

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JA41/00

In the matter between

Adcock Ingram Critical Care

Appellant

and

The Commission for Conciliation, Mediation and Arbitration

First Respondent

Mike Miles

Second Respondent

South African Chemical Workers Union

Third Respondent

Theophilus Vilakazi

Fourth Respondent

JUDGMENT

VAN DIJKHORST AJA

1. The fourth respondent, then employed by the appellant, was found guilty of misconduct in terms of the appellant's disciplinary policy and procedures (the code) in that on 12 August 1998 and as a member of the union's negotiating team, which was negotiating with management in respect of a strike, he had threatened the management negotiating team (management) by stating: "You can treat this as a threat - there will be more blood on your hands". Intimidation is in terms of the appellant's code an offence which may lead to dismissal. He was dismissed. The second respondent, sitting as arbitrator under the auspices of the first respondent, found that the dismissal was substantively unfair and ordered his reinstatement. An application for review by the appellant to the Labour Court was dismissed with costs. Hence this

appeal.

2. The fourth respondent made the statement at a meeting between management and the union including shop stewards of whom the fourth respondent was one. A bloody strike, which lasted some eight weeks, and had been accompanied by inflammatory statements, the murder of one worker, shootings at others and at buses, thirteen petrol bombings of houses of non-strikers and ongoing assaults and intimidation, had nearly ended, an agreement having been reached with the permanent employees. But striking temporary workers, whose contracts had meanwhile expired through effluxion of time, were disillusioned and this was the issue on the table. The remark, which was not in dispute, was the opening remark on behalf of the shop stewards. Management walked out but were requested to return and the meeting continued in an orderly manner.
- 3 The fourth respondent's defence at the disciplinary hearing was that he was explaining to management "...that shop stewards and permanent staff might get hurt and management will get blamed for that", should the temporary employees not be reinstated. This explanation was not, however, tendered at the meeting of 12 August 1998. The chairman of the disciplinary inquiry did not believe that the fourth respondent's aim was not to threaten management as he had used the word "threat" which is an immediate statement of intent to punish or hurt a person if he/she does not do as one wishes.
- 4 The inquiry found that the threat was uttered in a desperate attempt to force management to change their view on the temporary workers, that it was a real and cohesive threat substantiated by what had happened previously following inflammatory statements and that the words were therefore not an idle threat of a man under pressure from the temporary workers but a real threat that someone else would be hurt. The chairman expressed the belief that that is why there had been a form of

apology from the unions at a meeting held the next day between management, the unions and shop stewards in the absence of the fourth respondent. The chairman found that dismissal was the most appropriate sanction to impose in these circumstances. The fourth respondent was therefore dismissed.

- 5 The internal appeal which the fourth respondent lodged against his dismissal was dismissed by the senior management of the appellant.
- 6 After all internal procedures had been exhausted by the third (the union) and fourth respondents the dispute of alleged unfair dismissal was referred to the Commission for Conciliation, Mediation and Arbitration for conciliation and thereafter for arbitration in terms of section 136 of the Labour Relations Act 66 of 1995. The second respondent in a reasoned judgment held that as the words were uttered in the course of a negotiation whilst the fourth respondent was a member of the union's negotiating team he "made that utterance in his capacity as a representative of a collective, within a privileged environment at the negotiating table (behind closed doors)" and that it would be "grossly unfair to single out the applicant for individual action and to dismiss him for it." The commissioner posed the rhetorical question: "Does this imply that the next time a vociferous and determined spokesperson acting on behalf of his/her worker constituency uses a threat as part of his negotiation tactic to put pressure on the management team to accede to his demands, that he too will run the risk of disciplinary action?" The commissioner referred to two authorities on the negotiation process within the context of collective bargaining for his contention that threats are part of the collective bargaining process. They are Anstey in his South African text *Negotiating Conflict - Insights and Skills for Negotiators and Peacemakers* - 1991, Juta and Co p154, and Walton and McKersie: *A Behavioral Theory of Labor Negotiations*, 2nd ed 1991, IRL Press, New York p107 - 111.
- 7 The commissioner had a second string to his bow. He reasoned as follows: (a) Taking cognizance of the actual text of the words used, as they were not directed at one particular person but at the management team members generally and were of such general nature they were in the context an empty threat of no consequence of

physical harm to anyone. The presiding officer at the inquiry had used the dictionary definition of “intimidation” and had failed to appreciate the dynamics of the negotiation process in the highly charged atmosphere of the collective bargaining situation and the context in which threats and sanctions are applied to put pressure on the opponent. (b) Furthermore both parties were under stress and the fourth respondent was afraid of his own personal safety fearing reprisal at the hands of temporary workers. (c) There was no evidence linking him personally to the violence. (d) The trade union team through its leader apologized for the remark: which apology was accepted by management. (e) One of the reasons why disciplinary action was taken was because he personally failed to apologize. (f) This was a factor taken into account by the presiding officer of the inquiry when she dismissed him. (g) The fourth respondent had 18 years service with the company. He had a clean record. The reference to an incident of insubordination at a Christmas party some 20 months earlier was irrelevant.

8 In passing I point out that some of this reasoning is wrong. As the code is a document it is perfectly correct to use the dictionary as a starting point to determine the meaning of words used therein. The “dynamics of the negotiating process “ do not change the plain meaning of words. Apart from his own belated statement there was no evidence that the fourth respondent had been threatened. The apology by the union was noted and the fourth respondent not absolved. Reasons (e) and (f) are factually incorrect. The incident at the Christmas party was not taken into account. The fact that the reasoning can be faulted is, however, in itself no ground for interference with an award.

9 The commissioner found that the dismissal of the fourth respondent amounted to an unfair dismissal on the basis that the appellant had failed to show that in the circumstances it had good grounds for terminating the fourth respondent’s services. He ordered reinstatement.

10 This award was taken on review to the Labour Court on the grounds that the

commissioner committed a gross irregularity in the arbitration proceedings and/or that his decision is not rationally justifiable in terms of the reasons given and that his findings are permeated with bias in favour of the third and fourth respondents.

11 Waglay J dismissed the application for review, holding that the commissioner had properly applied his mind to the matter and had not committed any irregularity which tainted his award.

12 This finding by the Labour Court is on appeal before us. The learned Judge held that the statement did not amount to a threat. This should have disposed of the matter. The learned Judge, however, then dealt with a further issue, namely the commissioner's finding that even if the statement made by the fourth respondent was intimidatory, it was made in a representative capacity and "within the privileged environment at the negotiation table (behind closed doors)" and that it would therefore be grossly unfair to single out the applicant for individual disciplinary action and to dismiss him for it."

13 The reasoning of Waglay J was as follows: 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 which they are able to secure and it is not uncommon for these meetings to often degenerate. To give the employer the right to discipline an employee, sitting as an equal opposite him, would undermine the whole process. This does not give any of the parties an entitlement to abuse or intimidate or licence criminal acts. If this happens there are a number of options open to each of the parties. One of them may simply refuse to remain in the bargaining process for lack of any constructive discussion or if any criminal act has been committed the police may be called. Thus far the reasoning of the learned Judge.

14 Although these remarks were in my view *obiter* in the light of the prior finding pertaining to the absence of a threat, they echo the approach of the commissioner who based his award mainly on this ground. This "anything goes" approach is not, in my

view, a correct statement of the law.

15 One cannot divorce the bargaining situation from reality. The negotiation pertains to the workplace and the employment situation. The employer negotiates as employer and the employee as employee and the fact that both negotiating teams represent their principals does not alter this. The fact that meetings often degenerate does not mean that one should jettison the principle that as in the workplace also at the negotiating table the employer and the employee should treat each other with the respect they both deserve. Assaults and threats thereof are not conducive to harmony or to productive negotiation. Of course the criminal law can be invoked should there be a criminal act, but that is the last thing one looks for in the bargaining process. Of course the refusal to negotiate further in the face of abuse is an option, but why should the inhibitory effect of possible disciplinary action in case of serious transgressions not be allowed to lubricate the process into civility? To me it is unacceptable to hold, as the commissioner did, that when one acts in a representative capacity anything goes. I find support for this view in section 97(3) of the Labour Relations Act 66 of 1995 which grants immunity from civil liability to the representatives, but only for bona fide acts.

16 Waglay J did not refer to any authority for his view. The commissioner's two references do not support him. The "threats" discussed there are threats of sanctions, i.e. lawful remedies and actions imposed to assert a position forcefully -- like strike action.

17 It may be accepted that an employee enjoys greater leeway than normal when he acts as a negotiator. This flows from his dual capacity (as an employee and as negotiating representative). But it would be wrong to lay down that he has free rein to do or say whatever he wants. He remains an employee, and that relationship has to be taken into account as well. It is in this appeal neither necessary nor advisable to draw the line of unacceptable conduct finely. It is clear that the conduct with which we are concerned goes beyond such leeway as is permissible to a shop steward within the negotiation context.

- 18 I turn now to the real issue - Did the words uttered amount to a threat in these circumstances? In favour of such a finding would be the use of the word “threat” by the fourth respondent himself as well as the tense circumstances prevailing at the time. There was no explanation that anything else was meant. It was never contended at any tribunal that the fourth respondent did not know perfectly well what the meaning of the word was. On a previous occasion this threat uttered by the general secretary of CWIU, the other union involved in the strike, at a meeting had been followed by murder. The threat was uttered in a climate of total mayhem. To the knowledge of the fourth respondent his remarks were taken as a serious threat by management who walked out, yet he did nothing to still their fears. The words following upon the reference to threat mean: There will be bloodshed. You (management) will be responsible for it. This cannot mean that management will spill blood or order it to be spilled. Neither does it mean that employees loyal to management (the non strikers) will spill blood. In the context it can only mean that strikers (union members and their cohorts) will cause bloodshed, as they did in the past. That is clear from the word “more” in the phrase. That blood will include that of non-striking employees, as in the past. This means that management are told, angrily as it was shouted, that if they don’t concede on the issue of the extension of contracts of temporary workers the union’s members will cause serious injury to the employer and/or its loyal workforce. This is a threat of violence.

- 19 The view that in order to amount to “intimidation” the threat must be directed at one particular person and not generally at management (which was the view of the commissioner) is incorrect. One can intimidate a group as much as one can intimidate a single person and violence against the person of the party who is being intimidated is not a prerequisite. One can intimidate another by threatening to harm his beloved ones or his business by injuring his workers. In the Shorter Oxford English Dictionary “intimidate” is defined as “Terrify, overawe, cow. Now esp. force to or deter from some action by threats or violence ”.
- 20 The view of Waglay J was that in the prevailing circumstances there was no threat and that “had management simply reflected on the statement ... the only reasonable inference they would 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” for which management will be blamed. This approach is incorrect. It ignores the fact that management was unaware of threats by temporary workers against permanent workers and shop stewards -- if there were in fact such threats. It ignores the import of the word “threat” in the context of the history of violence. It ignores the absence of any explanation to the meeting by the fourth respondent, who on this interpretation of the statement should have been taken aback by the reaction of management to his alleged innocuous remark. And if it was merely an explanation of the situation in the workplace, why was it shouted as an opening remark?
- 21 Both the commissioner and the Labour Court therefore misdirected themselves in two respects: In the interpretation of the facts and on the law pertaining to the immunity of union representatives at the negotiating table who are shop stewards from internal disciplinary measures of the employer.
- 22 Are we at liberty to interfere? The test to be applied was set out by this Court in *Carephone (Pty) Ltd v Marcus NO & Others* (1998) 19 ILJ 1425 (LAC) 1435B-E. The mere fact that the reviewing court differs in its conclusion of law or fact from that of the tribunal of first instance may not be reason for interference as that would blur

or obliterate the distinction between appeal and review. But when the difference is so great that it impinges upon the basic norm viz the necessity of a fair trial, interference is warranted. Whether that point is reached has to be decided on the facts of each individual case. In this case the divide is in my view so great that it warrants interference. The finding of the disciplinary inquiry was clearly correct. The reasons given were lucid and sound. If the fourth respondent was guilty dismissal was obviously an appropriate sanction. Yet the commissioner on a totally incorrect view of law and fact set it aside His reasoning was in my view not rationally justifiable.

23 The appeal is upheld with costs. The order of the Labour Court is set aside and the following order is substituted therefor: “ The application for review is upheld. The award of the commissioner is set aside, with costs.”

Van Dijkhorst AJA

I agree

I agree

Zondo JP

Comrie AJA

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Date of judgment: 29 June 2001

