

SOUTH AFRICA / JUDGMENT

SATAWU obo Diveti v Bidvest Services (Pty) Ltd t/a Bidvest Prestige Cleaning Services (C162/2022) [2023] ZALCCT 64 (17 November 2023) [2023] ZALCCT 64

COURT

Labour Court Cape Town

BEFORE

BN Conradie

CASE / FILE NUMBER

C162/2022

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IN

THE LABOUR COURT OF SOUTH AFRICA

(HELD

AT CAPE TOWN)

Not Reportable

case

no: C162/2022

In

the matter between:

SATAWU
OBO NTOMBESICELO DIVETI
Applicant
And
BIDVEST
SERVICES (PTY) LTD t/a
BIDVEST
PRESTIGE CLEANING SERVICES
Respondent

Heard:

2,3,14,15 August and 30 October 2023

Delivered:

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 17 November 2023

JUDGMENT**CONRADIE AJ****Introduction**

- [1] In this matter the applicant (Ms Diveti) claims that her dismissal by the Respondent (the company) was automatically unfair, alternatively unfair. She also claims that her dismissal was procedurally unfair. No case in support of an automatically unfair dismissal was presented and I will therefore not address this aspect of Ms Diveti's claim.
- [2] The company called 5 witnesses to testify in support of its case. Ms Diveti testified on her own behalf and called Ms Alice Tshwili as a witness in support of her case.
- [3] In the pre-trial minute the company indicated that it was challenging this court's jurisdiction to hear the matter. This challenge was however abandoned at the commencement of the trial. The pre-trial minute also records several issues which the parties believed this court has to determine. However, most of these issues form part of the main enquiry into the fairness of the dismissal and there is no need to address them all separately.

Background

- [4] The following facts are largely common cause:

4.1. The company has a contract with the University of Stellenbosch (the University) to provide cleaning services at certain of its hostels. Two other companies have similar contracts to clean other hostels.

4.2. On 2 December 2020 a group of students calling themselves "The People's Movement" sent an email to the company in which it requested a meeting to discuss complaints relating to the mistreatment of employees.

4.3. On 8 December 2020 the University wrote to the company to inform it that they needed to remove their staff from the library. The staff gathered there and demanded that somebody receive a memorandum from them. That same day the company sent a memorandum to its staff calling on them to follow internal grievance procedures and indicating that any issues are to be addressed with the unions. It warned employees that if they are found guilty of intimidation or of participating in illegal industrial action, they will be held accountable for their actions. The company requested that any intimidation be reported to its head office.

4.4.

On 9 December 2020, The People's Movement embarked on a protest and went from hostel to hostel to force the company's employees to join the protest. This included threatening and intimidating the company's employees.

4.5. The employees were requested to cease work and to move to other hostels where employees were still working. This pattern continued from hostel to hostel. As a result, no work took place on that day.

4.6.

On 10 December 2020, The People's Movement and its supporters again gathered outside the company's office and continued from

where they left off on the previous day. The employees again did not work because of the threatening and intimidating behaviour on the part of The People's Movement. Serious violence was threatened should any of the employees not comply.

4.7. The company maintains that the protest continued on 11 December 2020.

4.8. Ms Diveti claims that she was intimidated and threatened into participating in the protest on 8 and 9 December 2020. She did not however participate on 11 December 2020 and claims that she worked that day.

4.9. On 29 January 2021, Ms Diveti was issued with a notice to appear before a Disciplinary Hearing to answer to the following allegations:

Charge 1

(a)

"Dereliction of duty - (failure to carry out one's obligations/the act or instance of abandoning) I refusing to carry out lawful and reasonable instructions to perform work;"

Charge 2

(b) "Inciting violence or to strike illegally;

(c) Deliberate disruption of clients business operation;

(d) Intimidating and/or threatening behaviour;

(e) Insolence. Offensively contemptuous, arrogant or insulting behaviour; and

(f) Bringing the company's name into disrepute with the client."

Charge 3

(g) "Failure to comply with health and safety Covid-19 rules and standards i.e. ignoring social distancing, failure to wear masks".

4.10. The disciplinary hearing took place on 2 February 2021. Ms Diveti was found guilty of all the charges and dismissed.

Summary of evidence

The employer's evidence

- [5] Mr Sharlon September testified that he was the company's Operations Manager at the time of the unprotected strike. He testified about the company's contract with the University of Stellenbosch in terms of which it is only responsible for certain hostels and that its employees are not allowed to enter other hostels.
- [6] He testified that on Wednesday, 9 December 2020, a group of people associated with "The People's Movement" marched from hostel to hostel forcing employees to join their protest. In order to protect the University's property and its students, the company told its employees to leave the hostels.
- [7] He introduced video footage showing various people entering the Majuba Hostel, which does not fall under the company's contract. He identified Ms Diveti as the person holding the door open at Majuba Hostel.
- [8] On Thursday, 10 December 2020, the protest started outside the company's offices and employees were prevented from going to their hostels.
- [9] On Friday, 11 December 2020, the company blocked the access cards of its employees. They could only gain access to their hostels by speaking to their supervisors. This was communicated to employees via a WhatsApp message.
- [10] As far as the disciplinary hearing is concerned, he personally handed the notice of the hearing to Ms Diveti and read it to her. He was also the complainant at the hearing where Ms Diveti pleaded guilty.
- [11] He testified that he was not informed that Ms Diveti wanted a fellow employee to be a witness at the hearing.
- [12] Under cross-examination he maintained his view that the video showed Ms Diveti holding the door open. He pointed out that Ms Diveti had admitted it was her when the video was shown at the disciplinary hearing. He also maintained that Ms Diveti had not worked on Friday, 11 December 2020 and pointed out that she pleaded guilty to this at the hearing. He disputed that Ms Diveti was intimidated and contended that the video showed that she was enjoying what was taking place. She had also not reported any intimidation to him.
- [13] Mr Gideon Jacobs testified that he chaired the disciplinary hearing. He confirmed that Ms Diveti had pleaded guilty, signed the relevant pages of the disciplinary record acknowledging the process and viewed the video footage. He also testified that he had arranged for an interpreter to be available during the hearing.
- [14] Under cross-examination he denied that Ms Diveti had indicated that she wished to call a witness. He also pointed out that, at the hearing, Ms Diveti conceded that it was her holding open the door at Majuba Hostel.

- [15] Ms Lizzy Penelopiphi testified that she was a supervisor at the hostel, HuisBothma, where Ms Diveti worked. She confirmed that on 9 December 2020, when the protesters arrived, the employees were told to leave the hostel. They were not, however, given permission to join the strike.
- [16] She identified Ms Diveti as the person holding the door open in the video at Majuba Hostel. She pointed out that Ms Diveti was wearing the same denim jacket in the video, which she wore to court.
- [17] She confirmed that the protests had taken place on 9, 10 and 11 December 2020 and that the access cards were blocked on 11 December
2020. Employees were told that if they wanted to work, they had to contact their supervisors to get access to their hostel. She testified that Ms Diveti did not work on 11 December 2020 and that only two people in her team worked on that day.
- [18] Mr Jonathan Dirks, a cleaner employed at Helshoogte Hostel, testified that employees had been called out of the hostel by a group of protesting students and workers. They followed the crowd to Majuba Hostel where they waited outside until the door was opened. With reference to the video, he identified Ms Diveti as the person holding the door open at Majuba Hostel. He also identified himself in the video.
- [19] On Thursday, 10 December 2020, employees were prevented from reporting to their hostels. Ms Diveti was one of those who had blocked them from reporting for duty. On that day, there was a gathering at the “Rooi Plein” where they were addressed by a union official.
- [20] He testified that the situation was the same on Friday, 11 December 2020, except that there had not been much active participation in the protests. Most employees did not work, including himself. He confirmed that he saw Ms Diveti on that Friday.
- [21] Although he was seen on the video, he pointed out that he simply followed at the back of the protest and was not a willing participant. He received a warning for his participation.
- [22] Mr Wilmore Matthyse testified that he was a cleaner at Helshoogte Hostel and was called out of the hostel on 9 December 2020 and then joined the protests. He identified Ms Diveti from the video footage and conceded that he was carrying a hockey stick. He however denied that he carried the stick in order to intimidate. Rather he found the stick outside and wanted to take it home for his child.
- [23] He confirmed that Ms Diveti was part of the protests. He testified that he received a written warning for his participation in the strike and distinguished his conduct from that of Ms Diveti on the basis that he had not held open any doors.

Ms Diveti's evidence

- [24] Ms Diveti testified that she was involved in the protests on 9 and 10 December 2020, but did not know the reason for the protests. According to her she participated because she was threatened.
- [25] She denied that she is the person in the video holding the door open at the Majuba Hostel. She however testified that she held the door open to the Helshoogte Hostel.
- [26] She testified that on 9 December the union representative informed the protesters at the “Rooi Plein” that participating in the strike was “not right or within the law” and that they may be dismissed.
- [27] According to Ms Diveti she reported for duty on 10 December 2020 at the company’s office but was unable to access her hostel as the access cards had been blocked. She therefore joined the other protestors. She disputed that she did not work on 11 December 2020, testifying that although her access card was blocked, she gained access via her supervisor.
- [28] She testified that she did not plead guilty at the disciplinary hearing and claimed that the record did not record everything she said at the hearing. On the other hand, she admitted initialing the disciplinary documents and that she was read her rights at the hearing. She claimed that she wanted to call a witness, but the witness advised her that she would not attend the hearing. She admitted that there was an interpreter at the hearing.
- [29] Ms Alice Tshwili, testified that she was involved in the protests on 9 and 10 December 2020, but also claimed that she did so because she had been intimidated. She denied that she was a leader in the protests.
- [30] She initially testified that she did not remember seeing Ms Diveti at either the Helshoogte or Majuba hostels on 9 December 2020. Later in her testimony she testified that on 9 December 2020 she saw Ms Diveti leaving Helshoogte Hostel and that she was wearing her uniform.
- [31] She also testified that on 9 December 2020 the union addressed the protestors and told them that what they were doing was wrong and that they might be in trouble as a result.

Analysis

- [32] My starting point is the version put up by Ms Diveti, which I find to be highly improbable and a dishonest attempt to get this Court to come to her assistance.
- [33] Ms Diveti wants this Court to believe that the reason why she joined the protestors was because the company told her to join the protest. While there is to some extent conflicting evidence on this point, whatever the company may have said it is improbable that the company told its employees to join a protest which could jeopardise its contract with the University. What is clear from the evidence is that the company wanted to avoid a situation where the protestors forced their way into hostels and caused damage to property and harmed students.

- [34] Ms Diveti also claims that she was forced to join the protest out of fear and intimidation. Ms Tshwili sought to advance the same argument. Yet there was no evidence to show that any acts of intimidation were committed against either of them.
- [35] This brings me to the issue of the video evidence. Ms Diveti denies that it is her in the video on the basis that the video was not clear. However, Mr Dirks and Mr Matthyse, both of whom participated in the protest and personally saw her holding open the door at Majuba Hostel, testified that it was her in the video.
- [36] Ms Diveti also sought to argue that she had her uniform on and that the person in the video was wearing casual clothes. Her supervisor testified that the jacket which the person in the video was wearing was the same jacket that she wore in court.
- [37] Ms Diveti testified that she reported for duty on 10 and 11 December 2020. Yet, in respect of 10 December 2020, on her own version, she reported for duty, but because her access card was blocked, she joined the protestors. No evidence was presented of any attempt to resolve the alleged inability to gain access. In respect of 11 December 2020, her supervisor was adamant that Ms Diveti did not report for duty that day. She testified that only two employees worked on 11 December 2020 and that

Ms Diveti was not one of them.

- [38] Based on the evidence I am therefore of the view that Ms Diveti willingly participated in the protest, or more accurately an unprotected strike.
- [39] As far as procedural fairness is concerned, the evidence of Mr September and Mr Jacobs is clear, that Ms Diveti pleaded guilty at the hearing and fully understood the allegations against her. I also accept that an interpreter was made available to her. All of this is also apparent from the disciplinary record. In the circumstances I am satisfied that Ms Diveti was given a fair opportunity to present her case and chose to plead guilty.
- [40] Despite my findings this is not the end of the matter. The ultimate question is whether or not it was fair to dismiss Ms Diveti for the misconduct attributed to her. I do not believe that it was. The only distinguishing factor, on the company's version, between Ms Diveti's conduct and that of the other protestors was that she held the door open at Majuba Hostel. Nothing more. While it may be that the act of holding the door open may have facilitated access to the hostel this does not appear to be the case to me. The door was opened by a student and Miss Diveti proceeded to hold the door open. There

is no indication that this resulted in the protestors passing through the door. Rather the video shows them all milling around in a foyer area although the door was open.

[41] The company's case is also hamstrung by the fact that it almost exclusively focused on Ms Diveti holding the door open. This in itself was not a charge against her, although the company claims that it informs the charges against her. Ultimately the company did not really present any evidence in support of the numerous charges if proffered against Ms Diveti. At most

it has shown that she participated in a strike "illegally" to use the words in the "charge sheet". Everything else seemed to have been abandoned or not supported by evidence.

[42] Ms Diveti also raises a valid argument in respect of Mr Matthyse who is seen in the video with a hockey stick, yet he received a written warning. I must say that Mr Matthyse's explanation for being in possession of the hockey stick is far-fetched and it was in all probability used as an instrument of intimidation. Yet, he was not dismissed.

[43] Another peculiar factor which bears on the company's decision to dismiss Ms Diveti is that although the last day of the protest was 11 December 2020, it only summoned Ms Diveti to a hearing on 29 January 2021. It was content to continue its employment relationship with her until this date. This is inconsistent with a break down in the trust relationship at that stage and the decision to dismiss her.

[44] In the circumstances, I am of the view that the decision to dismiss Ms Diveti was unfair. That brings me to the question of the appropriate relief.

[45] In my view reinstatement is not a possibility. Ms Diveti chose to approach this Court with a contrived and dishonest case. Through her representative she spent days putting false versions to the company's witnesses. It cannot be expected of the company to take someone back into employment who has behaved in this dishonest manner. The trust relationship has surely been severely undermined. In order to address the unfairness on the part of the company I am however ordering that it compensate Ms Diveti for her unfair dismissal. I have decided that eight months compensation is appropriate in the circumstances.

[46] In the premise I make the following order:

Order:

1. The dismissal of the Applicant was substantively unfair.
2. The Respondent is ordered to pay the Applicant 8 month's compensation in the amount of R 42 605.84 (R5 325.73 per month x 8 months) within 14 days of the Respondent receiving a copy of this judgment.
3. There is no order as to costs.

BN Conradie

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr Cyril Mfokofi – Union Official

For the Respondent: Mr C Beckenstrater of Moodie and Robertson Attorneys

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Prepared on 13 October 2026 · Esheria