IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA 34/2019

In the matter between:

PAUL THOBELA AND 52 OTHERS **First Appellant**

NATIONAL UNION OF MINEWORKERS **Second Appellant**

and

APOLLO BRICKS (PTY) LTD **Respondent**

Heard: **19 November 2020**

Delivered: **31 may 2021**

Coram: Davis JA, **Murphy AJA Savage AJA**

JUDGMENT

DAVIS JA

[1] This case illustrates fundamental problems inherent in the regulatory system which was set up in terms of the Labour Relations Act 65 of 1995 ('LRA'). Fundamental to this regulatory regime was the objective of the expeditious resolution of labour disputes. In sharp contrast, the present case stretches back to September 2014, following strike action by employees of respondent, (first appellant whom I shall refer to as the individual appellants) which commenced on 4 September 2014 and ended 12 September 2014. Disciplinary action was taken against the individual appellants, following upon which a lengthy arbitration hearing commenced on 11 March 2015. It culminated in an award in which the arbitrator found that the dismissals of the individual appellants were substantially fair and had been effected by way of a fair procedure. More than three years later, Whitcher J, sitting in the court *a*

quo, dismissed an application, wherein the appellants sought to have the award reviewed and set aside.

[2] Leave to appeal this judgment was granted on 25 March 2019. More than a year later, the appeal was heard before this Court. This long running saga represents an unsatisfactory state of affairs which requires a comprehensive examination of the entire regulatory system in order to bring it into alignment with the objective of the expeditious resolution of labour disputes.

The factual matrix:

[3] Notwithstanding the length of the arbitration hearing and the voluminous evidence, the scope of the dispute was confined as a result of a detailed pre-arbitration minute of 5 May 2015, to which I shall refer presently.

[4] Suffice to say of the facts: On 12 September 2012, the second appellant and the respondent entered into a collective agreement that included specific picketing rules. On 1 September 2014, second appellant gave notice to the respondent that it intended to embark on industrial action on 4 September 2014. There does not appear to be any dispute that the industrial action embarked upon, inter alia, by the individual appellants included violent and obstructive behaviour. This conduct prompted an application by the respondent to the Labour Court on 10 September 2014 at which Snyman AJ which issued an interim interdict, which order subsequently became final. The order provided that:

> *'NUM and all its members at the respondent's workplace were interdicted and restrained from:*
>
> - *Coming within 100 meters of the respondent's premises and entrances;*
> - *Harassing, threatening, assaulting, intimidating or removing from the premises, any member of management, non-striking employee, client, independent contractor, replacement labour or visitor to the respondent's premises;*
>
> *Interfering with the loading, supply; and transport of any goods or products manufactured and dispensed at the premises;*

NUM and its members were ordered to comply with the terms and provisions of the Agreement on Protected Strike and Picketing Rules entered into between the applicant union and the respondent;

NUM was ordered to take all reasonable steps and measures to ensure immediate compliance with this order by its members.'

[5] The respondent contended that the individual appellants had not only breached this order but had acted violently, blocked entrances to respondent's premises and had intimidated those employees who wished to continue to work. Accordingly, a series of disciplinary hearings were held in which each of the individual appellants were charged as follows:

'1.1 Gross misconduct: in that you, amongst other, made yourself guilty on one or more of the following:

- Threatening violence, physical assault, intimidation, undermining the company's operations, ignoring picketing rules, interfering with non-striking employees, blocking entrances etc.
- Such conduct perpetrated had detrimental effect on the company, its business and employees.

1.2 In Breach of a Labour Court Order: on that you breached one or more of the terms and conditions of the court order you, amongst others, form part of some of the employees who either came within 100 meters radius from the company premises, intimidated, assaulted employees, blocked access to company premises and prohibited persons and traffic from freely entering or exiting the premises, prohibiting your employer to conduct its normal business activities during a protected strike.'

[6] After examining the evidence, the arbitrator found, with the exception of one allegation of assault, that the respondent had proved, on a balance of probabilities, that the individual appellants were guilty as charged. Invoking the doctrine of common purpose, the arbitrator held:

'' . . *applicant had the responsibility to comply with the picketing rules to which their union had agreed, and with the interdict. As an individual component of the group of strikers, each of them had a duty to ensure that the group*

complied with the picketing rules and the interdict. Each of them had an opportunity to state his/her case at the disciplinary hearing as well as the arbitration, and to show shy her or she should not be blamed. None of the applicants showed why he or she should not be blamed. It is not necessary to apportion blame on any individual. On these considerations I find that a finding of guilty of each applicant is justified on the basis of the doctrine of team misconduct.'

[7] The arbitrator found that there was no basis by which to hold that the disciplinary hearings had not been procedurally fair and thus upheld the dismissals of all the individual appellants. Appellants were unsuccessful in their application before the court *a quo.* Significantly, for the purposes of this appeal Whitcher, J ordered the second appellant to pay respondent's costs. This part of the order became a major part of the second appellant's submissions before this court.

The appeal:

[8] Although, in general, an appeal of this nature requires this court to examine the reasonableness of the award of the Commissioner of 13 July 2015, in terms of the approach set out in *Sidumo & another v Rustenburg Platinum Mines Ltd* 2008(2) SA 24 (CC) as well as in *Herholdt v Nedbank Ltd* 2013(6) SA 224 (SCA), the enquiry, which this court is now required to undertake, was significantly narrowed by the pre-trial minute to which I have already made reference. In this minute the issues which were placed in dispute were set out in some detail as follows:

'***30. PROCEDURAL FAIRNESS-***

30.1 The Applicants allege the dismissals were procedurally unfair as they were not permitted to be represented in the internal disciplinary hearing by the Union Official of their choice at the internal hearings. The parties agree that this will be dealt with by way of legal argument and that evidence about this will not be required.

30.2 The Applicants claim that the Respondent acted inconsistently by not dismissing at least 10 other employees who were committing the same

misconduct as the dismissed employees. The names of these employees will be provided to the Respondent by 2 April 2015. The parties agree that this aspect overlaps with substantive fairness.

30.3 There are no other procedural aspects in dispute.

31. ***SUBSTANTIVE FAIRNESS:***

- The applicants allege the dismissals were substantively unfair for the following reasons:

31.1 Applicants 1-36 were provoked by other employees into committing the misconduct relating to the incidents in the extruder and robot sections of the plant as per the CCTV footage

31.2 Applicants 37-54 did not do anything wrong and are therefore not guilty as charged.

31.3 there are no further substantive issues in dispute.

31.4 Harshness of sentence.'

The appeal through the prism of the pre-trial minute:

[9] The detailed contents of the pre-trial minute dictates that the "reasonableness" enquiry is thus confined to the findings concerning the disputed issues which were expressly set out in the pre-trial minute.

[10] Turning to the question of substantive fairness, the question was raised squarely in the pre-trial minute as to whatever individual appellants 1 to 36 were provoked by other employees into committing misconduct; hence the only question for determination on appeal was whether provocation had been proved on a balance of probabilities to justify an argument that the arbitrator had acted unreasonably in terms of the established test.

[11] In so far as the balance of the individual appellants were concerned it was argued that *"they done nothing wrong."* Again it is to that specific question, as set out in the pre-trial minute, and that question alone that we must turn.

[12] The argument of appellants with regard to the defence of provocation turned on evidence given by Mr Dlamini, a packer employed by respondent. He appeared on video footage which recorded events which had taken place on 5 September 2014. According to his evidence, he and a number of strikers had proceeded to the Thankalani Hostel to take tea. *En route* they passed a number of non-striking workers who *"started calling our names screaming."* He further testified that *"they called of us that are stupid"* and generally acted in a provocative manner towards the striking workers. It was as a result of this provocation, according to Mr Dlamini, that the striking workers became angry, confronted the non-striking workers. This caused the violent clash between the striking and non-striking workers. Much was made by Mr Dlamini about one of the non-striking workers who had *"showed us the middle finger."*

[13] It was put to Mr Dlamini at the hearing that the events that were captured on the video clip took place at between 7h45 to 7h48 in the morning. The confrontation could not have taken place at around 10h00 as he had testified, that is at a time when it might have been plausible that these workers were proceeding to the hostel to take tea. It was not disputed by appellants' counsel that there no evidence provided to contradict the time lines which appeared on the video clip.

[14] A further difficulty with Mr Dlamini's evidence concerned the clarity with which the strikers could hear the insults and see the middle finger from where these events were alleged to have taken place, being outside the exclusion plant. Again the evidence of respondent's witnesses was uncontested: there was a distance between the exclusion plant and the location of the striking workers of between 135 and 150 meters. Mr Van der Meer on behalf of respondent, estimated the distance to between 180 and 190m. When this evidence is viewed as the only evidence provided by the appellant with regard to provocation, it is not possible to find that the following conclusion reached by the arbitrator was unreasonable:

> *'It is improbable that the strikers entered the plant as a result of provocation. Even if they had been provoked their conduct does not meet the standard that is set in our law that the response to provocation is excusable and if the*

reaction is reasonable in proportion to the provocation. The severity of the strikers' conduct, the assaulting of one non-striking worker and abducting others. . . is disproportionate to allege provocation that was allegedly caused by a comment / showing of a finger/taking photographs accordingly provocation cannot excuse the conduct.'

[15] On appeal, counsel for the appellants could point to no evidence which gainsaid this conclusion or point to any further evidence which might indicate that the arbitrator had not taken material facts into account in coming to the conclusion at which she arrived.

[16] The second issue regarding substantive unfairness was that the balance of the applicants, that is those who were not identified in the video but in photographs, had 'not done anything wrong' and that therefore it was unreasonable to find them guilty as charged. The record contains a series of photographs showing striking workers carrying short branches, other workers with branches of considerable length and yet others armed with potentially dangerous objects, all marching in a determined aggressive and purposeful fashion.

[17] For this reason, on appeal, counsel for the appellants focussed attention exclusively on two of the individual appellants. There was considerable debate regarding the involvement and identification of Mr Service Mashobng. Appellant's counsels' argument was based on the founding affidavit of Mr Nica Rakau, in which he stated:

'*The arbitrator's finding that Mashobeng was guilty of the charges simply because he had admitted to participation in the strike from the 8th to the 12th September 2014, when the said strike was protected, and there was no evidence of him acting in breach of any workplace rule or standard, the picketing rules or the court interdict, is defective and unreasonable.'*

[18] The difficulty with this version of events is that it was contradicted expressly by the production manager of respondent, Mr Zane Richards, who confirmed that he had seen Mr Mashobeng at between 14h00 to 15h00 on 4 September as part of the group of striking workers who had participated in violent action.

Mr Richards' evidence was confirmed by both Mr Van der Meer and Mr Mokoena. They testified that, on 4 September, Mr Mashobeng had been one of the strikers who had surrounded the bus which had transported Mr Mokoena to respondent's premises on 4 September 2014. Whatever the merits of the denial by Mr Mashobeng that he was not on the premises on 4 September 2014, he had conceded that he was at the gate of respondent's premises on 8 September 2014, during the strike and had continued to be there until the end of the strike.

[19] In short, on his own evidence, there was no basis by which to find that he had not participated therein and therefore was not as guilty as the balance of the individual appellants in respect of the events on which the charges had been based.

[20] The remaining appellant, who was the subject of debate about participation, was Ms Nakwana. Appellant's counsel noted that the only evidence presented with regard to her was a picture of her sitting on the side of the road which on respondent's premises. This is admittedly a somewhat more difficult case in that there is no direct evidence, whether on the record, by way of video or photographs which linked Ms Nakwana to the events which gave rise to the charges against all the individual appellants and the finding that their dismissal was both procedurally and substantially fair.

[21] An examination of the photographs indicates that Ms Nakwana was within the prohibited area, that is the area in terms of which striking workers were interdicted from entering pursuant to the order granted by Snyman, AJ on 10 September 2014. It was also common cause that the contents of this order had been conveyed to the shop stewards and through them to the striking workers. At the very least, Ms Nakwana had breached the court order and encroached onto the prohibited area where violent conduct had taken place and the picketing rules had been breached. This in turn, called for some explanation as to why she had not associated herself with the course of conduct of the balance of the appellants. Nothing was forthcoming to gainsay the finding that she exhibited a common purpose together with the balance of the individual appellants.

[22] In summary, this dispute had to be determined in terms of the disputes set out in the pre-trial minute. There was no evidence to which appellants' counsel could refer to show that the arbitrator had omitted relevant evidence when arriving at her award. On the available evidence, the conclusion reached by the arbitrator was clearly reasonable.

Costs

[23] There was one other issue which was raised on appeal and that is the question of costs. The second appellant contended that the court *a quo* had erred in finding that, although second appellant was not a party to the case, the averments in the founding affidavit were sufficient to justify that it had joined litigious battle against respondent and that an adverse cost order was justified against it.

[24] It is difficult to divine the precise basis of this opposition to the cost order. In the founding affidavit, deposed to by Mr Rakau, who referred to himself as the Legal Unit Head of the National Union of Mineworkers, he said:

"I am duly authorised to depose to this affidavit and institute these proceedings."

[25] In paragraph 8.12 of the replying affidavit, the deponent Mr Chauke, who referred to himself as 'an adult male shopsteward of the National Union of Mineworkers at the Respondent' workplace' stated as follows in paragraph 10 of his affidavit: *"NUM is not itself a party to these proceedings".* This statement is clearly at war with the balance of this affidavit and that which was contained in the founding affidavit. In paragraphs 8-9 of this affidavit, for example, Mr Chauke states:

> '*Nica Rakau is an official of NUM, the union of which the applicants are members, and I, on my behalf and the applicants confirm my authority and that of Rakau, NUM and Mothobi Attorneys to institute these proceedings on behalf of the applicants, and the applicants and I hereby ratify all what NUM, Rakau and Mothobi Attorneys have done in these proceedings.*
>
> *In any case, the individual applicants are themselves parties to these processing.'*

[26] Manifestly second appellant attempted by way of paragraph 10 of the Chauke affidavit to 'hedge its bet' with regard to an adverse cost order. However, it is clear that the proceedings were instituted by an official of second appellant who had been duly authorised. To the extent that there is any doubt, the existence of authorisation can be found by way of a reasonable inference drawn from the relevant affidavits. There is therefore no basis by which to disturb the cost order.

[27] For all of these reasons, the appeal is dismissed with costs.

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Davis JA

Murphy AJA and Savage AJA concur.

APPEARANCES:

FOR THE APPELLANTS:	Adv ML Khomola
	Instructed by Mohale Incorporated.
FOR THE RESPONDENT:	Helena Strijdom
	Helena Strijdom Attorneys for the Respondent