CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 204/22

In the matter between

RAND REFINERY (PTY) LIMITED	Applicant
And	
MATOME VICTOR SEHUNANE N.O.	First Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Second Respondent
NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA	Third Respondent
WANDA MASEKO	Fourth Respondent

Neutral citation:	*Rand Refinery Limited v Sehunane N.O. and Others* [2023] ZACC 28
Coram:	Zondo CJ, Maya DCJ, Kollapen J, Madlanga J, Majiedt J, Mathopo J, Rogers J, Theron J and Van Zyl AJ
Judgment:	Rogers J (unanimous)
Decided on:	21 August 2023
Summary:	Section 34 of the Bill of Rights — Labour Court deciding case without reference to answering affidavit — fundamental right of access to courts infringed Labour Relations Act 66 of 1995 – review in terms of section 145(2)(b) – improper obtaining of award — to be proved on balance of probability

ORDER

On appeal from the Labour Court, Johannesburg:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The Labour Court's order dated 19 November 2021 is set aside.
4. The review and rule 11 applications, brought by the present third and fourth respondents in the Labour Court, are remitted for hearing by the Labour Court.
5. The parties must bear their own costs of the hearing in the Labour Court on 14 October 2021 and of the applications for leave to appeal in the Labour Court, the Labour Appeal Court and this Court.

JUDGMENT

ROGERS J (Zondo CJ, Maya DCJ, Kollapen J, Madlanga J, Majiedt J, Mathopo J, Theron J and Van Zyl AJ concurring):

Introduction

[1] This application, which the Court is deciding on the basis of written submissions without an oral hearing, is for leave to appeal a judgment of the Labour Court, Johannesburg (Nkutha-Nkontwana J). In that judgment the Labour Court set aside an arbitration award in favour of the present applicant, Rand Refinery (Pty) Ltd (Rand Refinery), on the basis that the award had been improperly obtained as contemplated in

section 145(2)(b) of the Labour Relations Act (Act).[1] The Labour Court and Labour Appeal Court refused leave to appeal.

[2] The fourth respondent, Mr Wanda Maseko, was employed by Rand Refinery in its barcasting department. During 2017, he and a number of other employees faced disciplinary charges arising from the theft of gold bars. Mr Maseko's disciplinary hearing was held in May 2017. He was dismissed. He referred an unfair dismissal dispute to the second respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA). At the ensuing arbitration before the first respondent, Mr Matome Victor Sehunane, one of Rand Refinery's witnesses was Mr Phumudzo Sydney Mulafhi, at that time employed by the company as Manager: Security Investigations. The arbitrator found that Mr Maseko's dismissal was fair and dismissed his unfair dismissal claim.

Litigation history

[3] In March 2018, Mr Maseko and his trade union, the National Union of Metalworkers of South Africa (NUMSA), which is the third respondent, launched an application in the Labour Court to have the award reviewed and set aside. In what follows, my references to Mr Maseko include NUMSA unless the context indicates otherwise. Relying on section 145(2)(a) of the Act,[2] Mr Maseko alleged that the arbitrator had committed a gross irregularity by accepting hearsay evidence and making

[1] 66 of 1995. Section 145(1) provides that any party to a dispute, who alleges a "defect" in any arbitration proceedings under the auspices of the CCMA, may apply to the Labour Court for an order setting aside the arbitration award. Section 145(2) reads:

> "A defect referred to in subsection (1), means—
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> (a) that the commissioner—
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> (i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
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> (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."

[2] See n 1 above.

a decision which no reasonable decision-maker could have made. Rand Refinery opposed the application. It was eventually enrolled for hearing on 14 October 2021.

[4] On 21 September 2021, some three weeks before the scheduled hearing, Mr Maseko delivered an application in terms of rule 11 of the Rules of the Labour Court[3] in which he sought leave to supplement his case by adding, as a ground of review, that the award had been improperly obtained as contemplated in section 145(2)(b) and by adducing new evidence. This new evidence took the form of the founding, answering, replying and supplementary answering affidavits in litigation between Rand Refinery and Mr Mulafhi in the High Court, Limpopo Division, Polokwane (High Court).

[5] The background to the High Court litigation is this. In March 2019, Rand Refinery dismissed Mr Mulafhi on grounds of incapacity after he failed several routine polygraph tests. Mr Mulafhi referred an unfair dismissal dispute to the CCMA which led to a settlement agreement in May 2019. In terms of this agreement, Mr Mulafhi was to cooperate with Rand Refinery in all pending security matters and to return all documents on investigations and disciplinary cases.

[6] According to Rand Refinery, in May 2020 Mr Mulafhi began a smear campaign against the company, its attorneys and its labour law consultants. In September 2020, Rand Refinery launched an interdict application in the High Court to put a stop to this. An interim order was granted and extended from time to time. In October 2020, Mr Mulafhi – at that time unrepresented – filed an opposing affidavit, to which Rand Refinery replied. In his opposing affidavit, Mr Mulafhi alleged improprieties by Rand Refinery and its advisers in connection with disciplinary hearings.

[7] In August 2021, Mr Mulafhi consulted attorneys for the first time on the High Court litigation. These attorneys were also Mr Maseko's attorneys in the review case. They came on record for Mr Mulafhi, and towards the end of August 2021 Mr Mulafhi

[3] Rule 11 makes provision for the bringing of various types of applications on notice, supported by an affidavit. These include interlocutory applications and other applications incidental to, or pending, proceedings referred to in the Rules.

delivered an application in the High Court for leave to file a supplementary affidavit. The supplementary affidavit expanded on the alleged improprieties in Rand Refinery's disciplinary processes. Mr Mulafhi alleged, among other things, that he was cajoled into giving false evidence against employees, including Mr Maseko.

[8] It was against this background that Mr Maseko, on 21 September 2021, applied to introduce into the review application all the papers filed to date in the High Court litigation. It is common cause that Rand Refinery filed a notice to oppose Mr Maseko's rule 11 application. It is also common cause that on 12 October 2021 Rand Refinery's attorneys served the company's opposing papers on Mr Maseko's attorneys by email. In this affidavit, Rand Refinery opposed Mr Maseko's application to supplement his case and also responded to the allegations made in Mr Mulafhi's affidavits. I shall return, presently, to the question whether Rand Refinery's opposing affidavit was filed with the Labour Court.

The Labour Court's judgment

[9] The review application was argued virtually on 14 October 2021. On 19 November 2021, the Labour Court delivered judgment. The Labour Court granted Mr Maseko leave to amend his notice of motion and to file the further papers; reviewed and set aside the arbitration award; remitted the case to the CCMA for hearing afresh before a different commissioner; and ordered Rand Refinery to pay costs. In the course of the Court's reasoning, the Judge said that, despite having filed a notice of opposition, Rand Refinery "failed to file any answering papers". After summarising Mr Mulafhi's allegations in the High Court litigation and quoting from the Supreme Court of Appeal's judgment in *Mkhize*,[4] the Judge said that the Court could not "turn a blind eye" to the assertions of Rand Refinery's main witness, Mr Mulafhi. The Judge concluded:

> "In sum, it follows that the impugned award stands to be reviewed and set aside as it had been improperly obtained due to the *prima facie* proof that the arbitration proceedings were tainted by the perjured evidence of Mr Mulafhi. Of course, these

[4] *Mkhize v Department of Correctional Services* [2015] ZASCA 7; (2015) 36 ILJ 1447 (SCA).

> allegations must be tested. Hence this matter must be remitted to the CCMA for a hearing *de novo* before a Commissioner other than the first respondent. However, the enquiry will be limited to the issue of substantive fairness."

[10] In awarding costs against Rand Refinery, the Judge said that Rand Refinery was ill-advised in persisting with its opposition "despite the fact that it has no answer to the serious allegations contained in the supplementary affidavit". A sensible move could have been to consent to the order sought by Mr Maseko, said the Judge.

Was the opposing affidavit filed?

[11] Why did the Judge think that Rand Refinery had not filed an opposing affidavit? This Court sought submissions on that question, among others. Given that Rand Refinery filed a notice of opposition and served its opposing affidavit on Mr Maseko's attorneys two days before the hearing, it is unlikely that Rand Refinery would not have filed the opposing papers with the Labour Court. According to Rand Refinery's deponent in this Court, the opposing papers were indeed filed and were part of the paginated record. In supposed confirmation of this fact, the deponent attached an email sent by Rand Refinery's attorneys to the Judge's "associate" (that is, the Judge's law clerk) at 08h25 on the morning of the hearing. This email, sent to an @judiciary email address, read, "Kindly find attached the paginated version of the documents". The recipient acknowledged receipt a few minutes later.

[12] In response to this Court's directions for submissions, Rand Refinery's attorneys state that the answering papers were served and filed on 12 and 13 October 2021 respectively. They refer to the passage in Rand Refinery's founding affidavit in this Court where such serving and filing were alleged and to the email I mentioned in the previous paragraph. Rand Refinery's attorneys say that, since the case was argued virtually, they cannot be certain about what was in the Judge's file. The Judge, however, never indicated that she understood Mr Maseko's rule 11 application to be unopposed and "both parties proceeded to argue the matter as if it was opposed".

[13] The answering affidavit in this Court was made by a NUMSA legal administrator. The deponent admitted that the opposing papers were served on Mr Maseko's attorneys

but stated that it was "unclear" whether those papers were filed with the Labour Court. The deponent also alleged that, in argument before the Labour Court, Rand Refinery's legal representative did not draw the opposing affidavit to the Judge's attention. Whether the deponent herself witnessed the virtual hearing is not stated. Her assertion seems to be at odds with Rand Refinery's attorneys' submission that the rule 11 application was argued as if it was opposed, although neither side has elaborated on the submissions made on the rule 11 application.

[14] In their submissions, Mr Maseko's attorneys contend that the Rules of the Labour Court do not make provision for electronic service. However, the Judge does not state that she treated the application as unopposed for this reason. She seems simply to have been unaware of the opposing affidavit. Mr Maseko's submissions question the adequacy of Rand Refinery's evidence about the filing of the opposing affidavit, pointing to the fact that Rand Refinery's deponent in this Court is not a person with personal knowledge about the filing of the papers or the sending of the email to the Labour Court on the morning of the hearing.

[15] It is regrettable that Rand Refinery's affidavit in this Court did not include the index of the paginated record in the High Court which was sent to the Judge's associate shortly before the hearing and which supposedly reflected the opposing papers. Nevertheless, Rand Refinery's attorneys in their submissions state that the opposing affidavit was filed and was part of the indexed papers. That is something of which they would have personal knowledge. It is significant, in the circumstances, that in their responding submissions Mr Maseko's attorneys do not state that the opposing papers were *not* part of the indexed record. As I have said, there would have been no point in Rand Refinery preparing and serving an opposing affidavit unless it was filed with the Labour Court. As a matter of overwhelming probability, therefore, the opposing affidavit was filed, even if only electronically. Without a transcript of the oral proceedings, it is impossible to say whether the argument should have alerted the Judge to the fact that there was an opposing affidavit. However that may be, when the Judge came to write her judgment, she was unaware of or overlooked the existence of the opposing affidavit.

Application for leave to appeal to the Labour Appeal Court

[16] On 30 November 2021, Rand Refinery delivered its application in the Labour Court for leave to appeal. In paragraph 9 of the application, and with reference to the Judge's finding that Rand Refinery had not presented an answer to the rule 11 application, Rand Refinery stated:

> "This finding, with respect, is factually wrong. [Rand Refinery] did submit an answering affidavit on 12 and 13 October 2021, before the hearing of the matter. It was in fact part of the paginated pleadings. The learned Judge thus, with respect, did not afford [Rand Refinery] a fair hearing, by clearly not considering what it had to say in answer."

[17] One might have expected this ground of appeal to have elicited an enquiry by the Judge as to what Rand Refinery was talking about. Perhaps because the application for leave to appeal was decided on the papers, this did not happen. Nevertheless, and in view of Rand Refinery's clear challenge to the Judge's assumption that it had not filed opposing papers, the following paragraph from her judgment in refusing leave to appeal is unfortunate:

> "Firstly, [Rand Refinery] takes issue with the fact that I admitted [Mr Maseko's] supplementary affidavit. [Rand Refinery] seems oblivious to the fact that it did not oppose [Mr Maseko's] application for leave to file a supplementary affidavit. As such, [Mr Maseko's] evidence as contained in the supplementary affidavit is uncontroverted."

The Judge failed to address Rand Refinery's point by stating, for example, that the opposing affidavit was not to be found in the paginated pleadings.

[18] On the merits, the Judge emphasised the requirement of a fair hearing as a prerequisite for an adverse order against an individual, and continued:

> "Whether or not indeed Mr Mulafhi perjured himself is yet to be tested. That I made clear in the impugned judgment. The only way to allow this issue to be properly ventilated was to remit the matter back to the [CCMA] to be determined *de novo*. This is in line with the clear direction given by the SCA in [*Mkhize*]."

Jurisdiction

[19] Rand Refinery's application engages this Court's jurisdiction on several grounds. First, Rand Refinery's allegation that its opposing affidavit was overlooked implicates its right, guaranteed by section 34 of the Bill of Rights, to have a dispute that can be resolved by the application of law decided in a fair public hearing before a court or other independent and impartial tribunal. Disregarding one of the party's evidence violates the right to be heard, which is a core component of the section 34 guarantee.[5] Second, the exercise of review jurisdiction over the conduct of officials of a statutory body such as the CCMA is inherently a constitutional matter.[6] Third, the case concerns the interpretation and application of section 145(2)(b) of the Act, and this Court has repeatedly held that the interpretation and application of the Act are constitutional matters.[7]

Section 34 of the Bill of Rights

[20] Given my finding that Rand Refinery filed an opposing affidavit in advance of the hearing, the Labour Court's overlooking of that affidavit violated Rand Refinery's rights in terms of section 34(1) of the Bill of Rights.

[21] I must add that, even if it were so that Rand Refinery's opposing affidavit had, due to some or other oversight, not been filed with the Labour Court, the Judge was not entitled without more to set aside the arbitration award. In his rule 11 application, Mr Maseko sought leave to file a supplementary affidavit and to amend the relief claimed in the notice of motion. If the rule 11 application was, as the Judge thought, unopposed,

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[5] *De Beer N.O. v North-Central Local Council and South-Central Local Council* [2001] ZACC 9; 2002 (1) SA 429 (CC); 2001 (11) BCLR 1109 (CC) at para 11, *National Director of Public Prosecutions v Mohamed N.O.* [2003] ZACC 4; 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC) at para 36 and *Public Servants Association obo Ubogu v Head of the Department of Health, Gauteng* [2017] ZACC 45; 2018 (2) SA 365 (CC); 2018 (2) BCLR 184 (CC) at paras 62-3.

[6] *Harrielall v University of KwaZulu-Natal* [2017] ZACC 38; 2018 (1) BCLR 12 (CC) at paras 17-18 and *Competition Commission of South Africa v Group Five Construction Ltd* [2022] ZACC 36; 2023 (1) BCLR 1 (CC); [2023] 1 CPLR 1 (CC) at para 121 read with *Sidumo v Rustenburg Platinum Mines Ltd* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) at paras 89-104.

[7] *Solidarity obo Members v Barloworld Equipment Southern Africa* [2022] ZACC 15; (2022) 43 ILJ 1757 (CC); [2022] 9 BLLR 779 (CC) at para 34, *Steenkamp v Edcon Ltd* [2016] ZACC 1; 2016 (3) SA 251 (CC); 2016 (3) BCLR 311 (CC) at para 25, *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at paras 13-4.

the Judge could properly have granted the relief claimed in the rule 11 application. That would have resulted in an amendment of the notice of motion and the supplementation of Mr Maseko's founding papers in the main case. Rand Refinery was not strictly required to respond to the amended notice of motion and supplemented founding papers until the rule 11 application was granted. The Judge should at least have asked Rand Refinery's attorney whether, if the rule 11 application was granted, the company wanted time to answer the new material. That would have brought to light the fact that Rand Refinery was under the impression that its opposing affidavit was already before the Court.

[22] Furthermore, and assuming for the moment that the Judge was entitled to decide the main case simultaneously with the rule 11 application, she confined her attention to the allegations made by Mr Mulafhi in the High Court litigation, ignoring Rand Refinery's replying affidavit in the High Court. The procedure which Mr Maseko followed – simply attaching copies of affidavits made by others in High Court litigation – was not strictly correct. The attached copies were hearsay evidence in the Labour Court. If Mr Maseko wanted Mr Mulafhi's evidence in the High Court to be adduced in the Labour Court, he should have obtained a new affidavit from Mr Mulafhi. A copy of evidence given by a witness in earlier proceedings is not admissible in later proceedings merely because the witness gave the earlier evidence under oath.[8]

[23] Be that as it may, Mr Maseko chose to attach, as hearsay evidence, all the affidavits made to date in the High Court, including those filed on behalf of Rand Refinery. If the Labour Court was minded to have regard to the High Court material, it had to consider all the High Court affidavits. Mr Maseko may have wanted to rely only on Mr Mulafhi's affidavit, but the Labour Court could not pick and choose.

[8] *African Guarantee & Indemnity Co Ltd v Moni* 1916 AD 524 at 532, *Botha N.O. v Tunbridge N.O.* 1933 EDL 95 at 103-4, *Hattingh v Le Roux* 1939 EDL 217 at 219, *Fourie v Morley & Co* 1947 (2) SA 218 (N) at 222 and *Du Plessis N.O. v Oosthuizen; Du Plessis N.O. v Van Zyl* 1995 (3) SA 604 (O) at 619I-J. See also *O'Shea NO v Van Zyl N.O.* [2011] ZASCA 156; 2012 (1) SA 90 (SCA); [2012] 1 All SA 303 (SCA).

[24] It is true that, at the time the matter served before the Labour Court, Rand Refinery had not yet replied to Mr Mulafhi's supplementary answering affidavit, but it had replied to his first answering affidavit. That replying affidavit was wholly at odds with Mr Mulafhi's version. Rand Refinery's deponent said, among other things, that its labour law consultants were entirely independent; that neither the company nor its attorneys ever prescribed to chairpersons of disciplinary hearings what the outcomes should be; that in most cases its disciplinary proceedings had been found by the CCMA to be fair; that nobody ever instructed Mr Mulafhi to present false evidence; that if Mr Mulafhi was a man of conscience, as he now professed to be, he should have refused to give false evidence; and that Mr Mulafhi had previously made such allegations but demanded payment for his silence, which showed that he had no integrity or credibility.

[25] In the light of this material, the Labour Court could not, without more, treat Mr Mulafhi's evidence as uncontested. Furthermore, Rand Refinery's replying affidavit in the High Court should have alerted the Labour Court to the fact that it was most unlikely that Rand Refinery would leave Mr Maseko's rule 11 application unanswered.

Section 145(2)(b) of the Labour Relations Act

[26] This brings me to the interpretation of section 145(2)(b) of the Act. In their submissions in this Court, the parties agree that an award can only be set aside in terms of that provision if it is proved on a balance of probability that the award was improperly obtained. That is undoubtedly so. But the Labour Court seems to have approached matters differently. The Judge said that the Court could not turn a blind eye to Mr Mulafhi's assertions and that there was "prima facie proof" that the arbitration proceedings were tainted by perjured evidence. The Judge added that Mr Mulafhi's allegations still had to be tested. In refusing leave to appeal, she said that whether Mr Mulafhi had perjured himself in the CCMA arbitration had yet to be tested – that would be the purpose of the fresh hearing before a new arbitrator.

[27] The Labour Court's invocation of *Mkhize*[9] is consistent with the view that the Judge made no finding that Mr Mulafhi had, on a balance of probabilities, perjured himself in the arbitration proceedings. In *Mkhize*, a Mr Sibiya, who had given evidence against a dismissed employee in arbitration proceedings under the auspices of a bargaining council, later made an affidavit that he had given false evidence because he had a grudge against the employee. In a passage quoted by the Labour Court in the present matter, Wallis JA said:

> "It must be accepted that if Mr Sibiya is now telling the truth – and on any basis he is a self-confessed liar – and he had said to the arbitrator what is said in his affidavit, that may possibly have affected the outcome of the arbitration. The evidence is material and indicates the possibility of there having been a miscarriage of justice, although courts are with good reason reluctant to place much reliance on the evidence of a recanting witness. However, the affidavit cannot simply be accepted at face value. Its contents must be tested if it is still feasible to do so."[10]

Relying on section 22 of the now repealed Supreme Court Act,[11] the Supreme Court of Appeal considered that it was entitled to set aside the arbitrator's award and remit the matter to the arbitrator for further hearing.

[28] It is apparent, from the above passage, that the Supreme Court of Appeal did not find on a balance of probabilities that Mr Sibiya's evidence at the arbitration had been false and that the recanting version was true. That was merely a possibility and the

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[9] Above n 4.

[10] Id at para 4.

[11] 59 of 1959. See section 22 which reads:

> "The appellate division or a provincial division, or a local division having appeal jurisdiction, shall have power—
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> (a) on the hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by such division, or to remit the case to the court of first instance, or the court whose judgment is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary; and
>
> (b) to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require."

Supreme Court of Appeal considered that the best way of addressing the conflict was to allow the matter to be ventilated further in front of the arbitrator.

[29] It is unnecessary to explore whether the Supreme Court of Appeal was entitled to act as it did in *Mkhize*.[12] For present purposes, it is enough to say that, in a review based on section 145(2)(b) of the Act, the Labour Court may not set aside an award unless satisfied on a balance of probability that the award was improperly obtained. In the present case, that would entail a finding on a balance of probabilities that Mr Mulafhi gave perjured evidence in the arbitration and truthful evidence in the High Court. That is not a finding which the Labour Court made.

[30] Even if it were permissible to set aside an arbitration award merely because of the possibility that a key witness gave perjured evidence, it is far from clear that this would be the best way of ventilating the matter. In the present case, for example, the Labour Court's order might well not lead to uncovering the truth. In a *de novo* (fresh) arbitration, Rand Refinery would bear the burden of proving the fairness of the dismissal. Since Mr Mulafhi is now hostile to Rand Refinery and since his evidence could be expected to be adverse to the employer, the company might well feel unable to call him as a witness. If, without his evidence, the company could not make its case against Mr Maseko, Rand Refinery would have to abandon the arbitration. Nobody would then ever know which of Mr Mulafhi's versions was the truth. This shows why it is unjust to set aside an arbitration award in terms of section 145(2)(b) without making a factual finding on a balance of probabilities.

Conclusion

[31] For these reasons, the Labour Court's judgment must be set aside and the case remitted to the Labour Court to determine the review application in accordance with the principles stated in this judgment and with reference to all admissible evidence. From Mr Maseko's perspective, the delay in finalising his case is most unfortunate. There is

[12] It may be, however, that, in relying on section 22 of the Supreme Court Act, the Supreme Court of Appeal overlooked that the alleged irregularity had not occurred in the court from which it was hearing an appeal but in arbitration proceedings which were the subject of a review application in the Labour Court. The important question was thus what powers the Labour Court had to address the alleged irregularity.

evidence that he is unwell. However, the Labour Court's order would not necessarily have led to finality more quickly than the order this Court will make. A *de novo* arbitration could give rise to further review proceedings and subsequent appeals. This Court's order will instead require the question of perjured evidence and other alleged improprieties to be thrashed out in the Labour Court itself. Once the Labour Court has regard to all the affidavits, there may well be a need for oral evidence unless Mr Maseko is content, despite the principles governing disputes of fact in motion proceedings, to argue the review on the papers.

[32] Although I have summarised Rand Refinery's response to Mr Mulafhi's initial answering affidavit in the High Court, I do not for a moment underestimate the gravity of the allegations he has made. If his allegations are substantially true, there may be consequences beyond the civil realm. It is important that the truth be uncovered. But that is something that must happen in the Labour Court, not in a fresh arbitration. If the Labour Court finds that Mr Mulafhi's allegations are substantially true and sets the arbitration award aside, it is difficult to see how the company could persist with disciplinary proceedings against Mr Maseko.

[33] In accordance with the usual position in labour proceedings, the parties must bear their own costs in this Court. The parties should also bear their own costs in respect of the abortive proceedings before the Labour Court. The remitted review will not have to serve before the same Judge. That is a matter for the Judge President of the Labour Court to determine.

Order

[34] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The Labour Court's order dated 19 November 2021 is set aside.
4. The review and rule 11 applications, brought by the present third and fourth respondents in the Labour Court, are remitted to the Labour Court.

5. The parties must bear their own costs of the hearing in the Labour Court on 14 October 2021 and of the applications for leave to appeal in the Labour Court, the Labour Appeal Court and this Court.

For the Applicant	Snymans Attorneys
For the Third and Fourth Respondents	Cheadle Thompson and Haysom Incorporated