

## BACKGROUND

In August 2012, members of the National Union of Metalworkers of South Africa (“NUMSA”) engaged in a protected strike. During the strike, several acts of violence, intimidation and damage to property were alleged to have occurred. Despite not positively and individually identifying the perpetrators, Dunlop (the employer), dismissed the workers who had been involved in the strike for derivative misconduct.

NUMSA challenged the fairness of the dismissal and the matter proceeded to arbitration. The arbitrator held that the dismissals of the employees were substantively unfair and he ordered their reinstatement.

### Labour Court (“LC”):

Dunlop successfully took the award on review to the LC where it was set aside.

The LC found that the arbitrator acted unreasonably in finding that there was no evidence that the employees were present during the violent strikes, in that he ignored the circumstantial evidence and inferential reasoning that should have followed from it. Further, that there was a duty on the employees to assist their employers to identify the perpetrators and that, by remaining silent, the employees made themselves guilty of derivative misconduct.

The employees had thus breached their duty of good faith in the employment relationship by failing both the duty to disclose and the duty to self-exonerate.

### Labour Appeal Court (“LAC”):

The majority in the LAC confirmed the order of the LC and dismissed the appeal.

### Constitutional Court (“CC”):

Dunlop argued that the duty of good faith, underlying the employment relationship, necessitated the disclosure of the identities of others or personal exoneration, neither of which were forthcoming. Resultantly, these failures were sufficient to prove derivative misconduct.

NUMSA stated that even if an inference of presence at the scenes of violence could be drawn, derivative misconduct had not been established.

The Casual Workers Advice Office (“CWAO”), admitted as amicus curiae (friend of the court), argued that there can be no derivative misconduct comprising a breach of a duty to disclose information about the conduct of co-employees participating in strike action. It contended that this kind of duty could only flow from a fiduciary relationship, not merely from reciprocal good faith

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obligations in employment relationships.

## HELD

The CC held that it would be wrong to use the duty to disclose as an easier means to dismiss, rather than dismissal for actual individual participation in violent misconduct itself. To do so would result in the imposition of a harsher sanction on employees who did not take part in the actual primary misconduct.

The fact that a protected strike turned violent does not mean the right to strike is no longer implicated. On the contrary, an arbitrator or court should be wary of falling foul of section 187 of the Labour Relations Act, which defines an automatically unfair dismissal as including dismissal related to an employee's participation in a protected strike.

Furthermore, *"to expect employees to be their employer's keeper in the context of a strike where worker solidarity plays an important role in the power play between worker and employer would be asking too much without some reciprocal obligation on an employer's part."*

Dunlop's reciprocal duty of good faith required, at the very least, that the employees' safety be guaranteed before expecting them to come forward and disclose information or exonerate themselves. The CC found that this was not sufficiently done.

The appeal was therefore upheld and the orders of the LC and LAC were set aside.

## VALUE

Employers should be conscious of the restrictions placed on the use of derivative misconduct in disciplining employees. Employers are required to prove that the undisclosed knowledge of the wrongdoing was actual (rather than imputed or constructive) and that it was withheld deliberately.

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