



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR596/17

In the matter between:

TANKER SERVICES FOOD AND CHEMICALS

A DIVISION OF IMPERIAL GROUP

Applicant

and

AMCU OBO BHEKI HADEBE

First Respondent

NANCY KEKANA N.O

Second Respondent

**NATIONAL BARGAINING COUNCIL FOR THE
ROAD FREIGHT AND LOGISTICS INDUSTRY**

Third Respondent

Decided: 06 February 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 25 June 2020.

Summary: Review application – count 1- a shop steward employee on suspension arrived at work and addressed employees – whether he incited employees to an unprovoked work stoppage – circumstantial evidence relied upon by employer – direct evidence of employee probable – count 2 – use of

profanities at work place not permissible – has nuance of gender discrimination – misconduct serious – dismissal fair.

JUDGMENT

CELE, J

Introduction

- [1] This is an application in terms of section 158 (1) (g) of the Labour Relations Act¹, to review and set aside an arbitration award issued in this matter by the commissioner on 17 February 2017, acting as a commissioner of the third respondent. The commissioner found that Mr Hadebe's member, Mr Bheki Hadebe's dismissal by the applicant was procedurally fair but substantively unfair. She ordered the applicant to re-instate Mr Hadebe without back pay.
- [2] The first respondent acted on behalf of its member to oppose the review applicant. After the matter had been fully argued in court, the first respondent filed a notice of withdrawal of its representation for Mr Hadebe. This was clearly a belated attempt to withdraw from the matter. No grounds for such a late withdrawal were outlined. The trade union is the cited party in these proceedings. Its withdrawal without a simultaneous application to substitute it with another person, if accepted could mean there is no opposition to the review application. As already indicated, it is a belated attempt when the matter has been fully argued and is accordingly of no legal effect.

Factual Background

- [3] The applicant is a Tanker Services Food and Chemicals, a division of Imperial Group Ltd, which is a company duly incorporated in terms of the company laws of the Republic of South Africa. Mr Hadebe is a registered trade union, established in terms of the LRA, appearing on behalf of its member, Mr Hadebe, the erstwhile employee of the applicant.

¹ Act Number 66 of 1995, hereafter referred to as the LRA.

- [4] The applicant employed Mr Hadebe as a Bulk Vehicle Operator, or Truck Driver. The applicant transports a variety of food and chemical products for its customers. Its bulk vehicles are washed at a washbay designed to avoid cross contamination. The trucks take turns to go through the washing process. The washbay played a very important role in the logistics business of the applicant.
- [5] On 7 April 2016, the applicant transferred its washbay operation as a going concern, in terms of section 197 of the LRA, to Rheinichem. Employees of the applicant working at the washbay became concerned about the transfer of the business, as it affected them directly. Up to 11 April 2017, Mr Hadebe was at home in Durban or at his Johannesburg residence, on suspension due to some prior misconduct, awaiting a decision of the applicant on him. Other employees who had been on similar suspension were called back to work.
- [6] On 11 April 2017, Mr Hadebe arrived at the washbay of the applicant and went to address the washbay employees for a period of about 45 minutes, resulting in the trucks not being attended to. This incident was reported to management. Mr Petros Tsotetsi who was the washbay Manager was at the area to do the handover of the washbay to Mr Stefan Oosthuizen, Director of Rheinichem. Mr Tsotetsi overheard Mr Hadebe address the employees gathered at the bay. He then instructed the washbay Supervisor, Mr Bongani Ntuli to tell the group of employees to go back to their working station. These employees were about 5 to 7 and had been seated in a U shape formation, listening to Mr Hadebe. This took place from about 10h30 to 11h00. The employees refused to go back to work.
- [7] Mr Tsotetsi reported the reaction of the employees namely, failure to return to the working station, to the Divisional Human Resources (HR) Director of the applicant, Mr Lucky Kolobe. By that time, Mr Kolobe had already received a message about these employees and Mr Hadebe from the HR Manager of the applicant, Ms Elizabeth Radebe and from Mr Oosthuizen.
- [8] Mr Kolobe then telephonically contacted Mr Hadebe, enquiring if it was true that Mr Hadebe was holding a meeting with employees during working time.

Mr Hadebe asked who it was that told Mr Kolobe about the ongoing meeting. Mr Kolobe wanted Mr Hadebe to confirm or deny if he was indeed holding a meeting with the washbay employees. Mr Hadebe advised Mr Tsotetsi to go and tell the one who told him about the meeting that "*unina loyo obambe / meeting.*" Which if translated to English means "*It is his mother who is holding a meeting.*" This expression is of high obscene language, carrying derogatory insulting message.

- [9] Mr Kolobe requested Mr Hadebe not to use such words and asked Mr Hadebe to withdraw them. Mr Hadebe refused to withdraw the statement. The refusal was repeated even after Mr Kolobe had told Mr Hadebe that Mr Tsotetsi had made a report. Instead, Mr Hadebe repeated the statement directing it to Mr Tsotetsi. Mr Kolobe passed the statement of Mr Hadebe to Mr Tsotetsi. Mr Tsotetsi was very much disturbed by the comment because it was reference to his mother. He felt humiliated, disrespected and verbally abused. Mr Hadebe did not subsequently apologize or withdraw those comments until the end of the disciplinary hearing, when giving evidence in mitigation. After Mr Kolobe had contacted Mr Hadebe, the washbay employees started going back to their workstation although slowly and one at a time. The second group of washbay employees were also not working when Mr Hadebe was holding a meeting with the other group. Just about 20 trucks were lining up for a wash and there was a delay causing pressure from operation as trucks were delaying the loads of customers.

- [10] The applicant charged Mr Hadebe with and found him guilty of misconduct, which it described as:-

"You instigated and incited an unprovoked/unscheduled work stoppage at the depot washbay operations in Germiston now managed by Rheinichem on the 11th April 2016. You used inappropriate, vulgar and disrespectful comments when on a Telephonic discussion with one of the Directors of the business. You made derogatory comments against or directed at Tanker Services and its management."

[11] Mr Hadebe was dismissed. He referred an unfair dismissal dispute for conciliation and when it could not be resolved, he referred the dispute to arbitration, challenging both procedural and substantive unfairness. On procedural fairness, he said that the internal chairperson was biased and had a mandate to dismiss him. On substantive fairness, he said that he did not breach any rules relating to the charges preferred against him, as he had done nothing wrong. The commissioner found dismissal to have been procedurally fair but substantively unfair. She ordered the applicant to reinstate Mr Hadebe with retrospective effect from the date of dismissal but without back pay.

Chief findings of the commissioner

[12] In considering the first count of misconduct the commissioner examined various issues, which are:

Whether there was a meeting on 11 April 2016;

Whether the meeting was pre planned;

Whether the meeting was during working hours;

Whether there was a work stoppage and

Whether Mr Hadebe incited employees to embark in a work stoppage.

[13] The commissioner found that there were contradictions, paucity of evidence and inconsistencies in the evidence of the applicant. The commissioner found it common cause that Mr Hadebe arrived at the washbay to find employees congregating and seated under a tree. He greeted them. It was probable that he stopped to talk to the employees because he was passing next to them and he could not pass without greeting and talking to them. He heard their concerns about the transfer of business and learnt that they were confused about that issue. The applicant was requested to take photographs of the meeting but failed to do so. As a senior shop steward, he undertook to investigate their concerns and to later report to them. There was no evidence

that the applicant issued an instruction to the employees to get back to work and that the instruction was ignored. The applicant failed to charge all employees for not complying with its instruction. The evidence was not satisfactory that Mr Hadebe incited 4 to 5 employees at a washbay, which is comprised of 15 employees. In alleging that the whole washbay was not in operation, it was not clarified as to what happened to the other 10 employees. The versions of both parties were found probable. The applicant was found to have failed to discharge the onus resting on it.

- [14] In considering the second count, the commissioner said that Mr Hadebe admitted using the words “unina lowo” towards his senior and he was asked to withdraw three times and he refused. She said it was applicant’s evidence that if Mr Hadebe had withdrawn the words, the matter would have not been taken further. He was found guilty because he had not shown remorse. She found that it was not appropriate to use that language at the work place, even though Mr Hadebe alleged that it was the language that they normally used at the company. She found that Mr Hadebe had shown remorse because he did withdraw the words at the disciplinary hearing. She found the applicant to have been too harsh in dismissing Mr Hadebe for the alleged offence. She recommended that Mr Hadebe be given a final written warning. The commissioner concluded the enquiry by saying:

“Considering the above circumstances, I find that the respondent was harsh in dismissing the employee. I find that the dismissal was not an appropriate sanction to this offence, in view of the foregoing. I conclude that the respondent was not able to prove, on a balance of probabilities that the applicant has committed an alleged misconduct but the dismissal of the applicant was substantively unfair because the sanction imposed was too harsh.”

Grounds for Review

- [15] The applicant identified four scenarios as grounds for review. The submission is that the commissioner committed misconduct in relation to her duties, committed gross irregularities in the conduct of arbitration proceedings and

exceeded her powers. In amplification, it was said the commissioner failed to consider whether reinstatement was an appropriate result, considering the seriousness of the misconduct and breakdown in the trust relationship. It was submitted that the commissioner failed to consider that the allegations against the Mr Hadebe referred to in charge 2, constituted serious misconduct, which on their own would justify his dismissal. The issue of whether he had shown remorse or not was another aggravating factor. In arriving at the conclusion that the Mr Hadebe was remorseful, the commissioner failed to apply her mind to the evidence that:

After making the statement, the Mr Hadebe was given an opportunity to withdraw the statement three times. He refused to do so. He only apologised at the end of the disciplinary hearing.

Throughout the arbitration proceedings, Mr Hadebe maintained that he did nothing wrong. He continuously sought to justify his conduct by stating that this was the language used at the workplace;

Mr Tsotetsi testified that Mr Hadebe will never apologise to him and even after he greeted Mr Hadebe, Mr Hadebe responded by stating that he is not so bored to exchange greetings with him.

The nature and circumstances of Mr Hadebe's misconduct, led to the Applicant's witnesses testifying that the employment relationship between the parties was broken and could not be repaired.

There is no indication that the commissioner considered the impact of Mr Hadebe's misconduct on the employment relationship or had regard to any of the aforementioned aggravating factors.

[16] In finding Mr Hadebe not guilty of charge 1, the commissioner failed to have regard to all the evidence and to correctly determine the probabilities. It was submitted that in order to prove that Mr Hadebe was guilty of this charge, the applicant had to demonstrate that there was a work stoppage, which, was not authorised. Mr Hadebe caused or contributed to the work stoppage. The

Applicant had proved its case on a balance of probabilities. The totality of the evidence led demonstrated that Mr Hadebe's conduct in arriving at the workplace and addressing the employees on the section 197 transfer (without any basis to do so) caused and/or contributed to a group of employees refusing to perform their duties.

[17] One has to consider that "inciter" may refer to the approach to the other's mind which 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. It was submitted that the aforementioned definition of "inciter" (and hence incitement) was persuasive and Mr Hadebe's conduct fell squarely within this definition. Regardless of the technical wording of the charge sheet such as "instigating" or "inciting" what must be considered is the effect of Mr Hadebe's conduct, that is, it caused a work stoppage. Prior to Mr Hadebe's arrival there was no work stoppage. The work stoppage coincided with Mr Hadebe's arrival. On the day of the incident, Mr Hadebe was not even supposed to have been at work. There was no reason for him to drive all the way from Kwa Zulu Natal to Johannesburg simply to enquire about when his shift would be commencing. In this regard, the commissioner accepted that he drove all the way from Durban. This is highly unlikely that Mr Hadebe would drive all the way from Durban to the office considering that Mr Hadebe was at home for more than 3 months whilst being paid a salary. He had various options to enquire about his shifts whilst at home.

[18] The commissioner's finding that the probabilities favoured Mr Hadebe driving from Durban to Johannesburg to enquire about his shift completely ignored the evidence as a whole that this was the day scheduled for the handover of the business to Rheinichem. There was no reason for Mr Hadebe to be in the washbay area, if his purpose was to enquire about his work-related issues, he would have proceeded directly to the operations department. Mr Hadebe admits that he had a meeting. Evidence was led that Mr Hadebe came to the washbay specifically to meet with the washbay employees regarding the transfer. It is not merely coincidental that Mr Hadebe selected this particular

day to arrive at the washbay and address employees neither is it coincidental that the following day saw the commencement of an unprotected strike, which lasted for three days. The aforementioned findings meant that the commissioner committed a number of material mistakes of fact, which render the outcome of the award unreasonable.

- [19] The commissioner is said to have reached conclusions not supported by the evidence before her. The commissioner arrived at the conclusion that the Applicant acted inconsistently because it failed to discipline the employees who attended the meeting, yet only disciplined Mr Hadebe. This conclusion, by submission, is absurd considering that Rheinichem and not the Applicant employed the employees who attended the meeting; the commissioner accepted that the transfer of the business in terms of section 197 of the LRA had already taken place on the 07 April 2016. It would therefore not have been possible for the Applicant to discipline the employees of Rheinichem. Due to her flawed reasoning concerning the Applicant's failure to discipline the employees attending the meeting, she rejected the Applicant's version that the whole wash bay was not in operation as improbable. She further erred in finding that Mr Ntuli had to lead evidence to support that the instruction was given and employees ignored it. Two witnesses testified that the instruction was given and the employees refused. Mr Hadebe himself testified that Mr Kolobe had enquired from him why the washbay was not operating. Evidence was led that more than seven individuals participated in a work stoppage, which, would not have been necessary if the employees simply returned to work when requested to do so or if the washbay was not operational and there was no work for them to do. It was submitted that the commissioner erred in finding that Mr Hadebe had acted as a reasonable shop steward by advising employees that the issue of the transfer was not finalised, after she had already concluded in paragraph 20 of her award that it was common cause that there was a transfer of the business in terms of section 197 of the LRA. It therefore, should have been apparent to her that Mr Hadebe's advice that the transfer was not yet finalised could not have been reasonable in the circumstances.

[20] The commissioner is said to have failed to properly assess the credibility of the witnesses thus rejecting the testimony of witnesses on improper and unjustifiable grounds, in paragraph 19 of the award the commissioner found that:

"The Applicant told Lucky Kolobe to instruct those people who witness the meeting to take photos and he did not. There were contradictions of time period to witnesses as to how long the meeting lasted...! find that there was no evidence that there was not material evidence to support that there was a meeting at the company."

[21] It was submitted that the aforesaid conclusion defied logic. The Applicant was not required to take photos of the meeting in order to prove the existence of a meeting. The standard of proof is on a balance of probabilities. Mr Hadebe confirmed that upon his arrival he "met" three to four employees" There were no material discrepancies in the evidence of the witnesses regarding the duration of the meeting. The witnesses were consistent that the meeting endured for more than 30 minutes. The commissioner's finding that the time that Mr Hadebe visited the washbay might be on a tea break was completely at odds with the version of witnesses of Mr Hadebe, Messrs Komani and Mfuniseni Khumalo that they were sitting under the tree because there was a breakdown. The commissioner failed to apply her mind to these inconsistent versions,

First Respondent's submissions

[22] The first respondent submitted that there were no defects in the arbitration proceeding in question. The commissioner properly assesses the evidence and arrived at an award that a reasonable Commissioner with the same facts and evidence would have arrived at. The commissioner considered that the language that was used by Mr Hadebe was not appropriate even after Mr Hadebe stated that it is the language that he usually uses with Tsotetsi. It is

denied that the Commissioner substituted the decision of the Applicant with her own. The Commissioner stated that the sanction imposed by the Applicant was harsh and recommended a final written warning. She did not direct the company to issue Mr Hadebe with a final written warning. She merely recommended a sanction that was less harsh. Secondly, it was further denied that there were contradictions in the Commissioner's award. The Applicant only wanted to be overly technical. What the Commissioner was saying was that, the Applicant could not prove that he held a meeting without authorization. The whole award suggested that. She stated in paragraph 19 of the award that she found that there was no material evidence to support the allegation that there was a meeting at the company. That obviously means that the Applicant failed to prove its case on Charge 1. However as stated above, on charge 2, the Commissioner found that Mr Hadebe should not have used those words however, the sanction was harsh because Mr Hadebe had in fact apologised.

[23] The further submission was that the Commissioner considered the seriousness of the misconduct and the trust relationship between the parties and arrived at a reasonable conclusion that reinstatement was appropriate. The commissioner had regard to all the evidence that was before her and arrived at a reasonable conclusion that Mr Hadebe was not guilty of charge 1.

[24] It was the evidence of Mr Hadebe that when he arrived at the company's premises he found that there were about 3 or 4 employees that were seated near the car park. Mr Komani, who stated that the employees were sitting where they normally sat when they were waiting for the trucks to dispatch, corroborated this evidence. Therefore, when Mr Hadebe arrived, the employees he is alleged to have had a meeting with and caused an unauthorized work stoppage were not at their workstations working. Which then begged the question, how it is that the work stoppage was attributed to Mr Hadebe. The Applicant expected Mr Hadebe to just pass his colleagues that he had not seen in four months, without greeting and talking to them. He testified that he chatted to them and even said to them, after they raised their

concerns about the s197 transfer that they should continue working as there is still going to be a meeting regarding the transfer in the coming weeks.

[25] Mr Hadebe did not cause or contribute to the alleged work stoppage because when he arrived he found the employees seated. The Commissioner correctly stated that the Applicant simply could not explain how Mr Hadebe caused a work stoppage by having a meeting with 5 employees. A meeting with 5 employees could not have contributed to the whole washbay not doing their jobs. It was also Mr Khumalo's evidence that he was working on the day and he in fact was on his way to certify his truck when he met with Mr Hadebe. Mr Komani also testified that it was only one washbay that was not operational. Further, Mr Hadebe testified why he was at the Applicant's premises on that day and it was not to instigate a meeting as suggested by the Applicant. The Applicant's evidence relating to the fact that Mr Ntuli told the employees to go back to their workstations and they refused is hearsay and should be rejected, as he was not called to testify allegedly because he was scared. The Applicant simply failed to prove that there was an unauthorised work stoppage that was caused by Mr Hadebe.

[26] Mr Hadebe arrived at the Applicant's premises to enquire about his work as he had tried to contact Dirk on countless times to no avail. It was Mr Hadebe's testimony that he did not drive all the way from KZN as he has a house in Diepkloof. Mr Komani testified about what he meant when he stated that the employees must continue working. He stated that they were surprised by the letter that they had received and the Applicant informed them that it is still going to discuss the matter further at an upcoming meeting. Mr Hadebe informed them to just continue working presumably because the matter was still to be discussed.

[27] Mr Hadebe could not just pass his fellow employees without talking to them after having not seen them for 4 months. If the Applicant's version that the Mr Hadebe came to the washbay area specifically to hold a meeting, why was the meeting held with only 5 people and why would the meeting of 5 people cause some 15-20 people to stop working. The Applicant stated that Mr

Hadebe ought to have addressed the employees in responsible manner but in the same breath states that he was not the shop steward for the washbay and should have not addressed the employees. Lastly, there was no request for permission to hold a meeting because there simply was no meeting. The Applicant testified that Mr Hadebe's aggression when he was asked why he was holding a meeting proves his guilt. The alleged aggression in Mr Hadebe's voice could also mean that he did not want to be accused of holding a meeting when he in fact was not. Evidence before the Commissioner did not support the version that Mr Hadebe caused or contributed to a work stoppage. Therefore, the Commissioner arrived at a reasonable conclusion on this aspect.

[28] It was never in dispute that the employees had received letters relating to the transfer. There was also no dispute that the employees questioned Mr Hadebe regarding issues around the transfer. Mr Hadebe's version was that there was an upcoming meeting relating to the transfer and this is precisely why he stated that the issue was not finalised. The conclusion reached by the Commissioner is therefore fully supported by evidence. Even if the Commissioner is wrong on the issue of consistency, the submission is that this would not have much bearing on her findings. She did not find Mr Hadebe's dismissal to have been substantively unfair because the Applicant acted inconsistently but because the Applicant failed to prove the charges that were brought against Mr Hadebe.

[29] It is further denied that the Commissioner erred in finding that Mr Ntuli had to lead evidence that he gave the instruction and the employees ignored it. The two employees that testified that Mr Ntuli gave instruction were not present when he allegedly gave the instruction. Therefore, what they testified on was merely hearsay. In fact, Mr Breed testified to the contrary that it was definitely not Mr Ntuli who gave the instruction for the employees to disperse because by that time Mr Ntuli was busy with him. The Commissioner ruled that she rejected the Applicant's version because it is not probable that the whole washbay was not operating because 15 employees per shift comprise it. It is

therefore no true that the Commissioner failed to give reasons why she rejected the Applicant's version.

[30] It is further denied that there were no material discrepancies in the evidence of the witness regarding the duration of the meeting. Mr Breed's testimony was that the meeting lasted for 1 hour, at the disciplinary hearing Mr Tsotetsi said the meeting lasted for 10 minutes and changed his version to 45 minutes at arbitration.

[31] The Applicant stated that it was testified that the remaining washbay employees refused to work and were in their change rooms but did not point to which witness gave that testimony and where in the record the testimony is located. And even if the other employees refused to work, the Applicant cannot connect their refusal to work to Mr Hadebe. The Applicant's version that the washbay was not operational at all was rejected by the Commissioner and correctly so as Mr Komani testified that there was only one washbay that was not operational. The Commissioner's award is not flawed and is supported by evidence. From the evidence, there is no logical connection between Mr Hadebe having an alleged meeting with 5 employees and the whole wash bay not operating. The Applicant simply cannot make the connection. At best, the Applicant could argue that Mr Hadebe incited those 4 to 5 employees that he spoke with which argument would still not hold since the employees were already not working when he arrived. An explanation has been provided as to why Mr Hadebe remarked that the employees should continue working. The Commissioner's award is supported by evidence and reason and there is no reason why this Court should interfere with it.

[32] Mr Hadebe testified that he did not apologise earlier because according to him that was the language that they normally used with each other. It is denied that the apology was feeble. Mr Hadebe was remorseful and apologized because he regretted his actions. A withdrawal of words and an apology is the same thing. The working relationship between the Applicant and Mr Hadebe had not broken down and the fact that he did not greet Pretus or Ambani after

the incident is, as the Commissioner put it irrelevant. It had nothing to do with what the Applicant was charged with.

- [33] The Applicant's witnesses also provided contradictory testimonies about how many trucks were not washed. Mr Tsotetsi testified that the 4 trucks were not washed and Mr Breed testified that there were 8 trucks that were not washed. If indeed the whole washbay was not working, how were 4 of 18 or 20 trucks washed if Mr Tsotetsi's version that only 4 trucks were not washed is to be believed. If anything, this supported Mr Hadebe's version that there was only one washbay that was not working hence the 4 trucks that were not washed.

Analysis

- [34] In this matter, the commissioner was called upon to consider the principal issue before her, to evaluate the facts presented at the hearing and to come to a conclusion that is reasonable. Once she has done this, the arbitration award she issued should be allowed to stand as a final and definitive order². If not, depending on the defect, this court will be entitled to intervene. The commissioner was here faced with two contradicting versions on the events of the day. This was more so in count 1 than in count two and then in evaluating the fairness of the sanction in count two.
- [35] The principles utilised in the evaluation of such evidence are well known. The commissioner was called upon to weigh the evidence as a whole, taking account of the probabilities, the reliability and opportunity for observation of the respective witnesses, the intrinsic merits or demerits of the testimony of witnesses, any inconsistencies or contradictions and all other relevant factors in the context of the overall scrutiny of the evidence.³ There is no doubt that the commissioner was alive to her duty to consider the principal issue before her and to evaluate the facts presented at the hearing. The review attacks the process of facts determination or evaluation which would influence the reasonableness or otherwise of the outcome or decision.

² *Goldfields Mining SA (Pty) Ltd v CCMA* [2014] 1 BLLR 20 (LAC) at page 25.

³ *S v Chiya* 1974 (3) SA 844 (T).

Count 1

[36] On the probabilities of this matter, in relation to count 1, one may easily accept that Mr Hadebe's arrival at the work place on this day was not coincidental. He probably knew what was to happen on this day, namely the transfer of the business from the applicant to Rheinichem. He was on suspension and clearly, ought never to have been addressing other employees during their working hours. However, he was not charged for this. The allegation was that he instigated and incited an unprovoked or unscheduled work stoppage at the depot washbay. The applicant bore the obligation to prove these allegations. Its main difficulty lies in that the applicant's evidence is devoid of any direct evidence to implicate Mr Hadebe. It sought to rely on circumstantial evidence to prove the fairness of dismissal. The washbay supervisor, who could possibly have had direct evidence of the alleged instigation and incitement, as a person located at the washbay, yielded to some threats and refused to testify. The case of Mr Hadebe, on the other hand was one of direct evidence.

[37] The case proved by the applicant essentially amounts to the following:

On 11 April 2016 the applicant arranged for a s197 transfer of its washbay, as a going concern to be transferred and taken over by Rheinichem;

Mr Tsotetsi was the washbay as a Manager to do the handover of the washbay to Mr Oosthuizen as Director of Rheinichem.

Mr Tsotetsi overheard Mr Hadebe addressing the employees gathered at the bay area. Mr Hadebe was on suspension at the time. He was one of the shop stewards of the employees of the applicant. He was however, not allocated as such, to the washbay employees, who had their shop steward.

Mr Hadebe had a home in Durban but also had residence in Johannesburg.

Mr Tsotetsi then instructed the washbay Supervisor, Mr Ntuli to tell the group of employees to go back to their working station.

These employees were about 5 to 7 seated in a U shape formation, listening to Mr Hadebe.

In all, the washbay had no less than 15 employees on duty on this day. All were not working at times material to this matter.

This took place from about 10h30 to 11h00. The employees refused to go back to work.

Mr Tsotetsi reported the failure to return to work to Mr Kolobe.

Mr Kolobe then telephonically contacted Mr Hadebe, enquiring if it was true that Mr Hadebe was holding a meeting with employee during working time.

Mr Hadebe asked who it was that told Mr Kolobe about the ongoing meeting. Mr Kolobe wanted Mr Hadebe to confirm or deny if he was indeed holding a meeting with the washbay employees.

Mr Hadebe advised Mr Tsotetsi to go and tell the one who told him about the meeting that “unina loyo obambe i meeting.” Which if translated to English means “It is his mother who is holding a meeting.”

Mr Kolobe requested Mr Hadebe not to use such words and asked Mr Hadebe to withdraw them.

Mr Hadebe refused to withdraw the statement. The refusal was repeated even after Mr Kolobe had told Mr Hadebe that Mr Tsotetsi had made a report. Instead, Mr Hadebe repeated the statement directing it to Mr Tsotetsi.

Mr Kolobe passed the statement of Mr Hadebe to Mr Tsotetsi. Mr Tsotetsi was disturbed by the comment because it was reference to his mother. He felt humiliated, disrespected and verbally abused.

Mr Hadebe did not subsequently apologize or withdraw those comments until the end of the disciplinary hearing, when giving evidence in mitigation.

- [38] From these summarised facts, the applicant sought to have the commissioner draw inferences, as proof, on a balance of probabilities that Mr Hadebe had instigated and incited an unprovoked or unscheduled work stoppage at the depot washbay. Yet, the applicant failed to lead evidence in respect of -

What the 5 to 7 employees were doing when Mr Hadebe arrived at them. In the event they were already holding back their labour, this cannot be said to be an unprovoked work stoppage;

What it is that Mr Hadebe was saying to the employees for it to be said he instigated and incited them;

Why it is that the rest of the other employees, Mr Hadebe did not speak to, were holding back their labour;

What it is that the 5 to 7 employees did differently from the other group for one to say that this group had been instigated and incited.

- [39] Confronted by these considerations, the commissioner found the probabilities in this matter to be equal. I do not know how they can even be equal, but on that pronouncement, the commissioner had to check on who bore the onus of proof, in this case the applicant, and had to find that such was not discharged. In my view, the balance of probabilities favoured the version of Mr Hadebe, even though he had no right to address these employees as he was on suspension. Taking into consideration the meaning and definition of "inciter" (and hence incitement) no acts or conduct of Mr Hadebe were proved to fall squarely within the given definition.

Count 2

- [40] This count relates to the use of profanities or obscene language at the work place. According to Mr Hadebe, this should be accepted as a normal manner

of communication. If it were true that a language is accepted and tolerated at this work place, one need to wonder why Mr Kolobe warned Mr Hadebe more than twice to withdraw his utterances, while the incident was still fresh in their minds. Mr Hadebe claims that he was used to talking in profanities with Mr Kolobe. I find this difficult to accept. Mr Kolobe was the Divisional HR Director of the applicant. In terms of office hierarchy, after Mr Kolobe comes Ms Radebe, the HR Manager of the applicant. Mr Hadebe was only one of the Shop Stewards at the work place. No evidence was led by Mr Hadebe to support the grounds on how it came about he was so close to Mr Kolobe as to be able to use such a language with him. Nor was such evidence led in relation to Mr Tsotetsi. Mr Hadebe was told that the report of him holding a meeting was received from Mr Tsotetsi.

[41] I consider the usage of profanities to be an abhorrence or disgust in the same manner as with the use of racial slurs. We have already been warned not to pussy foot around the use of racial slurs at work places.⁴ This expression used by Mr Hadebe is of high obscene language, carrying derogatory insulting message. It has a nuance of belittling women, in this case, mothers. We have a constitution whose purpose includes healing divisions of the past and establishing a society based on democratic values, social justice and fundamental human rights⁵. Gender based discriminatory practices go against the establishment of a society based on democratic values. Women should fill free to ply their trades in places of work such as are offered by the applicant, with no fear of reprisal by men. Mr Hadebe displayed lack of respect for women. He displayed lack of respect for his seniors at work.

[42] The commissioner clearly failed to determine the seriousness of the misconduct in this matter. As already alluded to, Mr Hadebe was given two chances to withdraw his utterances. He not only failed to take advantage of that moment, but he insisted even when told that the report came from Mr Tsotetsi. It was only when he was confronted with a reality that he might be dismissed that he apologised. This apology cannot be a true expression of

⁴*Rustenburg Platinum Mine v Saewa Obo Meyer Bester & Others* 2018 (8) BCLR 951 (CC).

⁵ See the Preamble to the Constitution Act, 1996.

pertinence. This is rather the instance of a corrigible rogue who tried to get away with it. The concluding remarks of the commissioner demonstrate some confusion in her mind. She said:

“.....I conclude that the respondent was not able to prove, on a balance of probabilities that the applicant has committed an alleged misconduct but the dismissal of the applicant was substantively unfair because the sanction imposed was too harsh.”

[43] Through the arbitration hearing, it remained common cause that Mr Hadebe uttered the words he was accused of. This was in response to a reasonable request, asking him to confirm or deny that he held a meeting with the washbay employees. The request came from superior personnel who was entitled to investigate the claim. The utterances were offensive profanities. The decision of the commissioner that the applicant was not able to prove, on a balance of probabilities that Mr Hadebe has committed an alleged misconduct, is clearly unreasonable. At this stage, it was not an alleged misconduct. Rather, it was admitted misconduct, in respect of which a defence was to be raised, in the process of the shifting onus. The decision that the dismissal of Mr Hadebe was substantively unfair because the sanction imposed was too harsh, was similarly unreasonable, as already explained. An employee who undermines authorities at a working place with no justification does not deserve reinstatement or re-employment. His return to work is more than likely to wreak havoc, with disciplinary measures being ignored with impunity.

[44] In conclusion, I make the following order:

Order:

1. The review application in respect of count 1 is dismissed.
- 2.1. The review application in respect of count 2 is granted.
- 2.2. The dismissal of Mr Hadebe by the applicant in this matter was substantively fair.

3. No costs order is made.

Cele H.

Judge of the Labour Court of South Africa

Appearances:

For the Applicants:

Advocate S Saunders

Instructed by:

Cliff Dekker Hofmeyr Inc

For the Respondent:

Ms L Sidambe from MM MITTI Inc