IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG]

Reportable

Case no: JA66/2018

In the matter between**:**

WBHO CONSTRUCTION (PTY) LTD	**Appellant**
and	
THEMBA HLATSHWAYO N.O.	**First Respondent**
COMMISSIONER FOR CONCILIATION, MEDIATION	
AND ARBITRATION	**Second Respondent**
NUM obo MVELASE & OTHERS	**Third Respondent**

Heard: 5 March 2020

Delivered: 29 May 2020

Summary:

Coram: Davis JA, Sutherland JA and Murphy AJA

JUDGMENT

SUTHERLAND JA

Introduction

[1] The appellant, WBHO, a construction business, dismissed 41 of its workers, the respondents, on a charge of:

> 'Intimidation of subcontractors and Management and/or engaging in undesirable activities leading to the shut-down of the site on 14 September 2013.' [1]

[2] The workers referred a dispute about the fairness of the dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA). A very poorly conducted hearing endured for 12 days. More shall be said about that hereafter. The Commissioner concluded that no case of *intimidation* was proven. Upon that premise, the relief ordered was reinstatement with full retrospectivity to the date of dismissal.

[3] The appellant sought to review the award. The Labour Court concluded that the Commissioner had committed irregularities in the evaluation of the evidence of such a magnitude that the there was a distorting effect on the outcome, applying the dictum in *Head of Department of Education v Mofokeng & others*[2] per Murphy

[1] The workers had also been charged with defying an instruction not to turn up to undertake overtime work on that day and for their disruptive behaviour in the disciplinary process, but the internal disciplinary enquiry had not found them guilty on those charges. Perversely, a lot of the time at arbitration hearing was devoted to rehashing details irrelevant to the sole charge on which they had been dismissed.

[2] (2015) 36 ILJ 2802 (LAC).

AJA at [32] - [33][3]. The award was therefore unreasonable, in the sense contemplated by *Sidumo,* [4]and it was set aside.

[4] The Labour Court took the view that a case of intimidation had indeed been proven, albeit on a lesser scale than that alleged by the appellant. Axiomatically, this finding turned the award on its head: whereas an exoneration of the workers on the charge of misconduct meant there was no question of a sanction arising for consideration by the Commissioner, on a finding of guilt, the Labour Court was obliged to consider what an appropriate sanction should be. Upon an examination of the surrounding circumstances, the Labour Court concluded that there were mitigating factors present that, in its view, excluded dismissal as an appropriate sanction. As a result, the order made by the Labour Court was reinstatement from the date of the award. This outcome meant, *de facto*, a forfeiture of about one year's wages.

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[3] (2015) 36 ILJ 2902 (LAC) at [32] - [33]:
"[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted s 145 of the LRA, confining review to 'defects' as defined in s 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. 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 enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.
[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination." (Footnotes omitted).
[4] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC).

[5] There is no cross-appeal.

[6] The issues that arise in the appeal are these:

6.1 Ought the finding of the scale of misconduct by the workers have been broader than that held by the Labour Court;

6.2 On either the narrower factual basis as held by the Labour Court, or on the broader basis as alleged by the appellant, is the sanction of:

6.2.1 dismissal appropriate, or

6.2.2 is a lesser sanction appropriate, eg: no back pay (for the period between the date of the dismissal and the date of the Award: 12 months).

[7] It is useful at the outset of this judgment to foreshadow certain aspects which are addressed hereafter:

7.1 Both the Commissioner and the Labour Court overlooked in their analysis of the evidence the scope of the charge which formed the rationale for the dismissal. The charge, as cited, is not limited to intimidation *per se*, but extends to conduct which brought the site to a standstill, a common cause fact. In this regard, the Commissioner asked the wrong question and the Labour Court has not held the Commissioner accountable for that irregularity.

7.2 The inquiry into mitigating circumstances conducted by the Labour Court is, in my view, flawed in three respects: first, the consequences to the appellant are completely ignored and thus no balance of interests was undertaken; second, the gravity of the misconduct of which the workers are guilty was inappropriately appreciated and inadequate weight attached thereto, and third, the factors said by the Labour Court to be mitigating are either unconvincing on their own terms or are premised on factual findings by the

Commissioner which were wrongly held by the Labour Court not to have been unreasonable.

The relevant facts

[8] This account traces chronologically the events that the evidence discloses. Much of the critical evidence was not challenged in cross-examination. Where facts are in dispute that is indicated. It is also necessary to allude to the deficiencies of the record. Some evidence was missing from the transcript and not all was reconstructed. The notes of the Commissioner of some evidence were included in the record. In certain respects, the only account of the evidence was in the award itself. The Labour Court correctly took a pragmatic approach and dealt with the review on the incomplete record with the endorsement of both parties to do so.

[9] A three-week protected construction industry strike ended on Thursday 12 September 2013. The strike was not peaceful. The appellant had needed to procure an interdict against interference by the strikers with ongoing work at the site situated at Lynnwood Bridge, Pretoria. Attempts to continue work during the strike were hampered by sub-contractors being intimidated to leave the site. As a result, work proceeded intermittently. Ordinarily, in the undertaking of a construction project, the appellant deployed its own workforce directly on the structural aspects of the construction; in the main, the other aspects of the project were subcontracted to specialist artisans: eg, brickwork, plastering etc. Because of the strike, certain subcontractors were engaged to do some structural work too, a category of work usually undertaken by the WBHO workers.

[10] Kotze, the site manager, was informed only on the morning of Friday 13 September 2013 that the strike had ended. No evidence was adduced about the terms upon which the strike was ended.

[11] The striking workers returned to the site about midday on that Friday. The reason why the workers did not arrive at the usual time of 07h00 is explained by their transport arrangements. The workers all lived in a WBHO hostel in Germiston; the

site was in Menlyn, Pretoria some 50 km or so distant. They were bussed to and from the site in company transport. However, during the strike, the busses had been removed from the vicinity of the hostel and the drivers were, of necessity, obliged to fetch the busses and then proceed to the hostel to collect them.

[12] On site were numerous subcontractors who had worked or attempted to work throughout the strike. Their number was estimated, variously, to be between 50 – 110 persons employed by several firms. (Exactly how many individuals were on the site early on the crucial Saturday morning, before the site was closed down by the workers, is unclear.)

[13] The workers did not actually commence any work until 12h45, i.e. after the lunch break. What work they actually did, if any, was unexplored in the evidence. They left at 16h30. This was an early departure; a routine daily overtime period to 17h00 was supposed to have been worked by the workers. At least some subcontractors, if not all, were forced to vacate the site at that time too. In particular, Faria, a plastering subcontractor was told by his crewmen that the workers had said that they were not wanted there. Some subcontractors returned to the workplace after the workers left the site. These events of Friday formed no part of the charges *per se*, but, plainly, are pertinent to divining the state of mind of the workforce, an aspect addressed hereafter.

[14] Kotze was absent from the site when the workers arrived. He had to attend a meeting in Bryanston, Johannesburg. While travelling to Bryanston, by cellphone, he called two engineers on-site, Nel and Welman, and a foreman, Williams. He instructed them to convey to the workers that there would be no work the next day, as was the custom. Saturdays were regarded as overtime.[5] The rationale for the decision, which was taken, not by Kotze, but by Du Plessis, the project manager, who was not based on-site, was that there was no time to plan overtime work for the Saturday. It is also apparent from Kotze's evidence that what had been planned

[5] There was a dispute about whether Saturday overtime was compulsory; resolving that dispute is unimportant in the circumstances There was a dispute about whether Saturday overtime was compulsory; resolving that dispute is unimportant in the circumstances.

for the Saturday was work for the subcontractors and that the appellant, having done so, was financially committed to the execution of those tasks and a rearrangement would have been disadvantageous and logistically challenging. This aspect is significant and is addressed hereafter in relation to critical findings made by the Commissioner, which as shall be shown, shaped his perspective of the entire saga.

[15] Nel did not testify. Welman did testify, but was not asked about what he did, if anything, to relay this message.[6] Kotze says that Nel and Welman reported to him that they conveyed the message as instructed. Williams said he relayed to his two crewmen the message from Kotze that they "were not allowed to work the next day". The crewmen immediately protested and said they would come anyway. Precisely what time this encounter occurred is unclear. Williams did not at the time of the discussion with his crewmen, know the reason why there would be no overtime worked. He learnt the reason from Kotze late in the day. A point of importance is that Williams was the only foreman out of six foremen who worked on the site, who was scheduled to be on-site that Saturday. His mandate for Saturday was to oversee subcontractors and had no work planned with his own crew, who had last been on site, other than that Friday, three weeks earlier, before the commencement of the strike. It can usefully be noted at this stage, that even if it was proper to disregard Kotze's hearsay about Nel and Welman conveying the message, the evidence of Williams stood unchallenged. This is important because it is relevant to a probability finding that the message was indeed disseminated, whilst on-site, in the course of that Friday afternoon.

[16] Kotze returned to the site at about 15h00. According to him, Motsatse, the shop steward was waiting for him at the site office. According to Kotze, they conversed during the period 15h00 to about 15h45. The content and the time of the exchange is in dispute. Kotze says he repeated the message that the decision had been

[6] The Evidence of Welman available is his evidence in chief. The cross examination is missing. In the Award pp29-30) in the treatment of Welman's testimony, the commissioner states no evidence adduced from Welman about the events of Friday.

taken that there would be no overtime on Saturday and asked Motsatse to convey it to everyone. Kotze says that he stated that the reason for no overtime being worked was that no work had been planned for the workers. Significantly, according to Kotze, Motsatse pointedly asked why subcontractors were working while he and his fellow workers were not working. Kotze says that he explained the role of the subcontractors and that their work programme was not organised according to conventional working hours arrangements which applied to the appellant's workforce. Motsatse says they met very late in the day, at about 16h45. This time, given by Motsatse, is important in relation to his assertion that it was too late to convey any information to the workforce after he had been given the message. Motsatse disputes that any reasons were given by Kotze.[7] He says he was simply told: "listen – no work tomorrow".[8] It must be inferred from Motsatse's evidence, that on his version, he did not press Kotze for an explanation. This episode is addressed hereafter in relation to its significance in several respects.

[17] According to Kotze, after the bus left to return the workers to the hostel, he had a phone call from the bus driver. The bus driver is alleged to have said that he had been told that despite the instruction that there would be no work the next day, he was instructed by the workers to collect them and take them to the site. Kotze says he told the driver, who claimed to be afraid to defy the workers' demand, to acquiesce in the demand rather than risk his life. The driver was not called to testify by either party; however, Motsatse's evidence corroborates the fact that the driver had been enlisted to defy the management's decision that the workers were not needed at the site on Saturday by conveying the workers to the site the next day.

[18] Motsatse gave an account that when the bus left the site, he addressed the workers, this being, on his version, his first chance to convey Kotze's instruction. According to him, they ridiculed him for conveying such an instruction because it

[7] The evidence given in chief by Motsatse's is missing from the record: the only account is that of the summary of the commissioner in his award. The summary makes no reference to this discussion; it must be assumed that Motsatse did not address it. It was extensively addressed in cross examination, for which a transcript does exist.

[8] Record: Motsatse Vol 11/p1102/ L25.

was not his role to do so; rather, such instructions had to emanate from the crew foremen. The consensus was that they would go to work the next day, regardless of what Motsatse said. This stance formed a major element in the case presented by the workers: ie. the illegitimacy of the work-instruction channelled through a shop steward, thereby justifying them going on-site the next day.[9]

[19] The conduct of the workers on Friday at 16h30 must be considered together with the events alleged to have taken place on the bus. Two possibilities exist.

19.1 First, it must be inferred that their conduct on Friday at 16h30 - getting the subcontractors off the site - was precipitated by an oral communication about the absence of overtime work on Saturday, which is a powerful indication that the unhappiness about the workers not working overtime when the subcontractors were working, was communicated to them earlier than during the bus trip. This inference is also one that is consistent with Williams' evidence about the reaction he got when he conveyed the message to his crewmen. It is also consistent with Kotze's evidence about Nel and Welman passing on the message, about a rationale for Motsatse waiting for him at the site office and the time he had a discussion with Motsatse.

19.2 Second, the alternative inference is that the workers spontaneously chose on Friday to forbid the subcontractors to work at any time they were not working. In my view, the former inference is probable, the latter improbable.

[20] One of the workers called to testify, Moagi, a crane driver, claimed to have been personally instructed by Kotze to come to work on Saturday. This version was never put to Kotze. He also denied any intimidation occurred, emphasising that the absence of anyone being injured was conclusive proof of that fact. The absence of

[9] Record: Vol11/p1103/L14-15: - "He [Kotze] has no right to come to me and tell me that Motsatse you do not come to work. He must liaise with the foreman as the foreman is the one who get authority over me." (sic).

any physical injuries was a point much emphasised by worker witnesses as a basis to deny any intimidation. Self-evidently this is a wrong premise.

[21] On Saturday, the workers turned up at about 06h40 and almost at once left the site to take up a stand at the gate, locking it and denying all access. The subcontractors who were on site prior to their arrival, having started work from about 06h00, walked off the site with them. Work on the site was at a standstill. What was observed by Kotze, Welman and Williams, according to their evidence, was shouting and screaming coming from the appellant's workers, who having briefly entered the site, were walking behind a throng of subcontractors through a relatively narrow passage towards the gate. Some persons were seen carrying, variously, a reinforced iron rod, or pipes or sticks. Williams, in particular, testified that the body language of the workers was aggressive. Welman said he was told by a worker that if the workers did not work, nobody would work. The impression on all three men was that the subcontractors were being shepherded off the site by force. There was a dispute about whether, largely with reference to video footage taken by Welman, the images showed the subcontractors in front and the workers at the rear or showed then intermingled. The images were inconclusive in the resolution of that dispute of fact. Of no little significance was the unchallenged evidence of Welman that he was threateningly told to delete footage off the camera, which he did to avoid the risk of violence. In addition, in the presence of the managers, the drafting clerk, Aphina, an employee of the appellant, was approached in the site office by a group of workers and told to leave, which she promptly did.

[22] The bare fact of the workers coming onto the site, and almost at once, everyone, including the subcontractors vacating the site to stand at the gate which was then locked and re-entry prevented by the workers, is common cause. Also, common cause, is that no attempt whatsoever was made by anyone on behalf of the workers to approach Kotze or any other member of management to present a grievance or solicit a discussion about the workers' dissatisfaction. There was no attempt to tender to work. What is in dispute is that the workers intimidated the subcontractors

to leave. The workers' case that no intimidation occurred relies heavily on the fact that the subcontractors walked calmly of the site, intermingling with the workers, and the fact that no one was assaulted and injured.

[23] On Saturday morning, Kotze had posted notices at the gate and at the clocking station saying there was no work on the Saturday. The notices were up when the workers arrived. Astonishingly, a copy of the notice was not adduced in evidence; as a result, the content of the text was disputed and a resolution of the dispute over the message it articulated was impaired. Predictably, there is a controversy about how this notice was comprehended: i.e. was the "no overtime' instruction solely for Saturday or was all future overtime work opportunity now precarious? Kotze himself was vague about the text. He said its text was to the effect that there would be no work on Saturday 14 September for WBHO workers and Labour Broker workers.[10]

[24] According to the subcontractor, Faria, on the Saturday morning, he arrived to find the workers blocking the gate and the security guards absent from the vicinity. He did not read the notice. His experience, whilst locked out of the site, was that his crew were referred to as "rats" and that there was a lot of chanting going on by a throng of workers whose body language was aggressive. Some of the workers were carrying bricks. His crewmen relayed to him that the stance of the workers was that if they cannot work nor will anyone else. He thereupon called Kotze for an explanation and understood from what Kotze said that overtime was suspended "until further notice." Faria says he incurred losses in respect of his crew's wages and lost time to complete his assigned tasks.

[25] As regards members of management being intimidated, the allegations were premised on oral exchanges between the workers and various members of management and the demeanour of the workers collectively. Williams and Nel were told in a threatening tone that "it would be better" if the managers stayed off the site. The intimidatory character of this communication was pooh-poohed in

[10] Record: Kotze- p775/ L25.

cross-examination. There was evidence of discomfort by the managers who expressed their fears for their safety and who complied with the workers' desire that they too vacate the site. In Kotze's words: "We were intimidated to carry out the instructions from the workers."[11] Welman, who was filming the events, was approached by some workers who demanded he deletes the footage. He complied out of fear for his safety. Kotze called the SAPS who suggested a pragmatic response to the incident to preserve calm and advised them to acquiesce in the workers demand to remain off the site until they had bussed back to the hostel. The workers' case to refute the intimidation claims was premised on the fact that the managers were physically unhurt by anyone despite being in close proximity to the workers.

[26] There were several other reports of other acts of intimidation which axiomatically are always difficult to assess both for credibility and for objective reliability. The upshot is that the site was cleared, and no work was possible that day. Understandably subcontractors left the vicinity and did not return. Faria's crew of subcontractors, which had been denied access, asked permission of the workers to collect their overalls from the site before leaving. They were then escorted by the workers to the change facilities to collect their kit.

[27] The financial loss to the appellant for the day's lost production was estimated by Kotze to about R80 - 90,000. The financial loss to the subcontractors was not estimated.

[28] On the following Monday, 17 September, the workers arrived, as did the subcontractors. A routine working day proceeded until 16h30 when the workers again refused to work the routine half-hour of overtime and the subcontractors again were subjected to demands to leave too. The subcontractors did as demanded and returned to the site after the workers' bus had left for the hostel.

[11] Record: Vol 8; p789/ L12-22.

[29] The following day, the disciplinary process began with the suspension of the workers. The workers who are cited as the respondents in the appeal were all identified from the clocking process on the Saturday morning. There is no dispute as to their presence and participation in the relevant events of that morning.

Evaluation

The Award

[30] What did the arbitrator make of this body of evidence?

[31] The natural first point of reference would be the video footage. Having viewed it, the Commissioner concluded that it was not helpful in illustrating the veracity of the allegations made against the workers in respect of intimidatory behaviour. In this regard, he is not to be faulted.[12] But he was indeed in error, as found by the Labour Court, of exaggerating the absence of illustrated intimidation, and not giving due weight to other evidence of intimidation, in reaching his conclusion that there was no intimidation.

[32] The Commissioner correctly accepted that it was novel to relay work instructions via a shop steward. By inference, he concluded that, by implication, it was legitimate to defy the instruction, although no analysis was undertaken of why that could be a sound proposition, even if it was correct that the channel of instruction was novel. This too is a failure of analysis having a distorting effect on the outcome of the enquiry.

[33] A major finding by the Commissioner was that Kotze "wanted to short-change" the workers[13]. He disbelieved Kotze that the work needed to be planned. This finding was in part inspired by the finding that no planning was needed for the workers to work during the two and a half hours on Friday afternoon. Moreover, the Commissioner drew support from an inappropriate reliance on Moagi's evidence

[12] Award: p 33, para 5.6
[13] Award, p 34 Para 5.40

that Kotze instructed him to work, which claim had not been put to Kotze,[14] and an inappropriate reliance of Faria's "understanding" that the decision not to work overtime was "until further notice".[15] No analysis of the evidence that might offer plausible support for the need to plan work was undertaken nor of the probabilities relevant thereto.

[34] The Commissioner concluded that the episode on Saturday was one of confusion "reigning supreme" but no real substance is offered to support this conclusion.[16] Moreover, no attempt to synthesise the evidence in its totality was undertaken which could have contextualised several episodes that suggested a contrary perspective: i.e. a concerted defiance of the management, hatched as early as Friday.

[35] No credibility findings are made about the evidence of Faria, Welman, Williams or Kotze about what they observed, or about the impact the events made on them. By contrast, a credibility finding in favour of Moagi was made without that version being put to Kotze.

The judgment a quo

[36] The Labour Court, in a meticulous survey of the evidence and of the findings of the Commissioner concluded as follows; it is necessary to set out the conclusions in full to facilitate a critique:

> 'An assessment of the reasonableness of the award
>
> [45] In the portion of the *ratio* of the award quoted in paragraphs 34 – 36 above, the Commissioner makes three main findings (which I paraphrase and then expand on) in favour of the individual respondents that serve to contextualise (or mitigate) their conduct on the Saturday.

[14] Award: p 35 para 5.33.
[15] Award: p34 para 5.27 – 5.31.
[16] Award: p35/para 5.37.

a) Firstly, Mr Kotze went wrong in issuing the instruction to Mr Motsatse that the Saturday overtime shift would not be worked. The reasoning (or sub-findings) being that: it was inappropriate and unprecedented for Mr Kotze to have required instruction to the individual respondents; in any event, Mr Motsatse was not afforded a proper opportunity to address the workforce having regard to the time constraints; in these circumstances, and given the controversial / contentious nature of the instruction, the communication thereof was bound to be unsuccessful; and the manner in which the instruction was issued (i.e. to Mr Motsatse) was bound to cause confusion.

b) Secondly, the alleged rationale for the instruction – i.e. that management did not have time to plan – was without merit. The reasoning (or sub-findings) being that: the relationship was strained in the light of the strike; the individual respondents had returned to work and had worked on the Friday without any planning on the part of management; this supported their case that planning was not required for the Saturday overtime shift; three other things also supported their case, namely what occurred in relation to Mr Moagi (i.e. Samuel), Mr Faria's evidence that Mr Kotze had told him that overtime would not be worked *"until further notice"*, and Mr Williams' evidence that he (as a foreman) was not even told of the rationale for the instruction; and accepting that there was no need to plan work; it followed that Mr Kotze was *"malicious"* in refusing the individual respondents to work, and *"denied (them) the right to earn a living"* on the Saturday.

c) Thirdly, *"confusion reigned supreme"* on the Saturday. The reasoning (or sub-findings) being that: the notice posted on the gate and notice board (which was not produced by the company during the arbitration) advised of the stopping of overtime; the notice made no distinction between WBHO workers and subcontractors; those subcontractors who intermingled with the WBHO workers might have considered the notice as applying to them; and (as already mentioned above) the manner in which the instruction was issued (i.e. to Mr Motsatse) contributed to the confusion.

[46] Insofar as the company attacks the reasonableness of these three findings, I do not consider any of them to constitute a finding that a reasonable decision-maker could not arrive at.

a) Regarding the first finding, the evidence produced a dispute about the propriety of issuing a work-related (overtime) instruction to a shop steward (instead of foremen) – it being Mr Kotze's evidence that this had been done before, and Mr Motsatse's evidence that it was unprecedented. The Commissioner's finding in favour of Mr Motsatse's version was by no means unreasonable. And as for the balance of the Commissioner's sub-findings, the reasonableness thereof is borne out by the fact that it was the evidence of both Messrs Mvelase and Motsatse that workers on board the bus effectively laughed off Mr Motsatse's attempt to convey a work-related instruction to them – this because it was abnormal for him to do so.

b) Regarding the second finding, in circumstances where it was properly supported by at least three of the four factors relied on by the Commissioner, it is justifiable and thus reasonable. (I disregard what occurred with Mr Moagi in the absence of his version having been put to Mr Kotze under cross-examination). The same applies to the inference that the Commissioner then drew from the finding that the need for planning was not actually the rationale for cancelling the shift, namely that the decision was, in effect, *mala fide*. Indeed, Mr Faria's evidence alone served as a plausible and justifiable basis for this finding – the company had decided to stop overtime indefinitely, for reasons that I chose not to explain. The Commissioner may well have been wrong in finding *mala fides*, but the finding is supported by material evidence, and is thus not unreasonable.

c) Regarding the third finding, in failing to produce the notice at the arbitration, the company paved the way for the Commissioner to accept the evidence of NUM's witnesses about what it said, and about how the subcontractors may have interpreted it – it having been Mr Moagi's evidence that they could have assumed that it also applied to them. And as already found above, the relaying of the instruction to the shop steward – which was rejected out of hand by the workers – also contributed to the confusion on the Saturday. In these circumstances, the Commissioner's finding was by no means unreasonable.

[47] The upholding of the reasonableness of the three findings analysed above has important consequences for the review of the balance of the award – it being accepted (because the findings are unreasonable, not necessarily right) that it was inappropriate for the instruction to have been issued to the shop steward and that

it was bound to miscarry; that the rationale for the instruction was without merit and that the decision to cancel the Saturday overtime shift was *mala fide,* and that confusion reigned supreme on the Saturday. This then is the background against which the ensuing events and the Commissioner's findings in relation thereto, stand to be analysed.

[48] Turning then to the reasonableness or otherwise of the Commissioner's findings quoted in paragraph 37 above to the effect that there was no intimidation on the Saturday, my assessment of the findings is as follows:

a) All the quoted paragraphs from the award (save for paragraphs 5.50, 5.55, 5.56 and 5.62, which I deal with separately below) deal by and large with video 1 – and the commentary thereon provided by Mr Welman and NUM witnesses. Having evaluated video 1 (see paragraph 26(a) above), I am of the view that the Commissioner's conclusion that it does not establish that the WBHO workers marched out (or chased out, as the company's witnesses put it) the subcontractors from the site or intimidated them in the process, is reasonable. The same applies to the Commissioner's reasoning and each of his sub-findings, which are all supported by plausible, material evidence. In truth, video 1 did little to advance the company's case.

b) In relation to paragraph 5.50 of the award, the Commissioner incorrectly records Mr Williams' version. He did not testify that he felt threatened in the tunnel / passage, but rather that he felt threatened later on when he went to the entrance gate with Mr Nel (when some workers were carrying bricks). But in itself, this error is not material).

c) In relation to paragraphs 5.55 and 5.56 of the award, the findings accord with the Commissioner's rendition of Mr Welman's re-examination (not contained in the transcript) reproduced in paragraph 25 above. In the circumstances, the findings are not unreasonable.

d) In relation to paragraph 5.62 (dealing with videos 2 and 3), while it is so that Mr Welman may be accused of having posed the equivalent of leading questions, the Commissioner may well have misdirected himself in ignoring what the interviewees said on this basis alone. But, again, this is not material because, in the absence of

the interviewees having given evidence for the company at the arbitration and been subjected to cross-examination, the Commissioner could, in any event, have reasonably disregarded what they said in the videos (which is what he did).

[49] The above notwithstanding, it does seem to me that the manner in which the Commissioner determined the issue of whether the individual respondents engaged in intimidation on the Saturday is open to criticism in three main respects:

a) Firstly, the Commissioner focused extensively on video 1, to the exclusion of the eyewitness testimony of Messrs Kotze, Williams and Welman, who all testified that the WBHO workers chased the subcontractors out of the site (this also appears from paragraph 5.75 of the award quoted in paragraph 39 above.)

b) Secondly, the Commissioner focused extensively on whether the subcontractors were intimidated, to the exclusion of an inquiry (or a proper one) into whether management was intimidated (this also being evident from paragraph 6.1 of the award quoted in paragraph 39 above). Of the members of management who testified, Mr Kotze did not contend that he was intimidated; Mr Williams contended that he was threatened at the time of being told by Mr Madudijabe to leave the site and upon doing so together with Messrs Kotze and Nel; and Mr Welman appears to have contended in re-examination that he was threatened.

c) Thirdly, the Commissioner did not consider the events at the entrance gate after the WBHO workers and the subcontractors had left the site, which required as assessment of, in particular, the evidence of Mr Faria.

[50] While it can fairly be said that the Commissioner misdirected himself in these three respects, as the authorities make clear, the question is whether – despite such misdirections – the conclusion reached by the Commissioner that the dismissal of the individual respondents was substantively unfair is, nevertheless capable of reasonable justification. Put differently, is the distorting effect of the misdirections the production of an unreasonable outcome, or is the outcome reasonable, despite the misdirections? In addressing this question, I deal with each of the three misdirections in turn below.

[51] In relation to the first misdirection, while the Commissioner did not consider this particular evidence, given that it is materially at odds with video 1, it could thus reasonable have been rejected.

[52] In relation to the second misdirection, as dealt with above, the Commissioner's rejection of Mr Welman's evidence of intimidation given under re-examination was not unreasonable. That leaves the evidence of Mr Williams. The first leg of his evidence about feeling intimidated at the time of being told by Mr Madudijabe to leave the site, could reasonably be rejected insofar as he sought to attribute this to all of the individual respondents. Likewise, the second leg of Mr Williams' evidence about being intimidated upon leaving the site together with Messrs Kotze and Nel, could reasonably be rejected on the basis that it is entirely in conflict with the evidence of Mr Kotze, who made no mention of any intimidation at this point.

[53] The third misdirection is, however, more problematic.

a) On the evidence presented, WBHO workers gathered outside the entrance gate for at least some two hours (from after 07h10 to about 09h00, on Mr Motsatse's version). For at least a portion of this time, WBHO workers blocked the entrance and thus prohibited subcontractors from entering the site. In the process, WBHO workers carried what I loosely refer to as weapons, and chanted words to the effect that they *"do not want rats"*. This was clearly intimidatory, and struck fear into at least Mr Faria and his work crew. At the time, restraint was demonstrated by WBHO workers who (in close proximity) allowed three of Mr Faria's employees to access the site to collect overalls, and three of the company's managers (Messrs Kotze, Nel and Williams) to egress the site – all of this without incident. And by the time the SAPS arrived, calm had been restored, with WBHO workers cooperating with the SAPS – entering the site and then leaving on the bus without delay.

b) During the arbitration, NUM did little to rebut the adverse facts traversed above, with it seemingly having put its eggs in the basket of the company having been unable to identify who exactly participated in the intimidation of subcontractors at the entrance gate. To my mind, this is misconceived. In the peculiar circumstances of this matter, the company establish at least a *prima facie* case that all the individual respondents were present outside the entrance gate at the material

times and were party to the events that occurred there. If any of the individual respondents wished to contest this, it was up to them to do so. None of them did so. Instead, it was accepted that the evidence of NUM's witnesses (Messrs Moagi, Mvelase and Motsatse) would stand as the evidence of all the individual respondents, with none of NUM's witnesses having disputed their presence and participation in the events at the gate.

c) In these circumstances, a reasonable Commissioner would, in my view, have found that the individual respondents were guilty of having intimidated subcontractors outside the entrance gate. It follows that I consider the Commissioner's award that *"the WBHO workers did not intimidate the subcontractors"* (see paragraph 6.1 of the award quoted in paragraph 39 above) to be unreasonable.

d) But, as dealt with above, this, in itself, does not render the Commissioner's conclusion that the dismissal was substantively unfair and award of reinstatement reviewable. In order to succeed with a reasonableness review, the company must go further and establish that, if the Commissioner had found the individual respondents guilty as he ought to have, he could not reasonably have avoided finding that the sanction of dismissal was fair and appropriate. Because if he could have, then the outcome of the award – a finding substantive unfairness and reinstatement – is reasonable, and thus not reviewable.

e) The question then is this – had the Commissioner found the individual respondents guilty in the terms described above, could he reasonably have found that dismissal was not warranted? To my mind, the answer is in the affirmative. Although the misconduct of the individual respondents was serious, there are material mitigating factors in their favour. To begin with, as reasonably (not necessarily correctly) found by the commissioner: (i) it was inappropriate for the shift cancelling instruction to have been issued to the shop steward and it was bound to miscarry; (ii) the rationale for the instruction was without merit and the decision to cancel the shift was *mala fide*; and (iii) confusion reigned supreme on the Saturday. Each of these factors is compelling. In addition, the individual respondents had just returned from a protracted protected strike and were, no doubt, suffering the financial consequence thereof, with the cancellation of the

overtime shift being a blow. The fact that subcontractors were allowed to work – some of whom were performing the work of the individual respondents – and that overtime might have been perceived as having put on hold indefinitely, would also have understandably perturbed the individual respondents. Also mitigatory is the fact that the individual respondents exercised restraint in allowing some entry to and egress from the site, and cooperated with the SAPS. There was also no evidence of a prior disciplinary record. When all these mitigating factors (some being unique and peculiar) are balanced up against the severity of the misconduct, it seems to me that a reasonable decision-maker could readily have come to the conclusion that the sanction of dismissal was too harsh, and accordingly that the dismissal was substantively unfair. And for as long as that is the case, the Commissioner's finding of substantive unfairness and award of reinstatement (albeit for different reasons) was not unreasonable, and thus not reviewable.

f) That said, if they had been found guilty of the intimidation of subcontractors (as they ought to have been), I do not believe that a reasonable Commissioner would have reinstated the individual respondents retrospectively to their dismissal, i.e. with full back-pay. Instead, as a mark of his disapproval of the individual respondents' misconduct, a reasonable Commissioner would have reinstated them without back-pay.'

[37] There are several aspects to this analysis. Certain findings are, in my view, unduly generous to the Commissioner, others are inconsistent with the evidence adduced and what reasonable inferences could be drawn. I address these aspects in turn.

[38] The examination of a Commissioner's reasons to determine whether a distorting effect on the outcome has ensued to produce an outcome that no reasonable arbitrator could have reached is a delicate exercise. It is plain that the Labour Court appreciated this dimension. Under what circumstances is it proper for a Court of Appeal to disturb such findings of a Review Court? There must be a margin of toleration for the evaluations of the court *a quo*. Thus, in my view, it is proper to undo such findings only when clearly wrong. This is an outcome which can plainly be demonstrated when the Court of Appeal can point to errors of fact. In second-guessing evaluative conclusions, this is less simply demonstrable. In my view, that

threshold is breached when the conclusion reached by the Review Court is untenable.

[39] The Labour Court identified three main findings by the Commissioner: (1) that Kotze was wrong to instruct Motsatse to convey a work order, (2) that the rationale for the order was without merit and (3) that the consequences caused material confusion on the part of the workers. The Labour Court held that all three findings were in their material respects, not unreasonable, even if not right. These findings are, of course, delineated distinctly only for the purposes of analysis, and do not have separate objective self-standing status. I disagree with the conclusions that the Commissioner's findings were not unreasonable. I deal with these aspects holistically.

[40] The finding that it was novel for a work-order to be channelled through a shop steward is, itself, unassailable. The reasons for that finding are several. In addition to the reasons mentioned in the judgment *a quo* are the following which I mention because they have implications for other aspects of the overall analysis.

40.1 First, it is plain common sense that work-related orders go through the chain of command. Shop stewards are not in that loop.

40.2 Second, the protestations by Kotze that this channel was used in the past for work instructions are wrong, on his own version. His attempt to contend that relaying work instructions via a shop steward had precedent rises to a high point that it happened when the workforce wanted to vary work programmes or exceptional circumstances arose causing the management to want to disturb the usual routine. In such circumstances, the shop stewards would be consulted. This practice does not address the controversy at issue; such exchanges under those types of circumstances are proper Management/Union engagements, not work instructions. It is not sensible to conflate these two very different types of encounters.

[41] However, what was not properly appreciated was that this work-order conveyed to Motsatse on Friday was not issued under routine circumstances. The failure to evaluate the actual event in its proper context is a failure of analysis. Looming large by its absence is an appreciation of the following:

41.1 The site management was told of the end of the strike only on Friday morning, allowing no real opportunity to reintegrate the returning strikers into the work programme;

41.2 Kotze, the site manager, was absent from the site until after 15h00 and was impaired thereby from addressing the reintegration, the imminence of which he had had no prior notice;

41.3 Kotze had been instructed by the Project Manager, Du Plessis, not to marshal the workers on Saturday;

41.4 The rationale for that decision was that plans to cater for the work programme for Saturday were already in place and that (for the self-evident reason that no-one could predict the exact moment of the end of the strike) plans would either have to be changed or the workers not be deployed on Saturday;

41.5 That construction is *ipso facto* an orchestrated process requiring coordination of resources and deployment of capacity, not a rote process that can be activated or ceased at the drop of a hat; and,

41.6 That, accordingly, the notion that planning of work was necessary is both inherently plausible and credible. The finding that Kotze wished to short-change the workers is an egregious slur wholly unjustified by the body of evidence.

[42] As to the manner of conveying the fact of there being no work the next day under these exceptional circumstances, it was wholly appropriate to engage the shop steward, because it was necessary to manage the expectations of the workers and

a deviation from the work routine. It cannot be overlooked that Kotze had also instructed the line managers to cascade down the instruction that there would be no work the next day: the discussion with Motsatse did not occur in isolation. It is indeed plausible to conclude that Kotze's approach in this regard was not insightful. It is also plausible that he was run off his feet by the events of the day. In retrospect, a proper meeting with Motsatse, minuted, and followed up by a proper notice to the workers would, in hindsight, have been appropriate because what was called for was a discussion on the transition back onto the site, not a mere work instruction. Instead, by dealing with the issue informally, and not appropriately appreciative of the sentiments likely to be harboured by the returning strikers, the decision did nothing to assuage the resentment of the workers - returning strikers - towards the subcontractors earning while they were not. However, Kotze's lack of deftness in this regard ought not to be exaggerated nor exploited to try to rationalise that his conduct caused the work stoppage on Saturday.

[43] The idea that there was "confusion" on Saturday by the workers and subcontractors does not, in my view, stand up to scrutiny. Such a conclusion is premised on taking the workers' evidence at face value about the communication to them without proper analysis and ignoring the other evidence. Insofar as this conclusion is founded on the notion that it was Faria's understanding that overtime was indefinitely stopped until further notice, it is a wholly incorrect premise. There is not a shred of evidence that anyone other than Faria himself had that understanding – and he says he interpreted Kotze to have said so, not because he read the notice on the gate. Not unimportantly, no worker who testified quoted the text. The idea was floated that the notice was so worded as to make no distinction between the appellant's workers and the subcontractors, thereby facilitating the prospect that the subcontractors might have reasonably thought it applied to them too – a source of confusion, The Commissioner thought that the subcontractors saw themselves as victims of the appellant's capriciousness. This idea is preposterous: the subcontractors, taking instructions from their own employers and working to complete a task, not minding the clock, would not,

plausibly, have thought a notice about overtime could conceivably apply to them. Thus, the notion that their exodus was in response to confusion is untenable. As regards the fact that the workers worked on Friday without any planning being a support for such a notion; not only it a *non-sequitur*, but the issue was not meaningfully addressed in the evidence. The workers arrived in time for the lunch-break. They began work at 12h45 and finished at 16h30. What they actually did is not described, an omission that is much to be regretted. None of what is known helps to rebut the plausible proposition that the next day's work had to be planned. The last factor supposedly relevant, in the view of the Commissioner, was the strained relationship immediately after the strike. In my view this is immaterial to the enquiry as to the truth of the rationale for no overtime to be worked on Saturday; rather it feeds into a probability of a belligerent sentiment on the part of the workers. A more critical factor, again ignored, is the evidence that no foreman, except Williams, was scheduled to be on duty that Saturday: thus, who was supposed to supervise the workers perform the unplanned work?

[44] Moreover, what is again fatal to the analysis is the ignoring of important contextual evidence. First, there was the sabotaging of the half-hour overtime on Friday; second, the adamant responses of Williams' two crewmen on Friday afternoon that they would come to work anyway. This evidence went unchallenged. Similarly, the sabotaging of the half-hour of overtime on the following Monday was ignored. These episodes strongly suggest that the workers had collectively decided to react to the fact that the subcontractors were working overtime when they were not, a decision axiomatically taken on Friday before the bus left. Thus, at worst for the workers, if Motsatse alone conveyed the message, it is more likely that Kotze is correct that he spoke to Motsatse about it at the latest between 15h00 and 15h45, rather than at 16h45, as suggested by Motsatse. There was time to do exactly what Kotze expected Motsatse to do. Moreover, the events of the strike are pertinent to weigh, and they were wholly ignored. If during the strike these workers warned off the subcontractors and an interdict was necessary, how implausible could it be that they did the same on the Friday afternoon at 16h30, and again on Saturday morning, and, again on Monday 17 September at 16h30?

[45] In the result, in my view, the Labour Court's conclusions that these findings, in the respects addressed, are free from unreasonableness, are incorrect.

[46] I turn now to the Labour Court's treatment of the findings of the Commissioner on the question of intimidation being proven.

[47] The Labour Court concluded that the Commissioner was materially in error because he failed to appreciate that a solid case for intimidation of the subcontractors at the gate was proven. This conclusion is correct. However, I cannot agree that no case was made out in other respects as alleged.

[48] The evidence of the management witnesses about their experiences make out an unassailable case for intimidation: Welman was forced to delete footage; Williams gave an account of one worker, Philip, telling him to convey to management to leave the site – a demand made in front of a rumbling crowd which made him afraid; Kotze says he obeyed the demand to leave because he was afraid. (In the case of Kotze, the Labour Court has incorrectly noted his evidence: Kotze unequivocally expressed his fear) and lastly, Kotze and the other managers remained off-site on the advice of the SAPS. They also witnessed a group come to the office to demand Aphina to leave; they could not have thought that they too were not at risk of such a visit if they too did not acquiesce. They all had experience of the behaviour of the workers during the strike necessitating the application for an interdict. No sound reason exists to undervalue this evidence. Yet, the Labour Court concluded that only the intimidation of the subcontractors at the gate is proven. In my view, the unreasonableness of the award extends to a failure to appreciate that this evidence proves intimidation of the management too.

[49] Lastly, the Commissioner's finding that there was inconclusive evidence of intimidation of the subcontractors to leave the site is untenable and the Labour Court's conclusion that the finding was not unreasonable is incorrect. Again, there is no sound reason to reject the eye - witness accounts of the managers. The inherent probabilities are also relevant. I have addressed above, the implausibility of the subcontractors thinking the notice about no overtime could apply to them.

Whether the workers and the subcontractors intermingled on the way to the gate is unimportant. The plain fact is that the workers were the sole cause of the departure of the subcontractors from the site. The subcontractors had immediately before then, either been working or in a state of preparation to work: their self-interest was wholly at odds with walking off site and losing time, just as they had suffered during the strike at the instance of these very workers. If the subcontractors were intimidated at the gate to stay out, the overwhelming probabilities are that they were intimidated to get out too. The fact that no-one was injured is merely evidence of their submission to the force that could be exerted by the workers. The evidence of bricks, sticks, pipes and robars being carried about cannot be excluded from the mix of relevant facts.

[50] The upshot is that the failure to find that the subcontractors and the managers were intimidated to get off the site was unreasonable, and the Labour Court should have found that to be the case, in addition to the intimidation that occurred at the gate.

[51] Over and above these considerations, as alluded to above, there was a failure to take into account the deliberate shutting down of the site, part of the misconduct alleged by the appellant and an undisputed proven fact. The Commissioner and the Labour Court focussed on too narrow an issue. The intimidation is itself serious but it must be measured in the context of its functionality – to bring all work on the site to a halt; an action they had previously engaged in during the recent strike and had thereby provoked the appellant to obtain an interdict.

[52] To sum up, the Commissioner ought to have found the charge as framed was proven and that the misconduct extended to the intimidation of management and subcontractors to leave the site, as well as the blocking of the gate to prevent any subcontractors gaining entry, thereby illegitimately bringing work to a halt by the use of force.

The appropriate sanction

[53] I deal first with the factors the Labour Court deemed relevant to mitigating the workers' conduct.

[54] In my view:

54.1 The fact that the workers allowed certain subcontractors to collect their overalls under escort is not a mitigating factor. It was used to justify a finding that the workers acted with "restraint". In my view, this perspective is wholly misconceived; rather, it was a naked display of power over the circumstances and the subcontractors. Moreover, it was a power illegitimately arrogated by the body of workers to itself and is an illustration of the seriousness of their misconduct, not a factor to ameliorate their behaviour.

54.2 The inappropriate routing of a work-related instruction via a shop steward which was "bound to miscarry" is said to be a mitigating factor. This is premised on a wrong finding of fact. The manner of the instruction was exploited by the workers to afford a platform to vent their resentment that the subcontractors were working when they were not. No grievance was lodged which is what Motsatse could have done if he thought he had a proper case.

54.3 The notion that the instruction by Kotze was *mala fide* is premised on a wrong finding of fact, as addressed above. Moreover, as the probabilities show, the instruction to Motsatse was not the only communication of the instruction.

54.4 The notion that confusion reigned supreme is premised on a wrong finding of fact, as addressed above; on the contrary, on the probabilities, there could be no confusion.

54.5 The possible belief that overtime was on hold indefinitely is premised on a wrong finding of fact, as addressed above; it relied on a personal belief of Faria which belief had not been communicated to the workforce.

[55] One factor, the perception, however subjective, that the absence of overtime work on Saturday could affect the workers financially is mitigatory. What however is absent is evidence that this was the belief held and that it actuated their conduct. Their case was different: ie, that Kotze had no authority to say there would be no work on Saturday. However, even if this factor is to be naturally inferred, what needs to be weighed is the absence of any effort to take up the grievance in an orderly manner in accordance with sound labour relations norms.

[56] The Labour Court acknowledged that the misconduct, even on the lesser scale that it held, was serious. However, an order of reinstatement does not reflect the weight to be given to that perspective. Naked displays of power, bereft of respect for labour relations norms, ought not to be rewarded. To do so, achieves no more than to exacerbate the decline of respect for those norms. The Courts have repeatedly held that the resort to mob-power to ventilate grievances is utterly unacceptable. Only a zero-tolerance stance by the courts can bring such conduct to an end.

[57] The appropriate sanction is dismissal.

The costs

[58] In view of the ongoing relationship between the union and management and the fact that it was appropriate for the union to seek to resist the appeal and defend the review judgment in its favour, there shall be no costs order.

The order

(1) The appeal is upheld.

(2) The order of the Labour Court is set aside.

(3) The award of the Commissioner is set aside.

(4) The dismissal of the respondents is not unfair.

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Sutherland JA

Davis JA and Murphy AJA Concur

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