

Clarifying common purpose in strike-related misconduct

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A recent Constitutional Court judgment refines the application of the doctrine of common purpose in matters of strike-related misconduct. Establishing proximity is not sufficient grounds to dismiss large groups of employees.



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The Constitutional Court, in *National Union of Metalworkers of South Africa obo Aubrey Dhludhlu and 47 others v Marley Pipe Systems (SA) (Pty) Ltd* [2022]

again considered the doctrine of common purpose in ‘group dismissals’ for strike-related violence. This doctrine, in a criminal law context, states that where two or more people, who have a common purpose to commit a crime, act together to achieve that purpose, the conduct of each one in the execution of the purpose is imputed to the others.

On 14 July 2017, the head of human resources at Marley Pipe Systems was assaulted during an unprotected strike at the company’s premises. The strike began that morning because Numsa members were unhappy with the sector-agreed increases and wanted the manager removed. Striking employees surrounded the manager and assaulted him. He was punched and kicked while he was lying on the ground and rocks were thrown at him. He was pushed through a glass window and suffered injuries all over his body, requiring medical attention.

Marley Pipe Systems dismissed 148 employees for assaulting a manager and participating in the unprotected strike. Of these 148 employees, 12 were found to have been involved in the physical assault and 136 were convicted of assault on the basis of the doctrine of common purpose. The dismissal dispute ultimately came before the Labour Court, with Marley Pipe Systems also seeking damages resulting from the unprotected strike action.

The Labour Court accepted that 12 employees were positively identified as having been involved in the actual physical assault and that the others were placed on the scene as a result of other means of identification, such as clock cards and job cards used at workstations. Ultimately, the Labour Court upheld the dismissals and awarded damages to Marley Pipe Systems.



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Appeal

Numsa appealed the finding to the Labour Appeal Court (LAC) in respect of 41 of these employees. Of the 41, 40 were never identified as having been at the scene of the assault and one could not even be placed at the workplace. The appeal was unsuccessful. The LAC held that, for those 40 employees to escape liability for the assault, they should have "intervened to stop the assault" and should have "dissociated themselves in [some] way from the assault before, during or after it". The LAC could not, on the facts, determine this had happened.

The Constitutional Court conducted an assessment of our law in relation to the doctrine of common purpose and disagreed with the LAC's application of the doctrine. While the Constitutional Court accepted that the 40 employees were at the scene when the manager was assaulted, it also found that mere presence and watching did not satisfy the requirements set out in existing jurisprudence (and were not in conflict with its decision in *Commercial Stevedoring Agricultural and Allied Workers' Union and Others v Oak Valley Estates (Pty) Ltd and Another* [2022] (CC)).

The Constitutional Court confirmed that, to establish common purpose, there must be:

- firstly, direct or circumstantial evidence that the individual employees in some form associated themselves with the violence before it commenced, or even after it ended; and
- secondly, the employees concerned must have manifested their sharing of a common purpose with the perpetrators of the unlawful conduct by themselves performing some act of association with the conduct of the others.

The Court stated that employees could not be required to dissociate themselves when they had never associated and that more is required. The Court said: "[i]ndividual complicity in the commission of acts of violence must be established ... If it were to be otherwise, the law would be a cruel instrument that attaches guilt and imposes sanction on the innocent. Association in complicity for purposes of common purpose must include having 'the necessary intention' in relation to the complicity."



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While the Constitutional Court accepted that employers may face difficulties in proving strike-related misconduct, particularly when large numbers of employees are involved, it emphasized the need for employers to be able to go beyond simply placing employees 'at the scene of the crime'. The Court confirmed the approach that the principles of common purpose require that an employer must establish individual complicity in the commission of acts of violence.

The Constitutional Court found the 41 employees not guilty of the assault and remitted the finding on sanction back to the Labour Court (since those employees had still participated in an unprotected strike).

More evidence required

As sympathetic as the court was to the plight of employers seeking redress from violent conduct, it has offered little in the way of concrete solutions to address this issue (and understandably so). If anything, this judgment serves as a reminder to employers that more evidence than simple proximity to the conduct must be obtained when seeking to dismiss large groups of employees involved in, or nearby, strike-related misconduct.

As employers increasingly seek to rely on technological advances (such as drones, motion-sensing cameras and other surveillance technology) to record strike-related misconduct (and then identify the perpetrators of such misconduct), they must accept that such footage may be insufficient if all it does is place an employee at the scene of the misconduct. More is required and, when seeking to discipline employees for strike-related misconduct, employers may wish to 'cast the net' in a narrower fashion, in the hope of ensuring (and justifying) the necessary finding of dismissal.

Employees, in turn, must accept that this judgment does not protect them any more than the law already did. If anything, it will impel employers to take even stronger measures to curb the scourge of strike-related violence and, if it cannot be stopped, to at least have a better record of it. Big brother will be watching.

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