IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

DATE: 30 May 2000 **CASE NO. J3496/99**

In the matter between:

ADCOCK INGRAM CRITICIAL CARE Applicant

and

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION AND OTHERS Respondents

J U D G M E N T

WAGLAY, J:

[1] This is an application for reviewing and setting aside the award of the second respondent dated 2 August 1999 on the grounds that the commissioner committed a gross irregularity in the arbitration proceedings; and/or the commissioner's decision is not rationally justifiable in terms of the reasons given and that the commissioner's findings are permeated with bias in favour of the third and fourth respondents.

[2] Briefly the matter related to the dismissal of the fourth respondent on the grounds of intimidation. The background to the charge of misconduct preferred against the fourth respondent was that on 19 June 1998 applicant's permanent employees commenced a protected strike action. The protected strike action was joined by some 50 temporary employees. These temporary employees did not form part of the bargaining unit and their participation in the strike can therefore not be construed as a lawful one.

[3] The strike was marred with shocking and unacceptable violence. It led to one of the respondent's employees who did not participate in the strike being murdered; three other non-striking employees and a bystander were wounded in a drive-by shooting; another two non-striking employees were viciously assaulted. Further the homes of 13 of applicant's employees who were not on strike were attacked and petrol-bombed. Threats were

also directed at particular members of management resulting in the applicant having to secure services of private guards to protect the safety and security of the members of management.

[4] The strike ultimately came to an end on 17 August 1998. During the course of the strike period a number of temporary employees' contracts of employment were terminated by effluxion of time.

[5] Prior to the ending of the strike meetings were held between applicant on the one hand, the trade unions and a member of the shop stewards' committee on the other. These meetings were held with a view of resolving the issue about when the employees would return to work and, I assume, also finalising the wage agreement. Also for discussion at the first meeting which was held on 12 August 1998 was the position of temporary employees. The trade union and its team which as stated earlier included a member of the shop stewards' committee in the form of the fourth respondent, to whom I shall hereafter refer to as the employee team, and the respondent's team as the management. At the commencement of the meeting the fourth respondent, as a member of the shop stewards' committee and part of the employee team made the following statement:

"Treat this as a threat, there will be more blood on your hands."

The management team immediately left the meeting. It did so because, according to them, they considered the above statement as a direct threat on them.

[6] The deponent records that this statement engendered "... the fear, anxiety, uncertainty and misery that I have lived through the strike. This is also applicable to my fellow managers who were continually harassed and threatened during the strike as well as those employees who exercised their right to work and not to go on strike".

[7] The following day a representative of the trade unions apologised to management on behalf of the unions involved and distanced the unions from the statement made by the fourth respondent. The applicant took the view that it could not allow the fourth respondent to get away with this conduct lest it be seen as condoning his conduct and accordingly preferred misconduct charges against the fourth respondent. The charge preferred against the fourth respondent was set out as follows:

"T Vilakazi threatened the negotiating team by stating ‘treat this as a threat, there will be more blood on your

hands'".

At the hearing the charge of misconduct was construed to be that of intimidation while respondent takes issue of the chairman labeling the charge as intimidation. There is no merit in respondent's objection. It is self-evident that the charge as formulated related to the giving of facts rather than stating the charge. It was the facts which gave rise to the charge of intimidation.

[8] At the disciplinary hearing the fourth respondent admitted that he said the words attributed to him although he disputed the word "treat", stating that he used the word "take" but nothing turns on this. The fourth respondent was found guilty and dismissed on a charge of intimidation, this charge being an A2 offence prescribing summary dismissal as an appropriate sanction in terms of the applicant's disciplinary code.

[9] An appeal against the finding was dismissed and in due course the parties found themselves in arbitration. The commissioner sitting as an arbitrator found that the fourth respondent had not committed the misconduct and therefore the dismissal was unfair. The grounds upon which the commissioner found that the dismissal was substantively unfair was in essence that, having regard to the statement itself, it did not constitute a threat and even if it did, it was inappropriate for the respondent to proceed with a disciplinary hearing against the fourth respondent for the actions of the fourth respondent in a meeting, where an employee sits as an equal and not as an employee.

[10] In dealing with the first issue, what we really have is not a statement made by the fourth respondent per se but the manner in which the statement was made, that he shouted it to the management team, the time it was made, that being towards the end of the strike which was characterised by brutality, intimidation, murder, assault and violence, and most importantly, the statement engendered fears in the minds of the management team. These factors led to the belief that the statement was nothing short of intimidation, that it was a threat to the management team in order for it to concede to the demands made by the employee party.

[11] To accept the above without question is to pander to management's belief. Quite clearly the function of the commissioner is not to do so. The commissioner considered the surrounding circumstances, the prevailing environment at the time and dispassionately, as is expected of a commissioner, analysed the situation. Whether he was right or wrong is not for this court to determine. What I need to be satisfied is that he did properly apply his mind to the matter and that he did not commit any irregularity that tainted his award.

[12] The fact that the commissioner properly considered the matter is demonstrated from the following extract of his award:

"I also take cognisance of the actual context of the words uttered and the extent to which it could be considered intimidation to the management team. Firstly, they were not directed at any one person - as in 'I will kill you, Mr X, if you don't do as I say'. They were directed generally at the management team members to place pressure on management to revise its position on the issue in deadlock at the negotiation table. Secondly, whilst the offending words 'there will be more blood on your hands' could imply any amount of conjecture, of unsavoury acts of sanctuary. Such interpretation must also be seen to be so general in the context of the situation as to imply an empty threat of no consequence of physical harm to anyone. Thirdly, whilst one must acknowledge the intense stressful position that management of an enterprise must face when confronted with an extended eight weeks strike which is characterised and marred by ugly and brutal incidents, one must not lose sight of the equal stress that the representatives of the labour component must themselves have to endure in their roll as representing the interests of the constituents in what had become a bloody battlefield of collective power bashing. I accept the feasible argument of the applicant that as a stop steward he was afraid for his own personal safety. The shop stewards had promised temporary workers they would get their jobs back, perhaps another ill-conceived mistake made by them. And now that this promise was not going materialise the shop stewards had good reason to believe that they would take out the wrath on them in a bloody manner".

[13] I must add that having read the record and the papers I do not see what was the threat made to the management team having regard to the prevailing circumstances. Had management simply reflected on the statement, at least at the end of the day, the only reasonable inference that they could have arrived at is that what the fourth respondent meant was that the temporary staff would attack the permanent staff for their lack of support of them. By his statement that the management will have more blood on their hands, he was implying that violence which, according to applicant, was perpetrated against non-strikers at the time of the strike, was being blamed on the management and therefore the violence was not going to be directed at management but employees themselves and according to fourth respondent, the respondent must be blamed therefor. The fact that such accusation was probably erroneous is something management team could well have advised the employee team. The applicant was simply exercising his lawful right. To jump up and leave the meeting in fear reflects nothing more than perceptions of management team and this cannot be interpreted to imply that the statement imported to threaten or intimidate. In this respect I cannot find that the commissioner committed any

irregularity in arriving at the conclusion that he did.

[14] With regard to the second issue, the commissioner's finding that even if the statement made by fourth respondent was intimidatory, they were made in a representative capacity and to quote him "within the privileged environment at the negotiation table (behind closed doors) and that however unwise those ill-fated words might have been, for the strength of his team's argument (to encourage management to accommodate the temporary workers), it is grossly unfair to single out the applicant for individual disciplinary action and to dismiss him for it".

[15] The applicant suggests that this reasoning by the commissioner is warped because the reasoning that collective bargaining entitles and license criminal action. This not only, according to applicant, undermines collective bargaining as an institution but diminishes the integrity of the CCMA in the eyes of right-thinking South Africans. Rather strong words for such a meritless a point.

[16] When parties enter collective bargaining they sit as equals. Trade union representatives who are employees of the employer do not sit at the bargaining meeting as employees per se but as equals. They are there to bargain, to extract the best deal they are able to secure and it is not uncommon for these meetings to often degenerate. But to give an employer the right to discipline an employee sitting as an equal opposite him would undermine the whole process. Quite clearly this does not give any of the parties an entitlement to abuse or intimidate or license criminal acts. If this happens there are a number of options open to each of the parties, one of them to simply refuse to participate in the bargaining process for lack of any constructive discussion. Or if any criminal act is committed to call the police.

[17] The applicant has suggested that in arriving at this decision the commissioner went on a frolic of his own because there was no basis having regard to the evidence presented to him to arrive at this finding. This is clearly incorrect. The facts are clear. The statement complained of was made at the bargaining meeting. It is proper to look at this meeting, at the parties, the role they play and arrive at a finding with regard thereto. This was not inappropriate.

[18] Not only is the award of the commissioner well reasoned and researched, to state that the commissioner committed a reviewable wrong because the union apologised to the applicant is rather startling. Is it suggested that the commissioner must accept that a wrong was committed because the union believed it to be so? If such

logic is to be accepted one should close down the CCMA and perhaps there might not even be a need for this court.

[19] Although I have dealt with some of the issues raised by the applicant, there was not really need for me to do so because in effect what the applicant is seeking is to appeal the decision of the commissioner under the guise of a review. The grounds listed by the applicants for review are devoid of any merit. I find no irregularity that the commissioner is alleged to have committed. To argue that his decision is not rationally justifiable in terms of reasons given for the decision is likewise for reasons already stated above also of no merit. I further find it objectionable that the applicant could suggest that the commissioner was biased. There is not one iota of evidence to sustain such allegation.

[20] Finally, while there may be some misdirections by the commissioner, none of them are of any consequence, or of a nature that detract from the decision he finally arrived at.

[21] In the result the application is dismissed with costs.

WAGLAY, J
LABOUR COURT OF SOUTH AFRICA

: MR F A BODA

: Perrot Van Niekerk Woodhouse

: MR J LEBEA

: Lebea and Associates

: 30 MAY 2000

: *EX TEMPORE*