

South Africa: The workers who won't snitch

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Metalworker union Numsa will today [Friday] file legal arguments in the Constitutional Court on behalf of 65 Dunlop factory workers from Howick, KwaZulu-Natal. The workers were dismissed in 2012 because they did not snitch on fellow workers during a protected strike.

The duty of workers to tell on other workers is referred to as “derivative misconduct”, a relatively new feature in South African law. Numsa will ask the Constitutional Court at the very least to limit widespread and free application of this law by employers and courts.

Derivative misconduct was introduced to South African law in 1998 by Constitutional Court Justice Edwin Cameron during his tenure on the Bench of the Labour Appeal Court.

Workers found guilty of derivative misconduct are not themselves guilty of perpetrating misconduct. Rather, they are guilty of knowing which of their comrades *are* guilty of misconduct, then failing to inform their boss. They are workers who, according to Cameron, “through their silence make themselves guilty”.

‘Duty to rat’

This “duty to rat”, as Judge Kate Savage called it in her dissent to the Labour Appeal Court’s judgment in favour of Dunlop in July, forms part of workers’ broader duty to uphold the best interests of their employer’s business in good faith (a duty that, in employment law, stretches as far back as the Master and Servant Act). It is because of this duty that nobody is allowed to bad-mouth their employer.

The suppression of unions during apartheid was achieved partly by enforcing this duty, as organising and striking violated the duty of workers to promote their boss’s best interests and were, therefore, illegal.

Since Cameron’s judgment 20 years ago, the courts have developed derivative misconduct in a series of judgments to the point where employers and courts may assume that all workers on strike are aware of any misconduct that occurs during that strike. As a result, employers no longer need to prove that workers are guilty of misconduct; rather, employees must prove their innocence.

It is exactly this development in the interpretation and application of the law that Numsa is challenging in the Constitutional Court.

A wider struggle

The law is far-reaching, and, of course, does not only apply to the dismissed Dunlop workers who refused to snitch.

Speaking to *New Frame* in a grey suit, with light stubble covering his strong jaw, was Phikizwe

Mkhwanazi, 72. He has been mixing paint powder at Luxor Paints in Boksburg, on Gauteng's East Rand, for 15 years. Mkhwanazi was planning to retire next month but he is now one of 181 workers who were dismissed from Luxor Paints after a protected strike in March.

Many of the workers at the factory were dismissed not for committing the alleged misconduct but because they did not inform their employer that some of their co-workers had committed such misconduct. Because of the Labour Appeal Court's application of the derivative misconduct law in its ruling on the Dunlop case, Luxor Paints did not have to prove that the workers it sought to dismiss - the entire striking workforce - knew about the misconduct.

Mkhwanazi, whose brown eyes are glazed at the edges by the onset of *arcus senilis*, told *New Frame* he had nothing to do with the alleged acts of violence during the strike at Luxor and knew nothing about them.

Aside from being too old to do so, Mkhwanazi says he was eating "pap and vleis" for lunch the day much of the violence was meant to have happened, the same day on which private security guards hired by Luxor [fired rubber bullets at the workers](#), resulting in one worker losing his eye.

Lucas Du Preez, Luxor's in-house legal counsel, says there was a complete breakdown in the relationship between Luxor and workers who were involved in the strike but not present at the picket line, and who failed to condemn their comrades' actions, spending three months away from work during the strike.

"The employees didn't come to work with guarantees and say: 'No more nonsense - we are here to work.' They never did that," says Du Preez. "Then surely you can argue that they have made themselves part of the big scene [misconduct during the strike] by their conduct, by their absence."

Igshaan Schroeder, who coordinates the Casual Workers Advice Office, which is representing the Luxor workers in challenging their dismissal, told *New Frame* that derivative misconduct in relation to strikes is "a way of smuggling collective guilt in through the back door".

He adds: "Collective guilt is something that even the apartheid courts rejected in 1987. It comes from Roman slave law. That's what the bosses are using and that's what the courts are relying on."

Numsa's appeal will be heard in the Constitutional Court on 28 February 2019.

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