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EMPLOYMENT ALERT

Our programme on Conducting a Disciplinary Enquiry has been accredited by the Services SETA.

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STRIKES; DERIVATIVE MISCONDUCT AND THE EMPLOYEE'S DUTY OF GOOD FAITH

As unpacked in the recent 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).




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STRIKES; DERIVATIVE MISCONDUCT AND THE EMPLOYEE'S DUTY OF GOOD FAITH

The employer dismissed the striking employees for derivative misconduct, which dismissal was challenged by the employees at the Commission for Conciliation, Mediation and Arbitration.

The central issue before the court related to derivative misconduct.



As unpacked in the recent 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).

In this case the employees, all of whom were members of the respondent trade union NUMSA, embarked on a protected strike in furtherance of a wage dispute. During the course of the industrial action, the striking employees became involved in serious acts of misconduct which included damage to property and violent confrontations between the striking employees, supervisors, managers and representatives of the employer. The employer approached the Labour Court with an application to interdict the unlawful conduct of the employees. The Labour Court granted the interdict.

Despite the interdict, the employees' misconduct continued. The employer dismissed the striking employees for derivative misconduct, which dismissal was challenged by the employees at the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA in its award established that the nature of the derivative misconduct is found in the failure of the striking employees to come forward and assist the employer to identify perpetrators of the acts of violence, intimidation and harassment committed during the strike.

The CCMA concluded that the dismissal of some of the striking employees was both substantively and procedurally fair and while some of these employees had been found guilty of direct misconduct, a number of these employees who were found to be fairly dismissed, were dismissed for derivative misconduct.

The CCMA however ordered that the dismissal of certain other employees for derivative misconduct had been unfair on the basis that there was insufficient evidence indicating that these employees were indeed participants in the derivative misconduct. The CCMA ordered the employer to reinstate these employees. The employer applied to the Labour Court to review and set aside part of the CCMA award in so far as it declares certain dismissals unfair, and for the award to be corrected by determining that the dismissal of those employees, was indeed fair.

The central issue before the court related to derivative misconduct. The court in reaching its conclusion reasoned that an employee is bound by a duty of good faith to the employer and if the employee breaches such duty, this can justify dismissal. The court further reasoned that non-disclosure of knowledge that is relevant to misconduct committed by fellow employees constitutes a breach of the employee's duty of good faith. More importantly, the court held that the dismissal of an employee is derivatively justified in relation to the primary misconduct committed by unknown others, where an employee, innocent on actual perpetration of misconduct, consciously chooses not to disclose information known to that employee pertinent to the wrongdoing.

STRIKES; DERIVATIVE MISCONDUCT AND THE EMPLOYEE'S DUTY OF GOOD FAITH

CONTINUED

The court held that given the nature of the misconduct, the employees' failure to come forward and provide information constituted derivative misconduct making their dismissals appropriate.



One of the critical points of determination in the present case was whether an inference that the employees were participants in the misconduct can be drawn from the silence of the employees. The court was satisfied that the only reasonable and plausible inference that can be drawn from the evidence is that the employees were present during the strike and accordingly during the misconduct. If they weren't present or had no information regarding the perpetrators, the employees would have said so. The employees however, despite the opportunity afforded to them to disclose that information, did not do so.

The court held that given the nature of the misconduct, the employees' failure to come forward and provide information constituted derivative misconduct making their dismissals appropriate.

It is clear from the above that it is entirely reasonable for an employer to expect protected industrial action to be accompanied by orderly conduct by those employees who have embarked on such industrial action. This matter reinforces the necessity for employers to be able to rely on the duty of good faith owed to the employer by the employee and that the employee breaches this duty by remaining silent about knowledge possessed by the employee, where such knowledge threatens the business interests of the employer.

*Katlego Letlonkane
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Cliffe Dekker Hofmeyr

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1st by Unlisted Deals - Deal Flow

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Employment STRIKE GUIDELINE

Our Employment practice's new
EMPLOYMENT STRIKE GUIDELINE
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Topics discussed include strikes, lock-outs and picketing.

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Michael Yeates named winner in the **2015 and 2016 ILO Client Choice International Awards** in the category 'Employment and Benefits, South Africa'.



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BBBEE STATUS: LEVEL THREE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 3 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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