



## CONSTITUTIONAL COURT OF SOUTH AFRICA

**National Union of Metalworkers of South Africa obo Khanyile Nganezi and  
Others v Dunlop Mixing and Technical Services (Pty) Limited and Others**

**CCT 202/18**

**Date of hearing: 28 February 2019**

**Date of judgment: 28 June 2019**

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### MEDIA SUMMARY

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

On Friday, 28 June 2019 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against the decision of the Labour Appeal Court (LAC), which had dismissed the applicant's appeal and confirmed the order of the Labour Court (LC). The LC had reviewed and set aside an arbitration award which found the dismissal of 65 members of the applicant trade union to be unfair, and reinstated them to their employment.

The applicant is the National Union of Metalworkers of South Africa (NUMSA), acting on behalf of Khanyile Nganezi and other employees of Dunlop. On 22 August 2012, members of NUMSA engaged in a protected strike. During the course of the weeks-long strike, several acts of serious violence, intimidation and damage to property were alleged to have occurred. As a result, Dunlop dismissed the workers who had been involved in the strike. Sixty-five of these workers were not positively and individually identified as being present when the violence was committed, but were dismissed nonetheless for derivative misconduct. NUMSA disputed the fairness of these dismissals and successfully saw the workers reinstated after an arbitration process. Both the LC and the LAC held that, in the present case, there was a duty on the employees to assist their employers identify the perpetrators and that, by remaining silent, the employees made themselves guilty of derivative misconduct. The LC set aside the arbitration award and the majority in the LAC confirmed the order of the LC.

In the Constitutional Court, NUMSA argued that the LC and LAC defined derivative misconduct incorrectly as creating an obligation on striking workers to come forward and disclose to their employers even if they have no material information to provide. This requirement is unfair and places informants at risk of retribution, unless the employer creates a safe environment for anonymous disclosure. Dunlop argued that the dismissals of these employees were substantively and procedurally fair, taking into account the surrounding circumstances of the strike. The evidence before them, when considering whether to dismiss the employees, was more than just the acts of violence themselves. The relevant evidence also included a breach of the trust relationship by each employee that failed either to come forward and explain that they were not present and so could not identify the perpetrators; or to come forward and identify the perpetrators. The Casual Workers Advice Office (CWAO), admitted as *amicus curiae* (friend of the court), supported NUMSA but also went further in their contention that an employee's duty of good faith does not encompass a positive duty to report the wrongdoing of a fellow employee. CWAO argued that such utter fidelity does not exist in employment law and, even if it did, it would not persist in the circumstances of a strike where such a duty would undermine the strike, unduly advantage the employer, limit the strikers' rights and diminish the protection afforded to striking workers.

In a unanimous judgment penned by Froneman J, the Constitutional Court held that it would be wrong to use the duty to disclose as an easier means to dismiss employees, rather than dismissal for actual individual participation in the violent misconduct. Such an approach may result in the imposition of a harsher sanction on employees who did not take part in the actual primary misconduct. The Constitutional Court further held that the contractual duty of good faith as a legal precept does not imply the imposition of a unilateral fiduciary obligation on employees to disclose known information of misconduct by their co-employees to their employer. The imposition of unilateral fiduciary obligations on either employees or employers could justifiably be seen as a choice favouring only one side, especially in matters relating to collective bargaining and recourse to strikes or lockouts.

The Constitutional Court cautioned that a duty to disclose might have an impact on the right to strike. The fact that a protected strike turned violent does not mean that the right to strike is no longer implicated in the assessment, or that the setting of the strike no longer constitutes relevant circumstances within which to assess the reciprocal duties of good faith. Expecting employees to be their employer's keeper in the context of a strike, where worker solidarity plays an important role in the power play between worker and employer, would be asking too much without some reciprocal obligation on an employer. Dunlop's reciprocal duty of good faith required, at the very least, that employees' safety should have been guaranteed before expecting them to come forward and disclose information or exonerate themselves. That was not sufficiently done. The Constitutional Court therefore upheld the appeal and set aside the orders of the LC and the LAC.