

SOUTH AFRICA / JUDGMENT

**Pailpac (Pty) Ltd v De Beer N.O and Others (DA
12/2018) [2021] ZALAC 3; (2021) 42 ILJ 1038
(LAC); [2021] 6 BLLR 570 (LAC) (1 March 2021)
[2021] ZALAC 3**

COURT

Labour Appeal Court

BEFORE

Phatsoane, Kathree-Setiloane, Savage

CASE / FILE NUMBER

DA 12/2018

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IN

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: DA 12/2018

In the matter between:

PAILPAC
(PTY)
LTD
Appellant
and
LISA
WILLIAMS DE BEER N.O
First Respondent
METAL AND ENGINEERING
INDUSTRIES
BARGAINING
COUNCIL
Second Respondent
THE NATIONAL UNION OF
METAL
WORKERS OF SOUTH
AFRICA
Third Respondent
MDUDUZI SHEZI
Fourth Respondent
MBUSO SHABANE
Fifth Respondent
MIRRIAM NGALIMANE
Sixth Respondent

KHULEKANI MSANE
Seventh Respondent
LINDA
MASUKU
Eight Respondent
THOLISILE
NGCOBO
Ninth Respondent
MTHANDENI
MTOLO
Tenth Respondent
BONKE
TOLBADI
Eleventh Respondent

Heard: 10 November 2020

Delivered: 01 March 2021

Summary: Strike—Protected
strike—Dismissal for misconduct during strike—Employees
carrying sticks during protected strike—Revised
disciplinary
code and picketing policy prohibiting carrying, brandishing or
wielding dangerous weapons—Employees dismissed
for brandishing
or wielding dangerous weapons, but commissioner finding that
employees not aware of the rules—Valid and reasonable
rule of
which employees were aware or could reasonably be expected to be
aware—On appeal, dismissal found to be fair.
Coram: Phatsoane ADJP,
Kathree Setiloane AJA and Savage AJA

JUDGMENT

KATHREE-SETILOANE AJA

- [1] This appeal is against the judgment and order of the Labour Court (Gush J) dismissing the review against the arbitration award of the first respondent (“arbitrator”) made under the auspices of the second respondent, the Metal and Engineering Industries Bargaining Council (“Bargaining Council”), in which the arbitrator, inter alia, found that the dismissal of the fourth to eleventh respondents (“dismissed employees”) was substantively unfair and reinstated them. The dismissed employees are members of the third respondent, the National Union of Metal Workers of South Africa (“NUMSA”). The appeal is with leave of this Court.

Background

[2] NUMSA embarked on a national strike in the metal and engineering industry in July 2014. The dismissed employees, who were employed by the appellant, Pailpac (Pty) Ltd (“Pailpac”), at its factory in New Germany, KwaZulu Natal, participated in the strike. They were dismissed for misconduct relating to the carrying of weapons such as sticks, PVC rods, sjamboks and golf clubs during the strike. Pailpac charged them, in terms of its revised Breaches of Discipline document (“revised BOD rules”), for “brandishing and wielding weapons during a strike”. The dismissed employees were found guilty as charged at individual disciplinary hearings and dismissal was recommended. Pailpac subsequently dismissed all of them.

[3] The dismissed employees referred an unfair dismissal dispute to the Bargaining Council for arbitration. The arbitrator found the dismissals to be substantively unfair and reinstated the dismissed employees retrospectively to the date of their dismissal. She reasoned as follows:

‘I do not believe that in the current circumstances that it will be fair to hold the [dismissed employees] bound to a rule that they did not know existed, or which was not effectively communicated to them.’

[4] Pailpac challenged this finding on review. It argued, relying on the constitutional standard of review in *Sidumo*[1] that the arbitrator’s award is reviewable as the outcome reached was not one that could reasonably have been reached on the

evidence and other material properly before the arbitrator. The Labour Court dismissed the review application with no order as to costs. In doing so, it reasoned as follows:

‘[23] In this matter, it is clear that the [arbitrator] gave the parties a full opportunity to have their say, identified the dispute she was required to arbitrate, understood the nature of the dispute and dealt with the substantial merits of the dispute.

...

[28] In her award, the [arbitrator] clearly analyses the evidence surrounding the [dismissed employees] averment that they were not aware of the rules and whether they reasonably should have been expected to have been aware of them.

[31] Bearing in mind that this is a review of the [arbitrator’s] award and not an appeal, I am not persuaded that the reasons for the conclusion of the arbitrator that the [dismissed employees] could not reasonably have been expected to have known the rule is a decision that another arbitrator could not have reasonably reached... .

[32] The [arbitrator has clearly set out the reasons for concluding that the [dismissed employees] could not reasonably have been expected to know the rule despite [Pailpac's] evidence. The decision clearly falls within a band of reasonable conclusions. It cannot be said that the [arbitrator's] conclusion is one to which another arbitrator could not reasonably have arrived.'

[5] It is these findings which are appealed against.

Analysis

[6] The primary issue for determination is whether the employees knew or could reasonably have been expected to be aware of the rule.

[7] Pailpac's central argument is that the evidence shows that the dismissed employees had knowledge of the rule preventing them from, effectively, carrying sticks, sjamboks and golf clubs in a hostile fashion during the strike, but the arbitrator ignored this evidence which was material to the outcome of the dispute. It furthermore argues that the arbitrator ignored material contradictions in the version of dismissed employees regarding knowledge of the rules and sight of the area where the rules were published, yet the Labour Court simply rubberstamped the arbitrator's findings and did not interrogate the evidence or the material contradictions in the dismissed employees' version. It contends that once it was established that the dismissed employees had knowledge of the rule or could reasonably have been expected to have knowledge of it, there was no genuine dispute as to its breach; hence their individual dismissals were justified.

[8] The dismissed employees contend, to the contrary, that that there was no acceptable evidence before the arbitrator that any of the dismissed employees had actual knowledge of the rule prohibiting the carrying of weapons and the sanction for contravening it. In development of this argument, they contend that Pailpac's

attitude towards its responsibility to ensure that its employees knew and understood the import of rules which could result in their dismissal was grossly inadequate, both generally in regard to the revised BOD rules and, specifically, in regard to its Picketing

Policy and Procedure ("picketing policy") which did not, in any event, inform employees that contravention was a dismissible

offence). In the circumstances, they argue that it cannot be concluded that the dismissed employees either knew or should have

known of the rule and sanction, hence the Labour Court did not err in concluding that the arbitrator's award is not reviewable.

Knowledge of the Rule

[9] Pailpac relied on two sets of rules which were in place on or after 2 July 2014, namely:

- (a) Rule 58 of the “revised BOD rule” which prohibits “brandishing or wielding of dangerous weapons”;^[2] and
- (b) Clause 14 of the picketing policy which provides:

‘The picketers shall at all times conduct themselves in a peaceful manner. They may carry placards, chant slogans, sing and dance, but they may not physically prevent members of the public, other employees or service providers from entering or leaving the premises, nor may they disrupt the normal functioning of the company or engage in unlawful or violent actions. No weapons of ANY kind are to be carried or wielded by the picketers.’

^[10] Neither the validity nor Pailpac’s entitlement to make these rules is disputed.

^[11] The arbitrator found that the revised BOD rule was affixed to the notice board at the entrance to the factory during 2014. She, nevertheless, held that simply affixing the rule to a notice board without at least drawing it to the attention of the employees was inadequate.

^[12] The evidence established, consistent with the arbitrator’s finding, that in February 2014, the revised BOD rules were displayed on the notice board at the main entrance to the factory, close to the clocking station. Ms B Symonds, Pailpac’s Human Resources Manager, confirmed that the revised BOD rules were put up on the notice board at the entrance of the factory by Mr Bongani Mkhize (“Mr Mkhize”), the HR Business partner, on her instructions. She said that it was standard practice for the company to use the notice board for such communication and that the employees were well aware of their obligation to read the communications posted there as they applied to them.

^[13] Although the dismissed employees denied that the revised BOD rules were posted on the notice board at the entrance to the factory, their version, as put to Pailpac’s witnesses, was that they did read the information on the notice board which included the details of doctors they could not consult, job vacancies, invitations, holiday

work rosters etc.

^[14] Having considered the evidence on this aspect, I am of the view that the arbitrator correctly rejected the dismissed employees’ version that the revised BOD rules were not placed on the notice board. That finding stands as there is no cross-appeal against it. It is, however, the arbitrator’s related finding that the employees were not given sufficient notice of the rule that is open to question because it is inconsistent with the proved facts which indicate that: (a) the employees (including the dismissed employees) were notified of the revised BOD rules as they were placed on the notice board at the entrance to the factory; (b) the dismissed employees regularly read notices and other announcements posted on that particular notice board; and (c) the employees (including the dismissed employees) were fully aware of their obligation to read the notices and other communications posted on the board.

- [15] Taking into consideration these proved facts, it is probable that the dismissed employees were aware of the rule or could reasonably have been expected to be aware of the rule. Had the arbitrator engaged fully with the evidence and evaluated it against the probabilities, she would have arrived at this conclusion. Accordingly, her finding on this aspect is not one that could reasonably have been reached on the evidence before her.
- [16] In spite of these misdirections which were material to the outcome of the dispute, the Labour Court simply paid deference to the arbitrator's findings. Crucially, in respect of the revised BOD rules, the Labour Court failed to have regard to the evidence that was placed before the arbitrator. Had it done so, it would have appreciated that what was shown was that Pailpac had taken reasonable steps to draw the revised BOD rules to the attention of its employees, and that the dismissed employees were either aware of the rule or could reasonably have been expected to be aware of the rule.
- [17] Concerning the rule in the picketing policy, Mr Mkhize testified that, on 2 July 2014, he had personally affixed the policy to the wall adjacent to gates 1,6, 8 and 10, respectively. These gates were the primary access areas for the employees during the strike. The arbitrator found, correctly so, that Mr Mkhize had affixed the picketing policy to the wall adjacent to gates 1,6, 8 and 10, and that some of the employees who participated in the strike were able to read it. She also held that clause 14 of the picketing policy which prohibited the carrying or wielding of weapons of any kind, became a rule once the picketing policy was put up on the wall adjacent to gates 1,6, 8 and 10 on 2 July 2014, despite the fact that NUMSA had not signed the picketing policy.
- [18] The arbitrator, however, concluded that no evidence was led at the arbitration proceedings demonstrating that the dismissed employees were amongst those who were able to read the picketing policy. Accordingly, she found that the dismissed employees could not reasonably have been expected to be aware of the picketing rule.
- [19] There is an irreconcilable tension in the version of the dismissed employees on the question of their knowledge of the picketing rule. Notably, during cross-examination, counsel for the dismissed employees had repeatedly put it to Pailpac's witnesses that the dismissed employees would testify that what was posted on the wall, next to the gates, was a copy of an SMS message calling on all employees to return to work. In other words, what their version (as put to Pailpac's witnesses) amounts to, is that they were able to approach the wall (next to gates 1,6, 8 and 10) and read the purported SMS message affixed thereto.
- [20] Their actual testimony at the arbitration hearing was, however, materially different. Each of them testified in similar terms (suggestive of being rehearsed) that the security guards present prevented them from approaching the gates where the picketing policy was displayed. Given the inconsistency between their version as put to Pailpac's witnesses and their actual testimony, a reasonable decision-maker in the position of the arbitrator would

have rejected the evidence of the dismissed employees as unreliable.

[21] If other striking employees had managed to approach the wall (next to the gates) to read the picketing rule, then the dismissed employees should have been able to do so as well. The evidence reveals that they had, in fact, approached the wall to read the SMS message, purportedly posted there, calling on all striking employees to return

to work. Surely, if the dismissed workers were able to read the SMS message on the wall then, as a matter of probability,

they would have also been able to read the rule in the picketing policy prohibiting the carrying or wielding of weapons of any kind during a picket. Thus, on the probabilities, the dismissed employees would have been aware of the rule or could reasonably have been expected to be aware of the rule. The arbitrator's finding to the contrary was, as such, not one that could reasonably have been reached on the evidence before her.

[22] In so far as the arbitrator held that there was no positive duty on the dismissed employees to approach the wall, that is not the test. The correct test is whether, on the evidence, the dismissed employees were aware of the rule or could reasonably have been expected to be aware of the rule. The Labour Court not only erred in endorsing the application of the wrong test by the arbitrator, but it also failed to consider the contradictory versions of the dismissed

employees as put to Pailpac's witnesses and their version as emerged in evidence.

Contravention of the rules

[23] As concerning the contravention of the rules, the Labour Court endorsed the arbitrator's finding that because the dismissed employees had no knowledge of the rule, the question of breach does not arise.

[24] It is not in dispute that each of the dismissed employees was in possession of items that are classified as weapons, namely sticks, PVC rods, sjamboks and golf clubs. They carried, wielded or brandished these items during the picket in contravention of the picketing rule and the revised BOD rule.

[25] The arbitrator stated that any item that is improperly used could constitute a weapon, including a stick, PVC rod, golf club and

sjambok. She, however, concluded that there was little evidence that the dismissed employees were "brandishing or wielding"

those weapons, as specifically referenced in the charge sheet. In her view, they were merely carrying these weapons. Rather than construing these words in context, the arbitrator adopted an overly technical and formulaic approach to their interpretation

- as well as to the framing of the charge - which our courts have consistently cautioned against.[3]

[26] Construed in context, the words “wielding or brandishing” would necessarily include the carrying or displaying of weapons in a manner that is “aimed at sending out a message that [is], at the very least threatening”.[4] This meaning is consistent with the purpose of both the revised BOD rule and the picketing rule which is to prevent harm and intimidation

to non-striking employees and protect company property. The arbitrator, however, excluded the application of the rule in the picketing policy because the charge sheet used the terms “brandishing or wielding” as opposed to “carrying”. A

reasonable arbitrator in the position of an arbitrator would not have done so.

[27] There is ample evidence on the record demonstrating that the dismissed employees were “carrying” or “wielding” or “brandishing” weapons in contravention of both the revised BOD rule as well as the picketing rule. The photographic evidence that forms part of the record depicts the fifth, ninth and eleventh respondents carrying their sticks above their heads in a manner that could well be construed as “wielding or brandishing”. In fact, the seventh respondent pleaded guilty to the charge of “brandishing or wielding” a dangerous weapon during the strike. His dismissal ought to have been confirmed, yet the arbitrator omitted to mention him in the arbitration award. It is, furthermore, not disputed that each of the remaining dismissed employees was clearly carrying sticks, golf clubs and PVC

rods in clear breach of the picketing rule. The Labour Court consequently erred in failing to deal with the question of whether

the dismissed employees were in breach of the rules when the evidence established that they were.

Sanction

[28] Notwithstanding that the dismissed employees were in possession of prohibited weapons as contemplated in the rule, the arbitrator found that the sanction of dismissal was inappropriate because the dismissed employees desisted from carrying them once NUMSA signed the picketing policy on 4 July 2014. The arbitrator’s finding on this aspect betrays the fact that, by this point, the dismissed employees were already in breach of the rules.

[29] The visible carrying or wielding of prohibited weapons at the picket was clearly aimed at creating or fostering a hostile and intimidatory atmosphere. Indeed, the evidence reveals that non-striking employees were intimidated by the conduct of the strikers who carried or wielded such weapons and had to be smuggled into work. Even more

concerning is that an employee, who attempted to go to work, was beaten with sticks by striking employees. The situation was so grave that Pailpac had to engage the services of a private security company. Even these security officers became “rattled” by the conduct of the strikers. A truck driver was forced to exit Pailpac’s premises under armed escort.

[30] As acknowledged by the arbitrator in her award, any reasonable employee would know that bringing a dangerous weapon to work would not be tolerated. Thus, to do so in flagrant disregard of a clear workplace rule which prohibits such conduct during a picket or strike, and expressly warns that the consequences of the breach is the sanction of dismissal. Unlike the revised BOD rule, the picketing policy does not expressly state this. It does, however, state that “where an employee’s actions during a picket are in breach of the organisation’s Discipline Code [otherwise known as the Breaches of Discipline Document]”, the employer may take disciplinary action. This effectively means that the dismissed employees knew or could reasonably have been expected to know that a breach of the rule could result in their dismissal. Accordingly, the

contention advanced on behalf of the dismissed employees that the picketing policy did not inform employees that contravention was a dismissible offence is unsustainable on the evidence.

[31] Viewed objectively, the breach of the rule by the dismissed employees coupled with the ensuing harm to, and intimidation of, non-striking employees rendered their continued employment intolerable and made dismissal an appropriate sanction. There was, markedly, no challenge to the evidence demonstrating that their continued employment with Pailpac would be intolerable. The sanction of dismissal was fair and appropriate in the circumstances. Accordingly, the arbitrator’s

finding that the sanction of dismissal was substantively unfair is reviewable, as it is not a decision that a reasonable decision-maker,

in the position of the arbitrator, could have arrived at on the material before her. The Labour Court consequently erred in failing

to set aside the arbitration award on review.

Costs

[32] NUMSA represented the dismissed employees in both the appeal and the review application. Taking this factor into account, I consider it fair and just to order costs against them in both the review application and the appeal. Pailpac seeks the costs of two counsel. Given the nature and complexity of the issues involved, ordering the costs of two counsel is unmerited.

Order

[33] In the result, I make the following order:

1 The appeal is upheld with costs.

2 The arbitration award of the first respondent, dated 19 June 2015, is reviewed and set aside and substituted with the following award:

“(a) *The review succeeds with costs.*

(b) The dismissal of the fourth to eleventh respondents is substantively fair.”

F Kathree-Setiloane AJA

Phatshoane ADJP and Savage AJA concur:

APPEARANCES

FOR THE APPELLANT:

Mr BA Acker SC with Mr AJ Boulle

Instructed by Barker’s Attorneys

FOR THE 3RD TO 11TH RESPONDENTS: Mr M Pillemer SC

Instructed by Brett Purdon Attorneys

[1] Sidumo and Another v Rustenburg Platinum Mines Limited and Others 2008

(2) SA 24 (CC) para 267-8 (“Sidumo”).

[2] Rule 58 of the revised BOD document.

[3] Pailprint (Pty) Ltd v Lyster N.O & others (2019) 40 ILJ 2047 (LAC); [2019] 10 BLLR 1139 (LAC) at para 18 (“Pailprint”).

[4] Pailprint at para 18.

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