

Strike misconduct - you don't have to be violent to get fired

By [Lizle Louw](#) and [Amy King](#)

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Mass dismissals for strike misconduct without meeting the threshold for common purpose can be a complex legal matter that requires careful considerations of the specific circumstances, particularly in establishing a clear link between an individual's actions and the collective misconduct.



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In the recent case of *National Union of Public Service and Allied Workers (Nupsaw) obo Lutendo and Others v CCMA*, a protected strike turned violent with numerous breaches of the picketing rules. One of the picketing rules reads as follows:

“ No picketing, demonstrating, singing, protesting and/or toyi-toying shall take place outside [d]esignated areas and any picketing outside of the demarcated area is prohibited as a contravention of the rules. ”

Court orders

Due to the violence, damage to property and disregard of the picketing rules, Dis-Chem obtained a court order mandating adherence to picketing rules and prohibiting acts of intimidation. Striking employees however persisted in their actions, which included assault, damage to property, and traffic blockades. Dis-Chem had to obtain a second court order which interdicted "any further picket, gathering, assembly or protest action".

Against this backdrop, one instance of strike-related misconduct concerning the dismissal of Nupsaw members was of particular relevance. On 10 December 2018, after both orders were granted, 100 employees were en route to a union meeting on a hired bus. The bus deviated from its intended route and stopped at two Dis-Chem stores. Most of the employees disembarked and engaged in acts of vandalism and protest, while some employees remained on the bus and sang struggle songs (bus incident).



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The fallout from the strike was significant, with approximately 800 employees, including 285 Nupsaw members, being dismissed because of their involvement in strike-related misconduct. Nupsaw contested these dismissals at the Commission for Conciliation, Mediation, and Arbitration (CCMA). The union's referral was largely unsuccessful as the CCMA Commissioner found that all but two dismissals were fair.

Common purpose

Nupsaw sought to review the CCMA award on the basis, among others, that the commissioner misconstrued the doctrine of common purpose for the bus incident, as it claimed that Dis-Chem did not prove common purpose for the employees who did not disembark and participate in acts of violence and damage to property, but rather remained on the bus and sang struggle songs.

In considering the dispute before it, the Labour Court referred to the recent Constitutional Court decision in *Numsa obo Dhludhlu and others v Marley Pipe Systems (SA)(Pty) Limited* which is the prevailing authority on the doctrine of common purpose insofar as it is relied upon as grounds for dismissal.

The court in *Marley Pipe Systems* ruled that for the purposes of establishing guilt in dismissal cases, individual complicity in acts of violence must be established, requiring evidence of association and intention to engage in the unlawful conduct. Mere presence or singing during the misconduct is insufficient to demonstrate association. The law demands that necessary intention be proven for complicity, ensuring that guilt and sanctions are not unjustly imposed.

Notably, one must consider the nature of the offence to which it is alleged that other employees showed common purpose. In *Marley Pipe Systems*, the offence was the violent assault of a human resources manager during an unprotected strike. In this context, the continued singing by employees near the scene of the assault could not be linked to the assault. Furthermore, in the *Marley Pipe Systems* case, the strike was not interdicted at the time of the assault.



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No evidence of intent

The Labour Court in the present case found that the commissioner erred in finding that employees who remained on the

bus, had a common purpose with those who disembarked and committed acts of violence and vandalism. There was no evidence indicating their intention to commit such misconduct, and singing struggle songs does not establish complicity. The court found that "[s]inging struggle songs is part and parcel of the culture of resistance, and is a feature in labour disputes, political rallies and service delivery protests".

Breach of court orders

However, this finding did not render the dismissals unfair. The culmination of circumstances that led to the singing of struggle songs on the bus however still amounted to serious misconduct as it constituted the breach of two court orders (which interdicted gathering, picketing, assemblies, and protest action) and it implied allegiance to the vandalism and it therefore warranted dismissal.

This case underscores the importance of establishing clear picketing rules and promptly seeking legal recourse when faced with strike-related misconduct. This in turn, will come to an employer's aid when carrying out dismissals for strike-related misconduct in circumstances where the more onerous requirements of common purpose are not met.

ABOUT THE AUTHOR

Lizle Louw, Partner and Amy King, Knowledge Lawyer at Webber Wentzel

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