

The doctrine of common purpose in strikes

by Cara Furniss

An unfortunate by-product of strike action in South Africa is the common occurrence of unlawful and sometimes violent conduct on the part of certain members of the trade union embroiled in the strike. It then frequently becomes relevant whether individual employees should be held accountable for the "actions of the masses" on the basis of the doctrine of common purpose.

In Association of *Mineworkers and Construction Union v KPMM Road and Earthworks (Pty) Ltd*, the Labour Appeal Court ("LAC") used the opportunity to pronounce on the applicability of the doctrine of common purpose to individual striking employees who form part of the relevant trade union.

Background

On 15 July 2016, certain employees of the Respondent embarked on a protected strike and engaged in various unlawful acts including intimidating non-striking employees. On the same day, the attorneys for the employer addressed a letter to the Association of Mineworkers and Construction Union's ("AMCU's") attorneys requesting AMCU's intervention to stop the unlawful acts of its members. AMCU provided the employer with an undertaking that it would take all reasonable steps to ensure that, during the course of the strike, its members would conduct themselves in a peaceful manner and refrain from any unlawful acts. AMCU alleged that one of its representatives addressed its members and conveyed the undertaking to them.

Nevertheless, the intimidation and other unlawful acts continued on 15, 16 and 17 July 2016.

As a result, the employer launched an urgent application to interdict AMCU and certain listed individual employees from continuing with their unlawful activities. On 18 July 2016, the Labour Court handed down a ruling, ordering AMCU and its members to refrain from: obstructing access to the employer's premises; threatening and intimidating its employees; intimidating sub-contractors of the employer and congregating within 2000 metres of the employer's premises, among other things.

Notwithstanding the order, AMCU and its members continued with their unlawful conduct. On 1 August 2016, the Respondent launched an application to have AMCU and certain of its members held in contempt of the court. This application succeeded and AMCU was ordered to pay a fine of ZAR1-million, suspended for three years on condition that it was not held to be in contempt of any order of the Labour Court during such period. The individual members were ordered to pay a fine of ZAR1 000 each.

AMCU and the individual members were granted leave to appeal to the LAC.

Appeal judgment

On appeal, the LAC pronounced on two issues. The first dealt with the issue of how court orders should be formulated in this context (which we covered in a previous ENSight). The second was the application of the doctrine of common purpose in the context of a strike.

In its judgment, the Labour Court held that:

"It is not necessary for an employer to establish a nexus between each individual employee sought to be held in contempt of Court, and the misconduct or unlawful conduct perpetrated. Neither is it necessary to identify every individual perpetrator. These employees continue to act for a common purpose, in support of the exercise of their right to strike."

In the appeal proceedings, the employer conceded that the evidence could not justify the application of the common purpose doctrine. It was unable to identify which of the individual employees were guilty of contempt and there was no allegation in the employer's application that individual employees could be in contempt on the basis of the common purpose doctrine.

The requirements of the doctrine of common purpose

The effect of the application of the doctrine of common purpose to an individual is that the individual can be held liable for the acts of other persons, provided that the employee associated himself or herself with these acts. Despite the fact that the employer had conceded that this doctrine was not applicable in this case, the LAC nevertheless decided to deal with this question and to set out the requirements necessary to justify the application of the doctrine to an individual. It set the following requirements:

1. the individual who it is sought to hold liable on the basis of the doctrine of common purpose must have been present at the scene when the unlawful action took place;
2. the individual must have been aware of the unlawful action;
3. the individual must have manifested some common purposes with those perpetrating the assault by performing some act of association; and
4. the individual must have possessed the requisite *mens rea* (intent).

In this case:

1. none of the individual members of AMCU who were cited were placed at the scene of the incidents giving rise to the contempt application;
2. no evidence was produced to show that the individual members were aware of the incidents;
3. no evidence was produced to show that the individual members manifested common purpose; and
4. no evidence was produced that showed that the individual members had the required *mens rea*.

The LAC ruled that the Labour Court had incorrectly applied the doctrine of common purpose. To apply it to the current case, it held, would be a clear breach of the established principles of the doctrine and there was no legal basis for the Labour Court to have made such a finding.

Comment

This decision dealt with the application of the doctrine of common purpose in the context of an application that individual employees be held in contempt of court. It could also be utilised where an employer seeks to discipline employees for acts of collective misconduct. But the decision shows that the doctrine of common purpose is subject to strict limitations and cannot be viewed as an easy mechanism for employers to hold individual employees liable and as a basis for disciplining employees.



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