



(1) Reportable: NO
(2) Of interest to other Judges: Yes

Signature

Date

THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Case no: DA25/24

In the matter between:

MONDI SOUTH AFRICA (PTY) LTD

Appellant

and

**NATIONAL BARGAINING COUNCIL FOR THE
WOOD AND PAPER SECTOR**

First Respondent

MF KHAWULA N.O.

Second Respondent

NTOKOZO E. ZUNGU

Third Respondent

MLONDI S. MTETWA

Fourth Respondent

THABO M. MABUZA

Fifth Respondent

MFUNDO MANQELE

Sixth Respondent

KP DUMAKUDE

Seventh Respondent

CEPPWAWU

Eighth Respondent

Heard: 24 March 2026

Delivered: 06 May 2026

Coram: Nkutha-Nkontwana JA, Tokota AJA et Collis AJA

Summary: Sanction review - strike misconduct – armed picket – peaceful strike conceded – no evidence of violence or intimidation - exceptional circumstances justify reinstatement – retrospective back pay equivalent to 12 months denied - *Pailprint* and *Pailpac* distinguished.

JUDGMENT

NKUTHA-NKONTWANA JA

Introduction

- [1] The Constitutional Court has consistently recognised that the right to strike is not merely derivative or residual, but a fundamental constitutional right and a central pillar of the collective bargaining system envisaged by section 23 of the Constitution.¹ However, the exercise of the right to strike is not unfettered. Peacefulness is not optional, the Constitutional Court instructs; a strike action characterised by violence, intimidation, or damage to property falls outside the scope of constitutional protection.²
- [2] In the present case, the parties accept the above tenets. The dispute, however, lies in whether it admits the qualification contended for by the eighth respondent (CEPPWAWU) and its members, the third to seventh respondents (respondent employees). CEPPWAWU and the respondent employees are collectively

¹ See: *SATAWU v Moloto and Another N.N.O.* [2012] ZACC 19; 2012 (6) SA 249 (CC); 2012 (11) BCLR 1177 (CC) (*Moloto*) at para 44.

²² See: *SATAWU and Another v Garvas and Others* 2013 (1) SA 83 (CC) at paras 51-53; see also ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th rev. ed. 2006) at para 651.

referred to as the respondents. Their case is that, while armed picketing constitutes grave misconduct, dismissal could not have followed as a matter of course. The arbitrator considered the mitigating factors and reasonably concluded that they collectively constituted exceptional circumstances justifying a lenient sanction, so the argument further went. These arguments must be measured against the settled jurisprudence of this Court. In *Pailprint (Pty) Ltd v Lyster N.O and Others*,³ this Court addressed the legal consequences of armed picketing during an otherwise protected strike, an approach subsequently confirmed in *Pailpac (Pty) Ltd v De Beer N.O and Others*.⁴ It is to the tenet it establishes that this appeal, which is by leave of this Court, turns.

Background

- [3] The respondent employees were employed by the appellant (Mondi South Africa). The respondent employees had participated in a protected strike called by CEPPWAWU, which commenced on 5 October 2020. The picketing was regulated by picketing rules agreed upon by Mondi South Africa and CEPPWAWU, which expressly prohibited the carrying of weapons. The respondent employees were charged and found guilty of "acting wrongfully and unlawfully and in breach of clause 22 of the picketing agreement by carrying a weapon whilst engaging in the strike".
- [4] The CEPPWAWU successfully challenged the dismissal of the respondent employees, a dispute that was arbitrated under the auspices of the first respondent. The second respondent (arbitrator) found the respondent employees guilty of brandishing weapons during a strike picket in breach of the picketing agreement. Notwithstanding a finding of guilty, the arbitrator was not convinced that the sanction of dismissal was appropriate, making the following observations:

³ [2019] ZALAC 43; (2019) 40 ILJ 2047 (LAC); [2019] 10 BLLR 1139 (LAC) (*Pailprint*)

⁴ [2021] ZALAC 3; (2021) 42 ILJ 1038 (LAC); [2021] 6 BLLR 570 (LAC) (*Pailpac*)

- '40. In respect of the appropriateness of the sanction of dismissal, I am of the view that there are mitigating factors against the sanction of dismissal in that on their first days of carrying weapons, when they were told to put them away, either by fellow employees or Police Officers, they complied and that they had clean disciplinary records and as much as their length of service varies but they have been with the respondent for a longer period. Those who were carrying branches of trees can be given a benefit of doubt that it was not their intention to bring weapons to the strike.
41. During the arbitration, they all appeared apologetic and some literally apologised and those who were carrying branches of trees did not bring them from home which shows that they did not have any intention of being armed during the strike. During the hearing, I had an opportunity to observe the applicants' demeanour, they did not appear as employees who might repeat the same misconduct. Some of them participated to the strike for only one day and either stayed at home or went back to work. I was therefore convinced that they valued their jobs more than participating in the strike. According to the CCMA guidelines on misconduct arbitration, dismissal is not a punishment. It is a rational response to risk management in the affected enterprise, ... In view of the above, the respondent is not facing any risk of further instances of such misconduct.
42. I am of the view that in this case, progressive discipline would have been an appropriate sanction. Had applicants committed violent acts, e.g. literally intimidating other employees, public or contractors, damage to property or assault as alleged in one of the court orders. they would have been charged and disciplined accordingly ... The applicants' only act of misconduct was that of carrying weapons during the strike. However, I do accept the argument of the respondent that carrying weapons during the strike has the potential to scare other employees and contractors ... The fact that the applicants were disciplined only for carrying weapons, tells me that they were not involved in any other act of misconduct.'

[5] The arbitrator found the dismissal substantively unfair and ordered reinstatement of the respondent employees without any back pay. He opined that, since the

respondent employees were not approaching justice with clean hands, denying them back pay equivalent to 12 months' salary, respectively, '[would] send a clear message to [them] that carrying weapons whilst picketing is prohibited'.

Before the Court *a quo*

- [6] Mondi South Africa impugned the arbitrator's findings on the appropriateness of the sanction of dismissal in a review application that served before the Court *a quo*. The crux of its impugn was that the arbitrator paid no heed to the dictum of this Court in *Pailprint*, ratified in *Pailpac*, that brandishing weapons during a strike picket is a dismissible misconduct. It further argued that the arbitrator misconceived the nature of the enquiry and made findings on the appropriateness of the sanction that are out of kilter with the evidence in the transcript.
- [7] The respondents defended the arbitration award as reasonable. They contended that, notwithstanding the ratio in *Pailprint* and *Pailpac*, brandishing weapons during a strike picket does not constitute automatic ground for dismissal. On the facts of the present case, *Pailprint* and *Pailpac* are patently distinguishable, so it was further argued.
- [8] The Court *a quo* took cognisance of the higher threshold for interference in a sanction review and the fact that the arbitrator was enjoined to consider all relevant circumstances when determining the fairness of the dismissal of the respondent employees.⁵ It rejected Mondi South Africa's argument that *Pailprint* and *Pailpac* find application in the present case, as the respondent employees had been charged solely with carrying weapons.
- [9] The Court *a quo* accordingly refused to interfere with the award for the following reasons: (i) 'there were apologies, verbalised in some cases and perceived (through demeanour) in others, and there is nothing to suggest that they were not

⁵ See: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC) paras 78 and 79.

genuine'; (ii) 'there was no evidence of 'intimidating and threatening behaviour', and it cannot be assumed (given the facts of this matter) that anyone had been intimidated or threatened by any of the third to seventh respondents'; (iii) 'that lengths of service were considered in mitigation is not ... an error of law'. Moreover, the respondent employees' conduct did not go unpunished, as they were penalised by being denied back pay equivalent to 12 months' salary.

In this Court

[10] In this Court, Mondi South Africa persists in its attack on the arbitrator's findings, which it argues are out of kilter with the evidence in the transcript. It submits that the respondent employees' respective versions of defence were patently dishonest; they never took responsibility for their transgressions; their apologies were insincere and opportunistic; and their long services heightened the gravity of their transgressions. Therefore, *Pailprint* and *Pailpac* are in all fours with the present case.

[11] CEPPWAWU submits that the Court *a quo* cannot be faulted for its deferential stance. The arbitrator reasonably exercised its value judgement based on the totality of the circumstances, which are distinguishable from those in *Pailprint* and *Pailpac*, and preferred a lenient sanction. However, the arbitrator's refusal to award back pay was sufficiently punitive to make a point that carrying weapons during strike pickets is illegal.

Discussion

[12] The enquiry before this Court is a narrow one. In a sanction review, the issue is not whether dismissal would also have been an appropriate or reasonable outcome, but whether the sanction imposed by the arbitrator falls within the range of decisions that a reasonable arbitrator could reach.⁶ It is common cause that the strike was peaceful and that no actual violence occurred. But that does not detract from the established tenet in *Pailprint*, affirmed in *Pailpac* and other

⁶ See: *Sidumo* above fn 5.

decisions of this Court, that participation in an armed picket constitutes serious misconduct. It is correct, however, as the respondents argue, that *Pailprint* does not establish dismissal as an inflexible or automatic consequence, nor does it dispense with the requirement that a sanction be determined through a context-sensitive and proportionate assessment.

Seriousness of the offence

[13] In my view, the approach adopted by the arbitrator was legally sound. He did not discount or neutralise the seriousness of the misconduct by his consideration of mitigating factors, but was expressly recognised and accordingly informed the outcome and the remedy. What is clear from the award is that the arbitrator evaluated thirteen mitigating factors cumulatively, not in isolation, and asked whether dismissal was the only sanction consistent with fairness in the light of the context and factual matrix. Pointedly, Mondi South Africa confined its challenge before the Court *a quo* to only three of those considerations: a finding on remorse, the absence of evidence of intimidation, and the respondent employees' length of service. Since the remaining findings were not challenged, they did not receive the attention of the Court *a quo* and aptly so.

Remorse

[14] The contention that an absence of genuine remorse renders dismissal inevitable proceeds from a misconceived understanding of the enquiry in a sanction review. Remorse is a relevant consideration in the assessment of sanction, but it is not a dispositive requirement. Contrary to Mondi South Africa's contention, the arbitrator did not ignore its criticism regarding accountability and apology. Instead, he accepted the respondent employees' evidence that, once they were instructed not to carry weapons, they complied willingly and never did thereafter for the duration of the strike. They also expressly apologised and committed not to repeat the misconduct.

- [15] Mondi South Africa's reliance on the respondent employees' alleged dishonest versions and lack of genuine remorse does not assist its case. The arbitrator did not accord a significant mitigating weight to remorse but considered all the mitigating factors cumulatively. In any event, assessments of credibility and remorse fall within the arbitrator's province. To require a review court to impose its own assessment of sincerity as decisive would collapse the distinction between review and appeal and offend the principle of institutional restraint.

Peaceful strike

- [16] Mondi South Africa's concession that the strike was peaceful is instructive. The arbitrator cannot be criticised for refusing to infer intimidation or threats in the absence of evidence, when the promise to lead that evidence was never made good. I accept that the harm addressed by the prohibition on armed picketing lies not only in actual injury, but in the latent threat, intimidation, and erosion of lawful collective bargaining. However, the absence of violence, viewed in light of the peculiar context and factual matrix of this case, was reasonably considered. That, to me, cannot be viewed as diluting the clear stance this Court has adopted against armed pickets, but as an exception founded in the peculiar context and factual matrix.

Long service

- [17] Likewise, as correctly found by the Court *a quo*, the consideration of length of service as a mitigating factor does not constitute an error of law. The arbitrator did not "place much stock on the fact that the employees had lengthy service histories and clean disciplinary records" as contended by Mondi South Africa. On the contrary, he considered, as he ought to, in the context of all other relevant factors.⁷ In essence, the arbitrator must be understood to be saying that, viewed contextually, the trust relationship was not impaired to the extent that continued

⁷ See: item 3(5) of the Code of Good Practice: Dismissal; *Sidumo* above fn 5 at paras 272 and 286

employment would be intolerable, if regard is had to the respondent employees' respective untarnished records of long service.⁸

Pailprint and Pailpac are distinguishable

- [18] The respondents are correct in their submission that *Pailprint* and *Pailpac* are distinguishable. Both decisions are distinguishable on a material basis. In each case, the Court intervened because the arbitrator had failed to appreciate the seriousness of carrying weapons during strike action, either by adopting an unduly technical approach (*Pailprint*) or by treating dismissal as disproportionate without recognising that any reasonable employee would know such conduct to be impermissible (*Pailpac*). Neither judgment lays down an inflexible rule that the mere presence of weapons at a picket invariably renders reinstatement unreasonable, irrespective of context.
- [19] By contrast, in the present case, the arbitrator did not trivialise or excuse the misconduct. The arbitrator expressly condemned the carrying of weapons, accepted it as serious misconduct, and imposed a substantial consequence by denying retrospective back pay. This was done against the uncontested backdrop of an otherwise peaceful strike, with no evidence of violence, assaults, or actual intimidation, and in the presence of other compelling mitigating factors.
- [20] Given the peculiar circumstances in the present case and the limited scope of attack mounted against the award, it cannot be said that the intolerability of the continued working relationship is obvious. Even then, in *Booi v Amathole District Municipality*,⁹ the Constitutional Court emphasised that intolerability constitutes a high threshold, requiring proof that the employment relationship has become insupportable. Intolerability cannot be inferred where the evidentiary basis for the alleged misconduct is tenuous or absent. Where such proof is lacking, as here, the conclusion that reinstatement is justified cannot be assailed. Moreover, the

⁸ See: *Sidumo* above fn 5 at para 286.

⁹ *Booi v Amathole District Municipality & Others* (2022) 43 ILJ 91 (CC); [2022] 1 BLLR 1 (CC) (*Booi*) at paras 34 – 43.

arbitrator concluded that there was no operational risk to Mondi South Africa that would have justified withholding the primary remedy of reinstatement.¹⁰

[21] Therefore, it cannot be true that *Pailprint* or *Pailpac* compel interference with a value judgment, even if the context and factual matrix rationally support it.¹¹ In *Algoa Bus Company (Pty) Ltd v TASWU obo Mzawi and Others*,¹² this Court reaffirmed the high threshold for a sanction review, which effectively constrains a review court (irrespective of whether the arbitrator considered the sanction of dismissal to be too harsh, as in the present case, or considered the penalty of dismissal to be fair) from intervening simply because it thinks that the arbitrator was wrong, or because it would have rendered a different decision on the same evidence.

Conclusion

[22] The award is unassailable, as it reflects a measured exercise of discretion that balances deterrence with corrective discipline and falls within the range of decisions a reasonable arbitrator could reach. Therefore, the Court *a quo* cannot be faulted for refusing to upset the award. It follows that the appeal must fail.

Costs

[23] It accords with the requirements of the law and fairness that there should be no order as to costs.

Order

[24] In the premise, the following order is made:

The appeal is dismissed with no order as to costs.

¹⁰ *De Beers Consolidated Mines v Commission for Conciliation Mediation and Arbitration and Others* [2000] 9 BLLR 995 (LAC); (2000) 21 ILJ 1051 (LAC) at para 24.

¹¹ See: *Duncanmec (Pty) Limited v Gaylard NO and Others* 2018 (11) BCLR 1335 (CC); [2018] 12 BLLR 1137 (CC) at para 52.

¹² [2024] 12 BLLR 1224 (LAC); (2025) 46 ILJ 89 (LAC) at para 15.

Nkutha-Nkontwana JA

Judge of the Labour Appeal Court of South Africa

Tokota et Collis AJA **concur.**

APPEARANCES:

For the appellant : Mr J. Whyte, Norton Rose Fulbright

South Africa Inc

For the third to eighth respondent : Mr J. Phillips of Cheadle Thompson &

Haysom Inc