

SOUTH AFRICA / JUDGMENT

Mako v SA Local Government Bargaining Council and Others (JR327/21) [2024]

ZALCJHB 270 (15 July 2024)

[2024] ZALCJHB 270

COURT

Labour Court Johannesburg

BEFORE

RN Daniels

CASE / FILE NUMBER

JR156/22

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THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

no: JR156/22

In

the matter between:

KATLEGO
NICODEMUS MAKO
Applicant
and
SA
LOCAL GOVERNMENT BARGAINING COUNCIL
First Respondent
COMMISSIONER
SOLOMON MODIPA N.O.
Second Respondent
RUSTENBURG
LOCAL MUNICIPALITY
Third Respondent

Heard:

11 June 2024

Delivered:

15 July 2024

Summary:

Application to review and set aside arbitration award.
Application without merit and dismissed.

JUDGMENT

DANIELS J

Introduction

- [1] The applicant brings this application, to review and set aside an arbitration award issued under case reference NWD052109, by the second respondent, acting under the auspices of the first respondent. The third respondent opposed the application.
- [2] For ease of reference, the applicant may be referred to as “the employee”. The second respondent may be referred to as “the commissioner” or “the arbitrator” and the third respondent may be referred to as “the Municipality” or “the employer”.

Material

facts

- [3] The applicant was employed by the Municipality as a Human Resources Officer, although the events in question related to the time that he spent acting in a more senior managerial role. On 23 December 2020, he received a notice of a pre-suspension hearing. The notice advised him that the hearing was scheduled for 15 December 2020, some eight days earlier. On 5 January 2021, the employee received two notices, the first advising him of the disciplinary charges he would face at a disciplinary hearing, and the second advising him that he had been suspended pending the outcome of the disciplinary hearing.

The internal disciplinary process

- [4] The disciplinary charges were as follows:

4.1 It was alleged that, on or about 19 October 2020 or sometime thereafter the employee disclosed an interview report to Ms. Sharon Mathulwe^[1] relating to interviews that she attended for the position of Finance Clerk (charge 1),

4.2 It was alleged that the employee was dishonest when asked by the Acting Unit Manager, Ms Masia if he had disclosed the interview report (charge 2),

4.3 It was alleged that the employee misled the director of Corporate Support Services (“CSS”) into signing a contract of employment for a vacancy which was not approved by the Municipal Manager (charge 3),

4.4 It was alleged that the employee failed to diligently perform his duties by forwarding an application (for the position of Administrative Officer: General) to the Work Study Officer, despite the advice of his supervisor, Mr Gabriel Chauke (charge 4).

4.5 It was alleged that the employee did not act in the best interests of the Municipality and compromised its credibility and integrity; an alleged contravention of the Municipal Systems Act, No. 32 of 2000 (charge 5).

- [5] A disciplinary hearing was convened and the outcome released on 12 March 2021.
- [6] During the disciplinary hearing, the employee sought the recusal of the chairperson on the basis that he was not independent. The chairperson, Mr Taukobong Conrad (“Conrad”), dismissed the recusal application. In the application, the employee submitted that it was likely that the chairperson had knowledge of the events leading to the disciplinary charges. It was also argued that because the initiator reported to the chairperson in the course of his employment, this compromised the independence of the chairperson.

The arbitration process

- [7] At the arbitration, the employer called Ms Sharon Mathulwe (“Mathulwe”) as its first witness.

7.1 Mathulwe testified that she attended an interview for the position of Sundry Clerk. The interview was chaired by the applicant, as the Acting Section Head: Recruitment.

7.2 Mathulwe subsequently received a letter offering to appoint her. However, she was concerned that the letter indicated that the position had been graded at level 11, whereas she held a higher grade (within the Municipality). Mathulwe declined the offer, and lodged a grievance.

7.3 She met with the applicant, who advised her to write an email to him requesting a copy of the interview report. She did so. Thereafter, the applicant met her in his office and gave her a copy of the interview report.

7.4 She lodged a second grievance, to which she attached the interview report.

- [8] The applicant denied sharing the interview report with Mathulwe. He testified that he was pursuing studies at UNISA, and would have been on study leave at the time of the alleged meeting with Mathulwe. The applicant further testified that the interview report had been disclosed in another disciplinary hearing and it was therefore in the hands of parties other than himself. In addition, he testified that he is not the custodian of the interview reports which are stored in a lockable cupboard by the Acting Unit Manager, Masia.

- [9] The Municipality called its next witness, Mr Gabriel Chauke (“Chauke”).

9.1 Chauke testified that he was engaged in directorate support, as the Senior Human Resources Officer. They received a request to fill a vacancy, which he discussed with the applicant (at that time, the applicant was the Acting Section Head: Recruitment).

9.2 When not Acting Section Head for Recruitment, the applicant reports to Chauke.

9.3 Chauke and the applicant learnt that the vacancy (for the position of Administrative Officer: General) was not on the approved organisational structure and had not been budgeted for. Chauke advised the applicant to discuss the matter with the Work Study Officer.

9.4 Instead, the applicant sent the request to the Work Study Officer without advising him that the position was not on the approved organisational structure, and had not been budgeted for.

[10] The applicant, on the other hand, contended that, because he was Acting Section Head, he was not required to take instructions or advice from Chauke. Chauke was junior to the applicant while he was acting as the Section Head.

[11] The Municipality called as its third witness, Ms Thandi Masia (“Masia”) who testified as follows.

11.1 During the events described in the charges, she was the Acting Human Resources Manager with overall responsibility for all human resources issues, including recruitment.

11.2 When she learnt that the second grievance of Mathulwe had attached the interview report, she summoned the applicant and Chauke to her office. She asked them whether they had leaked the interview report, and they both denied doing so. At that meeting, the applicant himself reiterated the workplace rule that interview reports are not to be released in the absence of the authority of the Municipal Manager.

11.3 During the grievance hearing for Mathulwe, her representative (from SAMWU) advised the hearing that he had obtained the interview report from an official in Human Resources but he would not disclose the identity of that individual. However, Mathulwe herself stated that she had obtained the interview report from the applicant.

11.4 A copy of the interview report was found in a drawer of an office used exclusively by the applicant.

11.5 Prior to the interview of Mathulwe, the representatives of the employer signed a declaration form stating that they would not disclose any information relating to the interview. The applicant also signed the declaration.

11.6 The applicant failed to perform his duties by failing to advise the Work Study Officer of all the necessary information related to the vacant post (Administrative Officer: General). She testified that the Work Study Officer was disciplined (for his failure to double check the information provided to him) and given a final written warning.

11.7 When the responsible Human Resources Officers discover that the vacant position is not on the approved structure and not budgeted for, they may return the request (to fill the position) to the “user department” or they may forward the request to the Work Study Officer for comment. In that instance, the Human Resources Officer must inform the Work Study Officer that the position is not on the approved structure and cannot be filled.

- [12] The applicant did not dispute that he had learnt that the position of Administrative Officer: General was not on the approved organisational structure. Nor did he dispute that he did not inform the Work Study Officer of this. Instead, he testified that it is the duty of the Work Study Officer to consider whether the position is on the approved organisational structure, and is budgeted for; and he is not required to inform the Work Study Officer of such information.
- [13] The applicant's version in relation to the above issues need not be separately canvassed given that it is referred to in paragraphs 8, 10 and 12 above.

Arbitration award

- [14] Before proceeding further, there are three issues of some importance; the arbitrator's evaluation of the evidence, the arbitrator's refusal to allow the applicant to call a second witness, and the arbitrator's ruling that the failure of the employer to hold a suspension hearing was irrelevant to procedural fairness.

Evaluation of the evidence

- [15] The arbitrator evaluated the evidence in detail and stated that his duties required that he weigh all the evidence and, in the event of disputes of fact he must determine such disputes by reference to the probabilities. The arbitrator did not set out the full test as to how to evaluate evidence, but what he did say was, broadly speaking, correct.[2]
- [16] The arbitrator stated that the evidence of the applicant was riddled with inconsistencies and inherent improbabilities. He also noted that the version of the applicant consisted of bald denials. For this reason, in respect of the various factual disputes, he accepted the version of the employer.

Refusal to allow applicant to call a further witness

- [17] The arbitrator noted that the applicant sought to call a second witness but stated that the evidence to be tendered by that individual was not put to the employer's witnesses during cross examination. The arbitrator asked the applicant's representative to identify the nature of the evidence to be tendered by the second witness. The representative stated:[3]

"This witness is crucial and it will proof beyond reasonable doubt that this uhm document didn't leak out from Mr Mako and as the case is de novo. It started fresh and rules of natural justice I believe that I'm entitled to bring a witness that will prove that indeed there was no leaking of documentation. So I, after Mr Sekute was objecting, I just want to address you on that for you to make a ruling on that sir"

- [18] The respondent's representative objected to the calling of a further witness on the basis that the applicant should have first

called his witnesses before testifying himself.[4]

[19] Ultimately, the arbitrator refused to allow the applicant to call a second witness. His reasons for doing so, set out in the award, are two-fold.

19.1 First, he stated that any evidence not tendered at the disciplinary hearing must be excluded because he has to consider whether the employer's decision to dismiss was reasonable, and the employer's decision was taken on the basis of the evidence before it. This proposition is, in my view, wrong.

19.2 Second, said the arbitrator, the evidence to be tendered by the second witness was not put to the employer's witnesses under cross examination.

[20] It is plainly incorrect that an arbitrator conducting an arbitration, in terms of section 138 of the LRA, is limited to the evidence before the disciplinary hearing. It is trite that the arbitration process and outcome both constitute administrative action.[5] Our constitution[6] guarantees to all the right to administrative action that is lawful, reasonable and procedurally fair. This finds expression inter alia through section 185 of the Labour Relations Act No. 66 of 1995 as amended ("the LRA") including its Codes of Good Practice, and the CCMA Guidelines: Misconduct Arbitrations.[7] Paragraph 93 of the Guidelines requires an arbitrator to make a value judgment as to the fairness of the employer's decision to dismiss "taking into account all relevant circumstances". This requires that the arbitrator take into consideration all the relevant circumstances, including any evidence presented for the first time at arbitration.[8]

[21] The employee's statutory right to a fair disciplinary process before dismissal is not administrative action, and cannot be assessed in the same manner. For example, an employee cannot, at a disciplinary hearing, subpoena documents which may be useful

- while this is a useful tool at arbitration. In addition, while the CCMA and Bargaining Councils are required to provide an independent and impartial hearing, there is no similar guarantee at a disciplinary hearing. In *Avril Elizabeth Home for the Mentally Handicapped v CCMA & others*[9] this court, per Van Niekerk J (as he then was) explained the statutory right to procedural fairness as follows: "...

the conception of procedural fairness incorporated into the LRA is one that requires an investigation into any alleged misconduct by the employer, an opportunity by any employee against whom any allegation of misconduct is made, to respond after a reasonable period with the assistance of a representative, a decision by the employer, and notice of that decision." The learned Judge explained that this is a fundamental departure from the onerous criminal justice model adopted by the former Industrial Court.

- [22] Section 138(1) of the LRA requires the arbitrator to conduct the proceedings in a manner considered appropriate to determine the dispute fairly and quickly, and with a minimum of formalities. Section 138(2) of the LRA reads as follows: “Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party may give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner”. (Own emphasis)
- [23] It is clear therefore, from the very text of section 138(2) that, depending on the circumstances, a commissioner may exercise his or her discretion, and refuse to permit a party to call a witness. In my view, the power to exclude a witness should be used cautiously and sparingly. In my view, the commissioner should only refuse to allow a witness to be called after considering inter alia the nature of the evidence (including its relevance and weight) to be given by the witness, the prejudice to the parties if such witness is permitted to testify or is refused permission to testify, whether refusing permission to call the witness will be unfair. In my view, in this matter, the commissioner exercised his discretion fairly and properly. In *President of the Republic of South Africa and others v SA Rugby and Football Union and others*[10] our apex court stated:

“[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 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.

- [62] The rule in *Browne v Dunn* is not merely one of professional practice but 'is essential to fair play and fair dealing with witnesses'. It is still current in England and has been adopted and followed in substantially the same form in the Commonwealth jurisdictions.
- [63] The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed.

- [64] The rule is of course not an inflexible one. Where it is quite clear that prior notice has been given to the witness that his or her honesty is being impeached or such intention is otherwise manifest, it is not necessary to cross-examine on the point, or where 'a story told by a witness may have been of so incredible and romancing a nature that the most effective cross-examination would be to ask him to leave the box'.
- [65] These rules relating to the duty to cross-examine must obviously not be applied in a mechanical way, but always with due regard to all the facts and circumstances of each case. But their object must not be lost sight of. Its proper observance is owed to pauper and prince alike....” (Own emphasis)
- [24] While the commissioner was wrong to refuse the applicant permission to call a further witness, this did not mean that the applicant was denied a fair hearing. If the further witness were called, his evidence would not have made any material difference to the outcome.[11] This is so because, as the commissioner correctly pointed out, this evidence had not been put to the Municipality’s witnesses. In any event, in my view, the evidence to be tendered by the further witness was irrelevant. The central issue was not whether the interview report had been used in other proceedings, but whether the applicant himself provided the report to Mathulwe knowing that the report was considered confidential.

Absence of suspension hearing : procedural fairness

- [25] The applicant contends that he was denied a pre-suspension hearing and this rendered his dismissal procedurally unfair.
- [26] Suspension is not part of the disciplinary process and ordinarily precedes such process.[12] The usual reason to impose suspension is to allow for an unhindered investigation of the alleged misconduct. In *Long v South Africa Breweries and others*[13] our apex court held that, where a suspension is precautionary and not punitive there is no requirement to afford an employee an opportunity to make representations.[14] However, importantly, for our purposes, the apex court distinguished between suspension and the requirements for fair disciplinary action.

General legal principles

- [27] In *Sidumo and another v Rustenburg Platinum Mines Ltd and others*[15] the Constitutional Court held that the appropriate test to be applied in relation to reviews of arbitration awards issued by the CCMA or Bargaining Council is whether the outcome is one which no reasonable commissioner could reach on the material before him or her. The so-called Sidumo test has subsequently been refined.

- [28] In *Herholdt v Nedbank Ltd (COSATU as Amicus Curiae)*[16] the Supreme Court of Appeal (“SCA”) considered the test on review. The SCA held that the reasonableness test does not do away with the procedural grounds for review in section 145(2)(a) of the LRA. However, such procedural defects must indicate that the arbitrator misconceived the nature of the enquiry or arrived at an unreasonable result. If the arbitrator misconceived the nature of the enquiry this is adequate to review and set aside the award.
- [29] In *Goldfields Mining SA (Pty) Ltd v CCMA and others*[17] the Labour Appeal Court (“LAC”) reminded us that the concept of reasonableness embraces a range of outcomes, all of which are reasonable. Accordingly, the test is whether the outcome is one that no reasonable decisionmaker could arrive at, on all the material before him or her. The award should not be evaluated on a fragmented and piecemeal basis, but on the totality of the evidence. In addition, said the LAC, a failure to follow a fair and proper process may lead to an unreasonable result.
- [30] In *Head of the Department of Education v Mofokeng and others*[18] the LAC clarified that if an arbitrator failed to apply his or her mind to the material issues, this would ordinarily suggest that the outcome is unreasonable or that the arbitrator misconceived the nature of the enquiry. However, an error of law or fact does not, by itself, render the outcome unreasonable. What matters is the materiality of the error. If the error has a distorting effect on the outcome this would signify that the error was material, and the outcome

unreasonable. The mere fact that the arbitrator’s reasoning was flawed is insufficient, the court must consider whether the result is unreasonable in light of all the evidence.

Grounds of review

- [31] The applicant raises various grounds of review. It is appropriate that these be explored by reference to the legal principles which govern review applications. In brief, these are as follows:

31.1 First ground of review:

31.1.1 The applicant contends that the arbitration award is a “cut and paste” of the internal disciplinary hearing, and, in the circumstances, this indicated that the second respondent was biased and failed to apply his mind. This is an altogether inadequate basis to sustain an allegation that the arbitrator was biased. Use of the same words and language does not, by itself, reflect bias. It may well have been an issue of convenience. There is no merit in this ground.

31.2 Second ground of review:

31.2.1 The applicant contends that the arbitrator committed two errors of law. First, the arbitrator refused to consider that suspension related to procedural fairness of the dismissal. I have already dealt with this issue. Second, the arbitrator considered that the chairperson's refusal to recuse himself was a procedural issue. The applicant is correct that this issue related to the procedural fairness of the dismissal. However, the applicant fails to take into consideration that the standards of criminal justice are not applicable to internal disciplinary hearings.

31.2.2 In addition, the applicant fails to appreciate that our courts take the approach that in internal disciplinary hearings there is a level of "institutional bias" that cannot be avoided.[19] The chairperson is frequently a senior manager, and the initiator is frequently also a senior manager. It may be that the chairperson is junior to the initiator. From time to time the chairperson or the initiator might have had some degree of knowledge, whether directly or indirectly, of the facts which led to the disciplinary hearing.

31.2.3 It appears that institutional bias, by itself, is inadequate to render a dismissal procedurally unfair and the courts require something more, such as actual bias.

31.2.4 Albeit that the arbitrator was wrong to consider that the chairperson's refusal to recuse himself was an issue relating to substantive fairness, that error was not material and had no significant bearing on the final outcome. In the circumstances, there is no merit in this ground of review.

31.3 Third ground of review:

31.3.1 The applicant alleges that the arbitrator ignored material evidence when he failed to take into consideration that the applicant was on study leave at approximately the same time that he was alleged to have met with Mathulwe and given her the interview report. The applicant alleges that, if this evidence were taken into consideration, the arbitrator would have found him to be innocent of the first charge. I disagree. Had the arbitrator considered this evidence, this would have had no material impact. The applicant's exam timetable (and his study leave) did not prove that the applicant was not at the office on the date, or dates, in question. It is plausible that the applicant preferred to study at his office. Furthermore, it must be recalled that the applicant was charged with meeting with Mathulwe on 19 October 2020 or sometime thereafter. This ground of review therefore has no merit.

31.3.2 The applicant alleges that the evidence given by Mathulwe was hearsay evidence because she did not call another witness to corroborate her evidence. I disagree. Her evidence was not hearsay merely because she could have called another witness to corroborate her evidence. Hearsay evidence is defined in section 3 of the Law of Evidence Amendment Act No. 45 of 1988 ("LEAA"). LEAA states that hearsay evidence is evidence, the probative value of which depends on the credibility of any person other than the person giving evidence. Mathulwe's evidence related directly to her own conduct. It was not dependent on any other person. In any event, corroboration is not a necessary prerequisite for the acceptance of evidence.[20]

31.3.3 The applicant alleges that there is no workplace rule against the disclosure of the interview report. He states that the workplace rule, sourced in the Recruitment Policy, is that he must not disclose “information” relating to the interviews. I disagree. This is splitting hairs. In any event, information, in my view, must include documents. Regardless of how the written policies are interpreted, the oral evidence presented by the Municipality was that the interview reports are kept in a locked cupboard. In this context, the applicant cannot possibly contend that he was unaware of the rule.

31.3.4 The applicant alleges that the arbitrator failed to take into consideration that, as Acting Section Head for Recruitment, he was senior to Mr Chauke and he was therefore not required to take instructions or advice from him. This misses the point. The point was that the applicant had knowledge of the problems associated with filling the vacant position (Administrative Officer: General) and he failed to communicate such information to the Work Study Officer.

31.4 Fourth ground of review:

31.4.1 The applicant alleges that the arbitrator wrongly prevented him from calling a further witness. I dealt with this issue earlier and need not do so again. In my view this ground of review has no merit.

Costs

[32] In this court, it is trite that costs do not follow the result. Neither party actively pursued costs. In the circumstances, I deem it appropriate that no cost order be made.

Conclusion

[33] In light of what is set out above, the application is dismissed with no order as to costs.

RN Daniels

Judge of the Labour Court of South Africa

Appearances:

Applicant : Adv K Ramarumo

Instructed by: Mataboge-Phefadu Attorneys

First Respondent: Mr Magoshi (Attorney)

Matjang Attorneys Inc

[1] The court papers reflected two different spellings of this individual’s surname. In the event that her surname is incorrectly spelt in this judgment, the court tenders its sincere apology.

[2] National Employer's General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E) at 440: "It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by 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 that 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." (Own emphasis)

[3] Transcript at p223 lines 15 – 20

[4] Transcript at p225 lines 13 – 20

[5] Sidumo & another v Rustenburg Platinum Mines Ltd
(2007) 28 ILJ 2405 (CC) at par 88

[6] Section 33(1) of the Bill of Rights

[7] Government Gazette 34573 of 2 September 2011

[8] E Fergus: The 'Reasonable Employer's' Resolve
(2013) 34 ILJ 2486 at 2491

[9]

(2006) 27 ILJ 1644 (LC) at 1651

[10] 2000

(1) SA 1 (CC)

[11] Head of the Department of Education v Mofokeng and Others (2015) 36 ILJ 2802 (LAC) at para 32: "...Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors

etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.” (Own emphasis)

[12] An employer’s use of suspension may be challenged as an alleged unfair labour practice, in terms of section 186(2)(b) of the LRA

[13]

(2019) 40 ILJ 965 (CC)

[14] Our apex court held that suspension must be for a fair reason, such as to allow an investigation to proceed, and it should not prejudice the employee.

[15]

(2007) 28 ILJ 2405 (CC)

[16] (2013) 34 ILJ 2795 (SCA)

[17]

(2014) 35 ILJ 943

[18]

[2015] 1 BLLR 50 (LAC)

[19] *Anglo American Farms t/a Boschendal Restaurant v Komjwayo*

(1992) 13 ILJ 573 (LAC)

[20] In *S v Sauls* 1981 (3) SA 172 (A) at 180 the court stated: “There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness. The trial Judge will weigh his evidence, will consider its merits and demerits and, having done so, will decide whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told.”

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