




Chapter 4

Strike Violence and Labour Law Liability

National Union of Metalworkers of South Africa obo Aubrey Dhludhlu and 147 Others v Marley Pipe Systems (SA) (Pty)¹

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“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” (*Marley Pipe Systems* par 36).

Abstract

This judgment marks a significant evolution in South African labour law, particularly regarding the interpretation of collective guilt and application of the doctrine of common purpose in industrial action contexts. The Constitutional Court's ruling in *National Union of Metalworkers of South Africa obo Aubrey Dhludhlu and Others v Marley Pipe Systems* addresses the dismissal of 148 employees following a violent unprotected strike where a company executive was assaulted. While upholding the dismissals of those directly implicated in the violence, the court overturned the dismissals of 41 employees whose participation was not adequately established, emphasising that "individual complicity in the commission of acts of violence must be established" rather than applying blanket collective guilt. This landmark ruling departs from previous approaches by affirming that mere presence at the scene of violence is insufficient for establishing liability under the common purpose doctrine. The court clarified that for liability to attach, there must be proof of an employee's association with the acts through direct or circumstantial evidence of complicity, not simply being present. The judgment is particularly significant as it emerges in the shadow of the Marikana tragedy, which fundamentally altered South Africa's approach to strike violence. By rejecting the notion that workers can be dismissed based on proximity to violence without evidence of participation, the Constitutional Court established a crucial safeguard for workers' constitutional rights to strike and assemble, while simultaneously condemning violence in industrial action. The court's nuanced approach balances employers' legitimate concerns about violent conduct with workers' rights to collective action, establishing a higher evidentiary threshold for dismissals during strikes. This judgment ultimately constrains the application of common purpose in the employment context, preserving individual accountability principles whilst recognising the complex dynamics of strikes and protest actions in South Africa's post-apartheid labour relations landscape.

4.1 Introduction

Strikes and protest actions in South Africa have often become violent. None of these instances has scared the South African psyche as much as the Marikana events of 2012. Although the *Marley Pipe Systems* case discussed herein was not related to these events, it is very much within the context thereof and strike violence in general that the case should be understood. On 16 August 2012, the South African Police Service (SAPS) attempted to disperse striking mineworkers at the Lonmin platinum mine in Marikana, resulting in the deaths of 34 miners.² This was the culmination of an unprotected strike that began on 9 August, when rock drill operators (RDOs) at Lonmin demanded a wage increase to R12,500 per month.³ The strike was characterised by violence and intimidation from the outset. On 11 August, strikers marched to the NUM (National Union of Mineworkers) office and clashed with union officials, resulting in injuries.⁴ On 12 August, two Lonmin security guards were killed by strikers.⁵ On 13 August, two police officers and three strikers were killed in confrontations.⁶ By 16 August, police implemented a plan to disarm and disperse the strikers gathered on a *koppie* (hill) near the mine⁷. At around 15:40, police began unrolling barbed wire, which agitated the strikers.⁸ A group of armed strikers then advanced towards a police line. At 15:53, police opened fire with live ammunition, killing 16 strikers.⁹ After this initial shooting, some strikers fled to a smaller *koppie* nearby. Police pursued them to this area, where a further 18 strikers were killed over the next 15 minutes in more chaotic circumstances.¹⁰

The Marikana incident brought unprecedented attention to the issue of strike violence in South Africa. The shocking death toll and intense media coverage made strike violence a national concern, influencing public opinion, policy discussions, and legal deliberations. After Marikana, the legislature introduced several amendments to attempt to prohibit instances of violence, such as those in the Marikana case. This indicates a shift in the legal landscape towards stricter control and management of strike actions aimed at preventing violent escalations. The court in the *Marley Pipe Systems* case would have been acutely aware of the Marikana incident and its aftermath when considering cases

involving strike action and violence. Marikana sparked intense debate about the use of force both by protesters and authorities during strikes. This debate likely influenced how violent actions during strikes were perceived and judged in subsequent cases. The trauma of Marikana lingers in the collective memory of South African society, influencing perceptions and reactions to strike actions in the years that followed. In this context, the *Marley Pipe Systems* case would have been adjudicated in an environment where the potential for strike violence was taken very seriously and where there was heightened sensitivity to the need to balance workers' rights with the maintenance of public order and safety.

In this context, the *Marley Pipe Systems* case represents a significant milestone in South African labour law, particularly concerning the interpretation of collective guilt and the application of the doctrine of common purpose in the context of strike action. The *Marley Pipe Systems* case centres on the dismissal of 148 employees following an unprotected strike that turned violent, resulting in the assault of a company executive. The case's journey through the labour courts and ultimately to the Constitutional Court highlights the complex interplay between workers' rights to strike, employers' rights to maintain workplace discipline and the legal principles governing collective action and individual culpability.

At its core, this case grapples with fundamental questions about the nature of collective action, the limits of solidarity and the balance between protecting workers' rights and maintaining order in industrial relations. The Constitutional Court's judgment provides crucial insights into the application of the doctrine of common purpose in labour disputes and sets an important precedent for how courts should approach cases involving group misconduct during strikes.

This discussion will examine the facts of the case, the legal framework governing strikes and protest action in South Africa and the reasoning behind the courts' decisions at various levels. It will also consider the broader implications of this judgment for labour relations, the right to strike and the principles of fairness and individual accountability in employment law. By

analysing this landmark case, the discussion aims to shed light on the evolving landscape of South African labour law and its attempts to navigate the often-turbulent waters of industrial action in a post-apartheid context. The *Marley Pipe Systems* case serves as a critical touchstone for understanding how the legal system seeks to balance competing rights and interests in the realm of collective labour disputes.

4.2 Facts of the case

This case concerns the dismissal of employees by Marley Pipe Systems (SA) (Pty) Ltd, the employer, following an unprotected strike at the company's premises in 2017. The National Union of Metalworkers of South Africa (NUMSA) represents 41 of the dismissed employees in this appeal.¹¹ The events leading to the dismissals began earlier in the year when a wage increase agreement affecting the plastics industry was reached. The employer communicated this increase to NUMSA shop stewards, who then informed the employer's employees.¹² Dissatisfied with the increase, NUMSA members working the morning shift initiated an unprotected strike.¹³

The striking employees initially gathered in the canteen, awaiting an address from the employer's head of human resources. When he did not arrive, they moved towards the administrative offices, carrying placards demanding the removal of the head of human resources.¹⁴ Upon the head of human resources' emergence, the striking employees surrounded and severely assaulted him. He was punched, kicked and had rocks thrown at him while on the ground. The head of human resources was also pushed through a glass window and only managed to leave the premises and seek medical help after two non-striking employees came to his rescue.¹⁵

Following the incident, the employer called the police to quell the unrest and secured a Labour Court order interdicting employees from committing acts of violence, intimidation and harassment, as well as engaging in the unprotected strike.¹⁶ After a disciplinary process, the employer dismissed 148 employees.¹⁷ Of these, 136 were convicted of assault based on the doctrine of common purpose, while 12 were found to have been

directly involved in the physical assault of the human resource manager.¹⁸ The doctrine of common purpose is a legal principle that allows individuals to be held liable for criminal acts or misconduct committed by others, even if they did not physically participate in the act itself. This doctrine is particularly relevant in cases involving group activities where it may be difficult to establish individual culpability.¹⁹

The dismissed employees, represented by NUMSA, referred an unfair dismissal dispute to the Metal and Engineering Industries Bargaining Council. When conciliation failed, the matter was referred to the Labour Court.²⁰ In their plea before the Labour Court, the employees denied that any assault or unprotected strike had taken place.²¹ The employer opposed the claim and filed a counterclaim seeking compensation for losses incurred because of the unprotected strike.²²

The Labour Court upheld the dismissals and awarded damages to the company.²³ The court's findings were based on several key pieces of evidence and considerations. First, the Labour Court identified 12 employees who were positively linked to the actual physical assault of the head of human resources. These individuals were directly implicated in the violent act that took place during the unprotected strike. For the remaining employees, the Labour Court relied on various forms of evidence to place them at the scene of the assault. This evidence included clock cards used for the company's payroll system, which established that all the employees, except for Mr Mokoena, had arrived at work for the morning shift. Additionally, job cards used at workstations helped to identify employees who were part of the morning shift. The court also considered photographic and video material that depicted the events of the day. Oral testimony indicated that a large group of employees had first gathered in the canteen and then moved as a group towards the offices. The fact that the employees were not at their workstations was interpreted to mean that they must have been part of the group that converged at the canteen and then proceeded to the scene of the assault. Furthermore, the Labour Court considered that the employees had been given an opportunity to indicate through Dropbox or

WhatsApp Messenger that they had not participated in the acts of misconduct.

Only a handful of employees took advantage of this opportunity and were, consequently, not charged.²⁴ The testimony of the sole witness, who testified on behalf of all the employees, was also considered by the Labour Court. The witness stated that all the employees regarded themselves as leaders with respect to the events of the day in question. However, his denial that Mr Steffens was assaulted was found to be untruthful. He also initially denied that the employees participated in an unprotected strike but later retracted this under cross-examination.²⁵ Based on this evidence, the Labour Court found 95 employees, in addition to the 12 directly involved in the assault, to have been present at the scene. The remaining 41 employees, including Mr Mokoena (who was not on the morning shift), were found guilty of assault based on the doctrine of common purpose.²⁶ The court thus upheld the dismissals of all 148 employees, finding them guilty both of assault and participation in an unprotected strike.²⁷

NUMSA then appealed to the Labour Appeal Court on behalf of 41 employees, arguing that their dismissals were substantively unfair.²⁸ The appeal was unsuccessful, leading to the current application for leave to appeal to the Constitutional Court.²⁹ The Labour Appeal Court upheld the decision of the Labour Court, dismissing NUMSA's appeal on behalf of the 41 employees whose direct involvement in the assault had not been established.³⁰ In its judgment, the Labour Appeal Court made several key findings regarding the application of the doctrine of common purpose. Firstly, the Labour Appeal Court sought to place all the appellant employees at the scene of the assault. It noted that there was no evidence suggesting that only the 107 employees (for whom the appeal was no longer pursued) were present at the scene. The court emphasised that the undisputed evidence showed that all the appellant employees had left their workstations and participated in the strike.³¹ The Labour Appeal Court then held that common purpose had been established for all the employees. It based this conclusion on several factors. Notably, the court stated that none of the 148 employees had

distanced themselves from the actions of the group and there was clear evidence that the assault on the head of human resources was perpetrated by members of the group of striking employees.³² Furthermore, the court found it significant that none of the employees intervened to stop the assault or assist the head of human resources. It also noted that the employees did not disassociate themselves from the assault before, during, or after it occurred. The court highlighted the undisputed evidence that the striking employees celebrated the assault after the fact.³³

The Labour Appeal Court extended this reasoning to include Mr Mokoena, who arrived on the scene after the assault. The court concluded that through his conduct, Mr Mokoena had directly associated with the actions of the group.³⁴ In its judgment, the Labour Appeal Court also addressed the employees described by a witness as “bystanders”. The court held that these employees were present at the scene and associated with the events of the day. It emphasised that they took no steps to distance themselves from the misconduct either at the time of, during, or after the assault.³⁵ Finally, the Labour Appeal Court considered it significant that the employees persisted in denying that any assault had occurred, both in their pleaded case and in the evidence of Mr Ledwaba. The court also noted that the employees refused the opportunity to explain their own conduct in relation to the assault.³⁶ Based on these findings, the Labour Appeal Court concluded that the inference drawn – that all employees were involved in or associated themselves with the assault – was the most probable and plausible conclusion.³⁷ As a result, it upheld the Labour Court’s decision and dismissed the appeal.

4.3 Findings of the Constitutional Court

The Constitutional Court’s judgment, delivered by Madlanga J, critically examined the application of the doctrine of common purpose in this case and ultimately overturned the decisions of the lower courts. The court’s findings were based on a careful analysis of established legal principles and the specific circumstances of the case. First, the court emphasised that

while it understands the evidentiary difficulties faced by employers in proving individual employee complicity in acts of violence during strikes, this cannot result in the sacrifice of innocent employees.³⁸ The court acknowledged the possibility that employees might be mere spectators when other employees were committing acts of violence and stressed that it would be a travesty to charge, find guilty and dismiss an employee who never took part in or associated with such acts.³⁹

The court reiterated the established principles of common purpose as set out in the *Mgedezi* case.⁴⁰ These include the requirements that the person must have been present at the scene, aware of the assault, intended to make common cause with the perpetrators, manifested their sharing of a common purpose through some act of association and had the requisite criminal intent.⁴¹ However, the court also noted, referencing the *Dunlop* case,⁴² that presence at the scene is not always necessary if there is evidence of association with the misconduct before or after the event.⁴³ Crucially, the court held that for liability to attach under the doctrine of common purpose, there must be proof of an employee's complicity in the acts of violence. This proof can be direct or circumstantial but must demonstrate that the individual in some form associated themselves with the violence.⁴⁴ The court emphasised that mere presence at the scene and watching does not satisfy these requirements.⁴⁵

Applying these principles to the case at hand, the court found that the high watermark of the case against the 41 employees was that they were part of the group that waited for the head of human resources, marched and chanted songs within the premises and carried placards.⁴⁶ The court concluded that this evidence was insufficient to demonstrate an act of association with the assault.⁴⁷ The court took issue with the Labour Appeal Court's conclusion that the employees did not dissociate from the assault and were rejoicing. It pointed out that there was no evidence that they had ever associated with the assault in the first place and that the marching, singing and dancing were already taking place when the group left the canteen.⁴⁸

Regarding Mr Mokoena, who was not even at the premises when the assault took place, the court found the evidence of his complicity even weaker.⁴⁹ The court also distinguished this case from the *Oak Valley Estates* case,⁵⁰ which dealt with interdicts rather than termination of employment. In *Oak Valley Estates*, the issue at hand was whether an employer facing unlawful conduct during a protected strike could obtain an interdict against employees participating in that strike without linking each employee to the unlawful conduct.⁵¹ The court, in that case, established that in certain circumstances, a “link” may consist of merely being within a cohesive group committing acts of violence at the workplace without the individual being actually linked to the violence.⁵²

However, the court in the present case stressed that the principles applied in *Oak Valley Estates* are not directly applicable to cases involving termination of employment. The key differences highlighted by the court are as follows: First, interdicts, as were dealt with in *Oak Valley Estates*, are often concerned with future conduct. An interdict may not be necessary against an employee who has readily undertaken not to participate in any future unlawful action. In contrast, disciplinary action leading to dismissal is based on past conduct.⁵³ Secondly, the court emphasised that it would be inappropriate to suggest that an employee could be dismissed based on common purpose without being linked to acts of violence. The court firmly stated that a verdict of guilt cannot be appropriately returned for merely being present where acts of violence took place.⁵⁴ The court further explained that an employee could simply have been a spectator, or the acts could have happened so spontaneously or suddenly that the employee could not avoid being there. It reiterated the principle from the *Polyoak* case⁵⁵ that “our law knows no concept of collective guilt”.⁵⁶ This distinction emphasises the higher standard of proof required for dismissal compared to obtaining an interdict. While an interdict may be granted based on a reasonable apprehension of harm, dismissal requires concrete evidence of individual misconduct or complicity.

In summary, the Constitutional Court's analysis of the common purpose doctrine outlined the essential criteria for convicting an individual on this basis. For a conviction to be justified, the court emphasised that the person must have been physically present when the violence occurred and aware of the assault taking place. Additionally, they must have intentionally aligned themselves with the assailants, performed some action to associate with them and intended for the victim to be harmed. The court noted that to hold bystanders or spectators liable under this doctrine, it was crucial to prove their complicity in the violent act rather than mere presence or observation. The court's reasoning here reinforces the principle that in labour disputes resulting in dismissal, individual culpability must be established. It serves as a caution against applying principles from one legal context (interdicts) to another (termination of employment) without careful consideration of the differing standards and implications.⁵⁷

The Constitutional Court held that the principles applicable to common purpose had not been satisfied in this case. There was no basis for holding the 41 employees guilty of assault, and thus, their dismissals on this basis were substantively unfair.⁵⁸ However, the court noted that the conviction for participating in an unprotected strike still stands. Consequently, it remitted the matter to the Labour Court to consider the appropriate sanction for this charge now that the aggravating fact of a severe assault is no longer applicable.⁵⁹ This judgment, therefore, emphasises the importance of individual culpability in labour disputes and sets a significant precedent for the application of the doctrine of common purpose in such cases.

4.4 The legislative framework

Section 23 of the Constitution of the Republic of South Africa, 1996 (the Constitution) protects the right to strike as a fundamental labour right. Specifically, section 23(2)(c) states that “[e]very worker has the right to strike”. In addition, section 23(2)(b) states that “[e]very worker has the right to participate in the activities and programmes of a trade union”. This constitutional protection emphasises the importance of the

right to strike in South African labour relations and provides a strong legal foundation for workers to engage in collective action. However, it is important to note that the right to strike, like other constitutional rights, is not absolute. It is subject to limitation under section 36 of the Constitution, which allows for the restriction of rights under certain circumstances. This means that while the right to strike is protected, its exercise can be regulated to balance it against other rights and societal interests. While section 23 of the Constitution protects the right to strike, it does not explicitly protect violent actions. Any argument for allowing some degree of violence during strikes must be weighed carefully against the potential harm to individuals, property and the broader society, as well as the legal consequences outlined in labour laws.

The right to freedom of assembly plays a crucial role in democratic societies, particularly in the context of labour disputes and strike action. However, when strikes turn violent, complex questions arise regarding the limits of this fundamental right. The South African Constitution protects the right to assemble peacefully and unarmed under section 17. The section reads as follows: “Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions”. This provision recognises assembly as an essential form of political participation and expression, especially for marginalised groups who may lack other avenues to make their voices heard.⁶⁰ In the labour context specifically, the right to picket is explicitly included within the scope of section 17, highlighting its importance for workers engaged in collective action.⁶¹ However, as in the case of the right to strike, the right to assembly is not absolute and contains inherent limitations. Most notably, only “peaceful” assemblies receive constitutional protection.⁶² When strikes descend into violence, they fall outside this protected sphere. As Woolman notes, German jurisprudence considers an assembly non-peaceful only when acts of physical violence against persons or property are committed or threatened.⁶³ This suggests that minor disruptions or symbolic acts would not necessarily strip an assembly of protection, but overt violence would.

The challenge lies in determining at what point a strike crosses the line from protected assembly to unprotected violent action. There is a risk that overzealous authorities may exploit the “peaceful” requirement to suppress legitimate protest. As Hoffmann–Riem argues,⁶⁴ a generous interpretation is necessary to prevent the state from using this proviso to silence unpopular views.⁶⁵ Courts must be wary of blanket bans on assemblies based on vague assertions of potential violence. At the same time, the rights of non–participants and the broader public interest in order and safety must be considered. The Regulation of Gatherings Act⁶⁶ in South Africa allows authorities to prohibit gatherings that pose a credible threat to public safety, though such prohibitions must be based on tangible evidence rather than mere speculation.⁶⁷ A careful balance must be struck between allowing space for protest and protecting society from harm.

When violence does erupt during a strike, a key consideration is whether it represents the actions of a small minority or reflects the intentions of the assembly as a whole. It has also been argued that if some participants resort to violence while the majority remain peaceful, the assembly should retain its protected status.⁶⁸ This principle aims to prevent provocateurs from hijacking an otherwise lawful gathering. Police are expected to target violent individuals rather than dispersing the entire assembly. However, if violence becomes widespread or is clearly sanctioned by organisers, the assembly may lose constitutional protection. In such cases, authorities have greater latitude in restricting or prohibiting the gathering. But even then, any restrictions should be proportional and narrowly tailored to address the specific threat.⁶⁹ The issue of liability for damage caused during violent strikes is particularly contentious. South Africa’s Regulation of Gatherings Act imposes joint and several liability on participants for riot damage.⁷⁰ This provision has been criticised as potentially chilling the right to assembly by exposing participants to significant financial risk.⁷¹ There are valid concerns that such blanket liability may deter people from exercising their constitutional rights.

Ultimately, while peaceful assembly is a cornerstone of democracy, this right must be balanced against other societal interests when strikes turn violent. Courts and authorities face the difficult task of protecting legitimate protest while maintaining public order. A nuanced, context-sensitive approach is needed – one that safeguards the essence of the right to assembly while setting appropriate boundaries on destructive behaviour. Clear guidelines and robust judicial oversight are essential to prevent abuse of discretion by officials in restricting assemblies. As South Africa continues to grapple with labour unrest and protest action, finding this balance remains an ongoing challenge. The constitutional promise of freedom of assembly must be upheld, but not at the expense of descending into lawlessness. Careful, principled application of time, place and manner restrictions, rather than outright prohibitions, may offer a path forward in many cases.⁷² Above all, the fundamental importance of assembly as a form of democratic participation must remain at the forefront of any legal analysis in this domain.

The Labour Relations Act (LRA)⁷³ does not allow any employee to be dismissed for participating in a protected strike. Section 197(1)(a) of the LRA provides that “if the reason for the dismissal is – that the employee participated in or supported, or indicated an intention to participate in or support, a strike or protest action” that such a dismissal would be automatically unfair. So too, section 67(4) of the LRA provides that “[a]n employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike”. Nevertheless, section 67(5) of the LRA makes it clear that the Act “does not preclude an employer from fairly dismissing an employee in compliance with the provisions of [the Act] for a reason related to the employee’s conduct during the strike”. The test to determine if the reason related to the employee’s conduct during the strike is whether participation in the strike was the “main”, “dominant” or “legal” cause of the dismissal. The onus will be on the employer to prove that the dismissals were based on the employee’s conduct and that the requirements of the Act were followed.⁷⁴

The Labour Appeal Court in *CEPPWAWU v Metrofile (Pty) Ltd*⁷⁵ has reaffirmed that employers retain the right to dismiss employees for misconduct committed during a strike, regardless of whether the strike is protected (lawful) or not. This means that an employer is not precluded from initiating disciplinary proceedings, which may potentially result in dismissal, whilst the strike is ongoing. Should the striking employees opt not to participate in the disciplinary hearing, the employer is within their rights to continue the proceedings without the employees present.⁷⁶ This ruling emphasises the principle that whilst workers have the right to engage in protected strike action, this right does not provide immunity from disciplinary measures for misconduct. The court's position balances the employees' right to strike with the employer's need to maintain workplace order and discipline, even during periods of industrial action.⁷⁷

Two cases illustrate this principle. These cases deal with the limits of protection afforded to workers and union representatives during strikes. In the first case, *NUM v Black Mountain Mining (Pty) Ltd*,⁷⁸ two union representatives (shop stewards) were dismissed for misconduct during a protected strike. Their actions included accusing managers of racism and engaging in intimidation. The court ruled that while shop stewards generally enjoy some immunity for their actions during strikes, this protection only applies to actions taken in good faith. The key test is whether their conduct falls within reasonable and acceptable bargaining behaviour and is related to their duties as shop stewards.⁷⁹ In this case, the court determined that the shop stewards' actions went beyond reasonable limits and were not directly related to their responsibilities. Consequently, their dismissal was deemed fair. In coming to this conclusion, the court held that a "balance must be struck between the employer's right to maintain discipline and the shop stewards' right to discharge their duties" and that "[t]he right to strike is not a licence for misconduct".⁸⁰

The second case, *NCAWU v Cummins Emission Solutions (Pty) Ltd*,⁸¹ involved employees who were dismissed for intimidating non-strikers during a protected strike. These employees argued that their dismissal was automatically unfair

because of their participation in a protected strike. However, the Labour Court disagreed and found the dismissals to be fair. The Labour Court found that the dismissals of the employees were not automatically unfair but were, in fact, fair dismissals for misconduct. In the matter, the employees failed to prove that they were dismissed merely for participating in the protected strike.⁸² The evidence showed that they were dismissed for intimidation, which is misconduct, rather than for strike participation.⁸³ The court again clarified that participation in a protected strike does not shield employees from disciplinary action for misconduct committed during the strike.⁸⁴

The employees were specifically charged with and dismissed for intimidation, not for their general strike participation.⁸⁵ Only 15 out of many striking employees were charged, with only nine ultimately dismissed, indicating that the employer was not targeting strikers generally.⁸⁶ The employer had also not discouraged strike participation but had raised concerns about intimidation.⁸⁷ Importantly, the court noted that threats of violence in the workplace constitute serious misconduct warranting dismissal, especially when employees had been assured that they could choose whether to strike.⁸⁸ The court, therefore, concluded that the dismissals were substantively and procedurally fair.⁸⁹ The court emphasised that while employees have the right to strike, this right is not absolute and does not protect them from consequences for misconduct committed during a strike.⁹⁰ This case demonstrates that employers can fairly dismiss employees for intimidation during a protected strike, provided the dismissal is for the misconduct itself and not for participation in the strike.

These cases illustrate an important principle that while workers have the right to strike and union representatives have certain protections when performing their duties, these rights are not absolute. Actions that go beyond reasonable advocacy or bargaining, particularly those involving intimidation or other forms of misconduct, can still result in fair dismissal, even during a protected strike. The courts aim to balance the rights of workers to engage in collective action with the need to maintain order and protect others from intimidation or harm.

Following Marikana, several amendments have been introduced to strengthen the regulation of picketing, with the primary aim of mitigating “picket line violence”. However, these changes largely serve to reinforce existing practices rather than significantly alter the status quo.⁹¹ The modifications to sections 69(4), 69(5) and 69(6)(c) establish a new framework for the picketing process. This framework mandates that agreements on picketing must be secured before the conciliation period expires. In cases where an agreement cannot be reached, the commissioner is tasked with determining the picketing rules, which must then be issued alongside the certificate of outcome. Crucially, picketing is only permitted when rules are in place, whether through a collective agreement, a separate agreement,⁹² or as determined by the commissioner. In essence, this means that picketing rules must be established prior to the commencement of any protected strike action.⁹³

The rules set forth by the commissioner are subject to applicable codes, which now include the Code of Good Practice: Collective Bargaining, Industrial Action and Picketing.⁹⁴ This code provides more detailed guidance on how unions should adhere to the requirements outlined in section 69. These changes aim to create a more structured and regulated environment for picketing, potentially reducing the likelihood of violence or uncontrolled demonstrations. The Code addresses picketing violence in several instances. The Code aims to prevent violence during protest action and strikes through several key measures:

1. The Code emphasises peaceful conduct. The Code strongly condemns violence, intimidation and damage to property during industrial action.⁹⁵ It stresses that strikes and pickets must be conducted peacefully and unarmed.⁹⁶
2. The Code promotes good faith bargaining. The Code encourages parties to engage in good-faith negotiations and adhere to principles of mutual respect.⁹⁷ This aims to resolve disputes before they escalate to strikes.
3. The Code establishes clear rules for picketing. The Code provides detailed guidelines on the conduct of pickets, including designating locations, limiting numbers of

- picketers and prohibiting dangerous weapons.⁹⁸ This helps to maintain order and prevent confrontations.
4. The Code defines the roles and responsibilities of the parties involved in strikes and protest action. The Code outlines specific roles for union officials, employers, police and private security in managing industrial action.⁹⁹ This clarity helps to prevent misunderstandings that could lead to violence.
 5. The Code encourages communication between the bargaining parties. The Code recommends establishing clear lines of communication between all parties involved in industrial action.¹⁰⁰ This facilitates quick resolution of issues before they escalate.
 6. The Code restricts the use of dangerous weapons. The Code explicitly prohibits the possession or display of dangerous weapons during pickets and provides a clear definition of what constitutes a dangerous weapon.¹⁰¹
 7. The Code promotes training. The Code emphasises the importance of training negotiators, picket marshals and security personnel in conflict management and the provisions of the Code itself.¹⁰²
 8. The Code establishes peace committees. The Code suggests forming peace and stability committees during industrial action to monitor and address potential conflicts.¹⁰³
 9. The Code limits provocative behaviour. The Code prohibits both picketers and employers from engaging in provocative or threatening behaviour that could incite violence.¹⁰⁴
 10. The Code encourages continued negotiations. The Code emphasises that parties should remain open to negotiations even after a dispute has been declared, which can help to prevent prolonged and potentially violent strikes.¹⁰⁵

By implementing these measures, the Code aims to create an environment where industrial action can be conducted peacefully, and disputes can be resolved without resorting to violence.

A more controversial aspect of these amendments is the expansion of the Labour Court's powers concerning picketing. Notably, the court now has the authority to suspend a picket at

one or more locations. However, the legislation does not specify the grounds on which such a suspension may be enacted.¹⁰⁶ This expansion grants the Labour Court a more interventionist role in managing picketing activities. Critics of this change argue that “a strong case would need to be made out to justify the limitation of a constitutional right”.¹⁰⁷ This concern stems from the potential for these expanded powers to infringe upon workers’ rights to protest and engage in collective action, which are often protected under constitutional law.

The LRA extends protection to pickets, but only under the condition that they remain peaceful. This fundamental principle emphasises the delicate balance between the right to protest and the maintenance of public order. Any instances of violence or intimidation during a picket will result in the forfeiture of this legal protection, potentially exposing those involved to both civil and criminal liabilities. This stipulation serves as a crucial deterrent against the escalation of pickets into more aggressive or harmful demonstrations. The legal landscape surrounding picketing and protests encompasses a delicate balance between the right to demonstrate and the need to maintain public order and protect property. This balance is exemplified in the case of *SATAWU v Garvas*, which was heard by both the Supreme Court of Appeal and the Constitutional Court. The case arose from a protest march organised by the South African Transport and Allied Workers Union (SATAWU) under the Regulation of Gatherings Act.¹⁰⁸ During this march, significant damage was inflicted upon vehicles and shops along the route. As a result, small business owners who bore the brunt of this damage sought compensation from SATAWU under section 11(2)(b) of the Regulation of Gatherings Act. Section 11(1) and (2) are set out immediately below to facilitate an understanding of the issues. Section 11(1) provides:

“If any riot damage occurs as a result of—

- (a) a gathering, every organization on behalf of or under the auspices of which that gathering was held, or, if not so held, the convener;

- (b) a demonstration, every person participating in such demonstration, shall, subject to subsection (2), be jointly and severally liable for that riot damage as a joint wrongdoer contemplated in Chapter II of the Apportionment of Damages Act, 1956 (Act No. 34 of 1956), together with any other person who unlawfully caused or contributed to such riot damage and any other organization or person who is liable therefor in terms of this subsection.”

Section 11(2) provides:

“It shall be a defence to a claim against a person or organization contemplated in subsection (1) if such a person or organization proves—

- (a) that he or it did not permit or connive at the act or omission which caused the damage in question; and
- (b) that the act or omission in question did not fall within the scope of the objectives of the gathering or demonstration in question and was not reasonably foreseeable; and
- (c) that he or it took all reasonable steps within his or its power to prevent the act or omission in question: Provided that proof that he or it forbade an act of the kind in question shall not by itself be regarded as sufficient proof that he or it took all reasonable steps to prevent the act in question.”

SATAWU’s defence centred on the argument that section 11(2)(b) of the LRA infringed upon the constitutional right to assemble, demonstrate and picket. However, the Supreme Court of Appeal rejected this argument, emphasising that the constitutional right to protest is specifically qualified by the requirement that such demonstrations be “peaceful and unarmed”. The court drew a clear distinction between legitimate protest and rioting, stating that participation in riots contradicts constitutional values. Conversely, the court held that attaching liability to

the organisers of events that result in damage aligns with these constitutional principles.¹⁰⁹ This ruling was subsequently upheld by the Constitutional Court,¹¹⁰ which found that section 11(2) of the LRA strikes an appropriate balance between limiting the right to assemble and demonstrate and protecting the public from reasonably foreseeable damage arising from such demonstrations. This decision emphasises the principle that while the right to protest is fundamental, it is not absolute and must be exercised responsibly.

The court's rulings in this case establish several important principles. Firstly, they reinforce the notion that peaceful protest is a protected right, but this protection does not extend to violent or destructive behaviour. Secondly, they affirm that organisers of protests can be held liable for damages resulting from demonstrations that they arrange, even if they did not directly cause the damage themselves. This principle of organisational responsibility serves as a deterrent against poorly planned or controlled protests.

Furthermore, these judgments highlight the legal system's approach to balancing competing rights and interests in society. On the one hand, there is the fundamental right to freedom of assembly and expression, which is crucial for a functioning democracy. On the other hand, there is the need to protect public safety and private property. The courts' decisions suggest that when these interests conflict, a careful balancing act must be performed, with the ultimate goal of maintaining social order while preserving essential freedoms.

In practical terms, these rulings serve as a cautionary tale for unions and other organisations planning protests or demonstrations. They emphasise the importance of thorough planning, effective crowd control measures and clear communication with participants about the boundaries of acceptable behaviour during protests. The threat of civil liability provides a strong incentive for organisers to take all reasonable steps to ensure that their events remain peaceful and do not infringe upon the rights of others.

However, the distinction between legitimate persuasion and unlawful intimidation is not always clear-cut. Picketing, by

its very nature, tends to be a robust and emotionally charged activity. Certain behaviours that are commonplace in pickets worldwide, such as name-calling, gesturing and glowering, are generally not considered unlawful in themselves. These actions are often seen as part of the standard tactics employed by picketers to express their discontent and apply pressure. The key factor in determining whether conduct crosses the line into intimidation is whether it induces a reasonable apprehension of harm in the person targeted. This criterion introduces an element of objectivity to the assessment, focusing on the impact of the behaviour rather than just its nature.

It is worth noting that employees who hold positions as shop stewards are not exempt from their responsibilities to adhere to their employer's rules, policies and instructions. This principle applies as long as these directives are reasonable and lawful.¹³³ This clarification is important as it emphasises that leadership roles within union structures do not grant immunity from workplace regulations or override the need for professional conduct.

These principles reflect the complex interplay between workers' rights to collective action and the need for social order and workplace discipline. They aim to create a framework where legitimate protests can occur without descending into harmful or disruptive behaviour. The challenge lies in the practical application of these principles, particularly in high-tension situations where emotions can run high. Employers, unions and legal authorities must navigate these nuanced distinctions carefully to ensure that the right to picket is preserved while also maintaining a safe and orderly environment for all parties involved.

These amendments reflect a delicate balance between maintaining public order and preserving workers' rights. While the changes aim to create a more structured environment for picketing, they also introduce new challenges in terms of interpretation and application, particularly regarding the expanded powers of the Labour Court. The effectiveness and fairness of these amendments will likely be tested in practice as stakeholders navigate this updated regulatory landscape.

4.5 The importance of violence

Woolman presents a compelling argument for allowing a limited degree of violence as part of democratic processes, including strike action. This perspective challenges the conventional notion that all assemblies and demonstrations must be entirely peaceful to be considered legitimate. The author contends that the overregulation and pacification of the right to assembly through its concretisation as a constitutional right has, in many ways, displaced the democratic politics that animate the freedom to assemble and act collectively as equal citizens.¹¹² This shift towards strictly peaceful protests often fails to acknowledge the realities of deeply entrenched inequalities and the struggles of second-class citizens to have their voices heard.

Woolman draws on the insights of influential thinkers such as Martin Luther King Jr,¹¹³ Hannah Arendt¹¹⁴ and Judith Butler¹¹⁵ to support his argument about the occasional necessity of limited force in democratic processes. Martin Luther King Jr, while primarily known for his advocacy of non-violent resistance, recognised that under certain circumstances, urban riots could serve as a form of social protest. King described riots as “durable social phenomena” that, while not insurrections, were “mainly intended to shock the white community”.¹¹⁶ He viewed these actions not as normatively desirable but as a necessary means of drawing attention to systemic injustices when other forms of protest had been ineffective. Hannah Arendt, although generally opposed to violence in political action, acknowledged that force might be justified under specific conditions. Woolman interprets Arendt’s work to suggest that the use of force could be deemed justified if it represents and results in a genuine transition from authoritarian politics to civic republicanism.¹¹⁷ Arendt saw the potential legitimacy in “successful revolutions” that create space for triumphant forms of collective action, such as the drafting of the US Constitution.¹¹⁸ Judith Butler’s perspective, as presented by Woolman, recognises the potential necessity of forceful collective action in challenging entrenched power structures. While Butler is concerned with the precarious nature of bodily integrity, Woolman argues that her work allows for a gap where

some form of force, not intentionally directed at the precarious individual, can be justified. This interpretation suggests that Butler's theory accommodates contestations of power that may occasionally escalate into force designed to "prick the conscience of the king".¹¹⁹

All three thinkers, while primarily advocating for non-violent methods, reluctantly acknowledge that in cases of persistent oppression or exclusion from meaningful political participation, limited use of force by marginalised groups might be necessary to effect change. However, they all emphasise that such force should not be an end in itself and should ultimately lead to more inclusive and equitable political participation.¹²⁰ While these theorists generally condemn the use of force to bring about political change, their work acknowledges that in certain circumstances, the occasional use of force by marginalised groups may be necessary to challenge systemic oppression.¹²¹ This recognition stems from the understanding that when groups are effectively excluded from a state's most important decision-making forums, they may need to resort to more forceful means to secure their participation in self-governance.

Woolman argues that the modifier "peaceful" in constitutional provisions regarding the right to assembly should primarily protect the bodily integrity of non-participants rather than be used to prevent minimal damage to private property or to silence the voices of marginalised groups.¹²² He contends that property rights often serve to maintain the status quo and act as a brake on the assembly's democratic and egalitarian aims.¹²³ Woolman cites King's observation that urban riots must be recognised as durable social phenomena that, while not insurrections, are intended to shock the privileged community and serve as a form of social protest.¹²⁴ This perspective acknowledges that certain disruptive actions, while not ideal, may be necessary to draw attention to systemic injustices and catalyse change. Woolman criticises court decisions, such as those in South Africa, that impose strict liability on protest organisers for any damage that occurs during demonstrations, even when such damage was unforeseeable and unpreventable.¹²⁵

He argues that this approach has a chilling effect on assembly rights and unduly restricts the space for collective action.

In conclusion, Woolman's argument suggests that allowing for a limited degree of forceful action within democratic processes, including strikes, may be necessary to ensure that marginalised voices are heard and that genuine social and political change can occur. While maintaining a general commitment to non-violence, this perspective recognises that the occasional use of force may be legitimate when it leads to the subsequent inclusion of previously excluded groups in the self-governance of the polity.¹²⁶ This nuanced approach to assembly rights seeks to balance the need for public order with the imperative of fostering genuine democratic participation and addressing entrenched inequalities.

Manamela and Budeli, however, argue against violence during protected and unprotected strike action.¹²⁷ The authors contend that violence during strikes has become a serious concern in South Africa. The authors cite examples from various sectors, including security, mining, transport and agriculture, where strikes turned violent, resulting in deaths, injuries and significant property damage.¹²⁸ They argue that the right to strike does not offer striking employees a license to engage in unruly or criminal conduct. Violence during a strike is considered an abuse of the right to strike.¹²⁹ The authors argue that a violent strike is not functional to collective bargaining and is not conducive to bargaining in good faith.¹³⁰ Protected and unprotected strikes can turn violent. However, the legal consequences differ depending on whether the strike is protected or unprotected.¹³¹ Violent conduct during strikes can lead to civil liability, interdicts and dismissal of employees, even if the strike itself is protected.¹³²

Violent conduct during strikes can lead to serious consequences for employees and trade unions, even if the strike itself is protected. While section 67(2) of the LRA provides immunity from civil liability for participation in a protected strike, this immunity does not cover unlawful acts by strikers. Employees who engage in unlawful violent conduct resulting in employer losses can be held liable for damages and trade unions

can also be held vicariously liable for the acts of their members if certain conditions are met. Although an employer may not interdict a protected strike itself, they can apply for an interdict against employees who engage in unlawful conduct during a protected strike. The employer may apply to the Labour Court or High Court for an order restraining any person from committing violent acts of misconduct and a mandatory order may also be issued directing the union to intervene and take all reasonable steps to stop unlawful acts.

Regarding dismissal, section 67(5) of the LRA allows for the fair dismissal of an employee for reasons related to their conduct during a protected strike. Employees who engage in unlawful violent conduct during a protected strike may be fairly dismissed, provided that all the requirements set by the LRA have been met. The dismissal must be both substantively and procedurally fair, as provided for in the Code of Good Practice: Dismissal and the employer must prove, on a balance of probabilities, that the employee was guilty of misconduct. The authors emphasise that while the right to strike is protected, this protection does not extend to violent or unlawful conduct. They argue that improper behaviour and unlawful conduct, such as assault, intimidation and damage to property (vandalism), will attract both civil and criminal liability. This stance emphasises the importance of maintaining peaceful and lawful conduct during strikes, even when they are protected under labour law.

Trade unions have a duty to take all reasonable steps to stop and prevent violence, damage to property and other acts of misconduct during a strike.¹³³ Trade unions can be held vicariously liable for the violent acts of their members during strikes under certain circumstances.¹³⁴ The authors note that South Africa has recently been confronted with a high level of violent strikes, which negatively impacts the country's international image and economy.¹³⁵ The authors argue that violence during both protected and unprotected strike action is unacceptable, not functional to collective bargaining and is discouraged in terms of both international and national labour laws. The authors conclude that lawlessness should not be allowed to infiltrate and pollute the right to strike and that it

is up to trade unions to ensure that their members conduct themselves properly during strikes.¹³⁶ These points collectively emphasise the authors' stance that while the right to strike is important and protected, violence during strikes is a serious issue that undermines the legitimacy of strike action and has significant legal and economic consequences.

The argument for allowing some degree of violence during strike action is complex and controversial. As a point of departure, it should be acknowledged that strikes are inherently disruptive and often involve heightened tensions. As Grunfeld notes, strikes are "essential parts of the collective bargaining process" and represent "the final stage when a negotiation agreement cannot be reached".¹³⁷ This suggests that strikes often occur in situations of extreme frustration and desperation. In labour law, the balance of power in industrial relations favours employers over employees.¹³⁸ In this context, some might argue that a degree of forceful action is necessary for workers to effectively challenge this power imbalance. In South Africa's history, strikes have played a crucial role in challenging systemic injustices and have played a central role in the liberation politics of the country.

4.6 The Constitutional Court's approach

The *Marley Pipe Systems* case, when examined through the lens of Woolman's argument, presents a compelling illustration of the complex interplay between workers' rights, democratic processes and the occasional necessity for forceful action in labour disputes. Woolman's perspective, which advocates for allowing a limited degree of force in democratic processes, including strike action, offers a nuanced framework for understanding the events and judicial decisions in this case. Firstly, it is crucial to consider the context of the *Marley Pipe Systems* strike. The workers, dissatisfied with a wage increase agreement, initiated an unprotected strike. This action itself can be seen as a manifestation of Woolman's argument that marginalised groups sometimes need to resort to more forceful means to secure their participation in self-governance. The workers, feeling that their voices were not adequately heard

through conventional channels, took collective action to draw attention to their grievances.

The violence that ensued during the strike, particularly the assault on the head of human resources, while regrettable, can be viewed through Woolman's lens as a form of social protest. The workers' actions, though extreme, were arguably aimed at drawing urgent attention to their plight and the perceived injustices in their workplace. Woolman's critique of the overregulation and pacification of the right to assembly is particularly relevant in this case. The courts' initial decisions to uphold the dismissals of all 148 employees, including those not directly involved in the assault, exemplify the kind of strict liability that Woolman argues has a chilling effect on assembly rights. This approach, he contends, unduly restricts the space for collective action and fails to acknowledge the realities of deeply entrenched inequalities.

However, the Constitutional Court's final judgment in the *Marley Pipe Systems* case aligns more closely with Woolman's perspective. By overturning the dismissals of the 41 employees who were not directly linked to the violent acts, the court demonstrated a more nuanced understanding of the complexities of strike action. This decision reflects Woolman's argument that the modifier "peaceful" in constitutional provisions should primarily protect the bodily integrity of non-participants rather than be used to silence the voices of marginalised groups. The court's emphasis on the need for individual culpability rather than collective punishment agrees with Woolman's critique of approaches that impose blanket liability on protest organisers. By requiring proof of an employee's complicity in the acts of violence, the court's decision allows for a more balanced consideration of the right to assembly and the need for accountability.

Furthermore, the court's recognition that mere presence at the scene and watching does not satisfy the requirements for liability under the doctrine of common purpose aligns with Woolman's argument for a more nuanced approach to assembly rights. This decision acknowledges that not all participants in a strike or protest necessarily endorse or participate in violent

actions, preserving space for legitimate collective action. The *Marley Pipe Systems* case also illustrates Woolman's point about the tension between property rights and assembly rights. While the violence against the head of human resources clearly crossed a line, the court's decision to remit the matter to the Labour Court for reconsideration of appropriate sanctions for participation in an unprotected strike (without the aggravating factor of assault) reflects a more balanced approach.

While the *Marley Pipe Systems* case involved regrettable acts of violence, its final resolution by the Constitutional Court aligns closely with Woolman's advocacy for a more nuanced understanding of assembly rights and the occasional necessity of forceful action in democratic processes. The court's decision acknowledges the complexities of labour disputes and strikes, recognising that while violence cannot be condoned, the right to collective action and the voices of marginalised workers must be protected. This approach, in line with Woolman's arguments, seeks to balance the need for public order with the imperative of fostering genuine democratic participation and addressing entrenched inequalities in the workplace.

4.7 Conclusion

The *Marley Pipe Systems* case, while distinct in its specifics, cannot be fully understood without reference to the shadow cast by the Marikana tragedy. Both incidents emphasise the volatile nature of labour disputes in South Africa and the potential for industrial action to escalate into violence. However, the Constitutional Court's measured approach in the *Marley Pipe Systems* case suggests a significant evolution in legal thinking since Marikana. Where the aftermath of Marikana was characterised by broad-brush approaches and collective accountability, this ruling demonstrates a more nuanced understanding of the complexities inherent in strike actions. It reflects a judicial recognition that while violence must be unequivocally condemned, the response must be proportionate and individualised. This shift may be seen as part of the ongoing societal and legal reckoning with the lessons of Marikana, striving to balance workers' rights to protest with the

imperative to maintain public order and safety. Consequently, the *Marley Pipe Systems* case represents not just a legal milestone but a step in South Africa's journey towards more equitable and less violent labour relations.

In conclusion, the *Marley Pipe Systems* case represents a watershed moment in South African labour law, offering a nuanced interpretation of the doctrine of common purpose and collective guilt within the context of strike action. The Constitutional Court's judgment, in overturning the dismissals of 41 employees not directly linked to the violent acts, marks a significant shift away from blanket applications of liability towards a more individualised approach to culpability. The ruling emphasises the delicate balance that must be struck between protecting workers' rights to collective action and maintaining workplace order and safety. By emphasising the need for concrete evidence of individual misconduct or complicity, the court has set a higher standard for employers seeking to dismiss employees for strike-related violence. This approach aligns more closely with constitutional principles of fairness and justice whilst still acknowledging the serious nature of violent conduct during industrial action.

The case also highlights the ongoing challenges faced by South African society in managing labour disputes. The spectre of the Marikana tragedy looms large over such cases, serving as a stark reminder of the potential consequences when industrial action spirals into violence. The court's decision reflects an awareness of this context, seeking to provide a framework that allows for legitimate protest whilst firmly discouraging violent behaviour.

Moreover, the judgment touches upon deeper philosophical questions about the nature of collective action and the limits of solidarity. By rejecting the notion of collective guilt, the court has affirmed the importance of individual agency and responsibility, even within the context of group activities like strikes. This stance may have far-reaching implications for how trade unions and employers approach industrial action in the future. The case also serves as a cautionary tale both for employers and unions. For employers, it highlights the

importance of thorough investigation and evidence-gathering before implementing dismissals in the wake of violent strikes. For unions, it reiterates the need to maintain discipline and control during industrial action to prevent the escalation of violence that could jeopardise the legitimacy of their cause.

Looking forward, this judgment is likely to shape the landscape of labour relations in South Africa for years to come. It may encourage a more measured approach to strike action on both sides of the bargaining table, fostering an environment where grievances can be addressed without resorting to violence. However, it also raises questions about how employers can effectively manage the risks associated with violent strikes whilst respecting the rights of individual workers. In the broader context of South African democracy, the *Marley Pipe Systems* case reflects the ongoing process of refining and interpreting constitutional rights in the post-apartheid era. It demonstrates the judiciary's crucial role in navigating the complex intersections of labour law, constitutional rights and societal expectations. As South Africa continues to grapple with issues of economic inequality and labour unrest, cases like this will undoubtedly play a vital role in shaping the country's path towards a more just and equitable society.

Ultimately, the Constitutional Court's decision in the *Marley Pipe Systems* case represents a significant step towards a more nuanced and fair approach to labour disputes. By rejecting simplistic notions of collective guilt and emphasising the importance of individual culpability, the court has provided a framework that better balances the rights of workers, the needs of employers and the broader interests of society. As South Africa continues to evolve its labour laws and practices, this case will stand as a landmark in the ongoing effort to create a more just and equitable industrial relations landscape.

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