



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR 912/20

In the matter between:

**NATIONAL UNION OF FOOD BEVERAGE SPIRITS
WINE AND ALLIED WORKERS (NUFBWSAW) Applicant**

SIMON RIKHOTSO AND OTHERS Second and Further Applicants

and

**COMMISSIONER PATRICK
MBATSANA N.O. First Respondent**

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION (CCMA) Second Respondent**

**UNIVERSAL PRODUCT NETWORK
(PTY) LTD Third Respondent**

Decided: In Chambers

Delivered: 27 February 2025

(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and

released to SAFLI. The date on which the judgment is delivered is deemed to be 27 February 2025.)

**JUDGMENT:
APPLICATION FOR LEAVE TO APPEAL**

VENTER, AJ

Introduction

[1] This is an application for leave to appeal against the whole of the judgment and order issued by this Court on 25 September 2024, where the applicants' review application was granted and the award was substituted with an order that the dismissal of the second to further applicants was substantively unfair.

[2] The application for leave to appeal is unopposed.¹

The Test in Applications for Leave to Appeal

[3] In terms of section 17 of the Superior Courts Act 10 of 2013:

‘17. Leave to appeal

Leave to appeal may only be given where the judge or judges concerned think that —

(a)(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.’

[Own emphasis]

¹ The applicants filed a notice to abide on 4 November 2024.

[4] In *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen*² the Land Claims Court held that the wording of this subsection *raised the bar of the test that now has to be applied* to the merits of the proposed appeal before leave should be granted.

[5] In *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others*³, the Court stated that the Superior Courts Act has raised the bar for the granting of leave to appeal. The Court quoted Bertelsman, J in *The Mont Chevaux Trust (IT12012/18) v Tina Goosen and 18 Others* when he held as follows:

‘It is clear that the threshold for granting leave to appeal against the judgement of the High Court has been raised in the new act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden v Cronwright and others* 1985 (2) SA 342 (T) at 343H. The use of the word “would” in the new statute indicates a measure of certainty that another court will differ from the court whose judgement is sought to be appealed against.’

[6] It is now a settled principle in our law that in order to be entitled to leave to appeal, an applicant must convince the Court that it has reasonable prospects of success on appeal. Further, there has to exist, a likelihood that another court, presented with the same facts, *would* come to a different conclusion.

[7] This aligns with the legislator's "*bold step*" to "*limit unnecessarily protracted litigation*". As confirmed in *Capendale and Another v Municipality of Saldanha Bay and Others, Capendale v 12 Main St, Langebaan (Pty) Ltd and Others*⁴:

‘Considering these provisions of the Act in their general context, it seems to me that it is no longer “*business as usual*” (to adopt a phrase employed by the

² Unreported, LCC case no LCC14R/2014 dated 3 November 2014, cited with approval by the full court in *Acting National Director of Public Prosecutions and Others v Democratic Alliance In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* [2016] ZAGPPHC at para 25 and also cited with approval in *South African Breweries (Pty) Ltd v Commissioner of the South African Revenue Service and Another* [2022] ZAGPPHC 695 at para 5.

³ On the distinction between *ratio decidendi* and *obiter dicta*, see *Pretoria City Council v Levinson* 1949 (3) SA 305 (A) at 316–17; *Santam Versekeringsmaatskappy Bpk v Roux* 1978 (2) SA 856 (A) at 871H–872B; *True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 (4) SA 153 (SCA) at 168A–F and 186C–188D; *Hardenberg and Another v Nedbank Ltd* 2015 (3) SA 470 (WCC) at 477A–I; *BSB International Link CC v Readam South Africa (Pty) Ltd* 2016 (4) SA 83 (SCA) at 97B–98B.

⁴ [2013] ZAWCHC 166 at para 16.

Supreme Court of Appeal in a completely different context) when it comes to the intended prosecution of an appeal. A matter must meet the strict criteria laid down by the Legislature before it will be referred to the Supreme Court of Appeal, one of the most important considerations undoubtedly being the practice of pursuing an appeal for essentially dilatory purposes. The Act is a bold step by the Legislature to limit unnecessarily protracted litigation, a state of affairs which would tend to bring the administration of justice into disrepute in the eyes of the general public.⁵

[8] Leave to appeal may "*only*" be granted if the applicants can demonstrate that an appeal "*would*" have a reasonable prospect of success – a more searching standard than before⁶ - or that there is some other compelling reason for an appeal.⁷

[9] The first leg calls for a "*measure of certainty*" that the Labour Appeal Court (the LAC) would reach a different outcome.⁸

Conclusion

[10] I feel it appropriate to quote the LAC in *South African Commercial Catering and Allied Workers Union and Others v Makgopela and Others*⁹:

This case illustrates the caution to be adopted where reliance is placed on collective misconduct as a basis for dismissal. This is so given that workplace discipline must at all times be fair and just. As much is required by the Labour Relations Act in giving meaning to the constitutional right to fair labour practices. Our law does not allow a determination of guilt simply by association. Where team misconduct is relied upon there must exist either a

⁵ Emphasis Added.

⁶ DE van Loggerenberg et al Erasmus: Superior Court Practice (RS 12, 2020) at A2 – 55.

⁷ Section 17(1)(a) of the Superior Courts Act.

⁸ *Acting National Director of Public Prosecutions v Democratic Alliance in re: Democratic Alliance Acting National Director of Public Prosecutions* [2016] ZAGPPHC 489 (24 June 2016) at para 25, cited with approval in *Fair-Trade Independent Tobacco Association v President of the Republic of South Africa* 2020 JDR 1435 (GP). See also *Feni v The Pan South African Language Board* 2018 JDR 0341 (GP) at para 5 ("*[section] 17(1) has raised the bar and ... there must now be a measure of certainty that another court would come to a different conclusion*"); *Okuli Security Services CC v The City of Cape Town* 2016 JDR 1661 (WCC) ("*the respective enactments of section 17 and section 18 of the Act have had the effect of raising the bar for granting leave to appeal*").

⁹ [2023] 6 BLLR 509 (LAC); at para 29.

factual basis or sufficient grounds for inferring that all employees were indivisibly culpable as members of the team for failing to ensure compliance with the employer's rule. A reliance on generalised facts, arising from a scant investigation into the alleged misconduct, does not provide a sufficient basis on which to infer that collective responsibility exists.'

[11] I will not repeat the grounds on which the third respondent seeks leave to appeal.

[12] I have considered the grounds of appeal and the written submissions; however, I am not convinced that another court would come to a different conclusion on the set of facts that was before me.

[13] I hold this view as my decision on the merits of the matter was based on trite principles that have been confirmed and/or laid down by the Constitutional Court, these principles are trite and do not need to be revisited by the LAC.

[14] My starting point was *Sidumo v Rustenburg Platinum Mines (Pty) Ltd*¹⁰ (*Sidumo*) where the Constitutional Court held that:

'But recognising that the employer has such discretion does not mean that in determining whether the sanction imposed by the employer is fair, the commissioner must defer to the employer. Nor does it mean that the commissioner must start with bias in favour of the employer. What this means is that the commissioner, as the CCMA submitted, does not start with a blank page and determine afresh what the appropriate sanction is. The commissioner's starting point is the employer's decision to dismiss. The commissioner's task is not to ask what the appropriate sanction is but whether the employer's decision to dismiss is fair.' [Own emphasis]

[15] On the basis of *Sidumo* the chairpersons' decisions to dismiss was central to the fairness of the dismissal.

¹⁰ 2008 2BCLR 158 (CC); (2007) 28 ILJ 2405.

[16] The fairness of the dismissals is to be evaluated against the principles laid down by the Constitutional Court in *National Union of Metalworkers of SA on behalf of Dhludlu and others v Marley Pipe Systems (SA) (Pty) Ltd*¹¹ that:

‘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. Some of the employees may successfully be caught within the net, but many who are most likely complicit may escape.

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 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”.

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.

Also, it is not as though employers cannot ameliorate the evidentiary difficulties. Quoting Mondi Paper¹⁶ and Durban University of Technology,¹⁷ here is what Oak Valley Estates says in this regard:

¹¹ (2022) 43 ILJ 2269 CC; 2022 (12) BCLR 1474 (CC) at paras 20-25.

“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—

‘with the modern methods of access control, CCTV cameras, etc, there is ample opportunity for the applicant’s security services to be able to identify those persons who were on the campus when the violence occurred, and steps could be taken to identify them.’”

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”.

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”. 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*.

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 after it ended”. 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". So, employees cannot be required to dissociate when they never associated. An intention in relation to the violence is required.¹²

[17] The Constitutional Court in distinguishing the requirements for an interdict in a strike scenario from that of the dismissal of employees for acts of misconduct during a strike stated as follows:

'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". 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."

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.

¹² Emphasis added.

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 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.’¹³

[18] In addition to the *Marley Pipes judgment* there is the judgment of *National Union of Metalworkers of South Africa obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd and others (Casual Workers Advice Office as amicus curiae)*¹⁴ where the Constitutional Court confronted with the principle of derivative misconduct said as follows (I quote from the judgment for purposes of emphasis):

‘Misconduct, incapacity and operational requirements are the gateways to fair dismissal under the LRA. For an employer, each has its own difficulties of proof and process. Dismissal for operational reasons involves complex procedural processes, requiring consultation, objective selection criteria and payment of severance benefits. Dismissal for incapacity requires proof that performance standards deal with the alleged incapacity and that alternative ways, short of dismissal, were unsuccessfully pursued before dismissal can take place. Dismissal for misconduct in circumstances where the primary misconduct is committed by one or more of a group of employees and the exact perpetrators cannot be identified, is complicated by the accepted principle that the misconduct must be proved against each individual employee. It is this kind of evidential difficulty that sowed the seed for the concept of derivative misconduct.

The evidence showed that there were more than 150 employees involved in the strike and that on the first day about 100 were present when violence occurred. That was the high-water mark in the numbers of those present at violent occurrences. At least three possible inferences could be drawn in relation to presence at any one of the incidents of violence:

- (a) none of the applicants were present;

¹³ Ibid at paras 34 and 36. Emphasis added.

¹⁴ [2019] 9 BLLR 868 (CC); (2019) 40 ILJ 1957 (CC).

- (b) all of the applicants were present; or
- (c) some of the applicants were present.

The more probable inference of these is the third, namely that some of them were present. But that is not good enough. One still does not know who they were. To dismiss all in the absence of individual identification would not be justified.

So the inferential reasoning fails at the first step. And even if it passed the first step, drawing the other necessary inferences would simply become progressively more difficult. Dunlop's case also fails on these facts.¹⁵

[19] UPN had all the tools available to it to "ameliorate" the evidentiary burden but chose, for reasons only known to it, not to use the video footage at the disciplinary hearings.

[20] Instead, UPN seeks a conclusion that it was not necessary, at the disciplinary hearings, to identify the individual employees committing the misconduct they were dismissed for as it gets the opportunity to do so at the *de novo* arbitration, a second bite at the proverbial cherry. This goes against all the trite principles of a fair dismissal. On these facts alone I am not persuaded that the LAC would come to a different decision.

[21] Not one of these Constitutional Court judgments is authority for the approach advanced by UPN that the identification of the individuals committing the misconduct does not have to take place when the decision to dismiss is made but can only occur when the arbitrator is determining the fairness of the dismissal.

[22] These judgments, as I have emphasised, is authority to the contrary and that is that a dismissal without such identification at the time the decision to dismiss is made will be unfair. UPN would like the court to find that it is not necessary at the disciplinary hearing to produce evidence as long as the employer produces sufficient evidence at the arbitration. This is a bizarre argument, and I am not convinced that another court will come to a different conclusion on the facts. This approach belies the entire purpose of a disciplinary hearing.

¹⁵ Emphasis added. The Constitutional Court was dealing with the principle of derivative misconduct but the principle that identification is required was emphasised and repeated.

[23] While the arbitration is a hearing *de novo* (afresh), the commissioner does not decide the matter afresh. It is trite that the commissioner is obliged to consider the facts and circumstances and decide whether the employer's decision to dismiss was fair. UPN's decision to dismiss is contained in the outcomes issued by the chairpersons in terms of which individuals were dismissed without any identification and in *absentia*. These findings of the chairpersons are the starting point, not a proverbial blank canvas that can be manipulated to depict the desire of the artist. The proverbial slate is not wiped clean as UPN contends. These are trite principles, and I am not persuaded that another court will come to a different conclusion.

[24] Lastly, the twin principles of common law being the rules of natural justice of *audi alteram partem* and *nemo judex in causa sua* are not new concepts. The concepts are entrenched principles rooted in procedural and substantive fairness.

[25] This has been confirmed by the Constitutional Court in *Chirwa v Transnet Ltd and others*¹⁶ where the Constitutional Court confirmed that the LRA is premised on the principle of natural justice:

'The LRA includes the principles of natural justice. The dual fairness requirement is one example; a dismissal needs to be substantively and procedurally fair. By doing so, the LRA guarantees that an employee will be protected by the rules of natural justice and that the procedural fairness requirements will satisfy the audi alteram partem principle and the rule against bias. If the process does not, the employee will be able to challenge her or his dismissal and will be able to do so under the provisions and structures of the LRA. Similarly, an employee is protected from arbitrary and irrational decisions through substantive fairness requirements and a right not to be subjected to unfair labour practices.'¹⁷

[26] The LAC in *Department of Education v John Kearns N.O & others*¹⁸ said as follows on the importance of the *audi alteram partem* rule:

¹⁶ (2008) 29 ILJ 73 (CC). Emphasis added.

¹⁷ At para 42.

¹⁸ [2019] ZALAC 79.

‘It is well established in our law that everyone is entitled to be heard before an adverse decision is taken against him or her – this is called the *audi alteram partem* rule. In *Psychological Society of South Africa v Qwelane and Others* the Constitutional Court highlighted the considerations of legal policy that underpin this rule as follows:

‘It is trite that at common law and in terms of the tenets of natural justice, hearing the other party – audi alteram partem – is an indispensable condition of fair proceedings.

...

The principle is underpinned by two important considerations of legal policy. The first is recognising the subject’s dignity and sense of worth. Second, there is a more pragmatic consideration. This is that audi alteram partem inherently conduces to better justice”.

The audi alteram principle is the cornerstone of procedural fairness as it plays a vital role in providing the repository power with an opportunity to obtain information which may be relevant for the proper exercise of the power. In short, it is indispensable to fair proceedings. More recently, the Constitutional Court in *Law Society of South Africa and Others v President of the Republic of South Africa and Others*, said that “procedural fairness has to do with affording a party likely to be disadvantaged by the outcome the opportunity to be properly represented and fairly heard before an adverse decision is rendered”.¹⁹

[27] Under the circumstances of this matter, considering the materially defective process followed by UPN which led to the irrational and arbitrary decisions by the chairpersons for the reasons more fully set out in my judgment and on the application of the trite principles as enumerated by the Constitutional Court, I am not convinced that another court will come to a different conclusion.

[28] The Highest Court in the land has had the final say on the principles involved in this matter.

¹⁹ At paras 26 and 27. Emphasis added.

[29] After considering the requirements of the test, I find no basis to grant leave to appeal.

[30] In the premise, the following order is made.

Order

1. The third respondent's application for leave is dismissed.
2. There is no order as to costs.

D. Venter

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicants: No appearance

For the third respondent: Adv. Craig Watt Pringle SC

Instructed by: MacGregor Erasmus Attorneys Inc.