

Case Study

Everybody's fired!

South Africa is well into strike season. The corporate and government environments are tense and emotions are running high. A number of trade unions and their members have taken to the streets to secure their interests. Unfortunately, during this time, emerge many cases of violence, damage to property and other acts of misconduct and criminality.



The perpetrators of these acts typically hide themselves in the crowds. Frustrated by the difficulty in identifying these perpetrators and the group's failure to expose them, the employer is tempted to simply "get rid of the whole lot of them". Are employers entitled to do this?

This scenario played out in ***National Transport Movement (NTM) v Passenger Rail Agency of South Africa (PRASA) (JA43/16) [2017] ZALAC 71.***

Following the commencement of strike action by employees of PRASA, several PRASA trains were burnt. PRASA, suspecting that the arson was linked to the strike and being unable to identify the culprits, held all striking employees "*jointly and severally responsible for the torching of the trains*" and invited some of them to make representations on why they should not be dismissed.

In a collective response, NTM's members denied their involvement. Dissatisfied with the response, PRASA dismissed the employees concerned. The dismissals were endorsed as substantively and procedurally fair by the Labour Court (LC), which found that the employees were liable for *derivative misconduct*.

The Labour Appeal Court (LAC) held that the principle of *derivative misconduct* may be relied upon by employers where there is no direct evidence that an employee committed the primary misconduct. In such case, the employee is liable for a completely different misconduct, i.e. the employee's failure to offer reasonable assistance or disclose information about the culprits responsible for the primary misconduct. Importantly, the employee needs not be associated with the primary misconduct.

An employer who relies on derivative misconduct must prove that:

- (i) the employee knew or must have known about the primary misconduct. It is not enough to say he possibly knew. The employer is required to call upon the employee to provide the information and his failure to cooperate cannot, without any other evidence, necessarily mean that he knew; and
- (ii) the employee elected, without justification, not to disclose his knowledge

The LAC found that PRASA failed to prove the elements of *derivative misconduct*. In this regard, the court said that even if the burnings were strike-related, it did not follow that all the striking employees had knowledge of this. The call for written representations to avoid joint liability was not a call for the employees to disclose evidence about the perpetrators and the text of the dismissal letter shows that PRASA, in reality, held the employees liable for the “collective misconduct”, which is unacceptable in our law. The dismissals were therefore found to be unfair and all the employees were reinstated with back-pay and costs.

The principle of *derivative misconduct* is applicable to any kind of misconduct. If carefully and properly applied, it can save employers a lot of headaches of trying to identify anonymous troublemakers. If relied on for ulterior motives or undue expediency however, it is likely to cause employers very expensive headaches.

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