



**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not reportable

Case no: JR2578/14

In the matter between:

**WBHO CIVIL CONSTRUCTION (PTY) LTD**

**Applicant**

and

**THEMBA HLATSHWAYO N.O.**

**First Respondent**

**COMMISSION FOR CONCILIATION,  
MEDIATION AND ARBITRATION**

**Second Respondent**

**NUM obo MVELASE & OTHERS**

**Third Respondent**

**Heard:** 1 September 2017

**Delivered:** 10 May 2018

**Summary:** Reasonableness review – commissioner finding employees not guilty of intimidation of sub-contractors and reinstating them – although finding of not guilty unreasonable, outcome of award nevertheless reasonable – review application dismissed, save that award of back-pay set aside

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## JUDGMENT

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### MYBURGH, AJ

#### Introduction

- [1] This is a section 145 review application, with the primary issue for determination being whether the commissioner's award passes the *Sidumo* test. It is a hard case with a long record, involving a dismissal that took place a long time ago.
- [2] Following their participation in a three-week protected strike in the construction industry, the 41 individual respondents returned to work on Friday, 13 September 2013, but were not allowed to work their Saturday overtime shift the next day, despite sub-contractors being entitled to work. Aggrieved by this, the individual respondents came to work on the Saturday – the events of which resulted in them being charged and subsequently dismissed (on 8 November 2013) for the “*intimidation of sub-contractors and management and / or engaging in undesirable activities leading to the shut-down of the site on 14 September 2013*”.
- [3] The ensuing CCMA arbitration, which ran for 12 days, culminated in the commissioner issuing an award on 4 November 2014, in which he found the dismissal of the individual respondents substantively unfair (because of an absence of guilt) and awarded them retrospective reinstatement. The company now seeks to set aside the award on review.
- [4] In what follows, I deal with the following topics in turn: background and chronology of events; an overview of the evidence at the arbitration; the commissioner's award; relevant legal principles; an assessment of the reasonableness of the award; and other grounds of review.

### Background and chronology of events

- [5] The company is a well-known construction firm, with this matter relating to its Lynwood Bridge project (outside Pretoria), which involved the building of an office complex on behalf of Atterbury Developers (“the site”). At the site, the company employed a group of construction workers (including the individual respondents) and engaged a number of sub-contractors.
- [6] The individual respondents lived in a company hostel situated in Germiston and were transported to the site by way of a company bus (although some used their own transport). They generally worked 11 shifts per fortnight: Monday to Saturday (07h00 to 17h00) in week one, with the Saturday being an overtime shift; and Monday to Friday in week two, with the Friday (ending at 12h00) being the fortnightly pay day. The week in which the individual respondents worked on Saturday was referred to as a “*Mampara week*”. (The evidence produced something of a dispute about whether the Saturday overtime shift was voluntary or compulsory.)
- [7] In August / September 2013, a three-week protected strike took place in the construction industry, which the individual respondents participated in. During the strike, the company was forced to obtain an interdict from this court relating to intimidation / violence. It appears that after this, some sub-contractors worked during the strike (some of whom did the work performed by the strikers), while others did not work. Following a collective agreement having been concluded, the strike came to an end on Thursday, 12 September 2013.
- [8] On Friday, 13 September 2013, the company came to learn of the settlement at about 08h00. The individual respondents returned to the site at about 11h00, and commenced their duties after lunch (at 12h45). At this point, they worked side-by-side with sub-contractors, and continued doing so until knocking off at 17h00.

- [9] Although the exact time is in dispute (either 15h00 according to the company or 16h45 according to NUM), during the course of the afternoon, Kobus Kotze (the site manager) met with Isaiah Motsatse (a shop steward and one of the individual respondents). At this meeting, Mr Kotze advised Mr Motsatse that the individual respondents would not be allowed to work the Saturday overtime shift because work had not been planned for them, but that sub-contractors would work. Mr Motsatse contested the instruction. Mr Kotze further instructed Mr Motsatse to convey the instruction to the workforce. According to Mr Kotze, he also advised his site engineers (Louis Welman<sup>1</sup> and Stefan Nel) to tell the foremen (there being six of them) to relay the instruction to the workforce, and spoke to some of the foremen himself, including Rudi Williams. There is a dispute about whether it was appropriate for Mr Kotze to have required a shop steward to convey a work-related instruction of this nature to the workforce. But what is not really in dispute is that the instruction was not conveyed to the workforce by the foremen, at least not to the majority of the workforce (the company not having established this in evidence).
- [10] While travelling on the bus back to the hostel after the shift had ended at 17h00, Mr Motsatse sought to convey the instruction to those of the individual respondents on board the bus. They questioned how he (as opposed to the foremen) could give them work-related instructions, and effectively laughed him off. It was in these circumstances that Mr Motsatse told the bus driver that he should collect the individual respondents the following day from the hostel and take them to work. According to Mr Kotze, he received a call from the bus driver (Koos Khumalo) at 19h30, who informed him that he had been intimidated (which Mr Motsatse disputed) and told by Mr Motsatse to bring the individual respondents to work the next day. In response, Mr Kotze told Mr Khumalo that he should not place his safety at risk, and that he should do as required.

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<sup>1</sup> Incorrectly spelt Welma in the award.

[11] Turning to Saturday, 14 September 2013, the events and timeline were as follows:

- a) Mr Kotze arrived at work at about 06h15 and went to the site office, which is about 100 metres away from the entrance gate to the site.
- b) The individual respondents arrived at the site at about 06h40 and proceeded through the entrance gate and onto the site, where they clocked in – it being common cause that all the individual respondents did so. From there they moved as a group to the vicinity of the storerooms.
- c) A notice was posted at both the gate and on the notice board in the vicinity of the clocking station advising that no work was to be performed on the Saturday (although the precise wording of the notice is in dispute). The notice came to the attention of the individual respondents.
- d) By this time, some sub-contractors were already on site.
- e) At about 07h10, and having clocked in, the individual respondents turned around and proceeded back outside the entrance gate, with the sub-contractors being together with them (see further below).
- f) Mr Kotze witnessed things as he was moving back to the site office, and was about 50 metres away.
- g) Mr Welman walked through this group of workers while he was on route from the entrance gate to the site office. In the process, he took some video footage on his cell phone.
- h) The individual respondents then assembled outside the entrance gate, which they closed – the result being that access to the site was blocked.

- i) Apparently before this, Mr Motsatse and other individual respondents went to the site office and asked that the drawing clerk (Mrs Alpha), who was, like the individual respondents, a fortnightly-paid general worker, should leave the site. She did so. In the process, there was no intimidation of the members of management present in the site office, including Mr Kotze.
- j) At some point, Mr Welman left the site office and made his way to the Glenfare Shopping Centre, which is across the road from the site. He took further video footage (using a video camera) there.
- k) At about 08h00, and having placed calls to management advising that they could not gain access to the site, the sub-contractors started leaving.
- l) At about 08h30, Messrs Nel and Williams, who had also been in the site office, proceeded to the entrance gate to see what was going on.
- m) When at the gate, they were told by an individual that management should leave the premises.
- n) At about 09h00, and after Messrs Nel and Williams had reported back to the site office, they together with Mr Kotze left the site by exiting through the entrance gate. Mr Williams went home, while Messrs Kotze and Nel joined Mr Welman at the shopping centre.
- o) At about 09h15, and after having been called by Mr Kotze earlier in the morning, the SAPS arrived at the site. (Mr Motsatse's evidence was, however, that this occurred before 09h00, because, as far as he was concerned, the individual respondents ultimately left the site at around 09h00.)

- p) After the SAPS had engaged them for about five minutes, the individual respondents moved back inside the site premises as required by the SAPS – and thus off the road / pavement.
- q) In the process of liaising with the SAPS, Mr Kotze was advised that the SAPS would wait on site until 12h00 to monitor the situation. The SAPS also advised Mr Kotze that management should not aggravate the situation by returning to the site, or allowing sub-contractors to be on site.
- r) At about 10h00, and some ten minutes after this engagement with the SAPS, Mr Kotze received a telephone call from a member of the SAPS advising that the individual respondents had boarded the bus and left the site. (As stated above, according to Mr Motsatse, this would have occurred closer to 09h00 than 10h00.)
- s) No work was performed at the site, with all six / seven sub-contracting firms (employing some 50 employees) who were scheduled to work either having left the site or not having gained entry to the site. According to Mr Kotze, losses to the company ran to some R80 000.

[12] On Monday, 16 September 2013, the individual respondents worked normally until 16h30, when they engaged in a 30-minute overtime ban until 17h00. (Apparently, the last 30 minutes per day is paid at overtime rates.) Although they were not charged with this, the company contended that the individual respondents engaged in removing sub-contractors from work at this time.

[13] On 17 and 18 September 2013, the individual respondents were suspended pending a disciplinary inquiry. In the process, the company alleged that they threw back their notices of suspension at management.

[14] On 19 September 2013, the individual respondents were charged with these three charges of misconduct:

- “(1) Refusal to obey a legitimate instruction in that you proceeded to clock-in for unauthorised overtime on 14 September 2013 despite being instructed not to do so by management.
- (2) Intimidation of sub-contractors and management and/or engaging in undesirable activities leading to the shut-down of the site on 14 September 2013.
- (3) Gross insubordination and making a mockery of the employer’s disciplinary processes on 17 September 2013 when the suspension letters were being handed out.”

[15] On 26 September 2013, the disciplinary inquiry commenced and appears to have been concluded on 22 October 2013. The written findings of the chairperson reflect that he found the individual respondents not guilty of charges 1 and 3, but guilty of charge 2, and that they were dismissed on that basis. The actual date of dismissal appears to have been 8 November 2013.

#### The arbitration: an overview of the evidence

##### *Introduction*

[16] At the arbitration, the company called four witnesses: Mr Kotze; Mr Williams; Tony Faria (of Alberton Contractors, a sub-contractor); and Mr Welman. NUM, in turn, called three witnesses: Samuel Moagi (an individual respondent who was a crane operator); Alfred Mvelase (an individual respondent); and Mr Motsatse (an individual respondent who was also the shop steward).

[17] It warrants mention at the outset that this evidence is missing from the transcript: the cross-examination and re-examination of Mr Welman (although I have watched the video footage that his evidence is based on); the evidence of Mr Mvelase; and the evidence-in-chief, the last portion of the cross-examination<sup>2</sup> and the re-examination of Mr Motsatse. Given that NUM made no issue of this in its answering affidavit or heads of argument, I do not intend to consider the possible refusal of the review on this basis alone. Instead, I

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<sup>2</sup> Although the transcript contains 75 pages of his cross-examination.



intend to rely on the commissioner's summary of the evidence – which is detailed and generally undisputed – where evidence is missing from the transcript. That said, as reflected below, the company's failure to take steps to reconstruct the missing part of the transcript<sup>3</sup> has some negative consequences for it.

- [18] Another concerning introductory issue is this. From the outset of the arbitration, the company presented its case on the basis that the individual respondents were found guilty of all three charges that were brought against them. Having covered charges 1 and 3 in evidence, it was revealed for the first time by the company's attorney at p 693 of the record that the individual respondents had been found not guilty of charge 1 and at p 854 of the record that the individual respondents had been found not guilty of charge 3, and thus that the arbitration should be confined to charge 2 alone. This is unacceptable.

*The company's case: the events of the Saturday*

- [19] To begin with the evidence of Mr Kotze, he testified that at around 07h00, he heard loud voices (shouting at the sub-contractors) and saw people walking back towards the entrance gate, and "*some of the sub-contractors ... leaving the site*". Later on, he said that he saw the WBHO workers walking behind the sub-contractors, thus forcing them out of the premises. He went on to testify that Mr Welman had reported to him (upon his arrival at the site office after having walked through the group of workers without being intimidated) that the WBHO workers had told the sub-contractors that they would not be allowed to work if the WBHO workers were not allowed to work. Mr Kotze had also received telephone calls from sub-contractors advising that the entrance gate was blocked and wanting to know what was going on, with his response being that they should just wait it out. In other calls, it was alleged that sub-

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<sup>3</sup> See in this regard, *Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v Commission for Conciliation, Mediation & Arbitration & others* (2003) 24 ILJ 931 (LAC). I should mention that the review record contains a transcription of the commissioner's bench notes, but it ends at the conclusion of the evidence of Mr Faria. It thus does not cover the missing evidence.

contractors were being threatened outside the gate. He had also received calls from Mr Welman (after he had gone to the shopping centre) to the effect that some of the WBHO workers had trapped him inside the shopping centre. Upon their return from the gate, Messrs Nel and Williams appeared shocked and reported to him that they had been threatened at the gate and told that management must leave immediately. Upon doing so, he witnessed the WBHO workers in a group blocking entrance through the gate, but the three of them walked through the group without being intimidated. By the time the SAPS arrived, the WBHO workers were just standing in front of the gate and there was no intimidation going on anymore; no arrests were made. As far as he was concerned, he had expected the shop steward to come to the site office to discuss the matter with him. (Although Mr Kotze took the commissioner through the video evidence, this was ultimately left for Mr Welman to present as he was the videographer – see further below.)

- [20] Turning to the evidence of Mr Williams, he arrived at work at 07h00, and first saw the WBHO workers at the time that they were clocking in. He witnessed them singing, chanting and shouting at the sub-contractors, and “*chasing all the people off site*”, which caused them to “*walk as quickly as they could ... outside*”. At this point, the WBHO workers were not carrying anything in their hands. Once everyone had left, the WBHO workers stood outside the entrance gate and made sure that nobody could come on site. Later on, he went to the entrance gate with Mr Nel to see what was happening. In the process, Phillip Madudijabe opened the gate and approached them some ten metres inside the premises, stating that “*it is better for us ... to leave the site and that we should call the people inside*”. He felt threatened by this; some individuals had bricks in their hands and the group was mumbling, and “*it felt to me they agreed with what he said*”. Having returned to the site office, he then left the site together with Messrs Kotze and Nel. Different to Mr Kotze, he testified that when exiting the gate and walking through the group of workers, “*there were things said in their language*” which came across as threatening. But he accepted that nothing physical happened to them. Asked why he thought the WBHO workers behaved as they did, he testified that “*maybe they*

*felt it was unfair for them not to work on that Saturday and the sub-contractors could work*".

[21] This brings one to the evidence of Mr Faria, who runs a plastering business and was the only sub-contractor to testify. He sought to enter the site at about 07h30 in a vehicle he was driving with 12 of his employees onboard, but came across the WBHO workers in front of the entrance gate, which was closed. Having parked the vehicle about 100 metres down the road, the occupants were approach by three individuals who *"advised my staff not to go [in] because they had locked out the site and [were] not allowing anybody to work on that specific day"*. This was not intimidating, but the scene at the gate was *"quite hectic"*, with WBHO workers carrying sticks, pieces of rebar or bricks and chanting words to the effect that they *"do not want rats"* (Mr Faria having been told of the translation), which he found intimidating. Upon phoning Mr Kotze, he was asked to hold on and give management an hour or so to resolve the issue. When the entrance was not cleared after an hour, Mr Faria and his employees decided to leave. Before doing so, Mr Faria's foreman (August Langa) approached some of the individuals at the gate and asked if they could collect their overalls so that they could take them home to be washed. This was agreed to, with three of the individuals having accompanied three of Mr Faria's employees onto the site to collect the overalls. Mr Faria and his employees then left at about 09h00. Significantly, Mr Faria testified that, during the course of his interaction with Mr Kotze (on the day in question and / or on the Friday), Mr Kotze had advised him that a notice had been published advising that *"there was no overtime until further notice"*. As far as Mr Faria was concerned, the WBHO workers were aggrieved by this.

[22] Turning finally to the evidence of Mr Welman, it warrants mention that it was interposed after the evidence of Mr Moagi (see below). Mr Welman arrived at work at about 06h55. According to him, after the WBHO workers had clocked in, he *"saw all the sub-contractors walking out and being chased out by a group of WBHO workforce"*. Some of the WBHO workers were carrying pipes, sticks and rebars, with the group being unhappy about the fact that the sub-contractors were working, when they were not. Mr Welman immediately took

out his cell phone and started videoing the scene. After having done so, he went to the site office, and was given a video camera by Mr Kotze at about 07h30. It appears that he then went to the shopping centre across the road from the entrance to the site, where he videoed the scene at the entrance gate, and interviewed some sub-contractors. They told him that they were chased out by the WBHO workers, and that if they went to work, their cars would be burnt. While at the shopping centre, Mr Welman was approached by certain WBHO workers who asked him to accompany him, which he refused to do. He was then told to delete some of his video footage, and (cunningly) deleted one of the videos, which satisfied them. He then remained at the shopping centre.

[23] Mr Welman presented the video evidence to the commissioner, with his commentary being as follows in summary:

- a) Video 1 (07h05): capturing sub-contractors walking towards the entrance gate followed by a group of WBHO workers, some of whom were carrying rebars or plastic pipes; only these workers could be identified – Samuel (presumably Moagi), Pule Mathikhe, Modisadife, Modisadife's cousin (unnamed), Philemon, and Joseph (aka Zulu).
- b) Video 2 (08h35): capturing Mr Welman speaking to a foreman employed by one of the sub-contractors at the shopping centre; two of the individual respondents are seen approaching him.
- c) Video 3 (time not stated): the transcript reflects that the evidence was not transcribed because of "*noisy background*", but Mr Welman appears to go on to state that it reflects interviews conducted at the shopping centre.

[24] As stated above, the cross-examination and re-examination of Mr Welman is missing from the record, with the result that I am constrained to rely on the commissioner's rendition thereof. These portions of the commissioner's summary of Mr Welman's cross-examination appear material:

- “4.201 It was agreed by Louis that the passage [leading to the gate] was about 4m wide and 60m long where the workers were walking and he walked beside them.
- 4.202 The WBHO workers walked behind the sub-contractors and there was no one speaking in respect of the fact that there was intimidation.”
- “4.209 Many propositions were made to Louis regarding the fact that he walked amongst the workers in the passage and there was nothing that evinced intimidation.”
- “4.211 The [NUM] representative put it to him that it would have been impossible for the workers of WBHO to have walked side by side with the contractors given the size of the passage. Louis affirmed.
- 4.212 The [NUM] representative made propositions that in all video footage Louis started the conversation and directed it to where he wanted it to go. Louis disputed that.
- 4.213 Many propositions were made regarding the fact that workers did not show any sign of intimidation except the narration tendered by Louis. He affirmed.”

[25] Turning to the commissioner’s summary of Mr Welman’s re-examination, these portions appear material:

- “4.216 The re-examination raised new matters pertaining to the fact that video footage does not show all the incidents which took place. Louis related that he was confronted and threatened though that was not captured in the video.
- 4.217 I raised a concern that the version was not mentioned in evidence in-chief and therefore there was no cross-examination thereon.”
- “4.219 Louis gave an account of his whereabouts as he was taking the video footage. Louis claimed that he was afraid and chose to go to the shopping [centre] where there were people likely to protect him.”

[26] Having viewed the video footage, my own observations are as follows:

- a) Video 1: it captures workers wearing blue WBHO overalls, and others in different overalls or casual clothes, walking through a tunnel towards the entrance gate – there being a bunch of workers in WBHO overalls at the back; a few workers wearing WBHO overalls are carrying things in their hands; there is little if any singing and chanting going on; laughter can be heard; and from an overall perspective, the footage, in itself, does not establish the company's contention that the sub-contractors were being chased out of the premises by the WBHO workers in a threatening and intimidatory manner.
- b) Video 2: it captures an interview by Mr Welman of a sub-contractor at the shopping centre; he states that the WBHO workers had said that the sub-contractors had to go and they cannot work on Saturdays.
- c) Video 3: it captures another interview by Mr Welman of a sub-contractor at the shopping centre; he states that the WBHO workers had chased them out of the premises, that they do not want them to work, and that they had threatened to burn their cars; a discussion then ensues between the sub-contractor, Mr Welman and the sub-contractor seen in video 2 about whether it will be possible to work that day, with Mr Welman saying that it would be; a WBHO worker then arrives on the scene – he takes exception to Mr Welman “*shooting*” him (with his video camera) in a shopping centre.

*NUM's case: the events of the Saturday*

[27] To begin with the evidence of Mr Moagi, he appears to have been one of two crane operators employed by the company, the other being one Carter. According to Mr Moagi, he and Carter were specifically asked by Mr Kotze the previous day to come to work on the Saturday (but this had not been put to Mr Kotze). On the Saturday, he arrived by bus at the site at around 07h00; he saw a notice at the gate, but did not read it; he clocked in and then saw a

notice in the vicinity saying that there was no work that Saturday, but it did not involve him; the workers became confused; he and Carter ultimately waited in the vicinity of their cranes, but no one arrived; and the two of them then subsequently joined the WBHO workers outside the entrance gate. Mr Moagi denied having seen that sub-contractors were chased off the site, or that he was one of a group of WBHO workers *“who walked behind the sub-contractors, intimidating them and forcing them out”*, but he accepted that he had seen Mr Welman *“taking the pictures”* and had walked alongside him together with Pule Mathikhe. As far as Mr Moagi was concerned, *“the sub-contractors may have seen the WBHO workers not working then they said if the WBHO workers are not working we better also not work”*; *“it was their own decision that they decided that they cannot work if the company is not working ... it was their own decision”*. He also contended that the sub-contractors may have understood the notice to also apply to them, because *“it was not selective”* (i.e. did not identify who it applied to).

[28] Turning to the evidence of Mr Mvelase, as stated above, it is entirely missing from the transcript. The commissioner’s summary of his evidence in-chief about the events of the Saturday is as follows:

“4.228 The WBHO workers reported for work on 14 September 2013 based on the fact that they did not believe the shop steward.

4.229 On reporting for work he went to clock in and the workers spoke about the paper pasted on the notice board regarding the fact that the workers were not to work overtime.

4.230 A discussion ensued about the notice regarding the fact that they were not to work overtime.

4.231 The workers also spotted another notice by the gate regarding the fact that they were not to work.

4.232 WBHO workers were milling around the containers on site prior to them leaving site. As the WBHO workers left site the sub-contractors walked amongst them and between them.

4.233 A total of five workers were identified as workers from various sub-contractors by Alfred intermingling with WBHO workers.

- 4.234 Version of the [company] was put to him relating to the fact that the workers intimidated management and the sub-contractors. Alfred disputed the version.
- 4.235 Another version was put to him in respect of the fact that the workers were armed with weapons for purposes of intimidation. Alfred disputed the version.
- 4.236 Alfred pointed [out] some workers from sub-contractors carrying tools of the trade.
- 4.237 Alfred admitted that the WBHO workers were carrying an assortment of instruments for work. There was, according to him, no intimidation.
- 4.238 Alfred contended that if they were violent or prone to intimidation then the sub-contractors would not have walked amongst them.
- 4.239 Alfred made a point regarding the fact that some of the sub-contractors wore WBHO overalls<sup>4</sup> though most would be in their casual wear, whereas the WBHO [workers] would be in overalls as they were from hostels.”

[29] The relevant extract from the commissioner’s summary of Mr Mvelase’s cross-examination is this:

- “4.244 The attorney made many propositions regarding the fact that the workers identified belonged to RMS being a sub-contractor; however his brief was that those workers were closely related to the WBHO workers.
- 4.245 Alfred contended that they were nevertheless sub-contractors on site. The five persons identified by Alfred were conceded to be sub-contractors.
- 4.246 The assortment of instruments of trade was identified carried by some sub-contractors.

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<sup>4</sup> This appears to relate to a sub-contractor known as RMS.



- 4.247 Propositions were made by the attorney in respect [of] a steel pipe measuring plus / minus 2m carried by a WBHO worker as an instrument utilized for intimidation.
- 4.248 The assertion was disputed by Alfred. He further contended that there was no intimidation captured on the video footage as workers walked leisurely.
- 4.249 Alfred went on to point out other workers intermingling with the WBHO workers.
- 4.250 Propositions were made by the attorney in terms of the fact that Alfred was around the area for about two or so hours.
- 4.251 Alfred stated that he did not check for how long they were around on site. Alfred outlined events as he recalled them; arrived on site, clocked in and subsequent thereto met as WBHO workers to formulate how they were to engage management.
- 4.252 The attorney made propositions regarding the fact that they finally did not engage management.
- 4.253 Alfred conceded that they did not secure an audience with management premised on the advice of the police.
- 4.254 Alfred was quizzed on why the police arrived on the scene. He stated that the police were called by management alleging that the WBHO workers blocked the road.
- 4.255 Police called for a shop steward whom the police advised not to gain entry on site as they would be perceived to be trespassing.
- 4.256 WBHO workers resolved to leave site though there were some sub-contractors on site.
- 4.257 Propositions were made regarding the fact that the WBHO workers were frustrated by not working on the Mampara week. Alfred stated that, on the contrary, they were very happy as they had time to relax.”

[30] Turning finally to the evidence of Mr Motsatse, as his evidence in-chief is missing from the transcript, I again quote from the commissioner's award in relation to what Mr Motsatse said about the events of the Saturday:

"4.264 [WBHO workers were] walking in the narrow passage and intermingling with the sub-contractors.

4.265 Isaiah pointed out a number of sub-contractors in the WBHO midst carrying some instruments of work.

4.266 The sub-contractors were pointed out walking with their hands in their pockets and folding arms as well as chatting with the WBHO workers."

[31] As stated above, the last portion of Mr Motsatse's cross-examination is not contained in the transcript. What is contained in the transcript about the Saturday is this evidence: Mr Motsatse arrived at work before 07h00; all of the individual respondents attended work and clocked in; he saw a notice on the notice board in the vicinity of the clocking station, which stated (although he could not recall the exact wording) that workers were not to work; he thus sought to engage his colleagues, with the decision being that they should return to the hostel; in his evidence in-chief he had stated that he had told the WBHO workers to go and stand at the gate with a view to seeking clarity; at the point that the SAPS arrived (which was before 09h00) they "*were talking about going to see management ... and then the police advised me that ... I should not go speak to management in line with the notice, just as they had been phoned by management that we should not have access or come into the site or work area*".

[32] To this should be added this part of the award, setting out that portion of Mr Motsatse's cross-examination which is not contained in the transcript:

"4.272 Reference was made to the video footage and Isaiah pointed out more sub-contractors intermingling with the WBHO workers and rebutted the version of intimidation.

- 4.273 Concession was made by the [company] regarding the fact that the sub-contractors were viewed on the video intermingling with the workers because they were closely related to WBHO workers.
- 4.274 Isaiah contended that if there was intimidation then the sub-contractors would not have intermingled with them.
- 4.275 There was no notice presented before me regarding the prevention of WBHO workers to work overtime. Isaiah's recollection of the notice corroborated the account of both Samuel and Alfred in respect of the content.
- 4.276 The content of the notice was that the workers were not to work overtime until further notice.
- 4.277 Numerous propositions were made regarding the fact that the workers intimidated management and sub-contractors despite there being no evidence captured on the video footage."

#### The commissioner's award

[33] In what follows, I reproduce the *ratio* of the commissioner's award arranged under various topics that I have formulated.

[34] Regarding the process followed by Mr Kotze in giving Mr Motsatse (the shop steward) the instruction on the Friday that the individual respondents should not work the Saturday overtime shift:

"5.10 The [company's] case was that there was no formal and prescribed way of communication on site. It was however practice for the foremen to communicate to their respective teams whatever management's instruction.

5.11 The [NUM's] case was that there was a prescribed way of communication and the shop steward did not feature in the prescribed communication line except in matters whereupon the union had an interest.

- 5.12 In this respect I am persuaded to accept the version of the WBHO workers regarding the fact that the shop steward was not an integral part of the communication line to filter instructions from management to WBHO workers.
- 5.13 I am mindful of the fact that Kobus [Kotze's] assertion was that the shop steward was previously used in such a manner with significant success.
- 5.14 The previous incident was not presented to me and therefore the [NUM] could not comment thereon except to refute such an assertion.
- 5.15 In the absence of such evidence I accept the version of the [NUM] as the most probable version. It therefore follows that [their] version ... stands unchallenged in this regard.
- 5.16 The [NUM's] version was that the instruction was given at 16h45 whereas Kobus asserted, to the contrary, that he gave the instruction regarding the fact that the WBHO workers were not to work overtime at 15H00.
- 5.17 If I were to accept the version of Kobus: I would have to take into account that he admitted that the shop steward was not told how to address the workers given the fact that there were time constraints.
- 5.18 It follows that in whatever way one looks at the matter: the shop steward was not bound to succeed to effectively cascade the instruction to WBHO workers at that given time.
- 5.19 The nature of the instruction itself was controversial and contentious considering that the workers were generally allowed to work overtime on a Mampara week.
- 5.20 The shop steward undertook to relay the message as Kobus put it as an instruction, Kobus did not give the WBHO workers any choice save to comply with the instruction."

And further in this regard:

- "5.41 The manner in which Kobus issued the instruction was bound to cause confusion on site. The effective communication line was through the foremen.

- 5.42 Rudi [Williams'] WBHO workers were not on site as he was made the integral part of communicating the instruction to his workers.
- 5.43 Motsatse was the shop steward and he liaised with management on matters pertaining to the union and the [company's] relationship.
- 5.44 WBHO workers' view was that it was unprecedented for a shop steward to be utilized as a conduit pipe of communication.
- 5.45 Motsatse the shop steward held that it was indeed unprecedented whereas the [company] asserted that there was a precedent however this incident was not outlined to me.
- 5.46 I therefore prefer the version of the WBHO workers that it was unprecedented for a shop steward to filter down the work related instruction to WBHO workers."

[35] Regarding the motivation for and rationale behind the instruction that the individual respondents were not allowed to work the Saturday overtime shift:

- "5.21 If regard be had to the prevailing situation when the instruction was given: I have to take into account that the workers were from a national strike affecting the construction industry.
- 5.22 The [company's] version was that the workers commenced work during the course of the day on a Friday without prior planning.
- 5.23 The working relations were therefore still strained and parties should have had time to rebuild and strengthen their working relationship particularly as they were parties bound by the collective agreement.
- 5.24 Kobus' version was that he realized that there was a need to plan the work for the workers to work overtime on 14 September 2013 on a Saturday.
- 5.25 The strike was called off on 12 September 2013 and the WBHO workers resumed work on 13 September 2013. There was no need then by the [company] to plan work for the WBHO workers.
- 5.26 This lends support to the WBHO workers' assertion was that there was no planning required for them to work overtime.

- 5.27 In view of the fact Samuel [Moagi] demonstrated what has to be done prior to him commencing with his work in respect of risk assessment and inspection of his machine.
- 5.28 He was also allocated to work with an independent sub-contractor regarding ferrying of steel in order to help those sub-contractors working on columns.
- 5.29 Samuel worked across the board in that he worked with sub-contractors and amongst the WBHO workers.
- 5.30 Samuel was fetched by a bakkie unlike all the other workers and he clocked in ready to assist in the recovery plan.
- 5.31 I am persuaded to accept his version as the most probable version regarding the fact that he was called to assist with the recovery plan particularly that both crane drivers were on strike.
- 5.32 If I accept that there was no need for management to plan work for the WBHO workers then it follows that Kobus was malicious when he refused the WBHO workers to work overtime on 14 September 2013.
- 5.33 This view is strengthened by the account of Tony [Faria] in respect of why the WBHO workers were not to work overtime. Kobus told him that the WBHO workers were not to work overtime until further notice.
- 5.34 Regard must be had to the account of Rudi as the foreman on site he was also not told by Kobus why the WBHO workers were not to work overtime on 14 September 2013 whereas this was a Mampara week.
- 5.35 Mampara week was defined as the alternate week on which the WBHO workers were not paid. It was however compulsory for the WBHO workers to work overtime.
- 5.36 Tony asserted that he was of the view that the WBHO workers denied his workers the right to earn a living. I am persuaded to accept that this applied to Kobus' intention when refusing the WBHO workers to work overtime."

[36] Regarding the state of "*confusion*" on the Saturday:

- "5.37 It cannot be denied that confusion reigned supreme on the day in question.

- 5.38 The notice declining the WBHO workers to work overtime was not presented before me. The WBHO workers held that the content related to the workers being prohibited to work overtime.
- 5.39 There was no differentiation of who actually was prevented to work overtime. I surmise that the sub-contractors who intermingled with the WBHO workers perceived themselves as victims of management.
- 5.40 It is against this backdrop I have to deal with the ensuing intimidation. I have already accepted that Kobus wanted to short-change the WBHO workers.”

[37] Regarding the issue of intimidation on the Saturday:

- “5.49 The video footage evidence was presented by Louis [Welman] and captured scenes around the site on the day in question.
- 5.50 Rudi’s account was that he was also threatened by the WBHO workers carrying bricks as they marched through the passage of 4m by 60m.
- 5.51 The version presented was that the WBHO workers marched the sub-contractors out of site.
- 5.52 The WBHO workers showed, to the contrary, that they marched behind the sub-contractors because their containers on site were far behind those of the sub-contractors.
- 5.53 The WBHO workers further pointed out sub-contractors in the video footage who belonged to RMS and other sub-contractors.
- 5.54 There was no visible account of intimidation shown on video footage and Louis’ account was that the video footage captured snippets of events. He was however intimidated and asked to delete some part of the video footage which was not depicted in the video footage.
- 5.55 Louis’ account in terms of evidence in-chief did not mention the incidents which were mainly dealt with under re-examination regarding why he went to the shopping centre.
- 5.56 I will therefore not offer much probative value on the video footage evidence tendered by Louis.

- 5.57 It must however be stated that the WBHO workers demonstrated that the sub-contractors intermingled with them.
- 5.58 The sub-contractors pointed out by the WBHO workers were conceded by the [company] to be sub-contractors with whom WBHO workers had a close relationship. This however renders the assertion of intimidation enfeeble.
- 5.59 Louis' account was presented in a manner that I gained the impression that the WBHO workers marched out the sub-contractors. The video footage evidence did not sustain this assertion.
- 5.60 In the video footage some WBHO workers carried the tools of trade and so were some of the sub-contractors.
- 5.61 There was therefore little, if anything, to go by in terms of intimidation in respect of video footage.
- 5.62 There were voices made out in respect of the interview conducted by Louis from some sub-contractors whereupon the sub-contractors were saying they were threatened: much more as a response to the question posed by Louis."

[38] Regarding the issue of derivative misconduct:

- “5.63 The [company] had asserted that the matter before me should be dealt with in terms of a derivative misconduct.
- 5.64 Derivative misconduct is premised on the collective responsibility that the workers have in respect of either safe guarding or securing a property.
- 5.65 The phenomenon is rife in the retail sector whereupon workers would be called upon to disclose who was involved in the commission of misconduct in the face of an ultimatum given.
- 5.66 Failure to do so, within the ultimatum assumes that they are all dishonest and thereby undermining their contract of employment with the [company].
- 5.67 In the matter at hand there was no collective responsibility regarding not to report for overtime as already alluded to above.



- 5.68 WBHO workers were not viewed on the video footage and then called upon by the [company] to disclose what transpired on the day in question in respect of intimidation.
- 5.69 It should be borne in mind that Kobus spoke to [Koos] Khumalo regarding the WBHO workers having to report for duty in order [to] safe guard the life of Khumalo, the bus driver.
- 5.70 It follows that the reporting of WBHO workers for overtime was not in itself a transgression as the [company] did not find them guilty thereof.
- 5.71 ‘Collective guilt’ as a principle is repugnant in our law and is not encouraged as espoused by Grogan who is a staunch protagonist of derivative misconduct.
- 5.72 Rudi, Louis and Rudi [sic] told the sub-contractors to hang in the face of the confusion and when the confusion was not abetting, sub-contractors left as testified by Tony.
- 5.73 Some sub-contractors left at the instruction of Rudi and Louis, the WBHO workers wanted to engage management but abandoned the idea premised on the advice of police.
- 5.74 Given the submissions made before me, I conclude that the matter before me does not fall within the meaning of derivative misconduct.”

[39] The commissioner thus concluded:

“5.75 The WBHO workers were, accordingly not viewed intimidating the sub-contractors as per the video footage evidence as they were shown intermingling with some sub-contractors carrying an assortment of instruments of trade.”

“6.1 I find that the WBHO workers did not intimidate the sub-contractors and accordingly their dismissal by the [company], WBHO, was substantively unfair.”

[40] In the result, the commissioner awarded the employees reinstatement retrospective to the date of their dismissal on 8 November 2013.

Relevant legal principles

[41] In an often-quoted passage, Murphy AJA said this in *Mofokeng*:<sup>5</sup>

“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.*” (Own emphasis.)

[42] In short, errors or misdirections, in themselves, do not give rise to a review for want of reasonableness; they only do so if the “*distorting effect*” is the production of a substantively unreasonable outcome.<sup>6</sup> So where on all the material before the commissioner, the result is reasonable, errors and misdirections on the part of the commissioner in arriving at his or her conclusion are really of no consequence.

[43] As to when a decision will be unreasonable, it will only be so if it is one that a reasonable decision-maker could not arrive at.<sup>7</sup> It must thus fall outside of a notional range of reasonable decisions that could be reached on a given set of facts.<sup>8</sup> It will fall outside this range if the decision is not “*capable of*

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<sup>5</sup> *Head of Department of Education v Mofokeng & Others* (2015) 36 ILJ 2802 (LAC) (“*Mofokeng*”) at para 32.

<sup>6</sup> *Mofokeng* at para 33.

<sup>7</sup> *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC) at para 110.

<sup>8</sup> *Sidumo* at paras 109 and 119.

*justification*<sup>9</sup> (i.e. justifiable) or, put differently, cannot “*plausibly be reached on the material evidence*”.<sup>10</sup> This will be the case if the award is “*entirely disconnected with the evidence*” or is “*unsupported by any evidence*” and involves “*speculation by the commissioner*”.<sup>11</sup> “*It follows from this that [a commissioner’s] award will be reasonable when there is a material connection between the evidence and the result, or, put differently, when the result is supported by some [material] evidence.*”<sup>12</sup> In short, a wrong award is not, in itself, reviewable; to be so, it must be so wrong (“*obviously wrong*”<sup>13</sup>) as to be unreasonable. The result of this is that there will be many awards where this court differs with the decision of the commissioner – awards that might rightly be described as unsatisfactory or poor – but where the result is, nevertheless, not unreasonable, and the award thus not reviewable.<sup>14</sup>

- [44] There is another point that needs to be made for present purposes, which arises from the fact that reasonableness is a result-based review test. If the company in this matter establishes that the commissioner’s decision to acquit the employees of misconduct (and thus find the dismissal substantively unfair) was unreasonable, that does not mean it will necessarily succeed in assailing the award of reinstatement on review. In order to do so, it must go further and establish that, assuming the employees were guilty of misconduct (as contended), the commissioner could not reasonably have found the dismissal substantively unfair on account of the sanction of dismissal having been unfair, and reinstated the employees on that basis.<sup>15</sup> This is in line with the principle applicable to reasonableness review that the reasonableness of an

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<sup>9</sup> *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer & others* (2015) 36 ILJ 1453 (LAC) at para 12.

<sup>10</sup> *Hillside Aluminium Ltd v Kuppusami and Others* [2014] ZALCD 62 at para 15.

<sup>11</sup> *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA) at para 13.

<sup>12</sup> *Anglo Platinum* at para 11.

<sup>13</sup> *Goodyear SA (Pty) Ltd v CCMA & others* (2004) 1 BLLR 7 (LAC) at para 6.

<sup>14</sup> *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* (2001) 22 ILJ 1603 (LAC) at para 101.

<sup>15</sup> See in this regard, *Goodyear* at para 6.

award can be defended for reasons (or grounds) not considered by the commissioner.<sup>16</sup>

#### 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.

- 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 a shop steward (as opposed to the foremen) to convey the work-related 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

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<sup>16</sup> *Fidelity Cash Management Service v Commission for Conciliation, Mediation & Arbitration & others* (2008) 29 ILJ 964 (LAC) at para 102.

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 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 sub-contractors; those sub-contractors 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 the 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<sup>17</sup> 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

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<sup>17</sup> Award: paras 4.225 - 4.227.

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 it 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 sub-contractors 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 reasonable, 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 sub-contractors 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 sub-contractors 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 sub-contractors were intimidated, to the exclusion of an inquiry (or a proper one) into whether management<sup>18</sup> 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 sub-contractors 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

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<sup>18</sup> It will be recalled that the charge referred to the “*intimidation of sub-contractors and management*”.



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 reasonably 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 sub-contractors 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 same 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 sub-contractors 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 of 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 sub-contractors outside the entrance gate. It follows that I consider the commissioner's award that "*the WBHO workers did not intimidate the sub-contractors*" (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 of 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 sub-contractors were allowed to work – some of whom were performing the work of the individual respondents – and that overtime might have been perceived as having been 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.<sup>19</sup> 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 sub-contractors (as they ought to have been), I do not believe that a reasonable commissioner would have reinstated the individual respondents retrospectively to their date of 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.

[54] Turning to the balance of the commissioner's *ratio*, given the findings that I have made above, it is unnecessary to deal with the commissioner's findings on derivative misconduct quoted in paragraph 38 above, which are somewhat confusing.

#### Other grounds of review

[55] The company advanced two other grounds of review. The first is that the commissioner miscalculated the back-pay awarded to the individual respondents by effectively doubling their earnings. The second is that the commissioner was guilty of a reasonable perception of bias arising from the manner in which he conducted himself during the arbitration.

[56] Given the order that I intend to make, the first mentioned ground need not be dealt with. Insofar as the second ground is concerned, it was not advanced with much vigour in the company's heads of argument, and was not mentioned at all in its written address to the court. In circumstances where there are significant portions of the transcript missing, it is not possible for me to undertake a full assessment of the commissioner's conduct. However, on

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<sup>19</sup> This is not to say that if I was called up to decide upon the penalty of dismissal, I would have come to this conclusion. What I am saying is that such a conclusion falls within a range of reasonable decisions.

what I have read, I have not detected any conduct on the part of the commissioner that would sustain this ground of review, which is thus rejected.

### Summary

[57] In summary:

- a) The commissioner's finding that the individual respondents were not guilty of intimidating sub-contractors was unreasonable. They were guilty of intimidating sub-contractors while outside the entrance gate after they (i.e. the individual respondents) had left the site.
- b) Despite this, the commissioner's decision that the dismissal of the individual respondents was substantively unfair and award of reinstatement stands, because it could reasonably have been found that the sanction of dismissal was unfair in the peculiar circumstances of this matter. This would have justified the aforesaid decision and award.
- c) But the commissioner's award of back-pay stands to be reviewed and set aside because, in circumstances where the individual respondents were guilty of intimidating sub-contractors, a reasonable decision-maker would have deprived them of back-pay as a mark of disapproval of their misconduct.

### Order

[58] In all the circumstances, the following order is made:

- a) The review application succeeds only in relation to the issue of back-pay;
- b) The relief granted by the first respondent in paragraphs 6.2 to 6.6 of his arbitration award is replaced with an order that the third respondent employees are reinstated with effect from the date of the award (4

November 2014) and not the date of their dismissal (8 November 2013);

- c) There is no order as to costs.

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**Myburgh, AJ**

Acting Judge of the Labour Court of South Africa

**Appearances:**

For the applicant: Adv W Hutchinson (instructed by Fluxmans Inc)

For the third respondent: Adv E Masombuka (instructed by Finger Phukubje Attorneys)