what basis the applicant's investigation into this matter included attempts to obtain the co-operation and further information from the driver's assistants named as Thami, Moss and Nathi.

[13] Two days later on 10 February 2011 at 11h45, Aphane signed a second affidavit. In this affidavit she dealt with two issues:

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4 Page 115 of the record.
5 Page 115 of the record.

13.1. First, she attempted to create the impression that the scheme was one in which she, Mofomme and Mahlangu were involved in the form of a tripartite arrangement. In the first affidavit this assertion was visibly lacking.

13.2. Secondly, she dealt with the process of how Mofomme recorded the receipt of stock on behalf of the applicant, in the context of the scheme.

[14] In the first affidavit, Aphane indicated that Mofomme would either record on the relevant invoice that all the quantities of goods delivered was received[6] or alternatively Mofomme would indicate a shortage on the delivery note by encircling the particular product and indicating how many items were short, and she would thereafter institute a claim, but that the real shortage would be much more than the indicated amount.[7] In the second affidavit, she provided a somewhat different version of how Mofomme used the alternative process for indicating any shortages. She explained that Mofomme would sometimes indicate on the relevant invoice that there was a shortage in the products delivered by writing the word "short" next to the item but that no quantities would be indicated by her.

[15] However, given that Aphane effectively played the role of a double checker of the goods received, she explained (in the second affidavit), that once Mofomme exited the cage after checking the stock, she informed Aphane what quantities she needed to record on the invoice for the purposes of the scheme. According to her, a claim would then be raised for half of the recorded missing stock and the actual stock left behind in the truck would be sold by the crew and the monies received in respect thereof would be shared by the four of them (Mofomme, Mahlangu and Aphane and the driver's assistants) who were involved in the deal. For whatever it is worth, there is clearly a different version in the second affidavit about the manner in which the scheme operated and the details of those who were involved therein.

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6 See para 3 page 114 of the record.
7 See para 3 page 115 of the record.

[16] Nevertheless, and predictably so, Mofomme in the arbitration proceedings denied any involvement in the scheme. Prior to the arbitration proceedings and in the process of investigating the matter, Mahlangu also signed an affidavit in which he denied any involvement in the scheme or in any criminal activities at the applicant.[8]

The Commissioner's findings

[17] In the context of the evidence led at the arbitration proceedings, the Commissioner made the following findings:

17.1. That the evidence led on behalf of the applicant constituted hearsay evidence;

17.2. That there was no evidence as to why Molefe was not called as a witness, and no reasonable explanation was given as to why steps were not taken to secure Aphane's evidence at the arbitration proceedings. In this regard the Commissioner stated the following:

> 'There is no evidence before me as to why Joey Molefe was not called as a witness in this matter. Lerato Aphane had the courage to adduce a written affidavit on two occasions, she was bold enough to can be captured in a video adducing her confession despite having been informed about the consequences of implicating herself. There is no evidence that she was threatened with harm should she avail herself for the arbitration. The evidence of both Johannes Mynhardt and Thomas Louw is against the above backdrop rejected. The applicant cannot be found guilty on the basis of the video recording of Lerato Aphane's confession. If that can be the case, it would mean that the applicant was found guilty on the evidence she could not challenge. There is no way in which a video recording can be cross-examined by the opposing party'.[9]

17.3. That in light of Mofomme's contention regarding the authenticity of the documents submitted by the applicant in order to demonstrate

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8 Page 117 of the record.
9 Para 31 of the award at page 97 of the record.

that she had not complied with the receiving procedures, the applicant did not prove their authenticity, the originals were not handed up and only uncertified photocopies thereof were produced;

17.4. That there was no direct evidence against Mofomme that she had committed the misconduct which led to her dismissal and in the circumstances her dismissal was substantively unfair;

17.5. That Mofomme could not be found guilty on the basis of Aphane's affidavits because that would mean that she would be found guilty on the evidence that she could not challenge.[10]

Grounds of Review

[18] It appears from the applicant's founding affidavit that the grounds of review are formulated in terms of the *"process related review test"* developed by the Labour Court in various decisions including that of the Labour Appeal Court in *Herholdt v Nedbank.*[11] In terms thereof, the applicant submits that the arbitrator failed to cumulatively consider and place relevance on the following factors:

18.1. The commissioner ignored the company's evidence in which it presented a document entitled *"company rules"* which clearly states that breach of company policy and procedure will result in disciplinary action and possible dismissal. In that regard the commissioner ignored the fact that the applicant produced invoices signed and stamped but not ticked by Mofomme, in direct breach of the receiving procedure;[12]

18.2. That although the arbitrator detailed the provisions of the Hearsay Act, he failed to place any probative value on the evidence led by the applicant's witnesses;[13]

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[10] Pages 96 to 97 of the record.
[11] [2012] 9 BLLR 857 (LAC).
[12] Para 37.1.1 of the founding affidavit and page 18 of the pleadings bundle.
[13] Para 37.1.2 of the founding affidavit and page 18 of the pleadings bundle.

18.3. The commissioner failed to consider why Aphane would not have been truthful about the confessions that she made;[14]

18.4. The commissioner did not consider and place any relevance on the prejudice that was suffered by the applicant in such matters and that misconduct of this nature could lead to serious repercussions to the applicant both financially and professionally.[15]

The Review Test

[19] As is common knowledge now, the Supreme Court of Appeal (SCA), has set aside the 'process related review test' articulated by the LAC. In its decision, the SCA in *Herholdt v Nedbank*[16] stated the test in the following terms:

> 'That test (the test in Sidumo) involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator (a more stringent test than asking whether the decision is one that the arbitrator could reasonably reach). On this approach the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether the result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision-maker could reach in the light of the issues and the evidence.'

The Hearsay Act

[20] This brings me to what I regard as the crux of the issue in this matter, it turns on the admissibility of the hearsay evidence in the form of the affidavits attested to by Aphane, and her confirmation thereof in a recorded video. In this regard, section 3(1) of the Hearsay Act provides as follows:

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[14] Para 37.1.3 of the founding affidavit and page 18 of the pleadings bundle.
[15] Para 37.1.4 of the founding affidavit and page 18 of the pleadings bundle.
[16] 2013 (6) SA 224 (SCA), at para 12.

> (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –
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> (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings; or
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> (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
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> (c) the court, having regard to –
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> (i) the nature of the proceedings;
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> (ii) the nature of the evidence;
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> (iii) the purpose for which the evidence is tendered;
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> (iv) the probative value of the evidence;
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> (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
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> (vi) any prejudice to a party which the admission of such evidence might entail;
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> (vii) any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

[21] Sub-sections 1(a) and 1(b) of section 3 clearly have no bearing on the issues in this matter. This then heralds the determination of the central issue: whether the Commissioner should have, in the circumstances of this matter, accepted the affidavits submitted to by Aphane as the total sum of the evidence against Mofomme and should have in that process considered that the applicant had discharged its *onus* in terms of section 192 of the Labour Relations Act 66 of 1995 ("the LRA"). In at least two reported judgments,[17] the Labour Appeal Court ("LAC") has accepted that section 3 of the Hearsay Act should be applied in determining whether to admit hearsay evidence in

[17] *Southern Sun Hotels (PTY) Ltd v SACCAWU* 2000 21 ILJ 1315 (LAC); and *Edcon Ltd v Pillermer NO* 2008 29 ILJ 614 (LAC).

statutory arbitration proceedings. In terms of the common law, hearsay evidence was inadmissible. However, the Hearsay Act allows a more nuanced approach to the admission of hearsay evidence.[18]

[22] In *Makhathini v Road Accident Fund,*[19] the Supreme Court of Appeal ("the SCA") stated that in the application of the Hearsay Act in the context of a civil case, the Act requires the Court to take a contextual approach. The SCA indicated that the statutory pre-conditions for the reception of hearsay evidence are now designed to ensure that the evidence is received only if the interest of justice justifies its reception. In determining whether it is in the interest of justice to admit hearsay evidence, the Court must:

> 'Have regard to every factor that should be taken into account, more specifically, to have regard to the factors mentioned in section 3(1)(c). Only if, having regard to all these factors cumulatively, it would be in the interest of justice to admit the hearsay evidence, should it be admitted'.*[20]*

[23] Whether statements or affidavits of this kind should be admitted at all and, if so, what weight should be given to them must depend on the outcome of the application of the statutory test to the facts.

[24] I turn now to consider the application of section 3(1)(c) to the facts of the present case. As appears from sub-section 3(1)(c)(i), that sub-section requires a consideration of the nature of the proceedings. Even though section 3(1) of the Act makes it clear that it applies to both criminal and civil proceedings, sub-section (i) requires a consideration of the nature of the proceedings, for instance whether they are civil, criminal, trial or motion proceedings. Given that arbitration proceedings are in essence in the form of a civil trial, the commissioner may consider the absence of the testing power of cross-examination which will always be a factor when hearsay evidence is a contentious issue, but the commissioner may nevertheless admit such evidence if the party against whom it is sought to be admitted can counter the effect of such evidence by other means. However, in light of the fact that

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[18] *S v Molimi* 2008 (3) SA 608 (CC).
[19] 2002 (1) SA 511 (SCA).
[20] *S v Shaik and Others* 2007 (1) SA 240 (SCA) at para 170.

section 192 requires that the *onus* of proving that a dismissal is substantively and procedurally fair is on the applicant, the introduction and reliance solely on hearsay evidence must be assessed squarely. Issues such as: whether the applicant was able to explain and provide a reasonable justification for the absence of such witness is relevant; and whether the applicant provided any corroborating evidence on which the hearsay evidence was premised is yet another issue. So for instance the lack of any explanation as to whether any attempts were made to secure the evidence of the drivers' assistants named by Aphane (Thami, Moss and Nathi) and those drivers' assistants who were un-named must impact on whether the applicant was able to obtain other evidence in support of its case against Mofomme.

[25] Section 31(1)(c)(ii) requires that the nature of the hearsay evidence be considered. In *Makhathini*, the SCA referred with approval to the academic writing of Schmidt & Rademeyer in Bewysreg who suggested that this requirement relates mainly to the reliability of the evidence sought to be introduced. But as indicated by the SCA, reliability is perhaps more pertinent to the enquiry in terms of section 3(1)(c)(iv) which in any event must be considered as an interrelated factor to all the other factors indicated in this sub-section. In the SCA's view, what is required by section 3(1)(c)(ii) is a characterisation of the evidence sought to be introduced.

[26] In this case, the hearsay evidence is the sum total of the evidence produced in the form of two affidavits attested to by Aphane against Mofomme, and to a lesser extent against Mahlangu. It was common cause between the parties that Mahlangu had, in terms of an affidavit attested to by him, denied any involvement in the scheme referred to by Aphane. In any event, as indicated earlier in this judgment, Aphane's evidence in relation to two matters at least, was contradictory. That was in relation to the precise role of Mahlangu in the 'tripartite scheme', and secondly in relation to the process developed by Mofomme for the purposes of such a scheme. Perhaps more fundamentally however, we have been reminded by the Constitutional Court in *S v Molimi*,[21] that when addressing the safeguards that must be adhered to when receiving

[21] 2008 (3) SA 608 (CC).

hearsay evidence under the Act, courts must be careful to ensure respect for the fair trial rights in section 35(3) of the Constitution. Quoting the decision of the Supreme Court of Appeal in Sv *Ndhlovu and Others*,[22] it said-

> 'First, a presiding judicial officer is generally under a duty to prevent a witness heedlessly giving vent to hearsay evidence. More specifically under the Act, 'it is the duty of a trial judge to keep inadmissible evidence out and not listen passively as the record is turned into a papery sump of evidence'.

[27] In light of Mahlangu's denial of his involvement in the tripartite scheme, it was in my view incumbent on the applicant to ensure that some other corroborating evidence was produced by it in support of the contents of the affidavit attested to by Aphane. For instance, the corroborating evidence of the three drivers' assistants (Thami, Moss and Nathi), could have been led. In addition, the evidence of Molefe could also have been led, and the precise details of what was observed by him was extremely important, and finally efforts to ensure Aphane's attendance at the arbitration proceedings should have been undertaken with vigour.

[28] Section 3(1)(c)(iii) requires scrutiny of the purpose for which the evidence is tendered. This requires, amongst other things, a consideration as to whether the hearsay evidence was being introduced to prove the culpability of Mofomme, or whether a different or less important role was intended for such evidence. The applicant's main purpose for the introduction of such evidence was a central and a decisive one, that is, to prove that Mofomme was guilty of the charges that had been proffered against her and to secure her dismissal. As such, the hearsay evidence played a central and pivotal role in her conviction. Relying again on the academic writings of Schmidt & Rademeyer in Bewysreg, the SCA indicated that *"where the evidence sought to be admitted bears on the central issue in the case a Court should be slow to admit it".* In that regard, the SCA also referred to the decision of *S v Ramavhale*[23] a criminal case that establishes the following principle:

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[22] 2002 (6) SA 305 (SCA) at para 17.
[23] 1996 (1) SACR 639 (a).

> 'I do not wish to enter into the debate whether section 3(1)(c) should or should not be lightly applied, but I would agree with the remarks in this and other cases, the effect of which is that a judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or significant part in convicting an accused, unless there are compelling justifications for doing so'[24].

[29] Section 3(1)(c)(iv) requires that the probative value of the evidence be considered. Evidence sought to be introduced in terms of this sub-section may be such that its probative value, even at first blush, is minimal and in those circumstances the enquiry will end there. The sum total of Aphane's evidence as it appears in the two affidavits is that she was involved in the scheme that was designed and implemented by Mofomme and participated in by both her and Mahlangu. The applicant's difficulty is that both Mahlangu and Mofomme deny any such knowledge or participation in the scheme. According to the affidavits, Aphane does not clearly indicate the precise involvement of Mahlangu and insofar as she alleges that it was Mofomme who received the monies from the sale of the stolen goods, that evidence is disputed by the affidavit submitted on behalf of Molefe and the evidence given by Mynhardt.

[30] In the circumstances, the probative value of the affidavits is quite clearly ridden with contradictions and is minimal in value. One may speculate as to why Aphane signed two affidavits, and why she recorded her evidence on video but was yet unwilling to provide her evidence in the arbitration proceedings. There were clearly contradictions in her affidavits and there were clearly gaps in the information that she provided. In the context of this case, the probabilities of her version are not established and the applicant clearly cannot contend, on the basis of those affidavits, that its *onus* had been discharged. Regard being had to these factors, one is led to the conclusion that Aphane's affidavits lack probative value.

[31] Section 3(1)(c)(v) of the Act requires that a Court enquire into the reasons why the evidence is not given by the person whose credibility the probative value of such evidence depends. As recorded earlier in this judgment, no

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[24] At 649 (c) to (d) of that judgment.

explanation was given as to why Molefe was not called as a witness, and no reasonable justification was given for the failure of the applicant to produce Aphane as a witness. To the extent that the applicant was able to corroborate the information supplied by Aphane, it did not seek such corroboration from the drivers' assistants who were implicated by Aphane in her affidavits. In my view, the arbitrator raised a legitimate point of criticism against the applicant that it had not provided a reasonable explanation as to why the witnesses who could have given evidence and upon whose credibility the probative value of such evidence depends were not made available for the purposes of the arbitration proceedings.

[32] Section 3(1)(c)(vi) requires a consideration of prejudice to the party against whom the evidence is sought to be adduced. The evidence in this matter, if accepted, would have overwhelmingly placed Mofomme at an incredible disadvantage in circumstances were she was simply unable to test by cross-examination the information provided by Aphane in the affidavits. This was obviously prejudicial and in the absence of any other evidence to corroborate the information provided by Aphane, a conviction against Mofomme was achieved without due regard to her rights to a fair trial as indicated by the Constitutional Court in *Molimi*. It is the degree of the prejudice that must in each case be taken into account to determine whether an injustice will be done to a party against whom it is sought to be adduced and that is a matter of fact to be determined in the circumstances of each case.[25] In my view, the prejudice is heavily weighted against Mofomme, and in the absence of any other evidence to corroborate Aphane's evidence it must be discounted and be rendered inadmissible.

[33] Finally, in terms of section 3(1)(c)(vii) of the Act, the Court is required to take into account any other factor, which must refer to any relevant factor not yet covered by any of the preceding categories. In that regard the applicant did not produce any further information which can be had in order to determine this matter.

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[25] Page 524 of *Makhatini.*

[34] When all of the factors enjoined are weighed or taken together, I am of the view that it is in the interest of justice not to admit the hearsay evidence produced by the applicant in this matter and on which it secured a conviction of guilt and subsequently dismissed Mofomme. The deficiencies in the affidavits, together with a lack of corroborating evidence, and the denials by both Mahlangu and Mofomme all have a bearing on this issue. In the circumstances, I have come to the conclusion, in applying the *Sidumo* test, that the decision of the arbitrator in this matter was a decision of a reasonable decision-maker. In the circumstances and for all of the above reasons, the review application must fail.

[35] I accordingly make the following order:

(a) The review application is dismissed with costs.

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Gaibie AJ

Acting Judge of the Labour Court

APPEARANCES

FOR THE APPLICANT:	Mr B Masuku from Mervyn Tabac Incorporated
FOR THE THIRD AND FOURTH RESPONDENTS:	Mr W Khosa from the Retail & Allied Workers Union