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The accountability of a group of strikers for misconduct during a strike

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Dunlop Mixing and Technical Services (Pty) Ltd and Others v National Union of Metalworkers of South Africa (NUMSA) obo Nganezi and Others [2016] ZALCD 9 (11 May 2016)

ISSUE

In what circumstances may a group of strikers be held collectively accountable for misconduct during a strike? To what extent is there an obligation on employees to identify perpetrators of misconduct or, in the absence of having knowledge of such perpetrators, present evidence to escape charges of misconduct?

COURT'S DECISION

In the case of *Dunlop Mixing and Technical Services (Pty) Ltd and Others v National Union of Metalworkers of South Africa (NUMSA) obo Nganezi and Others* [2016] ZALCD 9 (11 May 2016), employees embarked on a protected strike in support of wage demands. A number of the employees committed acts of misconduct and violence during the strike. The employer obtained an interdict from the Labour Court in an attempt to put a stop to the unlawful conduct. Despite this, the employees' misconduct continued unabated until the date of their dismissals on the grounds of 'derivative misconduct'. The employees then referred the matter to arbitration at the Commission for Conciliation Mediation and Arbitration ("CCMA") as an unfair dismissal dispute.

The CCMA found that the derivative misconduct, of which the employees in question were found guilty, stemmed from the fact that the non-violent striking employees failed to come forward and assist the employer in identifying the employees who had resorted to violence. For this reason the CCMA concluded that the dismissals were both substantively and procedurally fair. However, the CCMA ordered that the dismissal of *certain* employees were substantively unfair in that there was insufficient evidence to suggest that those employees were in fact present and on strike. The CCMA thus ordered those employees to be reinstated. The employer then applied to the Labour Court for this part of the CCMA award to be reviewed and set aside.

The Labour Court held that it was not unreasonable to infer from the evidence that all the striking employees were participants in the strike and accordingly, in the absence of any explanation, were to be regarded as being present during the strike. Moreover, it was held that "in light of the trust nature of an employment relationship there is an obligation on those it can be inferred were present, to give evidence or provide some explanation" as to the identity of the perpetrators or their own innocence. An employee who claims to have no such knowledge cannot simply remain silent. Where employees remain silent, in circumstances where misconduct has been committed, the only reasonable inference that could be drawn is that they committed derivative misconduct. Thus, the Court reasoned that, had the employees not been present when the misconduct took place, they would have said so.

In conclusion, the Court held that due to the violent nature of the misconduct, the employees' failure to provide information about the violent perpetrators, or to offer a valid explanation to the employer as to their innocence, constituted derivative misconduct which justified their dismissals.

IMPORTANCE OF THIS CASE

This matter emphasises the importance of the duty of good faith owed by the employee to its employer, and recognizes that where an employee possesses knowledge that could impact the interests and well-being of the business, withholding such information could amount to a breach of the duty of good faith. In such circumstances, silence is not enough where sufficient evidence is presented of the misconduct. Even where no knowledge is in fact possessed of the perpetrators there is a duty to speak up or face the consequences.

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