



DISMISSAL OF EMPLOYEES WHO CARRY 'WEAPONS' WHILE STRIKING

November 2019

(DA18/2017) [2019] ZALAC 43; (2019) 40 ILJ 20147 (LAC)

In the matter between ***Pailprint (Pty) Ltd v Lyster N.O and Other***¹ the Labour Appeal Court confirmed that the presence of weapons of any kind, whether carried, brandished or wielded during a picket, will be construed as undermining the peaceful support of the strike and will render the picketers unprotected against disciplinary action.

Background

From 1 July 2014, the Employees of Pailprint took part in a national strike. Pailprint's disciplinary code made the brandishing or wielding of dangerous weapons a dismissible offence. Pailprint's picketing policy, which was communicated to the striking employees, stated that picketers may not engage in unlawful or violent actions, no weapons of ANY kind are to be carried or wielded by the picketers and the company may take disciplinary action where an employee's actions during a picket are in breach of the organisation's disciplinary code.

During the strike, some employees were seen carrying sticks, one carried a PVC pipe, one carried a sjambok, one employee carried a golf club and another an axe. They were charged with brandishing or wielding of dangerous weapons during the strike and were dismissed.

The dismissed employees referred an unfair dismissal dispute to the CCMA, and the arbitrator found the dismissals to be substantively unfair.

Pailprint reviewed the decision of the arbitrator, but the Labour Court 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.

The Labour Appeal Court's findings

The LAC specifically looked at the four reasons provided by the arbitrator for finding the dismissals unfair -

Although the employees had carried dangerous weapons, the picketing policy did not make reference to wielding or brandishing weapons

With regards to reason one, the Court found that 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 policy did not warn employees of the consequences of its breach or of its link to the disciplinary code

With regards to reason two, the Court found that the policy expressly stated that Pailprint may take disciplinary action "*where an employee's actions*

¹ (DA18/2017) [2019] ZALAC 43; (2019) 40 ILJ 20147 (LAC)

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.

The disciplinary code was intended to regulate the conduct of employees on-duty and not employees who were on strike but off-duty.

With regards to reason three, the Court found that 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, Pailprint 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 Pailprint.

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.

With regards to the fourth reason, the Court found that 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 have been reflected in the code remained to be determined having regard to the misconduct committed.

The Court further found and reiterated that an unduly technical approach to the framing and consideration of allegations should be avoided. The arbitrator approached the matter in an unduly technical manner and by doing so, appropriate regard was not had to the purpose of the rule and the harm it sought to avoid.

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.

Pailprint was accordingly 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.

The Appeal accordingly succeeded with costs and the dismissals of the employees were found to have been substantively fair.

For more information on this matter and advice on strikes, disciplinary codes and picketing rules, please do not hesitate to contact us.

**By WP Moolman
Senior Associate
©Maserumule Corporate Employment Law**

www.masconsulting.co.za