REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: D 275/10

In the matter between:

ALBION SERVICES CC **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION **First Respondent**

AND ARBITRATION

COMMISSIONER KESHREE KEMI N.O. **Second Respondent**

NUM obo MNGUNI **Third Respondent**

Heard: **30 April 2013**

Delivered: **21 May 2013**

Summary: **Review of award - The ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court - incite – meaning of - one who reaches and seeks to influence the mind of another to the commission of a crime or misconduct – award reasonable**.

JUDGMENT

CELE J

Introduction

[1] This is an application in terms of section 145 of the Act[1] to review and set aside an arbitration award issued by the second respondent under case number KNRB727-09 on 17 February 2010. The third respondent opposed the application acting on behalf of its member, Mr Mnguni, the erstwhile employee of the applicant.

Factual Background

[2] Mr Mnguni was in the employ of the applicant from 1 April 2004. In 2009, he held the position of a Metallurgical Supervisor and he also served in the capacity of a shop steward affiliated to the third respondent, which at the material times had not yet gained recognition at the workplace of the applicant. He worked with the Service and Maintenance Manager Mr Johan Botha, the Acting Team Supervisor Mr Bheka Ntuli, the Plant Supervisor Mr Aaron Khumalo and the applicant's Director Mr Richard Ntuli. The employees were divided into two groups referred to as team A and B.

[3] On 25 and 26 March 2009, there was an unprotected strike at the RBM premises of the applicant. Management of the applicant addressed the workforce on the implications of taking part in the strike. One of the employees, a Mr Mathenjwa, was then issued with a notice to attend a disciplinary hearing. According to the applicant, Mr Mnguni tore the notice given to Mr Mathenjwa. Mr Mnguni then called a workers' meeting to be held in the late afternoon on 27 March 2009. It is the events which occurred in that meeting which is the subject of this application. The applicant subsequently

[1] The Labour Relations Act No.66 of 1995.

charged Mr Mnguni with two acts of misconduct of incitement to strike and insolence. In respect of incitement to strike he was found guilty and the internal disciplinary chairperson pronounced a sanction of dismissal. The applicant dismissed him on 17 April 2009.

[4] An unfair dismissal dispute was then referred by Mr Mnguni for conciliation and later for arbitration by the first respondent which appointed the second respondent to arbitrate it. In her award, the second respondent found that Mr Mnguni's dismissal was substantively and procedurally unfair in that the applicant had failed to prove incitement by Mr Mnguni and in that his dismissal was not conducted fairly. She awarded him compensation to the tune of 6 months' salary in the sum of R 26 518, 08.

The issue

[5] Parties are in dispute about the actual utterances of Mr Mnguni in the meeting of 27 March 2008 and whether such utterances amounted to incitement. The evidence of the applicant to sustain the charge rested mainly on that of Messrs Mkhize and Khumalo who attended the meeting of 27 March 2009.

Chief findings of the second respondent

[6] The second respondent found that the balance of probabilities favours Mr Mnguni since the applicant's second and third witnesses made contradictory statements and contradicted each other materially and there was no evidence that they were in fact going to strike on instigation of Mr Mnguni and that the strike was averted by management. Mr Mnguni was found to have been clear and consistent in his testimony and there was no reason to doubt his credibility as his evidence was supported and corroborated by his first witness, whose version she accepts.

[7] She was not satisfied that it was Mr Mnguni who arranged the meeting in question or made the arrangements for the employees to leave early. According to the second respondent the crux of the matter was what transpired at the meeting. From all of the evidence presented she was not satisfied that the Mnguni was proved to be guilty.

[8] It appeared to the second respondent that it was the chairperson of the enquiry that dismissed Mr Mnguni and she found herself not satisfied that the applicant followed its own code as the chairperson of an enquiry did not have the authority to dismiss an employee because such authority lay with the employer. She found the dismissal of Mr Mnguni to have been procedurally and substantively unfair.

Evidence

[9] The applicant called four witnesses at the arbitration. However, the first and fourth witnesses, who were management members, did not attend the meeting where Mr Mnguni was alleged to have incited employees. The case of the applicant, therefore, depended on the evidence of the second and the third witnesses, Messrs Mkhize and Khumalo. The relevant evidence of Mr Mkhize pertaining to whether Mr Mnguni incited a strike lay in the following version recorded by the second respondent:[2]

> Q: 'Did the Applicant personally talk to you at the meeting? Did he address the crowd?"
>
> A: Yes
>
> Q: And he wanted to go on strike on Monday?
>
> A: Yes.
>
> ....
>
> Q: In other words according to your statement the [sic] was a question as to what the people will think about Nathi and Mathenjwa. There was a question?
>
> A: That question was whether we will stop on Monday or what.'

[10] Mr Khumalo was asked to and he did confirm that the written statement he made in this matter was correct. Under cross-examination he confirmed that

[2] Commissioner's notes, page 23 and page 28.

his statement was not correct in a number of respects. He also confirmed under cross-examination that nowhere in his statement had he stated that Mr Mnguni said the workers were to go on strike. It is apparent from the following line of questioning and his responses thereto that he did not believe Mr Mnguni had invited the workers to strike:[3]

> 'Q: The next phrase of your statement says he asked what was Team B thinking, or asked what was the view of Team B. In your view does that mean that people must strike?
>
> A: That was a question from the Applicant.
>
> Q: Confirm that it does not mean that people must strike?
>
> A: Yes'

[11] In respect of the question of authority to suspend or dismiss, it remained common cause that the applicant's disciplinary code provided that only the Chairperson of its executive committee had the power to impose disciplinary sanctions. Mr Botha, who was the first applicant's witness, conceded that there was no provision in writing in the code allowing such authority to be transferred to another individual. It was the applicant's version that it was Mr Botha who dismissed Mr Mnguni and that he was empowered to do so because Mr Ntuli delegated the powers conferred on him in the applicant's disciplinary code to Botha. Mr Ntuli, as the fourth witness for the applicant, said that the chairperson of the disciplinary enquiry merely made a recommendation and it was up to Mr Botha to decide whether he wished to follow that recommendation. Mr Mnguni challenged the fairness of his dismissal.

Grounds for review

[12] The applicant submitted that there was no reasonably sustainable fit between the material available before the second respondent and the conclusion that she reached in finding that the dismissal was unfair when it was the evidence

[3] Commissioner's notes: page 33.

of Mr Botha that the disciplinary code provided for dismissal as a sanction for incitement to strike. Mr Mnguni himself said that he had asked team B what their views were on the fact that team A was striking and what they intended to do about it. Mr Mnguni said that he did not make a request to Bheka or anyone to have a meeting with the workers which contradicted the evidence he gave at the enquiry. Mr Mnguni's evidence that the only issue discussed with the employees at the meeting was regarding the outcome of the meeting he had had with management on the issue of a monetary increase of R 2.00 directly contradicted his evidence at the enquiry.

[13] The submission was further that in the context of the evidence that on 26 March 2009 management spoke to the employees, including Mr Mnguni about the consequences of the illegal strike on 25 and 26 March 2009; and as a result of the meeting there was an agreement by both teams A and B that they would embark on an unlawful strike on 30 March 2009. It was clear that Mr Mnguni expressly, alternatively tacitly, instigated the strike as he certainly took no steps to avert a potential unlawful strike. It was submitted in the circumstances that the findings of the second respondent were findings that a reasonable decision maker could not reach.

Grounds opposing the review application

[14] The union submitted that the second respondent quite rightly took, as her point of departure, the applicant's version of what occurred at the meeting. The applicant's first witness, Mr Botha was said to lack personal knowledge of Mr Mnguni's alleged conduct at the meeting on 27 March 2009. Similarly, the applicant's fourth witness lacked personal knowledge of the alleged conduct at the meeting on 27 March 2009 as both witnesses admittedly did not attend that meeting.

[15] The applicant's case was therefore relied on the testimony of its second and third witnesses, Mr Mkhize and Mr Khumalo. The sum total of Mr Mkhize's evidence in chief was described as pertaining to whether Mr Mnguni incited a strike and was contained in two leading questions to which Mkhize replied "yes". Quite apart from the fact that these were leading questions, the

submission was that the answers did not establish whether Mr Mnguni made any attempt to persuade the "crowd" to go on strike on Monday of 30 March 2009. Under cross examination, Mr Mkhize acknowledged that he had contradicted his witness statement.

[16] Mr Khumalo's evidence in chief began by him reading his statement in isiZulu, which was then interpreted. The second respondent recorded that she was uncertain whether the interpretation was correct. The submission was that the applicant, in its evidence-in-chief, curiously failed to ask Mr Khumalo whether he confirmed his statement under oath. Nor was Mr Khumalo directly asked about the content of Mr Mnguni's speech on 27 March 2009.

[17] It was contended that under further cross-examination, Mr Khumalo conceded that Mr Mnguni at the meeting also addressed about "the incident of R2.00", and that he had failed to mention that in his earlier testimony. He acknowledged that it was important for the workers to be briefed about that issue. Mr Mkhize stated that after Mr Mnguni spoke, some workers replied. Mr Khumalo was said to have directly contradicted the evidence of Mr Mkhize in this regard when he stated that only Mr Mnguni spoke and that no-one replied to his speech. In the context of a charge of incitement to strike, it was submitted that this was a material discrepancy.

[18] In the premises, it was submitted that the second respondent was justified in finding that the applicant's second witness made two contradictory statements, one in writing and one at the disciplinary hearing. The applicant's third witness also made two contradictory statements, also one in writing and one at the disciplinary hearing. Those two witnesses were said not to have corroborated each other's version and in fact contradicted each other materially.

[19] Furthermore, the submission was that it was apparent from the testimony of the applicant's witnesses at the arbitration that the applicant's case went no further than Mr Mnguni allegedly telling the workers that Team A was going to strike on Monday 30 March 2009 and wanting to know what Team B was going to do, as confirmed by Mr Myeni, a witness of Mr Mnguni. This version

was duly noted by the Commissioner in her award. The union said that it was apparent that the Commissioner, notwithstanding concerns over the credibility of Mr Mkhize and Mr Khumalo as witnesses, gave consideration to this version at face value. She concluded that the applicant's version conveyed no more than that, Mr Mnguni was not spurring the workers to strike or rousing them to strike. Neither was he provoking them or instigating them. He was merely trying to ascertain their views.

[20] It was submitted that at best for the applicant, on its own version, Mr Mnguni's conduct could be construed, perhaps, as raising the curiosity of the workers about the possibility of going on strike. That, it was submitted, did not amount to incitement. The thinness of the applicant's case in this regard was said to be summed up by the applicant's rather equivocal submission at the end of paragraph 7 of its heads of argument:

> 'It is clear that the Third Respondent expressly, alternatively tacitly, instigated the strike – he certainly took no steps to avert a potential unlawful strike.'

[21] It was submitted that, in the premises, the second respondent's conclusion that Mr Mnguni was not guilty of incitement to strike was entirely reasonable and justifiable on the evidence placed before her.

[22] The question of authority to suspend or dismiss was raised in the cross-examination of Mr Botha. It was common cause that the applicant's disciplinary code provided that only the Chairperson of its executive committee had the power to impose disciplinary sanctions. Furthermore, Mr Botha conceded that there was no provision in writing in the code allowing such authority to be transferred to another individual. The second respondent concluded that as it appeared it was the chairperson of the disciplinary enquiry who imposed the sanction, the applicant had not complied with the strict provisions of its disciplinary code and hence had not complied with its disciplinary procedure.

[23] It was submitted that the finding made on the power to dismiss was reasonable, but that even if the Court did not agree that it formed a reasonable basis to find the dismissal to be procedurally unfair, then

nonetheless facts were placed before the second respondent justifying a finding of procedural unfairness.

Evaluation

[24] Subject to the grounds of review provided for in section 145 of the Act, the test in an application for review is whether:

1 the decision of the second respondent is one that a reasonable decision maker could not reach; and

2 there is a reasonably sustainable fit between the evidence and the outcome[4].

[25] In *Bestel v Astral Operations Ltd,*[5] the Court commenting on an appropriate approach to review applications said that:

> '[T]he ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.'

[26] With these principles in mind, the evidence led at arbitration falls to be considered for a determination whether Mr Mnguni was proved to have committed the misconduct of inciting members of Team B to engage in a strike. The Act, as amended does not have the meaning of "incite". Mr Christison appearing for the third respondent, and to whom I am indebted, drew Court's attention to a decision of the then Appellate Division, now the Supreme Court of Appeal in the case of *National Union of Metalworkers of SA and Others v Gearmax (Pty) Ltd*[6] where the Court considered the meaning of 'incite' in a labour context and it said:

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[4] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) at para 110.
[5] [2011] 2 BLLR 129 (LAC) at para 18.
[6] (1991) 12 ILJ 778 (A) at 782G-783A.

‘Incite' comprehends something less. The latter word received judicial interpretation in the case of *Dunlop SA Ltd v Metal and Allied Workers Union and Another* 1985 (1) SA 177 (D) ((1985) 6 ILJ 167 (D)), an action dealing with this section of the Act. Booysen JA adopted the reasoning of Holmes JA in *S v Nkosiyana and Another* 1966 (4) SA H 655 (A), where the components of 'incitement' were considered. The learned Judge in the Natal court accepted the definition of Holmes JA and quoted his very words (at 188E-F) in the following passage:

> 'Counsel were *ad idem* that an "inciter" in criminal law is one who reaches and seeks to influence the mind of another to the commission of a crime. The machinations of criminal ingenuity being legion, the approach to the other's mind may take various forms such as suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading, or the arousal of cupidity. The list is not exhaustive. The means employed are of secondary importance; the decisive question in each case is whether the accused reached and sought to influence the mind of the other person J towards the commission of a crime.'

In the appeal before us, counsel's arguments were based upon an acceptance of the correctness of that definition. It is, in my view, an acceptable definition for the purpose of this appeal, which, therefore, turns upon whether it was established that the union 'reached and sought to influence the minds' of its members towards the refusal by them to perform overtime work.’

[27] Accordingly, and following from the decisions hereinabove cited, it has to be determined whether Mr Mnguni was proved by the applicant to have acted in such a manner that he ‘reached and sought to influence the minds’ of his fellow employees in Team B to join Team A in a strike. The means employed by him are to remain of secondary importance. The evidence of Messrs Khumalo and Mkhize, who attended the meeting, is decisive in this regard. It has to be accepted from the recorded evidence that Mr Mnguni told the workers that Team A was going to strike on Monday 30 March 2009 and he wanted to know what Team B was going to do.

[28] With all the inherent improbabilities there are in the evidence of the applicant's witnesses, the version of the applicant is not capable of any other version beyond what is here accepted. By merely asking Team B what they would do and without any suggestion thereto, it is difficult to conceive how Mr Mnguni could be said to have acted in such a manner that he 'reached and sought to influence the minds' of his fellow employees in Team B to join Team A in a strike.

[29] By calling the meeting and raising the issue that Team A was going to strike, Mr Mnguni created an opportunity to incite Team B, but he did no more thereafter. If he wanted to incite the employees he had the opportunity but he did not use it. In other words, he made the means to influence the employees but failed to take advantage of them. The means therefore became of secondary importance. The scenario he created fell shorter than the one where a person creates a dangerous situation and then acquires a legal duty to prevent any other person from being harmed thereby. The second respondent concluded that Mr Mnguni's version conveyed no more than that he was not spurring the workers on to strike or rousing them to strike. Neither was he provoking them or instigating them.[7] He was merely trying to ascertain their views, for whatever purpose he had in mind.

[30] In the premises, it is found that the second respondent's conclusion that Mr Mnguni was not guilty of incitement to strike was reasonable and justifiable on the evidence placed before her. Further, her finding that the dismissal of Mr Mnguni was substantively unfair is reasonable and is not liable to be set aside on review.

[31] In respect of the question of authority to suspend or dismiss, Mr Botha was the prosecutor at the disciplinary enquiry. On the version of the applicant, it was Mr Botha and not the chairperson of the disciplinary enquiry who decided on and imposed the sanction of dismissal, thus being not only a prosecutor but also and ultimately, a judge. In the context of a substantial, formal disciplinary enquiry, where both employer and employee lead evidence,

[7] See paragraph 29 of the award.

purportedly for a decision to be made by an objective decision-maker, such enquiry can only be a sham.

[32] The second respondent concluded that as it appeared it was the chairperson of the disciplinary enquiry who imposed the sanction, the applicant had not complied with the strict provisions of its disciplinary code and hence had not complied with its disciplinary procedure. This finding is reasonable. A reasonable suspicion of bias was unavoidable, even if in fact no bias was present. The procedure followed in dismissing Mr Mnguni did not accord with the natural principles of justice and was grossly flawed. The dismissal was procedurally unfair.

[33] In conclusion,

1. The review application in this matter is dismissed.

2. No costs order is made.

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Cele J

Judge of the Labour Court of South Africa

Appearances:

For the applicant:	Adv. M.M. Posemann
Instructed by:	Riaan Kruger Attorneys
For the third respondent:	Adv. A Christison
Instructed by:	PKX Incorporated