

SOUTH AFRICA / JUDGMENT

# EPX Couriers (Pty) Ltd v Zwane NO and Others (JR1523/21) [2023] ZALCJHB 246 (15 August 2023)

[2023] ZALCJHB 246

## COURT

Labour Court Johannesburg

## BEFORE

Murphy

## CASE / FILE NUMBER

JR1523/21

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

case

No: JR1523/21

In

the matter between:

EPX COURIERS (PTY)

LTD

Applicant

and

THEMBA R ZWANE

NO

First Respondent

THE NATIONAL

BARGAINING COUNCIL FOR THE

ROAD FREIGHT &amp;

LOGISTICS INDUSTRY

(NBCRFLI)

Second Respondent

NTM obo THOMAS

MALATJI

Third Respondent

Heard:

05 July 2023

Delivered: 15 August 2023  
This judgment was handed down electronically by consent of the parties' representatives by circulation to them by email. The date for hand-down is deemed to be 15 August 2023.

## JUDGMENT

MURPHY, AJ

### Introduction

- [1] This is an opposed application to review an arbitration award in terms of section 145(1)(a) of the Labour Relations Act[1], (the LRA).
- [2] The arbitration award was handed down by Commissioner Themba R Zwane (the arbitrator) on 4 June 2021.
- [3] At the hearing before this court on 5 July 2023, Advocate A J Nel appeared for the Applicant, EPX Couriers (Pty) Ltd and Mr Ephraim Mphahlele for the Third Respondent, the National Transport Movement.

### Background

- [4] Mr Thomas Malatji was employed by EPX Couriers on 31 January 2005. He was summarily dismissed on the 28th of August 2020[2].
- [5] After the announcement of the national lockdown as a consequence of the Covid-19 pandemic, EPX Couriers staff went on pandemic enforced leave. They were informed they would be paid reduced remuneration

while on leave.

- [6] Upon their return, in May and June 2020, meetings were called to address Covid-19 remuneration-related matters and an exemption EPX Couriers had been granted in respect of increases.
- [7] The first meeting of direct relevance to this application was called by EPX Couriers on the 5th of May 2020 (the authorized meeting of 5 May, for convenience). The focus was Covid-19 TERS and Unemployment Insurance Fund payment matters.
- [8] Immediately after the meeting, which ended at about 10h00, certain staff members met a union official at the entrance to the EPX Courier premises. This meeting took place during working hours without EPX

Courier's consent (the unauthorised 5 May meeting, for convenience).

- [9] The fleet manager of EPX Couriers, Mr Bertie Kok, approached these staff members and instructed them to return to work. The unauthorised 5 May meeting continued for five to ten minutes thereafter.
- [10] On 2 June 2020, a second meeting was called. TERS and UIF payments that had not been made were again on the agenda, as was an exemption EPX Couriers had been granted in respect of increases (the meeting of 2 June).
- [11] A further meeting was held on 11 June 2020, when EPX provided staff with evidence of the exemption – being the exemption letter that had been received from the council (the meeting of 11 June).
- [12] On 17 August 2020, Mr Malatji was charged with gross misconduct. The disciplinary charges were:

‘Gross Misconduct, making of false allegations, gross insubordination and incitement of fellow staff in so far as:

- You have falsely and publically (sic) accused management / the company of defrauding its employees during Covid 19 lockdown.
- You informed staff and falsely and publically (sic) accused management / the company of presenting falsified documents to its employees.
- Attending an unauthorized meeting at the entrance to EPX Couriers on 5 May 2020 at around 10h00.’

- [13] The disciplinary chairperson found Mr Malatji guilty of these charges and recommended summary dismissal. EPX Couriers accepted this recommendation and Mr Malatji was summarily dismissed on 28 August 2020.

- [14] At the time of his dismissal Mr Malatji had been employed for over 15 years. He had not faced misconduct charges before.

- [15] Mr Malatji referred an unfair dismissal dispute to the Second Respondent’s bargaining council. Conciliation failed and the arbitration proceeded on 25 March 2021 and 28 May 2021.

- [16] The arbitrator and the parties’ representatives confirmed the nature of the dispute between them at the commencement of the

arbitration[3] as relating to gross misconduct for making false allegations, gross insubordination, and incitement.[4]

- [17] Mr Bertie Kok a fleet manager and Mr Marito Thibane a senior supervisor, testified for EPX Couriers[5]. Mr Malatji gave evidence and called Mr Jabulani Mkoko who had worked in the house dispatch department of EPX Couriers before being

dismissed on 24 July of 2020, was also called as a witness.

[18] The meetings of May and June 2020, what transpired (or did not transpire) and whether Mr Malatji, assuming the allegations against him were proved, incited unlawful conduct, are at the heart of this matter.

[19] EPX Couriers said that Mr Malatji levelled false accusations against the firm at these meetings, he incited staff members and he attended the unauthorized 5 May meeting.

[20] Mr Malatji denied making the statements ascribed to him and that he incited his fellow staff members. He admitted asking questions at the authorized meeting of 5 May but said these related to matters of a personal nature; he said he did not attend the unauthorised 5 May meeting; and he denied speaking at the meetings of 2 June and 11 June.

[21] The arbitrator handed down his award on 4 June 2021, holding and ordering as follows:[6]

‘59. I find that the dismissal of the Applicant, Thomas Malatji, by the Respondent, EPX Courier, was substantively unfair.

60. I accordingly reinstate the Applicant to his previous position without loss of any benefit. The reinstatement is retrospective to the date of dismissal on 28 August 2020.

61. The arrear payment due and payable to the Applicant is equivalent to seven months’ salary, calculated at the rate the Applicant was earning (R9,388.99 x 7 months) equals (R65,722.93).

62. I accordingly order the Respondent to pay the Applicant the above amount on 18 June 2021.

63. The Applicant to resume his duties on 18 June 2021.’

[22] Aggrieved by the arbitration award, EPX Couriers instituted review proceedings in this court. NTM opposed the review on behalf of Mr Malatji.

The issues for determination and the submissions

## Overview

[23] EPX Couriers raised four grounds of review in its founding affidavit. Each was introduced by recording different subsections of section 145

(2) of the LRA as alternatives. This scattergun approach is not helpful. The court should not have to work out for itself what is intended.

[24] The grounds were that the arbitrator:

24.1 Committed misconduct, alternatively exceeded his powers, alternatively committed a material error of law with regards to how he approached the credibility of witnesses and interpreted and evaluated their testimony;

24.2 exceeded his powers and committed an error of law, alternatively committed misconduct or a gross irregularity by stating that incitement is not a legitimate disciplinary charge;

24.3 committed misconduct or a gross irregularity and came to incorrect conclusions regarding the evidence and testimony placed before him. Certain evidence was interpreted incorrectly, other evidence was ignored;

24.4 committed misconduct, alternatively a gross irregularity and failed to apply his mind to the matter, as he seems to have completely ignored the third charge levied.

[25] EPX Couriers drew the conclusion that the arbitration award was not one a reasonable arbitrator could have arrived at.

[26] NTM disputed these grounds in its answering affidavit and submitted that the arbitrator arrived at a reasonable and justified arbitration award having regard to the evidence presented. On the issue of incitement, NTM said the arbitrator had indicated his views on incitement, but also reasoned it was not a legitimate disciplinary charge in this case.

[27] Mr Nel and Mr Mphahlele submitted helpful written heads of argument and made oral submissions. These assisted the court in determining the true ambit of EPX Couriers case and the disputes between the parties on review.

[28] In argument, Mr Nel submitted that the arbitrator failed to appreciate that the insubordination leg of EPX Courier's case was based on the contention that Mr Malatji failed to comply with an instruction by Mr Kok to staff attending the unauthorized meeting on 5 March 2021 to go back to work. (the failure to comply with an instruction / insubordination issue).

[29] Furthermore, said Mr Nel, the arbitrator failed to properly analyse the evidence because he did not understand (or otherwise did not apply) the appropriate legal principles (the failure to properly analyse the evidence).

[30] First, said Mr Nel, the arbitrator drew a negative inference due to the presentation (in chief) of evidence that gave the impression that Mr Kok had attended all the meetings of relevance. According to Mr Nel, the arbitrator consequently treated Mr Kok's evidence, in its entirety, as having been provided in a dishonest manner when there was no warrant for doing so.

[31] This was exacerbated, so the argument goes, by a failure to properly analyse the evidence (on the question of whether Mr Malatji attended the unauthorised 5 May meeting at the gate and failed to leave when instructed so to do) and prefer a version on the issue.

[32] Second, the arbitrator's approach to the evidence (the arbitrator preferred the evidence of Mr Malatji and Mr Mkoko in relation to these meetings) was due to his placing a "higher duty" on EPX Couriers.

- [33] Mr Nel argued that no negative inference could be drawn in respect of Mr Thibane. His evidence was that at the authorized meeting of 5 May, Mr Malatji accused EPX Couriers of lying to its staff and at the meeting of 2 June said EPX Couriers had presented its staff with a falsified document.[7]
- [34] Mr Malatji and Mr Mkoko would dispute this evidence, testifying that Mr Malatji spoke of a personal concern on 5 May and did not speak at the meeting of 2 June, but Mr Thibane was not confronted in cross-examination with what they would say regarding the meeting of 2 June.
- [35] According to Mr Nel, the evidence of Mr Thibane regarding what Mr Malatji said on 5 May should have been preferred, and that regarding 2 June stood uncontradicted and so had to be accepted.
- [36] Mr Nel conceded, during oral argument, that the charge of incitement was a crucial part of EPX Couriers case. Put differently, if the evidence, properly construed, did not show that Mr Malatji incited his fellow staff members, EPX Couriers did not have good prospects of setting the arbitration award aside.
- [37] This is not to say EPX Couriers conceded that there was no evidence of other misconduct. But that absent evidence of incitement, the misconduct relied upon by EPX Couriers, would not, having regard to other factors, rise to a level that would justify setting aside the arbitration award (the incitement issue).
- [38] Mr Mphahlele argued that EPX Couriers was trying to appeal, rather than review, the arbitration award. The circumspection the arbitrator applied to Mr Kok's evidence was appropriate; the notion of a "higher duty" was a reference to the onus being on EPX Couriers; the concession that incitement was a crucial part of EPX Couriers case had been correctly made, but there had been no evidence of Mr Malatji inciting staff.
- [39] Neither party sought costs as a consequence of the ongoing relationship between NTM and EPX Couriers.

#### Evaluation

- [40] The approach to a reasonableness review was articulated by Murphy AJA in *Head of the Department of Education v Mofokeng and others*[8] (*Head of the Department of Education*) and its importance has recently been reemphasised by Sutherland JA in *Makuleni v Standard Bank of South Africa Ltd and others*.[9]
- [41] These judgements stress that "the failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal (the SCA) in *Herholdt v Nedbank Ltd* (Congress of SA Trade Unions as Amicus Curiae) and in this court in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* have held that before such an irregularity will result in the setting aside of the award, it must in addition

reveal a misconception of the true enquiry or result in an unreasonable outcome.”[10]

[42] I will deal with the specific criticisms emphasised by Mr Nel before returning to the question of whether, if one or more or all have been established, the award should be set aside.

The failure to comply with an instruction / insubordination issue.

[43] The charge preferred against Mr Malatji in respect of the unauthorised 5 May meeting at the gate was – “attending an unauthorized meeting at the entrance to EPX Couriers on 5 May 2020 at around 10h00.” EPX Couriers confirmed this as an issue before the arbitration commenced. The charge was attending a meeting, not refusing to leave it.[11]

[44] While employers do not need to formulate disciplinary charges with the precision required in criminal proceedings, here the factual

underpinning for the charge was clear. Attending the unauthorized meeting was the complaint. Mr Malatji was not charged with insubordination for failing to comply with an instruction by Mr Kok[12] to leave the unauthorized meeting.

[45] As the introductory paragraph to the charges alleged (inter alia) insubordination in respect of all the matters listed thereafter the arbitrator considered the exchanges Mr Malatji had with EPX Couriers management at the meetings he attended. The arbitrator concluded that EPX Carriers had not established that Mr Malatji had been insubordinate at these meetings. [13]

[46] To the extent that attending a meeting could be construed as continuing to do so despite being instructed to leave, the evidence does not, to my mind, establish that Mr Malatji attended the unauthorized meeting in any event. Mr Kok was expressly challenged on this issue, and Mr Malatji and Mr Mkoiko testified that Mr Malatji did not attend the unauthorized 5 May meeting.[14]

[47] The arbitrator may not have explained himself in this fashion, but to my mind, the arbitration award read in context does not reveal an irregularity.

The failure to properly analyse the evidence.

[48] It is worth quoting the excerpt from the award relied upon in EPX Courier’s heads of argument in respect of Mr Nel’s first criticism under this head. In his award, the arbitrator said:

‘As regard’s (sic) Kok’s testimony that should indeed be dealt with circumspection as he was not present. This only came out through cross examination otherwise he would have lured me into believing he was present. I therefore draw a negative inference that there was an intention to misleading the arbitration.’

- [49] Whatever the arbitrator intended by referring to an adverse inference in this context he had good reason to be circumspect about Mr Kok's evidence. Mr Kok could well have created the impression that he had been present at all the meetings of 5 May to 11 June had there been no cross-examination.
- [50] As regards the unauthorized 5 May meeting, which Mr Kok did attend (and said Mr Malatji was present at), he was challenged on the issue under cross-examination.
- [51] In addition, Mr Thibane's evidence regarding the meeting between Mr Malula and Mr Malatji (called for by the former) during or at the end of the authorized meeting of 5 May, created, at the very least, considerable doubt on the matter.
- [52] Having regard to all the evidence the arbitrator preferred the version of Mr Malatji and Mr Mkoko. I find no reason to depart from that preference. Particularly if Mr Thibane's evidence (referred to in footnote 12 above) and the failure to call Mr Malula are considered.
- [53] As to the second criticism, that the arbitrator placed a "higher duty" on EPX Couriers and this influenced how he approached the evidence, the language the arbitrator used is unfortunate.
- [54] But I agree with Mr Mphahlele. If regard is had the arbitration award, I find no basis for concluding that the arbitrator intended anything more than that the onus of proving the fairness of the dismissal rested with EPX Couriers.
- [55] I will deal with Mr Nel's argument that Mr Thibane's evidence regarding what Mr Malatji said at the authorized meeting on 5 May should have been preferred and regarding the meeting of 2 June had to be accepted, together.
- [56] Mr Thibane was confronted under cross-examination with Mr Malatji's version that he asked questions that related to him personally, rather than to staff, at the authorized meeting of 5 May.
- [57] At the end of his evidence in chief, Mr Thibane volunteered that after the authorised meeting of 5 May, Mr Malula invited Mr Malatji to his office to clarify the issue Mr Malatji had raised. He thought the outcome of their meeting had been positive and they had resolved the issue.
- [58] As the arbitrator pointed out there were difficult issues to understand in the context of Covid-19 where questions were to be expected. Mr Malatji testified that his questions related to personal matters arising from his payslip. Mr Thibane's evidence concerning a meeting with Mr Malula tends to favour Mr Malatji's version on the issue.[15]
- [59] It is so that it was not put to Mr Thibane that Mr Malatji would say he did not speak at the 2 June meeting. And that generally, if a party calls a witness, and material evidence is not challenged under cross-examination, it can be accepted as correct.

- [60] Mr Malatji and Mr Mkoko testified that Mr Malatji did not have anything to say at the meetings of 2 and 11 June 2020 and Mr Thibane should have been confronted in respect of 2 June. Mr Malatji's representative seemed to believe he had done so, but on this issue that did not happen. [16]
- [61] As the Constitutional Court said in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[17] the rule is not inflexible, and it must not be applied mechanically. Regard must always be had to all the facts and circumstances of each case.
- [62] EPX Courier's argument focused on the failure of Mr Malatji's representative to challenge Mr Thibane's evidence, as contained in a statement[18] he read out. The statement recorded that at the meeting of 2 June 2020 Mr Malatji "stated that the exemption letter as claimed by the company was a lie and no exemption was granted..."
- [63] Mr Thibane was asked to read this statement out, which he did. The relevant portion was that:-
- 'Another meeting was held on the 2nd of June 2020 to discuss the non-payment of benefits from TERS, UIF as well as the exemption letter from and NBCRFLI. During this meeting Mr Malatji state (sic) that the exemption letter as claimed by the company was a lie and that no exemption was granted by NBCRFLI.'
- [64] A leading question regarding the 2 June meeting was then put to him by EPX Couriers based on the statement:
- 'Did you, you made mention that again Mr Malatji state (sic) that the exemption letter was a lie. Did you hear him say this.'
- [65] Mr Thibane said yes.
- [66] According to Mr Thibane, the meetings of 5 March and 2 June were led by Mr Malula. He, Mr Thibane was there as a "helper". Mr Thibane's evidence regarding these meetings was far from clear.
- [67] Mr Thibane conflated two different meetings[19], that of 2 June and a later meeting of 11 June and when pressed for clarity could not recall at which of these meetings the exemption letter was handed out.
- [68] According to Mr Kok, the exemption letter was only handed out on 11 June 2020. It is highly unlikely that Mr Malatji could have asserted on 2 June that EPX Couriers had provided a falsified document on 2 June in these circumstances. [20]
- [69] Mr Thibane did not give evidence about the meeting of 11 June, and Mr Malula, who was to have given such evidence was not called.

[70] Having regard to all the circumstances I find no reason to depart from the arbitrator's assessment of the evidence. If I am wrong in relation to the 2 June meeting that would not change the outcome I arrive at.

The incitement issue.

[71] There is good reason to be wary of the (ab)use of the concept of incitement in South African labour law. The concept was misused in the past, as the arbitrator indicated, in many situations in which parties were in truth engaging in valid labour related differences or disputes.

[72] That said, there will be times when a charge of incitement would be appropriate. The authorities relied upon by Mr Nel[21] focus on the incitement of unlawful / criminal conduct.

[73] Mr Nel's submission, in his heads of argument was that:

'There can be no doubt that Malatji sought to influence the minds of his fellow employees by means of false statements not to accept the facts as presented by EPX Couriers and thus persist in not accepting the rational for wage increases not being implemented. Malatji thus indeed attempted to incite.'

[74] But is that the evidence? And what is the unlawful conduct that Mr Malatji is said to have been inciting or attempting to incite?

[75] Mr Malatji raised issues at the authorized meeting of 5 May, considered important enough by Mr Malula to call him to a meeting to resolve them. The meeting appears to have addressed Mr Malatji's questions.

[76] If one accepts, as Mr Nel says we must, that Mr Malatji said EPX Couriers was lying to its staff at the 2 June meeting, the consequence was a further meeting to present the exemption letter.

[77] There is no admissible evidence from EPX Couriers that when the exemption letter was provided Mr Malatji said it was falsified or incited unlawful conduct. Mr Kok was not at the meeting, Mr Malula did not testify, and Mr Malatji and Mr Mkoko denied anything of the sort.

[78] But the real problem for EPX Couriers is, it seems to me, that it cannot point to the unlawful conduct it contends Mr Malatji incited or tried to incite.

The conclusions drawn.

[79] EPX Couriers case is that no reasonable arbitrator could have arrived at the arbitration award. To succeed EPX Couriers must not only show the identified irregularities that occurred, but they caused a misconception of the true enquiry or resulted in an unreasonable outcome.

[80] For the reasons I have given I cannot agree. I find that the arbitrator applied his mind to the material questions he had to address, and while he used certain language that was not appropriate, he nevertheless arrived at a reasonable outcome.

[81] In the premise, I make the following order:

#### Order

1. The application for review is dismissed.
2. There is no order as to costs.

M Murphy

Acting Judge of the Labour Court of South Africa

#### Appearances

For the Applicant: Advocate A J Nel Instructed by: Darran Ledden Incorporated Attorneys For the Third Respondent: Mr Ephraim Mphahlele Instructed by: NTM

[1] Act 66 of 1995, amended.

[2] At the time of his dismissal Mr Malatji was a driver.

[3] Mr Malatji also raised a procedural matter before the arbitration commenced. It seems to have become plain to the parties during the proceedings that this had no merit. There was no finding by the arbitrator on the matter and I will say no more about it.

[4] EPX Couriers fleshed this out by adding that Mr Malatji had committed gross insubordination and incitement and falsely and publicly accused EPX Couriers management of defrauding its employees, of presenting falsified documents to its staff during

Covid-19 and had attended an unauthorized meeting at the entrance to EPX Couriers premises at around 10h00 on 5 May 2020.

[5] EPX Couriers initially said it would also call the firm's Operations Manager (at the time), Mr Makaya Malula, but in the end did not do so.

[6] The arbitration award.

[7] The exemption letter.

[8]

(2015) 36 ILJ 2802 (LAC); [2014] ZALAC 50 at paras 30-33.

[9]

(2023) 44 ILJ 1005 (LAC); [2023] ZALAC 4 at paras 3-6.

[10] Head of the Department of Education at para 30.

[11] That is also how the arbitrator captured the issue in the arbitration award.

[12] There was no mention, even, of an instruction or of Mr Kok's involvement.

[13] The arbitrator principally relied on EPX Couriers evidence for this

### **conclusion.**

[14] Mr Thibane's evidence was that Mr Malula asked Mr Malatji to meet with him to discuss the matters he (Mr Malatji) raised at the meeting of 5 March. That such a request was made would seem to support Mr Malatji that the questions he posed related to his situation, not that of staff generally. They did meet, and, it appeared, resolved the issues Mr Malatji had raised. Mr Thibane was not certain precisely when the meeting between Mr Malula and Mr Malatji took place, but it was Mr Malatji's case that it was directly after the meeting called by EPX Couriers on the morning of 5 March 2021 – the time when the unauthorized 5 May meeting at the gate occurred. Mr Malula was not called as a witness.

[15] As do the probabilities having regard to Mr Malatji's specific reference to amounts that impacted him personally. This was put to Mr Thibane. And explained by Mr Malatji in his evidence.

[16] Neither of EPX Couriers or Mr Malatji were legal represented. The best person to raise the issue with would have been Mr Malula. But he was not called.

[17] 1999 (10) BCLR 1059; [1999] ZACC 11 at paras 64-65.

[18] The document was referred to repeatedly as an affidavit, but it was a written statement prepared for the disciplinary hearing. Mr Thibane was asked to read it out at the arbitration.

[19] He also differed with Mr Kok, and Mr Malatji as to who it was from EPX Couriers that led these meetings.

[20] Mr Malatji said, when asked about this by the arbitrator, that by 2 June staff knew of the exemption letter. But his evidence on these meetings and this issue was not a model of clarity. When pressed on the issue he said he could not recall.

[21] National Union of Metalworkers of South Africa and Others v Gearmax (Pty) Ltd

(1991) 12 ILJ 778 (A); [1991] ZASCA 26 at 782G - 783A in which reference is made to the definition adopted, in an employment context, in Dunlop SA Ltd v Metal and Allied Workers Union and Another 1985 (1) SA 177 (D) from cases dealing with the concept in criminal law.

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