IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA33/2020

In the matter between:

NUMSA obo AUBREY DHLUDHLU AND 147 OTHERS **Appellants**

and

MARLEY PIPE SYSTEMS SA (PTY) LTD **Respondent**

Heard: **18 May 2021**

Delivered: **23 June 2021**

Coram: **Waglay JP, Savage and Molefe AJJA**

JUDGMENT

SAVAGE AJA

Introduction

[1] This appeal, with the leave of the Labour Court, concerns the dismissal of 148 employees for the serious assault of a manager employed by the respondent, Marley Pipe Systems SA (Pty) Ltd, during the course of an unprotected strike at the respondent's premises on 14 July 2017. The appeal is pursued by the National Union of Metalworkers ('NUMSA') on behalf of only 41 of the dismissed employees.

[2] At the outset of the appeal, with no opposition raised by the respondent, the late filing of the notice of appeal was condoned. In addition, the respondent indicated that it had abandoned the compensation order granted in its favour against NUMSA. There was no appeal raised against the order granted against the remaining appellants.

[3] The respondent undertakes business in the plastics industry and falls under the jurisdiction of the Metal and Engineering Industries Bargaining Council ('MEIBC'). It is obliged to bargain at sectoral level through the Plastics Negotiating Forum ('the PNF'). Employers to the PNF may grant increases in excess of the minimum prescribed by sectoral agreement. During 2017, the respondent proposed to increase wages by 7.5% on condition that if the MEIBC negotiations resulted in a higher percentage increase the higher increase would be paid. Dissatisfied with the respondent's stance on wages, on 5 July 2017 the employees engaged in a work stoppage.

[4] A wage agreement, to which NUMSA was not party, was finalised in the PNF on 13 July 2017. The same day the respondent met with NUMSA shop stewards and communicated with employees regarding wages. The following day, on 14 July 2017, those employees who were NUMSA members ('the employees') engaged in an unprotected strike from 07h00. The striking employees moved together from their workstations with placards and written demands which included the removal of Mr Ferdi Steffens, the respondent's head of human resources.

[5] Mr Steffens exited his office to engage with the employees. He was surrounded by the employees and seriously assaulted. He was pushed out of a glass window, had rocks thrown at him and was punched and kicked while he lay on the ground. He sustained a number of blows to his body and head with injuries to his face, his right arm and body. After two other employees who were not part of the group on strike came to his aid, Mr Steffens left the premises to obtain medical attention. The respondent summoned the police. The employees left the premises around 12h00 having been issued with an ultimatum by the respondent to do so. The same day the respondent obtained

an order from the Labour Court interdicting the strike and prohibiting acts of violence, intimidation and harassment.

[6] Thereafter the respondent took disciplinary action against the 148 employees, all of whom were dismissed following a disciplinary hearing chaired by an independent chairperson. The employees were found to have participated in the unprotected strike on 14 July 2017 and to have acted with a common purpose in the assault of Mr Steffens. The identity of employees who participated in the misconduct was determined from the respondent's photographic and video evidence of events on the day; from clock cards used in the respondent's payroll system which recorded the names of employees who had arrived and remained at work; from job cards used at workstations; and the evidence of the respondent's witnesses. In addition, the employees were given the opportunity to provide information to the respondent via dropbox or whatsapp to indicate that they had not participated in the misconduct. Those employees who gave an acceptable explanation did not face disciplinary action.

[7] Twelve employees were identified as having participated directly in the assault of Mr Steffens. The remaining employees were found by the chairperson to have acted with common purpose on the basis that they had associated themselves with the assault through their presence on the scene; encouraged those involved in the assault; failed to come to the assistance of Mr Steffens; "rejoiced" in the assault; and held placards and demanded in writing that Mr Steffens be removed. In addition, the chairperson took account of the evidence of the employees' own witness that all employees regarded themselves as leaders in respect of events on the day. Having been found guilty of misconduct, the chairperson recommended that the employees be summarily dismissed and, on 14 August 2017, the employees were dismissed by the respondent.

[8] Aggrieved with their dismissals, the employees, represented by NUMSA, referred an unfair dismissal dispute to the MEIBC and, after conciliation failed, a claim of unfair dismissal to the Labour Court. The case pleaded was that no unprotected strike or assault took place and that the dismissal of the

employees was therefore unfair. The respondent opposed the claim and filed a counterclaim in which it sought just and equitable compensation, as contemplated in section 68(1)*(b)* of the Labour Relations Act 66 of 1995 ('the LRA') for losses incurred that were attributable to the strike. In the alternative, the respondent sought damages in terms of section 77 of the Basic Conditions of Employment Act 75 of 1997 ('the BCEA').

[9] In the Labour Court, the evidence for the respondent was that the employees, all of whom were NUMSA members, had embarked on the unprotected strike, leaving their workstations and gathering first in the canteen where they wanted Mr Steffens to speak to them. When he did not arrive, the employees moved as a group with placards and written demands, including that Mr Steffens "must go", towards the respondent's main gate and administration building. The employees indicated that they were all in charge and there were. An ultimatum issued to employees was ignored. Mr Steffens approached them to seek their return to work. As he did so he was attacked, thrown to the ground repeatedly and pushed through an office window. In evidence he said he tried to protect his head, realising that if he did not get out, he was "going to die". He was hit a number of times on his body by rocks, shoes and fists. Ms Rosaline Crowie heard breaking glass and Mr Steffens being kicked by striking employees, none of whom came to his aid. Following his assault, Mr Steffens left the premises and obtained medical treatment at hospital. Video footage of events showed striking employees celebrating and chanting after the assault was over. The police arrived on the scene shortly thereafter. By 11h35 the employees started dispersing.

[10] The evidence of Mr Klaas Ledwaba, the appellants' only witness, was that employees were unhappy with issues related to wages and wanted Mr Steffens to explain issues but he did not do so. Mr Ledwaba accepted that the employees had participated in an unprotected strike, but denied that they had marched to Mr Steffens' office or that Mr Steffens had been assaulted. While they waited at the respondent's main gate, according to Mr Ledwaba, Mr Steffens left the premises.

Judgment of the Labour Court

[11] Only the substantive fairness of the dismissals was in issue before the Labour Court. The Labour Court (Phehane AJ) accepted the evidence of the respondent's witnesses as both credible and reliable, consistent with the video footage and photographic evidence available. Although the appellants' only witness, Mr Ledwaba, accepted that the strike was unprotected, the Court rejected as improbable his denial that an assault had occurred.

[12] It was found that the employees who were identified as being on site had acted with common purpose in associating themselves with events on the day. With reference to the decision of the Constitutional Court in *National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others (Dunlop)*[1] it was noted that it was unnecessary to place each employee on the scene to prove common purpose which can be established by inferential reasoning having regard to the conduct of the workers before, during and after the incident of violence.[2] The evidence showed that the employees had taken part in the unprotected strike, had assembled in the canteen, marched on the respondent's premises carrying placards and demanded the removal of Mr Steffens. The Court found that the employees had acted with common purpose in the assault of Mr Steffens in what was a "*mob attack*". The employees failed to use the opportunities provided by the respondent to distance themselves from the events on the day and their dismissal was found to be fair. This included Mr Sonnyboy Mokoena, a NUMSA shop steward, who entered the respondent's premises after 09h00 on 14 July 2017, following the assault on Mr Steffens. Since the video footage showed him to be part of the group of strike leaders and he failed to distance himself from the events that had occurred, the Court found Mr Mokoena to have acted with common purpose in the assault of Mr Steffens.

[1] [2019] ZACC 25; 2019 (8) BCLR 966 (CC); (2019) 40 ILJ 1957 (CC); [2019] 9 BLLR 865 (CC); 2019 (5) SA 354 (CC); (2019) 40 ILJ 1957 (CC).
[2] Id. at para 46.

The respondent's counterclaim for damages under the LRA was upheld, with the appellants ordered, jointly and severally, to pay just and equitable compensation in the amount of R829 835.00 to the respondent.

On appeal

[13] There was no dispute on appeal that the strike embarked upon by the employees had been unprotected. Also undisputed was that 12 employees had been directly identified as having participated in the assault of Mr Steffens and that a further 95 employees had been identified via photographs and video evidence as having been on the scene and therefore associated with the assault. In relation to the remaining 41 employees, in respect of whom the appeal is pursued, it was contended with reference to *S v Mgedezi*[3] and other cases that common purpose in the assault had not been proved. This was so since there was no evidence that the 41 appellants had been on the scene of the assault, that they had been aware of the assault, had intended to make common cause with it, or that they had performed an act of association with it. In relation to Mr Mokoena it was submitted that his dismissal was unfair in that he had arrived on the scene after the assault. Furthermore, issue was taken with the fairness of the dismissal of three employees, Ms Hopolang Khumalo, Mr Pomolo Mohale and Mr Sandisile Msibi, given the evidence of the respondent's witness, Ms Rosaline Crowie, that they were not involved or had not been sufficiently identified in relation to the misconduct.

[14] As to sanction the appellants contended that since the respondent had previously not dismissed employees who had embarked on similar unprotected strike action and the 41 employees had not been shown to have acted with common purpose in the assault, the summary dismissal of the 41 employees was unfair.

[15] The respondent persisted that the finding of common purpose was sustainable against all 41 employees. This was so since the appellants' pleaded case was proved to be untrue and inconsistency in sanction had not

[3] *S v Mgedezi and Others* [1988] ZASCA 135; [1989] 2 All SA 13 (A).

been in issue until the appeal. The respondent relied on the fact that the 41 employees had been placed on the scene of the assault through clocking records, were absent from their workstations and video footage showed the entire crowd moving to the offices where the assault took place. Apart from Mr Ledwaba, none of the employees testified or made use of the dropbox or whatsapp opportunities provided to explain their conduct or whereabouts. Furthermore, Ms Crowie's evidence regarding the involvement of particular appellants amounted to opinion evidence which had to be assessed against the conspectus of other evidence presented. For these reasons, it was contended that the Labour Court did not err in finding that the 41 employees had acted with common purpose, that their dismissal was fair and that the appeal fell to be dismissed.

Evaluation

[16] The difficulties inherent in determining the individual culpability of an employee in the context of collective misconduct were considered by the Constitutional Court in *Dunlop.*[4] In that matter, the Court stated that:

> '[46] Evidence, direct or circumstantial, that individual employees in some form associated themselves with the violence before it commenced, or even after it ended, may be sufficient to establish complicity in the misconduct. Presence at the scene will not be required, but prior or subsequent knowledge of the violence and the necessary intention in relation thereto will still be required…'.

[17] The Court recognised that employees may participate in and associate with misconduct in many ways, both direct and indirect,[5] while cautioning that "*no one should be held accountable where no evidence can be adduced to substantiate the claim against individuals, solely on the basis of being part of the group*."[6]

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[4] *Dunlop* above n 1.
[5] Id. at para 75.
[6] Id. at para 48 quoting Maqutu "Collective Misconduct in the Workplace: Is 'Team Misconduct' 'Collective Guilt' in Disguise?" (2014) 25 *Stell LR* 566 at 568. See also *Association of Mineworkers and Construction Union v KPMM Road and Earthworks (Pty) Ltd* [2018] ZALAC 28; (2019) 40 ILJ 297 (LAC).

[18] In *Food & Allied Workers Union & others v Amalgamated Beverage Industries Ltd,*[7] which predated the current LRA, more than 100 employees emerged from a room in which a driver was left seriously injured after an assault. In that matter, the Court, relying on *R v Blom*[8] found that all the evidence presented was consistent with the inference that all of the employees had been part of the group which perpetrated the assault. This was so although on an abstract appreciation of the evidence this inference was not the most probable in that no alternative inferences had been advanced by the employees which had a foundation in the evidence. As a result, the Court had to select that inference which was the more plausible or natural one from those that present themselves.[9] It was found that the inference drawn that all employees were involved became the most probable only because none of the individuals concerned came forward, either at the individual disciplinary hearings, or in the Industrial Court, to absolve themselves, a failure which was weighed in the balance against them. With no evidence that it was only a majority of the appellants who were present, the Court found that the evidence was equally consistent with all employees having been present at the scene.

[19] In the current matter reliance was placed by the Labour Court on the doctrine of common purpose to find all of the appellant employees responsible for the misconduct. All of the employees had embarked on an unprotected strike. There was direct evidence which proved that 12 employees had engaged in the assault. The remaining 95 employees were identified as having been in the group of strikers and to have directly associated with the misconduct. The 41 remaining employees, in respect of whom the appeal is pursued, were not identified through direct evidence as having been part of the group. It follows that for the inference to be drawn that they had associated themselves with the assault including before it commenced, or after it ended, whether through direct participation or association, such an inference must be consistent with all the proved facts.[10]

[20] The proven facts were that all employees had reported for duty, left their workstations and embarked on the strike. All employees, save for Mr Mokoena, were on the respondent's premises and away from their workstations at the time of the assault. The striking employees, all of whom

[7] (1994) 15 ILJ 1057 (LAC).
[8] 1939 AD 188 at 202-3.
[9] *AA Onderlinge Assuransie Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A).
[10] *R v Blom* above n 8.

were NUMSA members, moved together towards Mr Steffens' office, holding placards and presenting written demands which sought his removal. The employees sought out Mr Steffens and remained present on the scene during the course of and after his assault, with none of the striking employees coming to his aid. Apart from Mr Ledwaba no employee took advantage of the opportunities availed, both prior to and during the disciplinary hearing or before the Labour Court hearing, to distance themselves from the events of the day.

[21] In its approach to the circumstantial evidence available to it, it is the task of the court to select that inference which is the more plausible or natural one from those that present themselves.[11] In having regard to the possible inferences available to be drawn, it is noteworthy that, as in *FAWU*, no alternative inferences founded in the evidence were advanced by the employees. There was no evidence that it was only 107 of the appellants, in respect of whom the appeal is no longer pursued, who were present on the scene of the assault. The undisputed evidence was that all the appellant employees had left their workstations and participated in the strike. The employees wanted to speak to Mr Steffens in the canteen and, when he did not arrive, they moved to the main gate and towards his office with demands that included his removal. There was no evidence that any of the 148 appellant employees distanced him or herself from the actions of the group and the clear evidence was that the assault on Mr Steffens was perpetrated by members of the group of striking employees. None of the employees intervened to stop the assault and assist Mr Steffens, nor did they disassociate in any way from the assault before, during or after it. In fact, the undisputed evidence was that the striking employees celebrated the assault after the fact. It followed in the circumstances, having regard to the proven facts, that the inference drawn that all employees were involved in or associated themselves with the assault became the most probable and plausible.

[22] In *Association of Mineworkers and Construction and Others v KPMM Road and Earthworks (Pty) Ltd* [12] this Court took issue with the failure of the Labour Court to have careful regard to the established principles of common purpose

[11] *AA Onderlinge Assuransie Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A).
[12] [2018] ZALAC 28; (2019) 40 ILJ 297 (LAC); [2019] 4 BLLR 340 (LAC) at para 13.

in the context of collective misconduct. In *Makhubela v S,*[13] the Constitutional Court, relying on *S v Mgedezi,*[14] set out the requirements necessary to prove common purpose, namely that the individual must have been shown to have been present at the scene where the assault occurred; to have been aware of the assault; have intended to make common cause with those who perpetrated the assault; have manifested some common purpose with the perpetrators of the assault by performing an act of association with the conduct of the others; and have possessed the requisite *mens rea*. These requirements were also considered in *S v Thebus*;[15] and in *Dewnath v S* it was held that:

> "The most critical requirement of active association is to curb too wide a liability. Current jurisprudence, premised on a proper application of *S v Mgedezi*, makes it clear that (i) there must be a close proximity in fact between the conduct considered to be active association and the result; and (ii) such active association must be significant and not a limited participation removed from the actual execution of the crime."[16]

[23] In *Dunlop,* the Court stated that association with the misconduct before it commenced or after it ended may be sufficient to establish complicity in the workplace context, with it not required that an employee be present at the scene. However, prior or subsequent knowledge of the misconduct and the necessary intention in relation to it is still required.[17] This moves the requirements to prove common purpose in the workplace outside of the strict requirements set out in the case law from *Mgedezi*. It allows an employee to be held to account for collective misconduct where the employee associated with the actions of the group before or after the misconduct, even if not present on the scene; where the employee had prior or subsequent knowledge of the misconduct; and he or she held the necessary intention in relation to it.

[24] From the evidence before the Labour Court, it is clear that the appellant employees associated with the actions of the group before, during or after the misconduct. This included Mr Mokoena who, although he arrived on the scene after the assault, through his conduct associated directly with the actions of

[13] [2017] ZACC 36; 2017 (2) SACR 665 (CC); 2017 (12) BCLR 1510 (CC) at paras 36 – 38.
[14] 1989 (1) SA 687(A) at 705I-6C.
[15] *S v Thebus* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) at para 49.
[16] *Dewnath v S* [2014] ZASCA 57 at para 15.
[17] *Dunlop* above n 1 at para 46.

the group. It also included the employees who, in Ms Crowie's opinion, she saw to be bystanders. There was no dispute that these employees were present at the scene and associated with the events of the day. They too took no steps to distance themselves from the misconduct either at the time of, during or after the assault. Instead, they persisted with the denial, both in their pleaded case and the evidence of Mr Ledwaba, that any assault had occurred and refused the opportunity to explain their own conduct in relation to it.

[25] In *S v Thebus,* it was made clear that a person "*…must have intended that criminal result or must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated himself or herself reckless as to whether the result was to ensue*."[18] Within a labour law context the requisite intention exists where it is proved that an employee intended that misconduct would result or must have foreseen the possibility that it would occur and yet, despite this, actively associated himself or herself reckless as to whether such misconduct would ensue. The 41 appellant employees were proved to have held such intent. In such circumstances, the Labour Court cannot be faulted for finding that the appellant employees committed the misconduct for which they had been dismissed. Given the seriousness of such misconduct, dismissal was an appropriate sanction. The appellants conceded as much in relation to 107 of the appellants at the outset of the appeal.

[26] For these reasons, the appeal cannot succeed. There is no reason in law or fairness why an order of costs should be made in this matter, nor did the respondent seek such an order.

Order

[27] For these reasons, the following order is made:

1. The appeal is dismissed.

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Savage AJA

[18] Id. at para 49.

Waglay JP and Molefe AJA agree.

APPEARANCES:

FOR APPELLANTS:	H van Nieuwenhuizen and E Sithole
	Instructed by S Mabaso Inc.
FOR RESPONDENT:	F A Boda SC
	Instructed by Cliffe Dekker Hofmeyr Inc.