

EMPLOYMENT

The Constitutional Court has tightened the noose on the doctrine of common purpose.

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Doctrine of common purpose

The principles underpinning the **doctrine of common purpose** came into the spotlight in the employment and labour landscape. In the recent judgment by the Constitutional Court ("CC") in *National Union of Metalworkers of South Africa obo Aubrey Dhludhlu and 147 others v Marley Pipe Systems (SA) Proprietary Limited* [2022] ZACC 30, the apex court had to consider the fairness of the dismissal of employees for misconduct stemming from the serious assault of the HR Manager during an unprotected strike on 14 July 2017.

Background Facts and Arguments

On 14 July 2017 the employees embarked on an unprotected strike after the employer announced a 7.5% wage increase negotiated under the auspices of the Plastics Negotiation Forum. During the strike, the employer's HR Manager was severely assaulted. Pursuant to this strike the employer dismissed all 148 employees.

One hundred and thirty six (136) of these employees were in addition, found guilty of and dismissed for assault, on the basis of the doctrine of common purpose. The employees, represented by the National Union of Metalworkers of South Africa (NUMSA), referred an unfair dismissal dispute to the Labour Court (LC) claiming that the employees' dismissals was both procedurally and substantively unfair.

Doctrine of common purpose in the Labour Court

In the LC NUMSA argued that the strike was protected and denied that an assault had taken place. The employer in response positively identified twelve employees involved in the actual physical assault of the HR Manager. The employer also placed 95 other employees at the scene of the assault by presenting the clock card data, job cards used at the employees' workstations and photographic and video material identified the employees who were part of the strike.

According to the employer, this demonstrated that the employees formed part of the group that engaged in the strike and assaulted the HR Manager. The LC accepted the employer's evidence and upheld the employees' dismissal.

Notably, 41 employees ("**Unidentified Employees**") were never identified by the employer and it is in respect of these employees that NUMSA noted its appeal to the Labour Appeal Court ("**LAC**") to challenge the LC's application of the doctrine of common purpose.

Labour Appeal Court

The LAC found that common purpose had been established on the basis that the Unidentified Employees were evidently placed at the scene of the assault and associated themselves with the actions of the group, on the following grounds

- The LAC found that in order to escape the reach of the doctrine of common purpose, the employees must have intervened to stop the assault or they should have dissociated themselves in some way from the assault before, during or after.

Constitutional Court

The matter was referred to the CC where NUMSA once again disputed the application of the common purpose doctrine by the LAC in respect of the Unidentified Employees. The CC, in differing with the LAC, referred to the case of ***S v Mgedzi 1989 (1) SA 687 (A)*** noting

“presence at the scene of the misconduct and awareness of the misconduct is required. There must be an intention to make common cause with those who were engaged in the misconduct and a manifestation of this common purpose by engaging in the misconduct.”

The CC found that there is no legal obligation on an employee to intervene in or to dissociate from acts of violence that one has not been shown to have participated in.

The CC noted that to satisfy the doctrine of common purpose, employers have to demonstrate that

- there is evidence, direct or circumstantial, that individual employees in some form associated themselves with the violence whether before it commenced, during its occurrence or after it ended; and
- the individual employees must have performed some act of association with the conduct of others. There must have been an intention in relation to the violence.

On this basis, a verdict of guilty cannot appropriately be returned for merely being where the acts of violence took place.

The CC found that although the Unidentified Employees were part of the group of employees who engaged in the strike, there was no evidence that they planned to assault the HR Manager or that they had associated themselves. In this basis the employees’ dismissals were unfair.

Conclusion

This case highlights the following

- misconduct, in the context of strikes, is, unfortunately, a common occurrence; and
- employers are cautioned to not be overzealous and approach these matters with caution, particularly with the application of doctrine of common purpose.

Read more on [Entitlement to embark on strike action when there is an unreasonable delay.](#)



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