IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR696-15

In the matter between:

BIDVEST FOOD SERVICES (PTY) LTD	**Applicant**
and	
CCMA	**First Respondent**
LESLEY MARTIN N.O.	**Second Respondent**
NUMSA obo L A MONDLIWA and 4 Others	**Third Respondent**

Heard: **31 May 2017**

Delivered: **31 May 2017**

***EX TEMPORE* JUDGMENT**

WHITCHER J

[1] The Applicant seeks to review and set aside the Award issued by the Second Respondent ("the Commissioner") wherein he found the dismissal of the Respondents Loyiso Mondliwa, Tanduxolo Njineli, Phindile Mtyagi and Makhwenkwe Vokwana to be substantively and procedurally unfair and ordered their retrospective reinstatement.

[2] During October 2014 there was a strike at the Applicant. The Respondents were dismissed on a charge that on 31 October they went to the house of a fellow employee, Tulley Benge and intimidated him to join the strike.

Evidence led at the arbitration

[3] Benge testified that on the morning of 31 October 2014 his neighbour shouted that there are “guys” outside to see him. When he opened his door, he found three of the Respondents on his doorstep. They told him that ‘Elias’ (Vokwana) and Mondliwa were in a car parked thereby and wanted to talk to him. When he got to the car, Vokwana told him to get into the car. When he refused, Mtyagi pulled at him, but he pulled away and proceeded to phone his father. When he began reporting the matter to his father, the Respondents proceeded to drive away but not before Vokwana and Mondliwa respectively uttered the statements: “*Keep on working and you will see what we are going to do with you”* and “*We are coming back for you”.*

[4] It was put to him that he could not have felt intimidated because he only reported the matter to the police at 8pm. Benge explained that he first wanted to seek advice on the matter and when he reported the incident to management, they advised him to report it to the police.

[5] It was then suggested that he only “cried intimidation” and reported the matter to the police because management had “coerced him” to do so, which he vehemently denied. No substantiating facts on this defence were put to Benge nor established in the Respondents’ evidence.

[6] It was also put to Benge that since the Respondents had not “come back for” him as they had allegedly threatened to do, they could not have intimidated him.

[7] Benje agreed that he had phoned one of the strikers, Raymond, but denied he had phoned him to say he wanted to join the strike. He said he had merely wanted to know where the strikers were stationed in order to avoid them.

Despite Benge's denial, the Respondents did not bring Raymond to testify at the arbitration.

[8] Despite conceding during their opening statement that they had gone to Benge's house, the Respondents' version of what transpired there, as testified to by Mondliwa and Mtyagi, was never put to Benge for a response.

[9] Horwitz testified that the Respondents were given a hearing. He had presided over the matter and had given each Respondent an opportunity to respond to the allegations in the charge. He said the Respondents had at first denied going to Benge's house but conceded going there after Benge pointed out each one of them at the hearing.

[10] It was put to him that the Respondents never initially denied going to Benge's house. Horwitz referred them to his notes and said he had no reason to fabricate this evidence against the Respondents. The allegation was not pursued further.

[11] It was put to him that the Respondents had already been dismissed when they attended the hearing. Horwitz said he has no knowledge of this – all he knows is that during the strike the Respondents were summoned to a hearing presided over by another person but did not attend. After the strike, the outcome of that hearing was obviously cancelled because a new hearing was scheduled before him. It is pertinent to point out here that during the opening statement on behalf of the Respondents, it was recorded that the Respondents were summoned to a disciplinary hearing prior to the one presided over by Horwitz but did not attend because they were on strike.

[12] Only two of the Respondents testified at the arbitration, Loyiso Mondliwa and Phindile Mtyagi. The Respondents accused of uttering the intimidating comments did not take the stand. Mondliwa and Mtyagi's version was that they had gone to Benge house to merely ask him to join the strike and he had lit a cigarette when they were talking to him. They denied Vokwana and Mondliwa respectively uttered the statements "Keep on working and you will see what we are going to do with you" and "We are coming back for you".

They did not address, and thus did not deny, Horwitz's testimony that they had initially denied going to Benge's house.

[13] The Commissioner rejected *in toto* Benge and Horwitz's version and accepted the Respondents' version. In doing so, the Commissioner failed to take into account the following material evidence and considerations.

[14] Benge's version was clear and detailed with no contradictions. The prospect of any partiality, prejudice or self-interest was not established. He gave a reasonable explanation for only reporting the matter at 8pm that night. During cross examination his version was not undermined in any substantive manner.

[15] The Respondents' on the other hand gave contradictory versions. At the disciplinary hearing they initially denied going to Benge' house. In this regard, the Respondents made a weak unsubstantiated attempt to suggest that Horwitz was lying when he testified that the Respondents initially denied going to Benge's house. Horwitz version was reinforced when the Respondents failed to address this issue when they testified. The testimony of Mondliwa and Mtyagi was deliberately vague and mostly consisted of bare denials. They did not explain why it required five of them to visit Benge to politely ask him to join the strike. Finally, the version of Mondliwa and Mtyagi regarding what had occurred at Benge's house was never put to Benge for a response and thus fell to be rejected outright. The Respondents did not bring Raymond as a witness so their claim that Benge had phoned Raymond to join the strike fell to be discounted.

[16] There was no basis for the finding that Benge was calm and casual during his encounter with the Respondents because no such evidence was tendered, and such finding could not be logically inferred from the allegation that he lit a cigarette while being addressed by the Respondents.

[17] There was also no basis for the finding that Benje could not have been intimidated because, as reasoned by the Commissioner, he appeared capable of taking care of himself and the Respondents did not follow up on their

alleged threat. The issue was not whether the threat was actually carried out or whether Benge actually felt intimidated. The test is whether it might reasonably be expected that a natural and probable consequence of the encounter and words uttered in the context of a strike would be that a person perceiving the act and words fears for his safety.

[18] If the Commissioner had taken into account all the aforementioned evidence and considerations, he would have found that the evidence points more probably to the conclusion that the Respondents committed the alleged misconduct than to their innocence and Benge reasonably felt intimidated as a result of his encounter with the Respondents.

[19] The record of the proceedings demonstrate that there was no basis at all for the Commissioner's finding that the dismissal was procedurally unfair. The Respondents' representative placed on record that they were called to a disciplinary hearing but refused to attend because they were still on strike and Howitz's testified that he held a disciplinary hearing and gave all the Respondents an opportunity to answer to the charge levelled against them was not disputed during his cross examination.

[20] In light of all the above, the ultimate conclusion reached by the Commissioner is not one that could have been reached by a reasonable decision-maker on the evidence on record.

Order

[21] The arbitration award issued by the Second Respondent is aside on review and substituted with an award that the dismissal of the Third Respondents was substantively and procedurally fair.

[22] There is no order as to costs.

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Whitcher J

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Adv A L Cook, instructed by Allardyce & Partners

For the Third Respondents: Finger Phukubje Attorneys