



IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN DURBAN

Not Reportable

Case no: D02-17

In the matter between:

TROPIC PLASTICS AND PACKAGING INDUSTRY (PTY) LTD Applicant

and

NATIONAL UNION OF METAL WORKERS

OF SOUTH AFRICA (“NUMSA”)

First to Twenty

Seventh Respondents

COMMISSIONER LEON PILLAY N.O.

Twenty Eighth Respondent

STATUTORY COUNCIL FOR THE PRINTING,

NEWSPAPER AND PACKAGING INDUSTRIES Twenty Ninth Respondent

Heard: 7 March 2018

Delivered: 29 June 2018

JUDGMENT

WHITCHER J

- [1] In the award under review, the Commissioner upheld the dismissal of eleven employees – but reinstated with retrospective backpay the second to twenty

seventh respondents and granted limited compensation to a deceased employee, Thulani Gwala (“the respondents”).

[2] The respondents and the eleven employees were charged with:

“Gross misconduct in that on 29 May 2015, the employees wrongfully and unlawfully and in breach of the picketing rules issued by the CCMA congregated outside the factory of Tropic Plastic and:

- 1. threw rocks;*
- 2. blocked traffic;*
- 3. burnt tyres;*
- 4. placed objects on the road;*
- 5. prevented the ingress and egress of traffic to Tropic Plastic Factory; and*
- 6. prevented employees who wished to work during the strike from entering the Tropic Plastic Factory.”*

[3] To first give orientation to different points in the area, the front entrance to the applicant’s premises is in Chamberlain Road, Durban with a back entrance in Balfour Road. Chamberlain Road has a northern and southern bound carriage way. A grass island between the carriageways on Chamberlain Road was demarcated by the applicant as the picketing area. At the corner of Phillip Frame Road and Chamberlain Road is a small retail shop known as the Wentex Tearoom [“the Wentex area”].

[4] At the arbitration, there were essentially three parts to the charge, which is described in this review as (i) the burning of tyres and placement of obstructions in front of the applicant’s premises; (ii) breach of the picketing rules; and (iii) the “rushing” of a taxi ferrying workers.

[5] To establish the charges, the applicant relied to a large extent on videographic evidence (which I have viewed).

The burning of tyres and placement of obstructions in the road

[6] The Commissioner found that the eleven employees who had set fire to tyres and otherwise placed obstructions in the roadway outside the applicant’s premises at approximately 06h00 in the morning on the 29th May 2015 [before

any picketing for the day had started and before the general body of the strikers had arrived], were guilty of gross misconduct and their summary dismissal was warranted.

The case of the respondents

- [7] In relation to the respondents, the Commissioner found that they could not be held liable for the actions of the eleven employees as there is no evidence that there were more than the eleven employees present at the time of the specific misconduct and no evidence that the respondents had associated themselves with the unlawful conduct.
- [8] On the charge of intimidation [the rushing of the taxi], he found that this charge was not proved.
- [9] On the respondents' role in the other events of 29 May 2015 (breach of the picketing rules) he found that they did breach the picketing rules but that the nature and extent of their actions did not warrant their dismissal.
- [10] He dismissed a claim that the respondents were guilty of derivative misconduct.
- [11] The review is aimed at these findings and the relief granted to the respondents.

The respondents' breach of the picketing rules

- [12] I see no reason to interfere with the findings of the Commissioner. On my evaluation, the applicant failed to demonstrate that the Commissioner overlooked material evidence which had the obvious potential to materially affect his finding and the outcome of the arbitration.
- [13] It is evident from the video evidence that the initial group of eleven employees were responsible for the placement of the dangerous obstructions on the roadway outside the applicant's premises.
- [14] The video footage does show, in separate and later incidents, another employee kicking a water bucket into the road, and another, a [not substantial]

tree branch. But, both employees are identified by the applicant and are not among the list of respondents.

- [15] The respondents' disruption to the flow of traffic in the area around the factory was not sustained for a long period of time.
- [16] According to the video footage, in the period 07h01 to about 07h08, a group of strikers, taking up both lanes of the northern bound carriageway of Chamberlain Road, can be seen proceedings in a southerly direction to the Wentex area. It seems the strikers usually met and gathered in this area, which is away from and not in front of the applicant's premises.
- [17] A group can also been seen occupying the southern bound carriageway of Balfour Road and then proceed to the Wentex area.
- [18] The video footage shows the strikers gathered in the Wentex area at about 07h23.
- [19] Not long thereafter the SAPS, who had blockaded the area from about 07h00, ordered the strikers to disperse. When they refused to do so, claiming they had a right to protest as they were on a protected strike, a stun grenade was thrown into the crowd of strikers at about 07h33. They were then effectively boxed in by police vehicles and moved along Chamberlain Road northwards *to the designated grass island*.
- [20] At about 07h43, the police threw a second stun grenade into the crowd of strikers and shot at them with paintball pellets. On the video evidence, there was no good reason for this since the strikers were in the demarcated picketing area [the grassy island].
- [21] It was the evidence of W/O Robin from the SAPS that the first stun grenade did not have the desired effect of *dispersing* the strikers, hence the second one. The purpose of the second stun grenade was to disorient the strikers and then arrest them for failing to *disperse*.
- [22] It is evident from the police witness that the instructions given to the respondents by the police were not to picket within the designated area (the

grass island) but rather to disperse, and their failure to *disperse* was the offence on which their arrests were based.

- [23] The police seemed to be in total control throughout of the situation in the area around the applicant's premises and they had successfully caused the strikers to move to the designated grass island when the strikers were arrested and removed from the area.
- [24] No evidence whatsoever was led regarding the claim that the strikers blocked persons who wished to enter the premises. Even the chairperson of the disciplinary enquiry found no evidence was led of any interference with customers or service providers.
- [25] And, as discussed below, it was the applicant's security guards who stopped the taxi ferrying workers from entering the applicant's premises from Chamberlain Road.
- [26] The applicant contends that it is shown in the video footage and still images that the respondents *wielded* sticks and knobkerries.
- [27] I saw that some of the strikers did carry sticks and what looked like knobkerries but I did not observe any "wielding" of such. The Commissioner found that the strikers had carried sticks and knobkerries in breach of the picketing rules. He, however, makes the valid point that the carrying of sticks and knobkerries is not part of the charge and the strikers who did so were not specifically identified anyway on the basis that the carrying of sticks and knobkerries was the basis for the dismissal.
- [28] A breach of picketing rules may in certain circumstances amount to misconduct justifying dismissal, but same is not axiomatic and there is considerable discretion vested in the Commissioner to determine the extent of the breach of the rules. It therefore follows that less serious breaches of the rules should not be regarded as dismissible misconduct.

The rushing of the taxi

- [29] It is alleged that while the strikers were moving down Chamberlain Road [to give a time perspective, just before the first stun grenade was launched], they

surged towards a taxi ferrying workers, who were to be dropped off in Chamberlain Road outside the applicant's premises.

- [30] Khan, the driver, testified that when he entered Chamberlain Road, he noticed a group of about 40 to 50 striking employees *in the Wentex area about 80 to 100m* from the factory entrance. The security guards stationed outside the applicant's premises prevented the vehicle from entering the premises. They gestured that he should make a U-turn. According to Khan, the "mob" surged forward when they saw his vehicle. The situation was scary and the passengers screamed. He continued driving and dropped the passenger off at the back gate of the factory in Balfour Road.
- [31] On his way out, in Balfour Road, he observed about 6 people who he assumed were strikers. They threw rocks at his vehicle, which caused damages totalling R3500.00.
- [32] The arbitrator found that the video evidence did not show the strikers surging towards the staff taxi. He found that Khan and his passengers may have felt frightened when they saw the strikers moving along Chamberlain Road, but they were never in any danger from these strikers.
- [33] The applicant contends that this finding is patently unreasonable in light of Khan having indicated his fear of the striking employees and the video evidence. In their view it is patently obvious from the videographic evidence that "the mob of dismissed employees surged towards the taxi". They contend that the video moreover shows an SAPS vehicle attempting to intercept the strikers as they "surge" towards Khan's vehicle.
- [34] To my mind, there is sufficient evidence on record (the video evidence evaluated with the evidence of Booysen [who appeared to be in charge of the private contingent of armed security guards employed by the applicant], W/O Robins and Ngirazi) to justify the Commissioner's finding.
- [35] It is common cause that long before Khan entered Chamberlain Road, a contingent of armed police officers and private security guards had stationed themselves in Chamberlain Road and would have been clearly visible to Khan

and his passengers. The armed security guards were stationed in front of the applicant's premises – at the very entrance the taxi would have entered.

- [36] What can be gathered from the video and the testimony of W/O Robins and Ngirazi, is that around the time that Khan entered Chamberlain Road, the police were in the process of herding the strikers to the grass island [that is down Chamberlain and in the direction of Khan].
- [37] It is common cause that not long into the process a stun grenade was fired into the crowd of strikers. It is significant that the only reason given by Robins and Booysen for this was because the strikers were blocking the road and had refused an order to disperse. The police witness never testified that they launched the stun grenade because the strikers were about to attack the taxi.
- [38] Booysen testified that when the strikers gathered at Wentex in Chamberlain Road, the police began putting in place "things to effect [the] arrests."
- [39] This counters the applicant's claim, which is merely based on a perception of the video footage, that the police moved in swiftly because the strikers were rushing for the taxi.
- [40] Ngirazi's evidence that the strikers were in the process of being moved down Chamberlain Road to the island [and thus in the direction of the taxi] was not meaningfully disputed. Significantly, during cross-examination, it was put to him that around the same time that the taxi appeared on Chamberlain Road, the first stun grenade was thrown. It was noted during the cross-examination of Khan that Officer Neethling gave similar testimony at the disciplinary hearing.
- [41] This, in my view, would reasonably account for any quick movements on the part of the strikers.
- [42] On Khan's version the strikers were about 100 metres down the road when he pulled into Chamberlain Road. More, significantly, there was a large contingent of both police and armed security guards between him and the strikers. Thus any danger was at the level of perception, but not imminent.

[43] It may also reasonably be inferred, in light of the timing of all of the events, that when stones were being thrown at Khan in Balfour Road, the respondents were in the process of being corralled and arrested *in Chamberlain Road*.

Derivative misconduct

[44] The applicant contends that the respondents must have been aware of all the misconduct committed on 29 May 2015, including that committed by the eleven employees, but none of them came forward to offer assistance to the applicant in bringing guilty employees to book, alternatively to exonerate themselves from any wrongdoing. In these circumstances, the Commissioner should have found them guilty of derivative misconduct.

[45] There is no substance to this ground of review, and I agree with the following submissions made by Mr Pillemer.

[46] In a case in which the employer wants to rely on misconduct that is not directly related to the employee's own wrongdoing, but is based on the employee not providing information that is needed to identify other wrongdoers in circumstances where speaking up is required to maintain the trust relationship, that constitutes a quite distinct ground of misconduct, applicable in a context where not speaking up can destroy an employment relationship. But this has to be specifically levelled as a charge, which can be defended.¹

[47] Derivative misconduct, like any other form of misconduct, has to be alleged and proved and turns on its own evidence and facts. There may be circumstances where it is incumbent upon an employee to come forward and spill the beans on his co-worker who he knows is stealing, is guilty of sexual harassment and so on, but to suggest that it applies to every employee engaged in strike action is taking the concept too far and, in the present case, there is no evidence (which has to be established on a balance of probabilities) that the respondents had such knowledge or even what

¹ *Western Platinum Refinery Ltd v Hlebela and others* (2015) 36 ILJ 2280 (LAC) at para 20. See also *Chauke & Others v Lee Service Centre CC t/a Leeson Motors* (1998) 19 ILJ 1441 (LAC)

information that it is alleged they were required to provide under threat of dismissal for misconduct if they failed to do so, and why it was required by the employer or why they would believe that there was a duty on them to provide such information, since it is by no means obvious.

[48] There is no proof or even any evidence that the employer expected them to provide information as part of the employment relationship. If the employer's complaint was that they failed to provide such information and it was this failure that had caused the relationship to break down, then it is inexplicable that this was not the basis of the charge that they faced.

[49] The employer had the video footage and witnesses available to it anyway. There is no reason to believe that the workers in question would be of the opinion that it was incumbent upon them in terms of their employment relationship to provide information on their colleagues and if they failed to do so they were destroying the employment relationship. The employer never asked them to provide the information either.

[50] The Commissioner dealt with the question of derivative misconduct briefly but adequately and his finding that it did not apply in the present case is a finding that is reasonable. The claim of derivative misconduct had not featured in the charges, at the disciplinary hearing or at the arbitration until the stage of argument. There is also no evidence to support it anyway.

The relief awarded

[51] I do not accept that the Commissioner failed to reasonably exercise his discretion in this regard.

[52] The awarding of backpay is at the discretion of the Commissioner's reasonably held conclusion that the transgression of the picketing rules was not serious enough to warrant that the respondents be re-instated with no back pay.

[53] The Commissioner found that the sanction of dismissal was not justified. It thus follows that had a lesser sanction been applied, that is, a final written warning, it would not have deprived the respondents of their income for this period. It is evident in his findings that the Commissioner duly considered this.

An overview of the award

[54] In relation to the respondents, the Commissioner had to make findings and come to a value judgment based thereon as to whether their role in the events of 29 May 2015 as testified to or depicted in video evidence and which led to their respective summary dismissals was such as to establish that the dismissals were fair.

[55] A judge determining the review on the other hand has to decide, not whether the dismissal was fair or not, but only whether the Commissioner's finding is a decision to which no reasonable arbitrator could have come on that evidence.

[56] As the cases in the footnote indicate² reasonable arbitrators can and do make decisions which involve them having made mistakes and there may well be imperfections in their assessment of the evidence or understanding or application of the law and they exercise a value judgment on which another reasonable arbitrator may differ.

[57] The Commissioner in this case has provided a full reasoned award that covers all aspects of the case before him.

[58] He went through each of the charges and weighed up the evidence and how it implicated the various applicants before him.

² *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC) at para 110; *Gold Fields Mining SA Pty Ltd (Kloof Gold Mine) v CCMA & Others* (2014) 35 ILJ 943 (LAC) para 16; *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* 2013 (6) SA 224 (SCA); (2013) 34 ILJ 2795 (SCA) at 2806 para 25; *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* 2001 (4) SA 1038 (LAC); (2001) 22 ILJ 1603 (LAC) at 1636 para 101; *Palaborwa Mining Co Ltd v Cheetham & others* (2008) 29 ILJ 306 (LAC) at 317 para 13; *Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2017) 38 ILJ 860 (LAC) at para 16 and 36.

[59] On every aspect, he provides reasons for his findings and that reasoning is substantively sound and borne out to a large extent by the video evidence and the applicant's own witnesses.

[60] On my evaluation, in relation to the charges, the applicant failed to demonstrate that the Commissioner overlooked material evidence which had the obvious potential to materially affect the outcome of the arbitration.

[61] In relation to the relief sought, the Commissioner exercised his discretion and his reasons for providing the full relief sought is evident from the award and not inconsistent with the law.

[62] The applicant has failed to establish that the award is such that it could not have been made by a reasonable arbitrator on the evidence before the Commissioner, or any other ground of review.

Order

[63] In the premises, the following order is made:

1. The review application is dismissed.
2. The applicant is ordered to pay the first to twenty seventh respondents' costs; such costs to include the costs of senior counsel.

B Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: A.T. Myburgh SC with C.B. Edy, instructed by Norton
Rose Fulbright Attorneys

For the First to Twenty

Seventh Respondents: M Pillemer SC, instructed by Brett Purdon Attorneys

Labour Court