CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 233/21

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA obo AUBREY DHLUDHLU AND 147 OTHERS Applicant

and

MARLEY PIPE SYSTEMS (SA) (PTY) LIMITED Respondent

Neutral citation:	*Numsa obo Aubrey Dhludhlu and Others v Marley Pipe Systems (SA) (Pty) Ltd* [2022] ZACC 30
Coram:	Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Theron J, Tshiqi J and Unterhalter AJ
Judgment:	Madlanga J (unanimous)
Decided on:	22 August 2022

ORDER

On appeal from the Labour Appeal Court (hearing an appeal from the Labour Court) the following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The 41 employees who are the subject of this appeal are found not guilty of the assault of Mr Ferdinand Christiaan Steffens.
4. Insofar as they relate to what is set out in paragraph 3, the orders of the Labour Court and Labour Appeal Court are set aside.
5. The matter is remitted to the Labour Court to consider a sanction afresh on the charge of participation in an unprotected strike.
6. For purposes of paragraph 5, the Labour Court must be constituted differently.

JUDGMENT

MADLANGA J (Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Theron J, Tshiqi J and Unterhalter AJ):

Introduction

[1] This matter has been decided without an oral hearing.

[2] At issue in this application for leave to appeal is whether the Labour Appeal Court created new rules on proof of common purpose and, if it did, whether – in the context of the requirement that dismissals be substantively fair – these rules accord with

this requirement. The issue arises in the context of the dismissal of employees for the serious assault of a manager employed by the respondent, Marley Pipe Systems SA (Pty) Ltd. The assault took place during the course of an unprotected strike at the respondent's premises on 14 July 2017. The applicant, the National Union of Metalworkers of South Africa (NUMSA), a registered trade union, comes before us acting on behalf of only 41 of a much larger number of dismissed employees.[1]

Background

[3] In July 2017 a wage increase agreement affecting the plastics industry was reached pursuant to sectoral level bargaining under the auspices of the Plastics Negotiating Forum. The respondent's business is within the plastics industry. On 13 July 2017 the respondent communicated the increase to NUMSA shop stewards. On that same day the shop stewards, in turn, communicated the increase to the respondent's employees who are NUMSA members. Unhappy with the increase, NUMSA members who worked on the morning shift embarked on an unprotected strike on the morning of 14 July 2017. They first gathered at the canteen waiting to be addressed by Mr Ferdinand Christiaan Steffens, the respondent's head of human resources. When he did not arrive, they moved towards the respondent's administrative offices carrying placards which called for the removal of Mr Steffens. This was still in the morning.

[4] Mr Steffens came out. The striking employees surrounded and assaulted him severely. He was punched and kicked whilst he lay on the ground. Rocks were thrown at him. He sustained injuries all over his body. He was also pushed through a glass window. He managed to leave the premises and went to seek medical help only after two employees who were not part of the group on strike came to his rescue. On the same day the respondent called the police to quell the unrest. It also secured an order in the Labour Court interdicting the employees from committing acts of violence, intimidation and harassment and engaging in the unprotected strike.

[1] The citation refers to the applicant as "*NUMSA obo Aubrey Dhludhlu and 147 Others*". That is mistaken because, before the Labour Appeal Court already, the appeal was being pursued in respect of only 41 of the original 148 litigating employees. Before us nothing has changed; we are concerned with only 41 employees.

[5] After a disciplinary process that took place during July to August 2017, the respondent dismissed 148 employees. An independent chairperson found the employees guilty of two counts of misconduct. One was the assault of Mr Steffens and the other was participation in the unprotected strike. One hundred and thirty-six of the employees were convicted of assault on the basis of the doctrine of common purpose. The other 12 were found to have been involved in the actual physical assault of Mr Steffens. The respondent dismissed all 148 employees pursuant to a recommendation to that effect by the chairperson. Aggrieved by their dismissals, the employees, represented by NUMSA, referred an unfair dismissal dispute to the Metal and Engineering Industries Bargaining Council. After conciliation failed, a claim of unfair dismissal was referred to the Labour Court.

[6] At the Labour Court the employees bizarrely pleaded that no assault or unprotected strike took place.[2] Based on that, they contended that the dismissals were unfair. The respondent opposed the claim. It filed a counterclaim in which it sought just and equitable compensation, as contemplated in section 68(1)(b) of the Labour Relations Act[3] (LRA) for losses incurred as a result of the unprotected strike. In the alternative, the respondent sought damages.

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[2] I say bizarrely because the employees had, indeed, embarked on an unprotected strike and plainly the assault had taken place.

[3] 66 of 1995. Section 68(1)(b) provides—

> "(1) In the case of any *strike* or *lock-out*, or any conduct in contemplation or in furtherance of a *strike* or *lock-out*, that does not comply with the provisions of this Chapter, the Labour Court has exclusive jurisdiction—
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> . . .
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> (b) to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, or conduct, having regard to—
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> whether—
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> (aa) attempts were made to comply with the provisions of this Chapter and the extent of those attempts;
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> (bb) the strike or lock-out or conduct was premeditated;
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> (cc) the strike or lock-out, or conduct was in response to unjustified conduct by another party to the dispute; and

[7] Satisfied that the employees were guilty of misconduct, the Labour Court upheld the dismissals and awarded damages. Twelve employees were positively identified as having been involved in the actual physical assault of Mr Steffens. Many more employees were placed on the scene by recourse to the following evidence. It was established from the clock cards used for purposes of the respondent's payroll system that – with the exception of Mr Mokoena (to whom I revert later) – all the employees had arrived at work for the morning shift. Job cards used at workstations also helped identify employees who were in the morning shift. Reliance was also placed on photographic and video material that depicted the events on the day. According to oral testimony, a large group of employees first gathered in the canteen and moved – still as a group – towards the offices. Also, the employees were not at their workstations. This appears to have been taken to mean that all of them must have been part of the group that first converged at the canteen and then proceeded to the scene of the assault. In addition, the employees were each given an opportunity to indicate to the respondent through Dropbox (a file sharing application) or WhatsApp Messenger that they had not participated in the acts of misconduct. A handful of employees did and they were not charged.

[8] What was also taken into account was the evidence of Mr Klaas Ledwaba, an employee. He was the only witness who testified on behalf of all the employees. He testified that all the employees regarded themselves as leaders in respect of the events of the day in question. He denied that Mr Steffens was assaulted, which was plainly untruthful. He said the employees gathered in the vicinity of the offices and that they saw Mr Steffens leave the premises of the respondent. He also denied that the

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(dd) there was compliance with an order granted in terms of paragraph (a);

(i) the interests of orderly collective bargaining;

(ii) the duration of the strike or lock-out or conduct; and

(iii) the financial position of the employer, trade union or employees respectively."

employees participated in an unprotected strike, on which he backed down under cross-examination.

[9] As I have said, only 12 of the 148 employees were identified to have engaged in the actual physical assault of Mr Steffens. Another 95 employees were placed on the scene by the one or other form of evidence referred to above. That leaves 41 employees. Of these, 40 were never identified as having been at the scene of the assault. One, Mr Mokoena, whom I mentioned earlier, was not on the morning shift. He was a NUMSA shop steward and came to the workplace after the assault had taken place. On the count of assault, the confirmation of the finding of guilt was based on common purpose.

[10] NUMSA appealed to the Labour Appeal Court. Notably, the appeal was in respect of only Mr Mokoena and the 40 employees who were not identified by means of the evidence discussed above. NUMSA's stance was that the dismissals were substantively unfair. The appeal was unsuccessful. The Labour Appeal Court first sought to place the appellant employees at the scene by saying:

> "There was no evidence that it was only 107 of the [employees], 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."[4]

[11] The Labour Appeal Court then held that common purpose had been established because—

> "[t]here was no evidence that any of the 148 . . . employees distanced him- or herself from the actions of the group and the clear evidence was that the assault on Mr Steffens

[4] *NUMSA obo Dhludhlu Marley Pipe Systems SA (Pty) Ltd* [2021] ZALAC 13; (2021) 42 ILJ 1924 (LAC); [2021] 9 BLLR 894 (LAC) (Labour Appeal Court judgment) at para 21.

> 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."[5]

[12] It added:

> "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 the group. It also included the employees who, in [the opinion of Ms Crowie, were] . . . 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."[6]

[13] Before us NUMSA persists in its stance that the dismissals were substantively unfair. In particular, it takes issue with the approach adopted by the Labour Appeal Court in its consideration of the doctrine of common purpose. The finding of misconduct for participation in an unprotected strike is not before us.

Jurisdiction and leave to appeal

[14] At first blush one may be led to think that this case involves nothing more than the possible misapplication of otherwise well-established legal principles of the doctrine

[5] Id.

[6] Id at para 24.

of common purpose, which would ordinarily not engage this Court's jurisdiction.[7] As I will demonstrate presently, that is not the case. Whilst purporting to apply extant principles of the doctrine of common purpose, the Labour Appeal Court, in fact, created new principles. It insists that in order not to be adjudged guilty under the doctrine of common purpose, a bystander must take positive steps to distance themselves from the act of the actual perpetrator. And it holds that employees whom Ms Crowie, the respondent's witness, described as bystanders ought to have so distanced themselves. It also requires of a bystander to intervene and protect another from physical harm. These implicate the substantive fairness of the dismissal, thus raising constitutional issues under section 23 of the Constitution.[8]

[15] In any event, this Court's jurisdiction is engaged on the simple basis that NUMSA challenges the fairness of the dismissal. In and of itself, that implicates a constitutional issue.

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[7] *Booysen v Minister of Safety and Security* [2018] ZACC 18; 2018 (6) SA 1 (CC); 2018 (9) BCLR 1029 (CC) at para 50 and *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 (8) BCLR 919 (CC) at para 38.

[8] Section 23 reads:

> "(1) Everyone has the right to fair labour practices.
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> (2) Every worker has the right—
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> (a) to form and join a trade union;
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> (b) to participate in the activities and programmes of a trade union; and
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> (c) to strike.
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> (3) Every employer has the right—
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> (a) to form and join an employers' organisation; and
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> (b) to participate in the activities and programmes of an employers' organisation.
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> (4) Every trade union and every employers' organisation has the right—
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> (a) to determine its own administration, programmes and activities;
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> (b) to organise; and
>
> (c) to form and join a federation.
>
> (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).
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> (6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

[16] As will soon become apparent, there are reasonable prospects of us holding that the Labour Appeal Court's approach was wrong. Also, the new principles created by the Labour Appeal Court will affect large numbers of employees where strikes – protected or unprotected – turn violent. These issues are thus of some import. Thus, it is in the interests of justice that leave to appeal be granted.

Proof of common purpose

[17] First, the law. Let me start with *Mgedezi* where Botha JA held:

> "In the absence of proof of a prior agreement, accused No 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of [common purpose], only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea* [criminal intent]; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue."[9]

[18] This is a correct rendition of the law in a situation where the person sought to be held liable was present at the scene. We know from *Dunlop*[10] that, to attract liability or a holding of complicity, presence at the scene is not a requirement. Although what was held in *Dunlop* was in the context of the concept of derivative misconduct, it is of relevance here. Here is what Froneman J held:

[9] *S v Mgedezi* [1988] ZASCA 135; 1989 (1) SA 687 (A) at 705I-706B.

[10] *National Union of Metalworkers of South Africa obo Khanyile Nganezi v Dunlop Mixing and Technical Services (Pty) Limited* [2019] ZACC 25; 2019 (5) SA 354 (CC); 2019 (8) BCLR 966 (CC) at para 46.

> "Inferential reasoning in establishing actual participation or association in the primary misconduct was sufficient in *FAWU*, *Chauke* and *RSA Geological Services (Review)*. The difficulty seems to be with the emphasis placed on the necessity of direct presence at the scene of the misconduct, as is also evidenced by the arbitrator's and Labour Courts' approach here. 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."[11]

[19] Let me get something out of the way. *Dunlop* quotes with approval a remark by Grogan in an arbitral award to the effect that "a refusal to disclose information relating to an offence can in certain circumstances make a person an accessory".[12] *Dunlop* adds that this would be an accessory after the fact.[13] The charge that the 41 employees were facing was not one of being accessories after the fact for refusing to disclose information. Yes, their witness lied in testimony when he denied that Mr Steffens was assaulted, but that bears no relevance to the charges they were facing.

[20] Sadly, acts of violence and intimidation by large groups of employees at the workplace during strikes – protected or unprotected – are not a rare occurrence. And I am quite mindful of the fact that an employer seeking to prove individual employee complicity in such acts for purposes of disciplinary proceedings faces formidable evidentiary difficulties.[14] Some of the employees may successfully be caught within the net, but many who are most likely complicit may escape.

[21] Much as I understand this difficulty, there is a countervailing factor. Sympathy for employers must not result in innocent employees being sacrificed. It is not beyond

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[11] Id.

[12] *Dunlop* above n 10 at para 46. See also *National Union of Mineworkers v RSA Geological Services (A Division of De Beers Consolidated Mines Ltd)* (2004) 25 ILJ 410 (ARB) (*RSA Geological Services (Arbitration)*) at para 29.

[13] *Dunlop* Id.

[14] Maqutu "Collective Misconduct in the Workplace: Is 'Team Misconduct' 'Collective Guilt' in Disguise?" (2014) 25 *Stell LR* 566 at 568.

the realm of possibility for employees to be mere spectators when other employees are committing acts of violence. It would be a travesty to charge, find guilty of acts of violence and dismiss an employee who – although part of a group of striking workers – never took part in or associated with such acts. Take the evidence of Ms Crowie in this very case. She said some of the employees were "*bystanders*". A bystander is just that: "a person who is present at an event but does not take part".[15]

[22] I am not placing any undue weight on what Ms Crowie said. I am aware that saying people are bystanders has loaded in it facts and a conclusion. On what facts is a conclusion being drawn that an employee is a bystander? I cannot readily tell what was fact or conclusion in what Ms Crowie said. But none of this detracts from the possibility that there may be employees who are "spectators" or "bystanders" whilst other employees are committing acts of violence. For liability to attach, there must be proof of an employee's complicity in the acts of violence, including proof on the basis of the doctrine of common purpose. Of course, in the context of labour disputes, this is proof on a balance of probabilities. But there must be proof.

[23] Also, it is not as though employers cannot ameliorate the evidentiary difficulties. Quoting *Mondi Paper*[16] and *Durban University of Technology*,[17] here is what *Oak Valley Estates* says in this regard:

> "As the High Court noted in *Mondi Paper*, 'the production of proper proof either directly or by circumstantial evidence is not beyond the ingenuities of employers, given the modern technology that is available' to them. Likewise, in *Durban University of Technology*, the High Court remarked that—
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> > 'with the modern methods of access control, CCTV cameras, etc, there is ample opportunity for the applicant's security services to be able to

[15] *Compact Oxford English Dictionary*.

[16] *Mondi Paper (A Division of Mondi Ltd) v Paper Printing Wood and Allied Workers Union* (1997) 18 ILJ 84 (D) at 93B-C.

[17] *Durban University of Technology v Zulu* 2016 JDR 1284 (KZP) at para 27.

> identify those persons who were on the campus when the violence occurred, and steps could be taken to identify them.'"[18]

I say "ameliorate" advisedly because these do not necessarily guarantee a 100% success rate. But they definitely are a valuable tool. And what must also be factored is what sits on the other side of the spectrum; the real prospect of finding guilty and sanctioning – including the possibility of dismissing – innocent employees.

[24] I accept the Labour Appeal Court's finding, and for the reasons it gives, that the probability is that the 40 employees were at the scene when Mr Steffens was assaulted. That said, it is a fact that they were never identified. Not having been identified, they were never seen doing anything. Implicit in what the Labour Appeal Court holds is that – to escape liability for the assault – these employees should have "intervened to stop the assault" and should have "dissociated themselves in [some] way from the assault before, during or after it".[19] The Labour Appeal Court does not explain where these obligations come from. At a moral level, one may have to intervene and save a fellow human being from physical harm. But I am not aware that there is a general *legal* obligation to do so. And I do not understand the basis of imposing an obligation to dissociate oneself from acts of violence that one has not been shown to have participated in. Does this obligation require of one to depart from the scene? Does it mean there can be no bystanders or spectators? If so, what is the basis for that? There is no basis whatsoever for the imposition of such an obligation. As I will show, this is not in conflict with *Oak Valley Estates*.

[25] Mere presence and watching does not satisfy the requirements set by *Dunlop* and *Mgedezi*. There must be "[e]vidence, direct or circumstantial, that individual employees in some form associated themselves with the violence before it commenced, or even

[18] *Commercial Stevedoring Agricultural and Allied Workers Union v Oak Valley Estates (Pty) Ltd* [2022] ZACC 7; (2022) 43 ILJ 1241 (CC); [2022] 6 BCLR 487 (CC) at para 45.

[19] Labour Appeal Court judgment above n 4.

after it ended".[20] The person concerned "must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others".[21] So, employees cannot be required to dissociate when they never associated. An intention in relation to the violence is required.[22] The high watermark of the case against the 40 employees is that: they were part of the group that waited for Mr Steffens in the canteen and, when he did not come, proceeded to the offices; they marched and chanted songs within the premises; and the group carried three placards which read "[a]way with Ferdi we want 15%", "7.5% se moer" (which, if I am to avoid an accurate equivalent of the colourful Afrikaans rendition, means the 7.5% must go to hell) and "[w]e want 15% across the board".

[26] There was no evidence that – as a group – the striking employees planned to assault Mr Steffens. For all we know, the assault may well have been spontaneous. Merely being there cannot constitute association. In *Tshabalala* Mathopo AJ says that where there is no agreement to commit the unlawful act in issue, "liability arises from an *active association* . . . with the requisite blameworthy state of mind".[23] If merely being there does not suffice, on what basis can the employees be found to have been complicit? The only other evidence is that the employees were singing as the assault took place. I am not convinced that this is enough to demonstrate an act of association. After all, according to the evidence of Mr Viro Chinner, one of the respondent's witnesses, the employees were already marching, dancing and singing within the premises upon coming out of the canteen. So, it is not as though they sang and danced as a sign of approval of the assault. Yes, it was morally reprehensible that the singing and dancing continued as the assault was taking place. But it was by no means an indication by all employees that they were associating themselves with the assault. The singing and dancing just did not screech to a halt when the assault on Mr Steffens began.

[20] *Dunlop* above n 10 at para 46.

[21] *Mgedezi* above n 9 at 706A.

[22] *Dunlop* above n 20.

[23] *Tshabalala v S; Ntuli v S* [2019] ZACC 48; 2020 (5) SA 1 (CC); 2020 (3) BCLR 307 (CC) at para 48 (emphasis added).

[27] Does this discussion not breach the rule on how this Court must deal with factual findings made by the court below? I think not. Before indicating why not, let me borrow from Jafta J in *Makate* what this rule says:

> "[T]his being the highest Court in the Republic which is charged with upholding the Constitution, and deciding points of law of general public importance, this Court must not be saddled with the responsibility of resolving factual disputes where disputes of that kind have been determined by lower courts. Deciding factual disputes is ordinarily not the role of apex courts. Ordinarily an apex court declares the law that must be followed and applied by the other courts. Factual disputes must be determined by the lower courts and when cases come to this Court on appeal, they are adjudicated on the facts as found by the lower courts."[24]

[28] As *Makate* further tells us, this is not absolute:

> "But even in the appeal, the deference afforded to a trial court's credibility findings must not be overstated. If it emerges from the record that the trial court misdirected itself on the facts or that it came to a wrong conclusion, the appellate court is duty-bound to overrule factual findings of the trial court so as to do justice to the case. In *Bernert* this Court affirmed:
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> > 'What must be stressed here, is the point that has been repeatedly made. The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is a recognition of the advantages that the trial court enjoys which the appellate court does not. These advantages flow from observing and hearing witnesses as opposed to reading "the cold printed word". The main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to "tie the hands of appellate courts". It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts and come to its own

[24] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 39.

> conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it.'"[25]

[29] I have not gone against a single fact – not conclusion – that the Labour Appeal Court found to have been established. To recapitulate, the 40 employees who were on duty were not at their workstations. They were part of a group of employees that went to the canteen to be addressed by Mr Steffens. They were part of a group that left the canteen and went towards the offices after Mr Steffens had not arrived at the canteen. As they went towards the offices, the employees were marching, dancing and singing and carrying three placards. On arrival next to the offices, Mr Steffens came out and was severely assaulted, but only 12 of the employees were positively identified to have taken part in the assault. The singing and dancing were continuing whilst Mr Steffens was being assaulted. None of the striking employees came to Mr Steffens' rescue. The 40 employees were still part of the group when the assault was committed.

[30] If I accept all of this evidence, with what then do I take issue? I take issue with two *conclusions*. The first is that the 40 employees did not dissociate from the assault. The second is that they were rejoicing. As I said, from the proven facts, there is no evidence that they ever associated with the assault. Regarding rejoicing, the marching, singing and dancing were already taking place when the group left the canteen. The Labour Appeal Court's conclusions are thus insupportable. I think my refusal to be bound by them falls squarely within the exception highlighted in *Makate*.

[31] On the available facts, the above reasoning applies with more force to Mr Mokoena who was not even at the respondent's premises when the assault took place. I emphasise "on the available facts" to avert any possible misunderstanding that I am departing from the holding in *Dunlop* that, for purposes of complicity, presence at the time of commission of acts of violence is not a requirement. All that is said about Mr Mokoena is that upon arrival, he joined the group that was participating in the

[25] Id at para 40.

unprotected strike. The Labour Appeal Court's judgment says nothing concrete about how exactly he associated himself with the assault.

[32] The respondent supports its argument on proof of common purpose by relying on this Court's recent judgment in *Oak Valley Estates*. There Theron J had this to say:

> "Two important principles can be distilled from this Court's jurisprudence . . . . First, mere participation in a strike, protest, or assembly, in which there is unlawful conduct, is insufficient to link the impugned respondent to the unlawful conduct in the manner required for interdictory relief to be granted. Second, the necessary link can however be established where the protesters or strikers commit the impugned unlawful conduct as a cohesive group. Whether this is established will, of course, turn on the particular facts of the case. Where, for instance, unlawful conduct during protest action is ongoing, widespread, and manifest, individual protesters or strikers will usually have to disassociate themselves from the conduct, to escape the inference that it is reasonably apprehended that they will cause injury to the applicant."[26]

[33] The respondent specifically relies on the second principle. *Oak Valley Estates* is distinguishable. It concerns interdicts, not termination of employment on the basis of common purpose. The issue in that case was whether an employer faced with unlawful conduct committed during a protected strike can obtain an interdict against employees participating in that strike *without linking each employee to the unlawful conduct*. As the second principle quoted from the case shows, in certain circumstances a "link" may consist in merely being within a cohesive group committing acts of violence at the workplace without the individual concerned being actually linked to the violence. Failure by an individual employee to, so to speak, walk away from the guilty cohesive group may result in an employer being entitled to obtain an interdict against that employee without her or him specifically being linked to the acts. Also, an interdict is distinguishable because – although it may concern conduct that is already taking place – it is often concerned with future conduct. It may not be necessary to obtain an interdict against an employee who has readily undertaken not to participate in any future

[26] *Oak Valley Estates* above n 18 at para 42.

unlawful action. Where there is no such undertaking, an interdict is usually warranted. Past conduct founding disciplinary action is on a different footing.

[34] On the other hand, it would definitely be a non-starter to suggest that an employee could be dismissed on the basis that – through common purpose – she or he was "involved" in acts of violence without linking that employee to those acts. A verdict of guilt cannot appropriately be returned for merely being where the acts of violence took place. An employee could simply have been there as a spectator or the acts could have happened so spontaneously or suddenly that the employee could not avoid being there. As was held in *Polyoak*, "[o]ur law knows no concept of collective guilt".[27] Maqutu aptly puts it thus:

> "Employers find it particularly difficult to prove the participation of each individual in the impugned conduct where misconduct is alleged to be collective. Nonetheless, 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."[28]

[35] Of course, the answer cannot be that the employee must save her- or himself from the prospect of a verdict of guilt by giving an explanation as to the true facts. Failure to give an explanation does not equal complicity. Workplace dynamics are not as simple as all that. Just one example: an innocent employee who was in the group that committed the acts of violence may choose silence for fear of ostracism and – worse still – animosity. I can well imagine that such fear may exist even if the explanation were not to tell it all about the actual culprits. And to those who are not sanctimonious armchair observers, this is no small matter.

[36] Sympathetic though I am to the difficulties facing employers, individual complicity in the commission of acts of violence must be established. That is what the principles on common purpose have always required. If it were to be otherwise, the law

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[27] *Polyoak (Pty) Ltd v Chemical Workers Industrial Union* 1999 20 ILJ 392 (LC) at 393C.

[28] Maqutu above n 14 at 568. This was quoted with approval in *Dunlop* above n 10 at para 48.

would be a cruel instrument that attaches guilt and imposes sanction on the innocent. Association in complicity for purposes of common purpose must include having "the necessary intention" in relation to the complicity.[29]

[37] In sum, the principles applicable to common purpose have not been satisfied. Thus, there was simply no basis for holding the 41 employees guilty of assaulting Mr Steffens. The dismissals on the basis of this finding of guilt were substantively unfair.

Remedy

[38] A complicating factor is that the employees were convicted of assault and participating in an unprotected strike. Despite the fact that the latter conviction stands, that does not necessarily mean that dismissal is the sanction that would have been imposed for it. The reality is that the unprotected strike entailed violence. It is not inconceivable that this fact had an influence on sanction. It seems to me that an appropriate order is remittal to the Labour Court for a consideration of what ought to be done with regard to sanction now that the aggravating fact of a severe assault is out of the way.

Costs

[39] This being a labour matter, costs will not be awarded.[30]

Order

[40] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.

[29] See *Dunlop* above n 10 at para 46.
[30] See *Zungu v Premier of the Province of KwaZulu-Natal* [2018] ZACC 1; (2018) 39 ILJ 523 (CC); 2018 (6) BCLR 686 (CC).

3. The 41 employees who are the subject of this appeal are found not guilty of the assault of Mr Ferdinand Christiaan Steffens.
4. Insofar as they relate to what is set out in paragraph 3, the orders of the Labour Court and Labour Appeal Court are set aside.
5. The matter is remitted to the Labour Court to consider a sanction afresh on the charge of participation in an unprotected strike.
6. For purposes of paragraph 5, the Labour Court must be constituted differently.

For the Applicant:	S Mabaso and N Masondo instructed by S Mabaso Incorporated
For the Respondent:	F A Boda SC instructed by Cliffe Dekker Hofmeyr Incorporated