IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Not reportable

Case no: DA18/2017

In the matter between:

PAILPRINT (PTY) LTD	**Appellant**
and	
RICHARD LYSTER N.O	**First Respondent**
THE COMMISSION FOR CONCILIATION	
MEDIATION AND ARBITRATION	**Second Respondent**
THE NATIONAL UNION OF METAL WORKERS	
OF SOUTH AFRICA	**Third Respondent**
THOKOZANI MADUNA	**Fourth Respondent**
TUSOKWAKE NSELE	**Fifth Respondent**
NSEBENZO MVELASE	**Sixth Respondent**
MBONGENI WAYISE	**Seventh Respondent**
MDUDUZI ROWLS	**Eighth Respondent**

Heard: **15 May 2019**

Delivered: **13 June 2019**

Summary: Strike related misconduct – employees dismissed for breaching picketing rule by carrying dangerous weapons in contravention of - picketing rule prohibiting employees from carrying or wielding of any weapons during the strike picket.

Held:

In finding that the employees were not "*brandishing or wielding of dangerous weapons*" as they had been charged but "*were clearly just carrying sticks in their hands*", the arbitrator adopted an unduly technical approach. Appropriate regard was not had to the purpose of the rule and the harm it sought to avoid. As much was evident from the reliance placed by the arbitrator in the determination of the matter on the definition of the word "wield". The decision to have a sjambok, PVC pipe and sticks at a protest, at which others were in possession of a golf club and axe, was not only a clear breach but, viewed objectively, was aimed at sending a message which, at the very least, was threatening to others. Within the context of the nature of the strike violence committed, the seriousness of this breach was overlooked by the arbitrator. Arbitration award and judgment of the Labour Court set aside- appeal upheld with costs.

Coram: Musi JA, Murphy and Savage AJJA

JUDGMENT

SAVAGE AJA:

Introduction

[1] This appeal, with the leave of this Court, is against the dismissal by the Labour Court (Whitcher J) of an application to review an arbitration award in which the dismissals of the fourth to eighth respondents (the employees) were found substantively unfair.

[2] The employees were employed by the appellant in various capacities at its factory in New Germany, KwaZulu Natal. From 1 July 2014, the employees took part in a national strike called by the third respondent, the National Union of Metalworkers of South Africa (NUMSA). The appellant's disciplinary code made the "(b)*randishing or wielding of dangerous weapons*" a dismissible offence. On 30 June 2014, in response to the impending strike, the appellant

posted its picketing policy dated 24 June 2014 on company notice boards. On 2 and 3 July 2014, the policy was displayed on the gates to the appellant's premises and on 4 July 2014 it was signed by NUMSA. The picketing policy stated that picketers may not "*engage in unlawful or violent actions*"; that "(n)*o weapons of ANY kind are to be carried or wielded by the picketers*"; and that the appellant may take disciplinary action "*where an employee's actions during a picket are in breach of the organisation's Disciplinary code*".

[3] The appellant's 2012 strike policy recorded its zero tolerance of "*any violent acts, intimidation or vandalism*" during strikes and stated that "(a)*ny employee caught behaving in a violent manner (which includes verbal abuse); vandalising property, preventing anyone from entering or participating in work or intimidating any other person in any form or manner*" would be disciplined.

[4] On 2 and 3 July 2014, the fourth, fifth, seventh and eighth respondents each carried a stick while picketing with a group of strikers outside the appellant's premises. The sixth respondent carried a length of PVC pipe and the seventh respondent, in addition to a stick, carried a sjambok. In the crowd with the employees were one person with a golf club and another with an axe. The employees were charged by the appellant with "*brandishing or wielding of dangerous weapons during* [the] *strike*" and following disciplinary hearings they were dismissed.

Arbitration and review

[5] Aggrieved with their dismissals, NUMSA referred an unfair dismissal dispute to the second respondent, the Commission for Conciliation Mediation and Arbitration (CCMA) on behalf of the employees. At the arbitration hearing graphic photographs of severe injuries sustained by two individuals during the course of the strike, which were not disputed, were placed before the arbitrator.

[6] In the arbitration award, the arbitrator had regard to the fact that at their disciplinary hearings more than one of the employees had "*disingenuously testified that neither a stick nor a sjambok could inflict any harm*". He found however that the employees had not been shown to have brandished or

wielded weapons but "*were clearly just carrying sticks in their hands*" and with no evidence that they intended to threaten or intimidate anyone, they were in partial breach of the valid and reasonable rule of the appellant. The picketing policy had been placed on company notice boards and the arbitrator found that the employees were aware of the rule, or could reasonably have been expected to have been aware of it. The arbitrator had regard to the employees' "*state of mind when they decided to go to the picket with sticks in their hands*" and to the fact that they had "*voluntarily associated"* with others who carried a golf club and an axe. He rejected as a "*grossly improbable scenario*" the claim that the employees were exercising their traditional and customary right to carry sticks and noted that the eighth respondent, the sole witness for the employees at arbitration, had accepted, by way of example, that it was unlawful to take a stick to a soccer game given the dangers which could arise there.

[7] Turning to the issue of sanction, the arbitrator found that the employees "*did not brandish or wield the weapons*" but carried them. He stated that the picketing policy did not indicate what the consequences of its breach would be, nor did it indicate a link to the disciplinary code. The arbitrator took the view that the disciplinary code was intended to regulate the behaviour of on-duty employees and not when they are on strike and off-duty and that there was an "*inconsistent disjuncture*" in the disciplinary code when it made provision for the sanction of a final written warning for assault but dismissal for brandishing or wielding weapons. Consequently, the sanction of dismissal was found to be inappropriate and the dismissal of the respondents, who it was stated "*can consider themselves extremely fortunate*", was found substantively unfair. The employees were consequently reinstated from the date of the arbitration award subject to a final written warning valid for 12 months. The arbitrator concluded by noting that the award should not be interpreted to validate the carrying of weapons during a strike and that "(i)*t goes without saying that the less we see in South Africa of groups of men armed with sticks, the better*". However, if the appellant wished to outlaw this practice the disciplinary code should be amended to "*make employees aware*

that the mere holding of any form of object that could intimidate others, or inflict harm on others, will be visited with dismissal".

[8] Dissatisfied with the arbitration award, the appellant sought its review by the Labour Court. In its judgment, the Court *a quo* found there to be no reason to interfere with the arbitration award since it was not unreasonable and the review application was accordingly dismissed with costs.

Submissions on appeal

[9] On appeal, it was contended for the appellant that the arbitrator had committed a gross irregularity in the conduct of the proceedings which led him to arrive at a result which a reasonable arbitrator could not have arrived at on the material before him. The unreasonableness of the outcome was apparent, it was submitted, from the fact that the arbitrator had found that dangerous weapons had been carried by the respondents (the fourth respondent had at his disciplinary hearing pleaded guilty to wielding a stick and the seventh respondent had admitted carrying a sjambok); the weapons were carried while the respondents were part of a toyi-toying crowd of striking workers, in which a golf club and an axe were carried; the evidence showed the severe assaults perpetrated on individuals during the course of the strike; and the disciplinary code was applicable to the misconduct.

[10] The respondents opposed the appeal on the basis that the award of the arbitrator fell within the bounds of reasonableness and that it reflected the distinction between lawful protest action, even angry protest action, and violence and intimidation which is not lawful. It was argued that the evidential material was so compelling that no reasonable decision-maker could find the respondents' misconduct sufficiently serous to warrant dismissal. The appellant bore the *onus* to prove that the sticks, pipe and sjambok were intended to threaten or intimidate and that the decision of the arbitrator was that of a reasonable decision-maker when he found that any transgression of the policy was not sufficiently serious to warrant dismissal. Consequently, it was submitted that the arbitration award was not susceptible to review, that

the Labour Court cannot be faulted for finding this to be so and that the appeal must therefore fail.

Evaluation

[11] In issue in this appeal is whether a reviewable error or irregularity was committed by the arbitrator of such a nature that it led to him arriving at a decision which a reasonable decision-maker could not reach on the material before him.[1] The picketing rule of which the employees were found to have been aware of barred the carrying or wielding of any weapons during the strike picket. There was no dispute that the employees carried weapons in the form of sticks, a sjambok and a PVC pipe while picketing and that during the course of the picket others carried a golf club and an axe. This conduct was clearly in breach of the express terms of the picketing rule which barred weapons of any kind from being "*carried or wielded*" by picketers.

[12] There was no dispute that the rule was a valid and reasonable. The purpose of the rule was clear given the undisputed evidence of violent attacks carried out against other employees during the course of the strike. It is, therefore, difficult to understand how the arbitrator was able to conclude on the material before him that the rule had only been partially breached when the rule expressly prohibited the employees' conduct.

[13] As to the issue of sanction, the arbitrator was required to consider whether dismissal was fair upon a consideration of the relevant circumstances.[2] In doing so the task of the arbitrator was to approach the dispute impartially in light of the totality of circumstances. This required consideration of factors which included the importance of the rule breached, the reason the employer imposed the sanction of dismissal, the basis of the employees' challenge to the dismissal, the harm caused by the employees' conduct and the effect of

[1] Section 145(2) of the Labour Relations Act 66 of 1995 (the LRA); *Herholdt v Nedbank* 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA) at para 25; *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* [2015] 1 BLLR 50 (LAC) at para 33; Sidumo *and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC) at paras 78 and 79.
[2] *Sidumo (op cit at fn 2)* at para 79.

dismissal on the employees. As was made clear in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[3] this is not an exhaustive list.

[14] The arbitrator gave four reasons for finding the dismissals unfair. The first was that although the employees had carried dangerous weapons, the picketing policy did not make reference to wielding or brandishing weapons. In fact, the policy expressly prohibited any weapons from being either carried *"or wielded by the picketers*" and it follows that reliance on the absence of a reference to "wielding" was erroneous. The second reason was that the policy did not warn employees of the consequences of its breach or of its link to the disciplinary code. The policy expressly stated that the appellant may take disciplinary action "*where an employee's actions during a picket are in breach of the organisation's Disciplinary code*". It followed that the employees knew or could reasonably have been expected to have known that disciplinary action could result if the picketing rules were breached.

[15] The third reason advanced by the arbitrator was that the disciplinary code was intended to regulate the conduct of employees on-duty and not employees who were on strike but off-duty. This is patently not so. A disciplinary code remains applicable to striking workers who exercise their constitutional right to strike within the context of the employment relationship. For this reason, the appellant is entitled to take disciplinary action against employees arising from strike misconduct and to take such action in accordance with the terms of its disciplinary code. The picketing rules, which expressly referred to the disciplinary code, could, therefore, be similarly enforced by the appellant.

[16] Finally, the arbitrator took issue with the "*inconsistent disjuncture*" which existed in the disciplinary code when it made provision for a final written warning for assault but dismissal for the wielding or brandishing of weapons. The disciplinary code expressly recorded that it constituted a guideline and as such the imposition of a sanction set out in the code was not mandatory. Any sanction proposed amounted only to a guideline, with each matter to be resolved on its own facts. In such circumstances, any disjuncture which may

[3] [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) at paras 78 and 79.

have been reflected in the code remained to be determined having regard to the misconduct committed.

[17] From the reasons advanced by the arbitrator, it is apparent that appropriate regard was not had to the importance of the rule breached or the reason the employer imposed the sanction of dismissal. This was somewhat surprising given the arbitrator's rejection as disingenuous of the evidence given previously by the employees "*that neither a stick nor a sjambok could inflict any harm*" and the undisputed evidence of serious injuries sustained by individuals during the strike.

[18] It has repeatedly been stated by this Court that an unduly technical approach to the framing and consideration of allegations of employee misconduct should be avoided. In finding that the employees were not "*brandishing or wielding of dangerous weapons*" as they had been charged but "*were clearly just carrying sticks in their hands*", the arbitrator adopted precisely such an approach. Appropriate regard was not had to the purpose of the rule and the harm it sought to avoid. As much was evident from the reliance placed by the arbitrator in the determination of the matter on the definition of the word "wield". The decision to have a sjambok, PVC pipe and sticks at a protest, at which others were in possession of a golf club and axe, was not only a clear breach but, viewed objectively, was aimed at sending a message which, at the very least, was threatening to others. Within the context of the nature of the strike violence committed, the seriousness of this breach was overlooked by the arbitrator.

[19] The result was that the matter was approached by the arbitrator in an unduly narrow manner, with appropriate consideration not given to relevant material factors and undue emphasis placed on other less relevant factors. Nothing from the substance of the employees' challenge to their dismissal or the consequence of their dismissals for them could reasonably have led to a different conclusion. The appellant was entitled to prohibit weapons from the picket line in order to preserve the safety of its premises and employees and to avoid strike violence of the nature which, from the evidence, it is apparent was committed. The constitutionally protected right to strike does not

encompass a right to carry dangerous weapons on a picket line which, by their nature, not only expose others to the very real risk of injury, but also serve to threaten and intimidate. It is noteworthy that the arbitrator recorded his discomfort with the outcome of the arbitration award when he described the employees as "*extremely fortunate*" and recognised the unacceptable dangers posed by armed crowds in this country. It follows for all of these reasons that in arriving at the decision that he did on the material before him, the arbitrator committed a reviewable irregularity and arrived at a decision arrived which a decision-maker acting reasonably could not have reached on the material before him. The Labour Court erred in finding that the decision of the arbitrator fell within the bounds of reasonableness required and the appeal must therefore succeed.

[20] Both parties sought costs of the appeal if successful. Having regard to considerations of law and fairness, there is no reason as to why costs should not follow the result. Although the appellant sought the costs of two counsel, such an order is not warranted having regard to the nature and complexity of the matter.

Order

[21] For these reasons, the following order is made:

1. The appeal succeeds with costs.

2. The judgment of the Labour Court is set aside and substituted as follows:

"*1. The review application succeeds with costs.*

2. The award of the first respondent is reviewed, set aside and substituted as follows:

'The dismissals of the fourth to eighth respondents, Mr Thokozani Maduna, Mr Tusokwake Nsele, Mr Nsebenzo Mvelase, Mr Mbongeni Wayise and Mr Mduduzi Rowls, are found to have been substantively fair.' "

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SAVAGE AJA

Musi JA and Murphy AJA agree.

APPEARANCES:

FOR THE APPELLANT:	B A Acker SC and R Pillemer
	Instructed by Barkers Attorneys
FOR THE THIRD RESPONDENT:	D P Crampton
	Instructed by Brett Purdon Attorneys