THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

Of interest to other judges

CASE NO: JR 1620/11

In the matter between:

NUMSA OBO BOASE MERE **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER MZONDI JOB MOLAPO (*N.O.*) **Second Respondent**

PRECIOUS METAL REFINERY (PTY) LTD **Third Respondent**

Heard: **18 June 2015**

Delivered: **9 July 2015**

Summary: (Review – failure to order reinstatement following acquittal on charge of incitement – arbitrator misconstruing application of s 193 in determining relief in the LRA - award of compensation not justifiable- matter remitted for determination of alternative relief under s 193(1))

JUDGMENT

LAGRANGE, J

Background

[1] In this matter the individual applicant, Mr P Boase ('Boase'), was a full-time shop steward of the applicant union, NUMSA. He had been employed by the third respondent, Precious Metal Refinery (Pty) Ltd ('PMR') since July 1990 and was dismissed on the 28 May 2010. He was dismissed for inciting employees not to work on 1 May 2009. PMR runs continuous operations and subject to special arrangements being made, 1 May 2009 was a normal working day for shift workers whose shift fell on a public holiday. Another shop steward of NUM, with whom he had acted jointly in the alleged misconduct was dismissed too, but his dismissal was upheld by the CCMA in separate proceedings.

[2] Although it is not necessary for the purposes of this judgement, to contextualise what transpired, it should be mentioned that there had been a practice at the firm in terms of which employees on duty on that day who wished to participate in May day celebrations could enter their names on a list which would be submitted to the management for approval. If management did not approve their absence from work on May Day would not be excused. In 2009, Boase was not prepared to submit a list for approval and encouraged workers not to work on May Day and undertook to defend them if they were charged as a result of not being at work. Those shift workers who did not attend work on May Day were disciplined for staying away without permission.

Condonation application

[3] Out of abundant caution, the applicant brought a condonation application in the belief that its review application might have been considered to have been filed late. The application was not opposed and on consideration of the evidence I am satisfied on a balance of probabilities that the application was indeed filed in time and it was not necessary to obtain condonation.

The arbitrator's award

[4] The Commissioner adopted the view that in order to find Boase guilty of incitement, the employer had to prove that employees had in fact stayed away because he incited them. Thus, after noting that the individual employees were held responsible for being absent without leave, the arbitrator stated at paragraph 394 of his award:

> *"In other words if I find the applicant had uttered the words alleged by some witnesses were in the canteen and the gate [to the effect that they should not go to work on May Day] I must then find further persuasion from the entire evidence that there was a causal nexus between the utterance of such alleged words and the absence of the employees on Mayday 2009."*

(*sic*-emphasis added)

[5] The arbitrator also held that the onus was on the employer to prove that each employee who was absent had been incited by Boase's words. The arbitrator reinforced his interpretation of the nature of incitement as a form of misconduct by stating:

> *"It is true that a shop steward can be found guilty of inciting employees not to report for duty on a particular day, but the employer must prove on a balance of probabilities that the employees allegedly incited with vulnerable employees who may not have known how the employer would react to such absence. This will normally be the case where such employees are still new in the workplace. In this case some of the respondent's witnesses were previously disciplined for the same offence without being incited by anyone to stay away from work and they all have confirmed that they were aware of their contractual obligations towards the respondent and also about the awareness campaigns the respondent had embarked on about this issue of public holidays."*

[6] Having decided that the act of incitement is only committed if the incitement achieves its objective, the arbitrator concluded:

> *"In so far as the events of the applicant having incited employees not to report for duty, I was not persuaded by the respondent's evidence. I find that the employees had a choice to either seek permission from their supervisors as they correctly stated it was the expected condition on their part or to report for duty as others have done so."*

[7] He then proceeded to "*…scrutinise the applicant's conduct against the very notion of accountability in the workplace, judged against his position as a shop steward*" to determine *"…<u>will it be fair for the employer</u> I were to award the reinstatement of the applicant*" (emphasis added). In the course of the analysis which follows, the arbitrator found that Boase's conduct "*left much to be desired*" despite PMR "*dismally failing*" to prove the misconduct with which he was charged. He considered the following factors to be material:

7.1 Boase had spoken to workers as alleged on 28 April 2009 and had "invited" them not to work on May Day.

7.2 Boase had been provided with the facilities to perform his duties as a full-time shop steward and he had a duty to tell members to either report for work or to request permission if they wanted to attend a May Day meeting. His conduct in the circumstances was irresponsible and counter-productive.

7.3 Boase's conduct did not befit his position as a full-time shop steward on whom the employer had generously bestowed resources for him to perform his duties.

7.4 The fact that Boase was a shop steward did not render him immune to misconduct committed in the course of acting as a shop steward.

7.5 In this instance, Boase acted outside of the scope of his office and rendered himself "incompatible with the culture and tradition of the respondent"

[8] In conclusion, he found Boase's continued employment would be "untenable as his conduct and reinstatement may be seen by others to be acceptable and victorious

and therefore encourage disharmony and unruly tendencies in the workplace." Consequently, reinstatement would be "counterproductive to the respondent's enterprise". The arbitrator also decided that he did not want to award the maximum compensation because that might be viewed as both 'punitive' towards the employer and as endorsing Boase's conduct. He therefore ordered payment of compensation equal to four months' remuneration. What is strikingly paradoxical about the award is that having found Boase not guilty of incitement because of the way he characterised the offence, the arbitrator then relied on the very same conduct Boase committed as the main reason for not reinstating him.

Review

[9] The applicant seek to review the relief awarded by the arbitrator. There was no attempt by PMR to cross-review the arbitrator's finding on the substantive unfairness of Boase's dismissal, so in consequence that finding stands unchallenged and is not subject to review.

[10] As mentioned, it is the relief awarded in the form of an award of compensation which is under attack in this application. The applicants argue that the arbitrator ought to have reinstated Boase having found him not guilty of incitement. Their grounds of review may be summarised as:

10.1 the arbitrator committed a gross irregularity in failing to accord primacy to section 193 of the Labour Relations Act, 66 of 1995 (' the LRA');

10.2 the arbitrator committed a gross irregularity in awarding compensation as relief which no reasonable arbitrator would have done, having regard to the evidence before him and his own finding on substantive fairness, and

10.3 in particular, the arbitrator decided on the relief with reference to factors that had not been placed before him in evidence and on issues that have not been matters canvassed by the parties in the presentation of their respective cases.

Evaluation

[11] Section 193 of the LRA provides:

> *"Remedies for unfair dismissal and unfair labour practice*
>
> *(1) If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair, the Court or the arbitrator may-*
>
> *(a) order the employer to reinstate the employee from any date not earlier than the date of dismissal;*
>
> *(b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or*
>
> *(c) order the employer to pay compensation to the employee.*
>
> *(2) The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless-*
>
> *(a) the employee does not wish to be reinstated or re-employed;*
>
> *(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;*
>
> *(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or*
>
> *(d) the dismissal is unfair only because the employer did not follow a fair procedure."*

(emphasis added)

[12] In ***Dunwell Property Services CC v Sibande & others***[1] the Labour Appeal Court reiterated the primacy of reinstatement as a remedy as confirmed by the Constitutional Court in ***Equity Aviation Services (Pty) Ltd v Commission for***

[1] [2012] 2 BLLR 131 (LAC)

Conciliation, Mediation and Arbitration & others.[2] The LAC expressed it thus in relation to the matter before it:

> *"Therefore, it followed that unless either or both conditions referred to in sections 193(2)(b) or (c) were present, the court below was obliged to issue an order reinstating* [the employee] *to his employment with effect from any date which the court, in its discretion, would deem just and equitable but not earlier than the date of dismissal. Indeed, the constitutional court has reiterated that the primary statutory remedy in unfair dismissal disputes is aimed at placing an employee in the position he or she would have been but for the unfair dismissal.*[3]

[13] Consequently, the arbitrator could only have refused dismissal if he was satisfied that either of the conditions mentioned were met. It seems the arbitrator did not approach the matter along the lines of the exceptions mentioned. Rather he decided on the relief by purporting to balance the fairness to the parties, which was the wrong test.

[2] 2009 (1) SA 390 and [2008] 12 BLLR 1129 (CC) at para [36]
[3] *Dunwell* at 139, para [30]

[14] Even if this misdirection by the arbitrator is ignored, and the review is considered from an outcomes-based perspective[4], can his decision nonetheless be salvaged as one that an arbitrator could nonetheless have arrived at without being unreasonable? This entails considering if the arbitrator's decision might nevertheless be reasonably justifiable under sections 193(2)(b) or (c).

[15] Issues of the impracticability of reinstatement do not present themselves on the evidence, so the only conceivable exception that might justify the arbitrator's award is that it would have been intolerable to reinstate Boase in the circumstances surrounding his dismissal. It was submitted in the respondent's argument at the end of the arbitration proceedings that Boase's conduct had created an irretrievable breakdown in the trust relationship, but nothing to this effect was led in evidence by the employer. The respondent argued on the basis of the judgment in ***Mediterranean Textile Mills (Pty) Ltd V SA Clothing & Textile Workers Union & Others***[5] that the arbitrator was entitled to consider any factor relevant to determining whether there are grounds for finding that an exceptional condition exists that justifies denying the employee's reinstatement. Despite noting

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[4] See ***Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others*** **(2014) 35 *ILJ* 943 (LAC)**, where the court stated at 948, para [14]:

> *"The court in Sidumo was at pains to state that arbitration awards made under the Labour Relations Act 4 (LRA) continue to be determined in terms of s 145 of the LRA but that the constitutional standard of reasonableness is 'suffused' in the application of s 145 of the LRA. This implies that an application for review sought on the grounds of misconduct, 5 gross irregularity in the conduct of the arbitration proceedings, 6 and/or excess of powers 7 will not lead automatically to a setting aside of the award if any of the above grounds are found to be present. In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision maker could come on the available material."*
>
> (emphasis added)

[5] **(2012) 33 *ILJ* 160 (LAC)**

that it was high time that employers took responsibility for adducing evidence and making submissions to persuade an arbitrator that reinstatement was not justified, rather than trying to deal with it *ex post facto*, the LAC still recognised that the arbitrator must consider if one of the exceptions is applicable on the available evidence. The court expressed it thus:

> *"At the conclusion of each case it remains the responsibility of the court or the arbitrator to determine whether or not, on the evidentiary material properly presented and in the light of the Equity Aviation principle, it can be said that the reinstatement order is justified. In other words, even in a situation such as the present, where no specific evidence was canvassed or submissions made during the trial on the issue of the non-reinstatable conditions, the court or the arbitrator is not only entitled but, in my view, is obliged to take into account any factor which in the opinion of the court or the arbitrator is relevant in the determination of whether or not such conditions exist."*[6]

[16] I am satisfied that the arbitrator failed to follow this principle in arriving at his decision on relief.

[17] The arbitrator's conclusion that Boase acted irresponsibly in encouraging employees to take May Day off without following the normal procedure of obtaining permission for those employees who had signed a list, was not an unreasonable one on the evidence, nor was his conclusion that this was at odds with the existing practice and culture of the employer in dealing with such events. His finding that Boase had encouraged employees to breach the collective agreement in terms of which continuous shift workers were required to work on public holidays was also not untenable.

[18] However, the arbitrator's inference that Boase's continued employment would be "untenable as his conduct and reinstatement may be seen as others to be

[6] At 171-172, paras [29]-[30]

acceptable and victorious and therefore encourage disharmony and unruly tendencies in the workplace" is harder to sustain as an inference drawn from the evidence. The employees who were absent from duty on May Day without permission were also disciplined Their misconduct was not ignored and it was dealt with, so there is no reason to suppose they might believe that what they had done was acceptable. Moreover, the arbitrator stressed that they had to take responsibility for their own actions for being absent without permission on the May Day shift. It is also difficult to understand how the wrong message would be sent to employees that unruly conduct was acceptable if Boase was reinstated given that the arbitrator himself had found Boase was not guilty of the charge against him. If the arbitrator felt that despite finding Boase innocent of the charge he should nonetheless express his disapproval of how Boase conducted himself that might have warranted something less than full retrospective reinstatement, but it is hard to reconcile his finding that the same conduct which he found did not warrant a finding of misconduct is nonetheless sufficient to deny him reinstatement altogether. This is especially so in circumstances where so little was made of the potential consequences of Boase's return to work in the course of the arbitration hearing itself. It seems that the arbitrator was somewhat remorseful about his own acquittal of Boase of any misconduct and sought to compensate for this when dealing with the relief.

[19] Consequently, I do not think this is a case where the evidence before the arbitrator could reasonably justify him refusing reinstatement or re-employment on either of the exceptions in s 193(2)(b) or (c) and his finding on relief must be set aside.

[20] That still leaves the question of whether or not the terms of re-employment or reinstatement should have been unqualified or not. In that regard, the court has really nothing before it to consider as the parties failed to make any submissions in this regard and the issue was not canvassed before the arbitrator. Accordingly, the most appropriate measure would be for this to be determined by an arbitrator after hearing submissions.

Order

[21] The second respondent's award to Mr M Boase for his unfair dismissal of four month's compensation in his arbitration award dated 4 July 2011 issued under case number NWRB 2257-10 is reviewed and set aside.

[22] The matter is remitted to the first respondent for a commissioner other than the second respondent to determine the appropriate relief in terms of s 193(1)(a) or (b) of the LRA on the basis of the record of the original arbitration placed before the court and after hearing submissions from the parties on the issue.

[23] The first respondent must pay the applicant's costs.

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R LAGRANGE, J

Labour Court Judge

Appearances:

For the Applicant: R Edmonds of Ruth Edmonds Attorneys

For the Third Respondent: I Gwaunza of Edward Nathan Sonnenbergs Inc.