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Derivative Misconduct and the Reciprocal Duty of Good Faith:

Employee silence in identifying perpetrators of misconduct.

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Abstract

The reciprocal duty of good faith is recognised in our South African labour law which requires employees to not behave in a manner that is detrimental to an employer's enterprise and should at all times remain faithful and loyal in continuing employment within the business. The reciprocity lies in an employer providing job security and remuneration for work done in furtherance of the business.

A breach of the duty of good faith can result in dismissal where an employee merely remains silent in circumstances which calls upon them to divulge pertinent information that could lead to the detection of the perpetrators to the primary misconduct. Employers rely on the notion of derivative misconduct wherein they argue that there had been a breakdown in the trust relationship and draw inferences of guilt attributed to those silent employees in that they knew or ought to have known whom the actual culprits were and make themselves look guilty because of this silence. Due to employers being not able to identify the actual culprits, they in turn dismiss all employees said to be in the vicinity of the impugned misconduct.

However, the Constitutional Court has now added that in order for employers to rely on the notion of derivative misconduct, they need to show reciprocity on their part as well. Actually expecting employees to come forth and divulge pertinent information in misconduct investigations, and not act passive in circumstances which requires them to do more, is asking a bit too much of them without providing some sort of protection in return. Protection in these circumstances would be to provide assurance that they would not face victimisation in the workplace by ratting on their fellow peers. This would prevent any injustice to those employees who may actually be innocent and not have any information, but merely remain silent in such circumstances.

New Zealand has also codified the principle of good faith in their legislation. South Africa still relies on the common law when applying the principle of good faith. It is submitted that from the investigations conducted, many scholars are of the opinion that this concept is rather complex and to have it codified would actually cause much more uncertainty. Having it codified would merely provide a guideline, however, the courts would still rely heavily on the common law to provide structure to the concept with the courts dealing with the concept on a case by case basis depending on the facts of the case.

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List of Abbreviations

LC	Labour Court
LAC	Labour Appeal Court
CC	Constitutional Court
IC	Industrial Court
CCMA	Commission for Conciliation Mediation and Arbitration
LRA	Labour Relations Act
PDA	Protection of Disclosures Act
ERA	Employment Relations Act (of Zealand)

CONTENTS

CHAPTER 1

INTRODUCTION

1.1 BACKGROUND

There must be a reciprocal duty of good faith between the employee and the employer in the workplace. This means that employment is based on the ability to advance an employer's business interests and employees are remunerated accordingly.

To safeguard employees' rights to the employment, there is an implied term in the employment contract which expects employers not to act in a manner that would destroy the trust and confidence in an employment relationship. Likewise, employees owe a corresponding duty of good faith, trust and confidence towards their employer by not acting in a manner that is detrimental to the employer's business interests.

It suffices that the reciprocal duty of good faith operates within the realm of Section 23(1) of our Constitution[1] which states that everyone has the 'right to fair labour practices'.

The term 'fair labour practices' is not specifically defined in our Constitution and the Constitutional Court ('CC') has held that that this perception is so complex that it is not capable of an exact definition and is determined by weighing the different interests of the employee to that of the employer. Fairness in this context depends on the facts of a particular case and a value judgment.[2]

The Labour Relations Act ('LRA') was enacted to give effect to Section 23(1) of the Constitution which aims to promote labour peace in the workplace. Hence, there is sufficient legal protection in our legislative framework that employees and employers can rely on to give effect to their right to fair labour practices.[3]

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[1] Constitution of the Republic of South Africa, 1996.

[2] *National Education Health & Allied Workers Union v University of Cape Town* 2003 24 *ILJ* 95 (CC) 110.

[3] C Bosch 'The Implied Term of Trust and Confidence in South African Labour Law' (2006) 27 *ILJ* 29.

It often appears to employers that the LRA tips the scale in favour of employees who are immensely protected by the legislature in terms of permissible grounds for termination of employment. However, the duty of good faith can be seen as a fiduciary duty which employers often seek to rely on when employees act in a manner which is detrimental to the proprietary interests of the business.

The Supreme Court of Appeal ('SCA') in the case of *Council for Scientific & Industrial Research v Fijen* (*Fijen)*[4] has endorsed the English principle of the duty of good faith, trust and confidence in an employment relationship in South Africa. There has not much been said as to whether there is a need for South Africa to introduce the concept of good faith into our legislation. Bosch indicates that it will serve as a vehicle through which to regulate conduct of employers.[5] Regrettably, there has been no debate on what the implications of the concept might be given its endorsement by the SCA in *Fijen*.

However, some academics find that the concept of good faith is one which is very fragile in nature that it would cause much uncertainty if it is introduced into our legislature.[6]

Thus the research seeks to critically examine whether the implementation of the good faith principle will work effectively in practice when legislated and what the potential pitfalls may be of such implementation.

One characteristic of the duty of good faith in South Africa requires that employees who have knowledge of a specific misconduct, but are not guilty of the primary misconduct, have the responsibility towards their employer to identify perpetrators of the misconduct. These employees cannot merely keep silent but have an obligation towards their employer to come forth and assist in the misconduct investigation if it is presumed by the employer that they do in fact have the specific knowledge of whom the perpetrator might be. A failure to do so can result in dismissal on the basis of derivative misconduct due to a breach in the trust relationship.[7]

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[4] (1996) 17 *ILJ* 18 (A).

[5] Bosch (note 3 above) 28.

[6] L Hawthorne 'Abuse of a Right to Dismiss not Contrary to Good Faith' (2005)17 *SAMLJ* (2) 214.

[7] See *RSA Geological Services (a division of De Beers Consolidated Mines Ltd) v Grogan & Others* 2008 2 *BLLR* 184 (LC) (*De Beers (LC))* para 48, where the court relied on Cameron JA's dicta in the case of *Chauke and Others v Lee Service Centre t/a Leeson Motors* (1998) 19 *ILJ* 1441 (LAC) (*Chauke*) para 33.

Derivative misconduct is therefore used by employers who seek to collectively dismiss employees who they presume knew about the primary misconduct and who knew who the perpetrators were, but failed to divulge this information to their employer and chose to remain silent. The distinguishing factor for an employer's use of derivative misconduct[8] lies in distinguishing between employees who were actually charged with the primary misconduct and those who merely knew about it.

The Labour Appeal Court ('LAC') in *Chauke* [9]supports that derivative misconduct is wide enough to include those employees who were not actually guilty of any misconduct but make themselves look guilty because of their silence leading to a violation of trust and confidence in the employment relationship.[10] This means that employers are able to draw inferences of guilt attributed to those silent employees who are not actually guilty of the primary misconduct. These employers argue that there had been a breakdown in the trust relationship hence these employees can no longer resume employment within their business. [11]

The employer hence bears a burden of proof on a balance of probabilities that the employees knew or ought to have known whom the perpetrators of the misconduct where and deliberately failed to assist in pointing them out.[12] According to Kemp, proof on a balance of probabilities has been described as requiring "the claimant to "out proof" the defendant by proving that the relevant fact is more probable than not. This standard is usually defined as "more probable than not."[13] From this it is common cause that there will be copious evidentiary issues which can arise from silence on the part of employees in assisting their employers to determine who the perpetrators are.

The LAC in the *PRASA* case held that:-

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[8] Instead of using other forms of misconduct such as common purpose, team misconduct or collective guilt discussed further in Chapter 3.

[9] *Chauke* (note 7 above).

[10] T Poppesqou 'The Sounds of Silence: The Evolution of the Concept of Derivative Misconduct and the Role of Inferences' (2018) 39 *ILJ* 38.

[11] See *De Beers (LC)* (note 7 above) and *National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others* (CCT202/18) [2019] *ZACC* 25*;* 2019 (8) *BCLR* 966 (CC) (*Dunlop (CC)*).

[12] *Dunlop Mixing & Technical Services (Pty) Ltd & others v National Union of Metalworkers of SA obo Khanyile & others* (2016) 37 *ILJ* 2065 (LC) (*Dunlop (LC)*) para 41; *National Transport Movement & others v Passenger Rail Agency of SA Ltd* (2018) 39 *ILJ* 560 (LAC) (*PRASA*) 570 para 30.

[13] A Le Roux-Kemp 'Standards of Proof: Aid or Pitfall?'(2010) 31 *(O)* (3) 686.

> '[A]nd that without *prima facie* evidence that any of the employees did have information about the principal misconduct one cannot conclude that the employee's failure to cooperate necessarily meant that they either did have or must have had something to hide.'[14]

Hence, courts are to be satisfied that the employees in question did in fact have knowledge of the impugned misconduct and such is quite difficult to prove on a balance of probabilities.

The duty of the good faith standard ensures protection of an employee's constitutional rights, more specifically, to the right to fair labour practices. It also protects other rights such as the right to human dignity and freedom. On the other hand, the courts have also endorsed a reciprocal protection to employers in holding employees responsible for a derived form of misconduct by relying on inferences. Can this then be seen as somewhat an abuse to the right to dismiss *en messe* when an employee may actually not have been guilty?

It now seems that *Dunlop (CC)* has recently put an end to the notion of derivative misconduct where the court held *obiter dictum* that employers are to prove direct or indirect participation of the misconduct by way evidence either direct or circumstantial.

The *Dunlop (CC)* case dealt with dismissal of striking employees on the basis of derivative misconduct wherein it set aside the judgment of the courts a quo which supposedly "extended" the principle in question. The LAC in *National Union of Metalworkers of SA obo Nganezi and others v Dunlop Mixing and Technical Services (Pty) Ltd and others*[15] (*Dunlop (LAC)*) called for the onus to be shifted to the employees to give reasons why they refused to assist their employer in their impugned investigations in the first place.[16] Based on *Dunlop (LAC)*, a failure to provide proper explanations, or not testifying at all, can result in a fair dismissal on the basis of derivative misconduct. *Dunlop (CC)* set aside that ruling of the LAC and held that this "extension" of the law was totally incorrect.

However, although *Dunlop (CC)* had passed judgment in favour of several employees being reinstated, the CC has not provided sufficient clarity on the protection that should be afforded

[14] *PRASA* (note 12 above) 571 para 30.
[15] [2018] 10 BLLR 961 (LAC).
[16] Ibid para 62.

to employees who do choose to break the silence and come forth and identify perpetrators of the misconduct. As to the practicality to the notion of derivative misconduct and its imposition being constitutionally compliant, much has not been said in *Dunlop (CC)*. This discussion will look at whether derivative misconduct can still be seen as touching the surface of collective guilt - a term wholly repugnant in our law. There is also much uncertainty regarding various other collective misconducts including common purpose and team misconduct. It is extremely important for employers to understand and distinguish between all these forms of misconduct, especially on the part of employers, to avoid costly litigation that would eventually amount to nothing if the incorrect legal doctrine is used.

It is imperative to further note that the criteria for contraventions of the principle of good faith in the workplace by employees has been set out in South African common law.[17] Comparatively, the principle of good faith has been codified into legislation in New Zealand by the Employment Relations Act of 2000 ('ERA'). This study will involve a comparative analysis with New Zealand's ERA where the principle of good faith has been codified in Section 4. New Zealand found that there was a need to codify good faith into statute because the common law introduced this concept to protect only the employer's proprietary interests, and does not take into account the employee's economic interests.[18] New Zealand's codification of the good faith standard allows employer's to rely on this principle to hold employees responsible for misconduct pertaining to the breach of good faith.

1.2 STATEMENT OF THE PROBLEM

Given the aforementioned brief discussion on derivative misconduct and breach of the reciprocal duty of good faith, it is trite that employees not act in a manner that will damage the trust relationship in a workplace. However, to what extent does the reciprocal nature of the duty of good faith extend on the part of employees to their employers where it is evident that employees are innocent of any intentional misconduct but merely remain silent when called upon to assist in misconduct investigations? Our CC – as per Dunlop - has confirmed that if an employer calls upon an employee to come forth and pinpoint the actual perpetrators, the reciprocal nature of the duty of good faith requires that that employer provides some sort of

[17] See *Western Refinery Ltd v Hlebela* (2015) 36 *ILJ* 2280 (LAC) (*Hlebela (LAC)*) where the court laid out the correct test to be used which set precedence for the cases that followed. For example see *Dunlop (CC)* (note 11 above).

[18] G Anderson "Good Faith in the Individual Employment Relationship in New Zealand" 32 Comp. Lab. L. & Pol'y J. 685 (2011).

protection to that employee who would otherwise face victimisation in the workplace. However, *Dunlop (CC)* was not clear in its judgment as to what this protection might entail and how such protection will work practically in the workplace.

1.3 STATEMENT OF PURPOSE

The purpose of this research is to examine how breach of the duty of good faith allows employers to use derivative misconduct to collectively dismiss employees for failure to come forth and assist in identifying the actual perpetrators of misconduct.

The objective of this study is to critically evaluate whether the current position adopted by the courts in determining breach of this duty of good faith is actually in keeping with the employees constitutional rights to fair labour practices, human dignity and freedom and security of the person when collectively dismissed due to silence.

Further, the purpose of the study is to emphasize that the courts are allowed to draw inferences from failure of employees to come forward and identify those employees that are actually responsible for the misconduct and deals with the evidentiary issues surrounding this. The research will also critically examine the criteria the courts use in determining derivative misconduct and the standard of proof on a balance of probabilities with the CC providing the latest guidelines on the use of the concept. [19]

The study will involve a comparative study with New Zealand to seek the effectiveness or pitfalls of the legislated application of good faith as compared to that in South African wherein we still rely on our common law.

1.4 RESEARCH METHODOLOGY

The researched material used in writing this thesis is desktop research consisting of online published cases and journal articles (local and international) as well as legislation. Published books and textbooks from the University of Kwazulu Natal, Howard College Campus Law Library is also used in the writing of this thesis when taking into account the South African view point. Online resources from the UKZN online Library will be used to source information pertaining to the comparative study with New Zealand.

[19] *Dunlop (CC)* (note 11 above).

1.5 RESEARCH QUESTIONS

There will be three focused research questions, namely: -

1. Under what circumstances should breach of the reciprocal duty of good faith result in derivative misconduct?

2. What are the Constitutional implications on employees' rights when they choose to remain silent and are subsequently dismissed by their employer?

3. How does SA deal with the duty of good faith compared to that of New Zealand?

1.6 CHAPTER BREAKDOWN

Chapter 1: Background

This Chapter has introduced the research topic and outlines what the study aims to achieve. It also covered the background into the concept of the duty of good faith and derivative misconduct in South Africa. This Chapter stated the focused research questions and a breakdown of how each question will be discussed. It also provided a guideline into the literature and layout into the Chapters that follow.

Chapter 2: The Reciprocal Duty of Good Faith

This Chapter will involve a discussion of the reciprocal duty of good faith and how the concept came to be in our common law. It will also discuss the breach of this principle which results in sanctions being imposed by employers in terms of derivative misconduct when wanting to collectively dismiss employees.

Chapter 3: Derivative Misconduct

This chapter will discuss derivative misconduct in our law. This will be compared with the other forms of misconduct in our law such as team misconduct, common purpose and collective guilt.

This Chapter will involve a discussion into the standard of proof on a balance of probabilities relied on by the employer in dismissing employers and its effectiveness.

It will also discuss the ability of the courts to draw inferences when it comes to employee silence.

This study will look at the Constitutional invalidities involved in dismissing certain innocent employees on the basis of derivative misconduct on the basis of mere silence.

Chapter 4: The Duty Of Good Faith In New Zealand Compared To South Africa

This Chapter will involve a comparative analysis with New Zealand's legislation which codified the principle of good faith in their Employment Relations Act of 2000.

It will also involve a discussion into the need to have this principle codified in our legislation by Parliament.

Chapter 5: Conclusion

The conclusion will summarise the points highlighted in the preceding paragraphs and emphasise if there is a gap in the law to codify the principle of good faith or not.

CHAPTER 2

THE RECIPROCAL DUTY OF GOOD FAITH

2.1 INTRODUCTION

An employment relationship is based on an employer providing work to employees for the advancement of the employer's business and proprietary interests which must be balanced by the ability to remunerate the employee for the work done in furtherance of his business and not to exercise tendencies of exploitation and unfairness towards the employee.

It is important to recognise that the principle of good faith stems from our early Roman and Roman Dutch law which seemed to be sufficiently equitable back then in our contractual law. However, the duty of good faith in labour law stems from the English Law.[20]

With the progress of this concept surfacing more frequently in our courts, there appears to be confusion and no set precedent to follow on application of this doctrine, with some scholars referring to the concept as being vague.[21] Derived from our common law, we find that there is no set meaning to the concept of good faith. The CCMA and the courts seek to pursue the role and function of this concept on a case by case basis depending on the facts of the matter.

2.2 THE COMMON LAW DUTY OF GOOD FAITH (BONA FIDES) IN SOUTH AFRICA

The concept of good faith is said to be reciprocal in nature in that the employer will return the duty of good faith and will provide the employee with security of employment and remuneration for his service, and not behave in a manner that will destroy the trust relationship based on bias, unreasonableness and unfairness.

The duty of good faith is paralleled with the duty of mutual trust and confidence and this has been acknowledged by South African courts.[22] Harms JA states that the concept does not even

[20] *Robb v Green* [1895] 2 *QB* 1 at 10-1.
[21] Zimmermann 128.
[22] (note 3 above) where Bosch refers to the case of *Mahmud & Malik v BCCI* [1998] *AC* 20 (HL) at 34 (Lord Nicholls) and 45 (Lord Steyn).

need to be equated to an implied term but rather 'flow from *naturalia contractus.*'[23] The court further went on to state that:-

> 'On an English rule of law. It is that in every contract of employment there is an implied term that the employer will not, without reasonable and probable cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties.'[24]

It suffices that this duty also extends to circumstances where there is no formal written contract of employment.[25] It is an implied term in any employment contract that an employee will act in *bona fides* towards his employer and that he has the utmost duty of honesty, loyalty and faithfulness towards his employer throughout the duration of his contract of employment.[26]

It is worthy to mention that it is important to distinguish whether the relationship between the employee and employer is a fiduciary one or one of good faith.[27]

Idensohn emphasises that there is an extreme distinguishing factor between fiduciary and good faith obligations. She states that:-

"Both fiduciary duties and duties of good faith, for example, require 'loyalty'. For the purposes of fiduciary duties, 'loyalty' has the specific meaning of acting solely and exclusively in the interests of another. In relation to duties of good faith on the other hand, 'loyalty' generally has a narrower, less exacting meaning that merely requires the incumbent to have regard to or take the interests of another into account."[28]

The CC has confirmed that these two concepts have not been clearly defined in our law by reaffirming Idensohn's remarks[29]. Froneman J in *Dunlop (CC)* held that as compared to good faith principles, fiduciary principles are not an implied term to an employment contract.[30] He

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[23] *Fijen* (note 4 above) 18.
[24] Ibid 17.
[25] This principle has been endorsed by the SCA in *Ganes v Telecom Namibia Ltd* (2004) 25 *ILJ* 995 (SCA) para 25.
[26] *SAPPI Novoboard (Pty) Ltd v Bolleurs* 19 *ILJ* 784 (LAC) *(SAPPI)* para 7.
[27] *Dunlop (CC)* (note 11 above), where the court had to decide whether the derivative misconduct formed part of fiduciary or good faith contractual obligations.
[28] K Idensohn "The Nature and Scope of Employees' Fiduciary Duties" (2012) 33 *ILJ* 1539 at 1550.
[29] *Dunlop (CC)* (note 11 above) para 57.
[30] Ibid para 62.

adds that :- "That is because the legal contractual obligation of good faith is a contested one and must, at the very least, be of a reciprocal nature."[31]

Froneman J further added that :-

> 'This Court's development of good faith and Ubuntu in contractual relationships is intended to infuse good faith into unequal contractual relationships, or more equality into hierarchical relationships precisely where the hierarchy leads to the exertion of unfair power over the subordinated party. This is especially so in commercial contracts where the power of one party enables hierarchical exertions over the subordinated other. If the Ubuntu analogy were appropriately applied here, it would be in relation not to the subordinated employee but to the employer.' [32]

Good faith is therefore an exceptionally imperative doctrine in the labour law context as it precludes an abuse of power by otherwise tyrannical employers who are in a more sophisticated locus in comparison to their employees and cannot just terminate employment contracts as they please.

The concept of Ubuntu that was used by Froneman J is an African analogy which came into being post -Apartheid after the new Constitutional dispensation. It is closely intertwined with the principle of good faith. *Barkhuizen v Napier CC*[33] was the first case in our law to make mention of the concept of Ubuntu which deals with developing the contractual law to bring it in line with the norms and values of our Constitutional dispensation.

Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers Ltd **[34]** by referring to the case of *S v Makwanyane and Another*[35] described Ubuntu as emphasising the communal nature of society and carries values such as humanity, social justice and fairness. It covers the most important values of humanity including 'group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity.'[36]

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[31] Ibid para 63.
[32] Ibid para 66.
[33] 2007 (5) *SA* 323 (CC).
[34] 2012 (1) *SA* 256 (CC); 2012 (3) BCLR 219 (CC) 276.
[35] 1995 (3) *SA* 391 (CC) 484.
[36] Ibid.

Hence, it is clear that the concepts of good faith, Ubuntu and public policy are pivotal in developing our contractual law in line with the tenets of our Constitution, even though these concepts have not been given precise definition in our legislation. It is submitted that it is not necessary to actually legislate these concepts as they are ever changing and its definition defers in different scenarios it may be presented with. The true meaning of these concepts need to be manipulated to suit the facts and merits of any particular case at hand.

The criteria for contraventions of the principle of good faith in the workplace by employees have been set out in common law in South Africa.[37]

The duty of good faith has been extended over the years to include circumstances where misconduct has occurred where an employer cannot identify culprits to the misconduct and rely on other employees to come forth to assist them in any information that could result in the culprits being identified. The withholding of such information by those other employees can result in dismissal for derivative misconduct even if they are innocent but choose to deliberately withhold such information. It is regarded by the courts as a breach of the duty of good faith.

Breach of this duty of good faith by employees are serious enough to warrant dismissal. An employer expects their employees to act in a manner of utmost loyalty in the workplace. If an act of misconduct has taken place, but an employee has not committed such misconduct directly, however is in a position of possessing pivotal information of whom actually the perpetrators are, there rests an obligation in terms of the duty of good faith to divulge such information to their employee that could lead to the identification of these perpetrators. A blatant refusal to provide such information and merely remaining silent in such circumstances, is not seen in very good light and could lead to a dismissal on the basis of derivative misconduct. The with-holding of pertinent information of this nature is a breach of the implied duty of good faith.

[37] See cases in Note 11 and 12.

CHAPTER 3

DERIVATIVE MISCONDUCT

3.1.INTRODUCTION

When trust becomes an issue between employee and employer, there is a breach of the duty of good faith which can lead to termination of the employment contract on the basis of derivative misconduct where employees abstain from assisting their employer in misconduct investigations without good reason.

Derivative misconduct is described as a misconduct which is derivative in nature because it involves, not the actual perpetrator of the primary misconduct, but employees who have knowledge of the actual perpetrators to the misconduct by being in the vicinity of the impugned misconduct. They become guilty of derivative misconduct by failure to divulge pertinent information that could lead to the detection of the perpetrators.

There have been various endeavours over the past decade to provide a clear-cut definition to derivative misconduct and the application of this concept in South African case law and commentary.

More simply put, labour law has classified derivative misconduct as a problem faced by the employer where there is distinct evidence of misconduct by employees, but the actual individual culprit responsible for such misconduct cannot be pinpointed. In terms of the standard of good faith, employees who may have knowledge of whom the perpetrator might be, have to come forth and disclose this information to their employer.[38]

Schedule 8 of the LRA, The Code of Good Practice on Dismissals, sets out that there are disciplinary procedures to be followed prior to dismissal.[39] Item 1 of the Schedule endorses the principle that all employers should adopt disciplinary rules that should establish the conduct required by the employees and this will obviously vary given the size and nature of the

[38] K Bassuday 'Derivative Misconduct and an employee's duty of good faith: *Western Platinum Refinery Ltd v Hlebela & others* (2015) 36 *ILJ* 2280 (LAC) (2016)' 37 *ILJ* page 86, para 1.
[39] Item 3.

employer's business. It further states that in a larger business, employers are to create certainty and consistency in the manner in which they apply discipline. The codes of conduct are to be clear and must be easily understood and readily available to employees. Some of these rules must so well be established and well known that it may not be necessary to communicate them.

There are various applications to derivative misconduct, which ranges from dealing with individuals who have knowledge of a specific misconduct, e.g. theft in the workplace, to grand scale misconducts like large scale strike action where it is virtually impossible to have disciplinary hearings for each and every participating employee found to be in the vicinity of the impugned misconduct or breach of certain workplace rules. Employers can then deal with the employees collectively by relying on derivative misconduct.[40]

In the precedential *Dunlop (CC)* case, wherein the employer dismissed several striking employees on the basis of derivative misconduct who were found to be in the vicinity of the impugned misconduct for failure to divulge pertinent information that could lead to the identification of the actual culprits who damaged company property, Froneman J held that:-

> '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.'[41]

Cohen also states that the difficulty with proving derivative misconduct lies with the employer actually proving that the silent employee does have knowledge of the specific misconduct. [42] The only way to prove that the employee does have knowledge, is to place the employee in the vicinity of the impugned misconduct. It must be *prima facie* proved that given the position of this employee at the time of occurrence of the misconduct, there is no way that this employee could not have known that the misconduct had taken place and had to have witnessed the

[40] Schoeman Law Shortnotes, available at https://www.schoemanlaw.co.za/wp-content/uploads/2017/10/AN-Website-article-COLLECTIVE-INQUIRIES-OCT-2017.pdf , accessed 29 March 2019.
[41] *Dunlop (CC)* (note 11 above) para 31.
[42] T Cohen 'Collective Dismissal: A Step Towards Combating Shrinkage in the Workplace' (2003) 15 *SA Merc LJ* 22.

misconduct and further known whom the culprit had been, alternatively, be in a position to pinpoint exactly whom the culprit was.

In most instances, and as previously mentioned in this writing, the courts find that derivative misconduct can sometimes be the incorrect source of law to rely upon when seeking to collectively dismiss as the distrusted employee has to be placed in the vicinity of the actual misconduct and it must be proved that this employee possesses knowledge that could implicate the actual culprits. The courts allow employees to draw inferences of guilt attributed to the employees found to be in the vicinity of the alleged misconduct and whom have remained silent in pointing out the culprits, making themselves look guilty of the misconduct as well.

3.2. DEVELOPMENT OF DERIVATIVE MISCONDUCT AND THE TESTS NOW IMPOSED BY THE COURTS

The notion of derivative misconduct firstly appeared in the case of *FAWU v Amalgamated Beverage Industries Limited* [43] (*FAWU)* where the court held that there may be instances where policy requires more from an employee than to merely keep silent in certain instances and a failure to assist employers in their investigations of misconduct can justify disciplinary action against those silent employees. The case sets out the principle that an employer can solely rely on inferences when collectively dismissing employees on the basis of misconduct for silence in coming forth and assisting in misconduct investigations.

In this case a large group of employees were collectively dismissed for assaulting a fellow worker who had chosen to work during strike action, as well as for insubordination and intimidation. When called forth by their employer to assist in identifying the culprits who assaulted the worker, nobody came forth. The employer had taken the decision that the correct sanction was to dismiss all employees known to be in the vicinity of the assault on the day in question. The employer had again given the opportunity to these employees to come forth and exonerate themselves from the alleged misconduct but still none of the employees came forth.

It is imperative to mention that there had been no direct evidence which linked any one worker to the assault. The employer relied on inferences that those who did not come forth, where actually guilty of the assault or alternatively actively participated in cheering on the culprits who did participate in the assault. The employer relied on witnesses who were present at the

[43] *Food & Allied Workers Union & others v Amalgamated Beverage Industries Limited* (1994) 15 *ILJ* 1057 (LAC).

time of the strike as well as the electronic clock - in system that was put in place to record the presence of employees at work on the day.

Regarding the role of inferences relied upon by the employer, Nuggent J held that in instances where evidence is provided by an employer to an employee's detriment, it would be expected that the employee come forth with an explanation and a failure to do so renders a case against him.

Nuggent J, referring to the case of *R v Blom*[44] held that when inferences are drawn by employers, it needs to be consistent with the facts from a logical perspective. If it is inconsistent, inferences cannot be drawn. Nuggent J held that given the facts before him, it was consistent with the inferences drawn by the employer that the employees were in the vicinity of the impugned misconduct. He added that it is not a given that in the circumstances the inference is a correct one. The court will make the ultimate decision as to which of the inferences are more plausible or natural given the facts of the case.

The court, by looking at the evidence before it, found that the failure of the workers to give evidence to assist in pointing the culprits to the assault or providing an explanation that could assist in them being exculpated, found that the employer was justified in drawing inferences of guilt towards these employees. The court went further to share the view that if these employees did have an innocent explanation, they would have come forth and tendered it. A failure to do so rendered an inference against them that they either directly participated in the assault to the scab worker, or they lent their support to the actual perpetrator in conducting the misconduct.

The court also rejected the argument that one or more of the workers may have failed to provide an explanation for fear of intimidation in the workplace or as a sense of "collegiality". The court held that the basis for this was merely speculation with a lack of evidence to support this argument, because four employees had already exculpated themselves without any fear of such intimidation. The court could not see any reason why the rest could not follow suit if they were in essence actually innocent.

[44] 1939 AD 188 at 202-3.

The next case which surfaced was that of *Chauke* which provided the "genesis" to the definition of derivative misconduct for all cases that followed. It was the very first case that mentioned derivative misconduct in its *dicta* - though the case had not referred directly to the notion.

The *Chauke* case involved the dismissal of 20 workers from a panel beating shop on charges of malicious damage to customer's vehicles and sabotage to the employer's company following a wage demand to which the employer refused to accede to and the dismissal of a fellow shop steward for gross negligence. Despite warnings by the employer, there had still been continuous damage to vehicles. When the employer had confronted the employees who worked directly with the vehicles as to whom the actual perpetrators were, the employees did not come forth to assist the employer to identify these perpetrators and instead chose to remain silent. The employer then issued an ultimatum that there would be dire consequences should further acts of malice occur. Despite this ultimatum, another vehicle was damaged. The employer then dismissed all 20 employees for malicious damage to property on the basis that they were unable to pinpoint the actual culprits.

The issue before the court was then to decide whether such dismissal of all 20 workers were justified.

Cameron JA echoed the sentiments of the court *a quo* in reaching its conclusion in favour of the employer that given the bad relationship that already existed in the workplace with their employer, the workers had collectively embarked on a sabotaging spree against their employee and collectively chose to remain silent with the attitude that if they assumed this position, their employee would be powerless.[45]

The employees contended in the Industrial Court ('IC') that each individual employee ought to have been given individual hearings and individual culpability ought to have been proved prior to them being dismissed and the matter should not have been dealt with collectively. This was rejected by the IC who shared a very sardonic view that this could emanate only from those 'living in a dream world'.[46]

Cameron JA posed a pertinent question *obiter* and asked:-

[45] *Chauke* (note 7 above) para 24.
[46] Ibid para 25.

> ‘Where misconduct necessitating disciplinary action is proved, but management is unable to pinpoint the perpetrator or perpetrators, in what circumstances will it be permissible to dismiss a group of workers which incontestably includes them?’[47]

In reaching its conclusion the court had to firstly determine whether the case involved a dismissal based on the employer’s operational requirements or that which is non-operational and involves misconduct which is disciplinary in nature. [48]

If the dismissal is said to be operational in nature, the court postulated a hypothetical scenario, with reference to Brassey. The first justification involved misconduct that had taken place in the workplace, and it is common knowledge that only one of two workers could have conducted major destruction in the workplace, but management is unable to pinpoint which of the workers between the two had committed the misconduct. Management could safely dismiss both these workers based on their operational requirements on the basis that they are doing so to save the company from future detriment, even if one of these two employees are absolutely innocent.[49]

The second justification to dismissal that the court refers to is misconduct which is non-operational in nature. This differs from dismissal on the basis of operational requirements because management here is able to infer that all workers involved are not innocent and through drawing inferences, is able to determine that there is sufficient grounds to dismiss these workers on the basis that the entire group of these workers are responsible for the perpetrated misconduct or in some way involved in the misconduct.[50]

Dismissal in this instance may be justified on one of two grounds. In the first instance, the court held that where a worker has information or reasonably known to be in possession of pertinent information that could lead to the perpetrators, our law requires more of that employee than to merely keep silent in such instances. A moral obligation rests on such employee to assist in identifying the perpetrators. A worker in a group amongst the perpetrators has an implied duty of good faith, trust and confidence towards their employer to bring the guilty to book, and any conduct which falls short with this common law obligation, is sufficient enough to warrant

[47] Ibid para 27.
[48] Ibid para 29.
[49] Ibid.
[50] Ibid para 30.

dismissal.[51] The court, referring to *Fijen*, held that this failure in itself is a violation of the duty of good faith towards the employer, and warrants dismissal.

The court also heavily relied on the *dicta* in *FAWU* wherein the court referred directly to Nuggent J's opinion on public policy that requires more than an employee to merely keep silent in such instances and have an obligation to come forth when the duty of good faith requires one to do so.

The case differs from *FAWU* as in this case, these acts of sabotage by the workers actually constituted criminal intent on the basis of common purpose and it was not necessary to decide the case on the basis of derivative misconduct. The acts of sabotage occurred over a long period of time of more than four months and was confined to a group of approximately 20 workers who worked directly within the vicinity of these saboteurs and it could not be anyone else that could have committed these acts other than these workers. The court held that in *FAWU,* it was just one act of misconduct against a fellow scab worker, and it could have only been the crewmen, of approximately 100 employed at the time, who clocked in on the morning of the incident to have been involved in the impugned misconduct. However, this was not the most probable inference. The most probable inference was that none of these crewmen gave evidence to exculpate themselves from the primary misconduct which led the court to the decision that the employee's dismissal had been justified as it drew inferences of guilt.

The reason for the court reaching its conclusion, was that the employer was justified in warranting, by inferential reasoning, that all the workers were responsible for the primary misconduct of malicious damage to company property and the evidence was much more probable than that of *FAWU.*

The court in *Chauke* also rejected the notion that it could have been just one 'maverick individual with an idiosyncratic grudge against management' [52] as the workers silence when confronted about the sabotage on several occasions shows collective motive. If they were in fact innocent they would have all given evidence against this one employee to safeguard their employment. An inference was drawn that each of them on one or more occasions had directly been involved in the planning and executing of the sabotage or that each of them knew whom the culprits were. Their deliberate silence showed that they had acted in cohorts with each

[51] Ibid para 31.
[52] Ibid para 40.

other. The court held that this differs from *FAWU* as in this case a primary inference of culpable participation can be drawn and whereas in *FAWU*, a secondary inference is drawn from the lack self –exculpatory evidence.[53]

The next case which dealt with the notion of derivative misconduct was *De Beers (LC)* where Pillay J held that the culpability to the primary misconduct is in fact diminished in derivative misconduct. However, the employer must prove on a balance of probabilities that the employees knew or must have known about the misconduct and elected to remain silent without justification. If this onus is discharged, then derivative misconduct is diminished on the basis that these employees participated or lent support or associated themselves with the primary misconduct.[54]

A two-stage enquiry was postulated by the court when considering evidence in cases where employers rely on inferences only:-

The first stage of the enquiry '*was to determine whether the facts, and inferences drawn from the facts, constituted prima facie proof that all of the employees had participated in the misconduct and had been aware of it*.'[55]

The second stage of the enquiry involves an assessment into *'whether the employees rebutted these facts and inferences effectively and if not, whether the employer succeeded in elevating its prima facie proof to conclusive evidence sufficient to discharge its onus of proving the fairness of the dismissal on a balance of probabilities. It was common cause that if the employer proved that the employees committed the offence, dismissal was the appropriate sanction.'*[56]

Hence, the first stage of the enquiry requires a look into the facts of the case. In this case, all employees in a mineral laboratory where dismissed after a secret informant advised the company that large quantities of kimberlite sample were being discarded in a borehole despite company policy being that this sample must be kept in order to effectively report to clients even though it may not contain any diamonds or precious minerals. The employees were

[53] Ibid para 41.
[54] *De Beers (LC)* (note 7 above) para 49.
[55] Poppesqou (note 10 above) 39 – 40.
[56] *FAWU* (note 41 above) para 23.

interviewed by security and none provided information until a polygraph test was taken and an employee admitted to throwing the kimberlite in the borehole and implicated two other employees. Polygraph tests were offered to all other employees and after initially agreeing, they had declined their consents upon advises of their representative union. They were warned that should they be withholding information regarding the discarding of the kimberlite, they could be dismissed. They had been provided with a telephone number of which they could contact their manager anonymously if they had any information. None came forth. They had been urged to co-operate in the investigations but all of them denied knowing anything about the discarding.

Given the large quantity of kimberlite that was discarded, two employees were insufficient for all discarding that took place and the company drew the inference that the employees who had worked overtime at the time the dumping took place were attributed to the misconduct and the rest were attributed to the misconduct as they possessed information regarding the actual perpetrators of the dumping.

The first leg of the test had therefore been satisfied as the company proved prima facie that all employees were attributed to the scam.

The second stage of the enquiry involves the employee's case and the ability to rebut his employers' arguments against him. Having regard to the circumstantial evidence placed before him, Pillay J held that the employees' refusal to testify placed them in a position of being more inclined to guilt as they would have had a fear of losing their jobs and if they had been innocent they would have testified.[57]

In the absence of evidence that rebutted the employers case, the employees were found to be guilty of derivative misconduct in that they probably participated in the dumping or knew whom the culprits where and failed to disclose this information to their employer and where ultimately dismissed.

The court found that derivative misconduct did not apply to the case as all the employees were alleged to have participated in the primary misconduct directly by common purpose.

[57] Ibid para 33.

Another case which involved much commentary after *Chauke* was the case of *Hlebela (LAC).*[58] Hlebela was accused of assisting in on-going theft in the workplace and having knowledge of material information which saw him live a lavish lifestyle. Hlebela was found not guilty with regards to the theft, but guilty on the basis of derivate misconduct. The facts of the case resembled that of the *De Beers (LC)* case rather than the case of *Chauke* and *FAWU.*[59]

The main elements to proving that the employee is guilty of derivative misconduct which was postulated by the court were:-

> '(i) The employee must have had actual knowledge of the wrongdoing, otherwise the blameworthiness cannot be attributed to him or her.
>
> (ii) Non-disclosure must be deliberate.
>
> (iii) The gravity of the non-disclosure must be proportionate to the gravity of the primary misconduct.
>
> (iv) The rank of the employee may affect the gravity of the non-disclosure.
>
> (v) While there is a general duty to disclose wrongdoing, the non-disclosure may also be affected by whether the employee was specifically asked for that information.
>
> (vi) The employee needs not have made common purpose with the perpetrator.
>
> (vii) An employee cannot be guilty of derivative misconduct on the basis of negligently failing to take steps to acquire knowledge of the primary wrongdoing.'[60]

Sutherland JA elucidated what was said in *Chauke*, where he held that the judgment had not created a new species of misconduct by "judicial *fiat*"[61], it had simply reiterated and again affirmed the principle that employees are implicitly bound by a duty of good faith towards their

[58] (note 17 above).
[59] J Grogan '"Derivative misconduct" Not a trap to snare the (apparently) innocent" 2015 *ELJ* 31
[60] (note 17 above).
[61] Ibid para 8.

employers, and that an employee breaches that duty 'by remaining silent about knowledge possessed by the employee regarding the business interests of the employer.'[62]

Sutherland JA, referring back to the *Chauke and FAWU* cases, found that the most important point of departure was the following put forward by the aforementioned courts:-

> '[A]n employee is derivatively justified in relation to the primary misconduct committed by unknown others, where an employee, innocent of actual perpetration of misconduct, consciously chooses not to disclose information known to that employee pertinent to the wrongdoing.'[63]

Grogan reaffirms that there are 3 limitations to this "derived justification" as proposed by Sutherland JA namely:-

1. The employee must be innocent of the primary misconduct.
2. The non-disclosure of information that he is or she is aware of must be deliberate.
3. The information withheld must be "pertinent" to the misconduct, which presumably means that the information withheld would have materially assisted the employers to track down the perpetrators. [64]

Sutherland JA had elaborated on each of the aforementioned limitations. He held that but for the disclosure being deliberate, this would not warrant breach of the duty of good faith. Grogan states that deliberate silence implies that there is actually knowledge to disclose because a moral blameworthiness standard which is linked to this non – disclosure 'implies a choice not to tell.'[65] Grogan further states that the seriousness of the derivative misconduct must be compared to the gravity of the primary misconduct and what impact it has caused to the employer. The rank of the employee in the workplace is also relevant as if the employee is in a more intimate position in the workplace, his "moral blameworthiness" will be higher in respect of the deliberate non-disclosure.

[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Ibid.

Sutherland JA further held that the duty to disclose is not necessarily triggered by the employer asking for such information. Mere knowledge of the perpetrators is sufficient to discharge the onus. Furthermore, a defence to derivative misconduct does not constitute proof that the employee is not guilty of the primary misconduct and such cannot be brought in derivative misconduct cases. Being guilty of the primary misconduct constitutes common purpose. Derivative misconduct falls short of the common purpose standard in that bystanders to the actual misconduct who fail to divulge information of the actual perpetrators are guilty of derivative misconduct due to such silence.

Derivative misconduct in this case was the correct basis of dismissal because Hlebela was charged with involvement of the theft of the precious material as well as failure to make a "full and frank" disclosure of pertinent information of what he knew could help the employee in its investigations of the perpetrated misconduct.

When derivative misconduct is relied on by employers in dismissing employees due to their preferred silence in coming forth to assist in misconduct investigations, the onus rests on the employer, to prove on a balance of probabilities that the employee actually committed the misconduct.

The LAC, as per Kathree-Setiloane AJA, in *PRASA*[66] held that:-

> 'This would require the employer to prove the following main elements of derivative misconduct, namely, the employee knew or must have known about the primary misconduct, but elected, without justification, not to disclose what he or she knew.'[67]

During labour proceedings (as with all other court proceedings), a presiding officer is to analyse the evidentiary material before him to reach a judgment and the degree of sanction is based on the evidence before him which must be in keeping with public policy, fairness and justice.[68]

The standard of proof that is used in instances of derivative misconduct is proof on a balance of probabilities. Le Roux-Kemp provides for the civil definition of proof on a balance of probabilities being that it requiring the applicant to out proof the defendant in that the relevant

[66] *PRASA* (note 12 above).
[67] Ibid para 30.
[68] Le Roux-Kemp (note 13 above) 686.

facts at hand is more probable than not. If it is more probable, it would be accepted as the truth.[69]

Item 7(a) of the Code of Good Practice: Dismissals[70] requires the employer to prove on a balance of probabilities that the employee is actually guilty of misconduct. This becomes more difficult to prove in instances which involves misconduct of employees on a grand scale.

There are also general guidelines built into our Labour legislation to be taken into account prior to employees relying on derivative misconduct to collectively dismiss employees regulated by the Code of Good Practice: Dismissals. This provides basic guidelines that should be followed by employers when deciding to dismiss employees for misconduct. There are three factors that should be taken into account when deciding whether dismissal is the appropriate sanction namely, employee's circumstances, the nature of the job and the circumstances of the infringement.[71]

Furthermore, in terms of Item 7 of Schedule 8, the employer must show the following requirements in order to dismiss employees on the basis of misconduct (and the same should apply in instances of derivative misconduct in the case of collective dismissals)

- That the employee contravened a rule or standard
- that the rule or standard was valid and reasonable;
- that the employee knew or should have known the rule or standard;
- that the rule or standard was applied consistently, and
- that dismissal was a fair and appropriate sanction.

The CC has most recently provided some direction and certainty to the doctrine of derivative misconduct which Grogan described as being 'slipped almost unheralded into the lexicon of South African Labour law about a decade ago.'[72] The *Dunlop (CC)* judgment[73] set aside the

[69] Ibid 692.
[70] Schedule 8 of the LRA.
[71] Item 3(5) of the Code of Good Practice: Dismissals and reaffirmed by Item 105 of The CCMA Guidelines: Misconduct Arbitrations.
[72] J Grogan '"Derivative misconduct" – label concept or principle?' (2018) 34.6 *EL.*
[73] Concurred unanimously by Mogoeng CJ, Cameron J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Nicholls AJ and Theron J.

judgments by the LC and LAC in favour of the employee. Froneman J in the case held that it is important to firstly distinguish between the primary and derivative misconduct.[74]

The case involved employees who had been on a protected strike for over a month due to a wage dispute. There had been several acts of serious violence and intimidation by the employees as well as damage to the employer's vehicles and property by setting alight the home of a manager and foreman[75] as well as petrol bombing the workplace which resulted in the employer being awarded an interdict by the LC which prohibited the workers from such unlawful conduct. Despite this, misconduct continued to occur, which ultimately resulted in the striking workers being dismissed.

On arbitration, it was found that some of the employees had been unfairly dismissed in that it could not be properly established that these employees were present during the acts of the principle misconduct and where hence not obliged to provide the employer with information regarding the perpetrators.[76] The arbitrator found in favour of those employees who could not be ascertained to be in the vicinity of the primary misconduct and were hence reinstated.

Both the LC and LAC found the arbitration award to be incorrect and handed down their judgments in favour of the employer in that there did exist an obligation on the employees to come forth and identify the perpetrators and by failing to do so, make themselves guilty of derivative misconduct.

The finding of the LC was that the arbitrator was unreasonable in his findings that there had been no evidence to prove that the workers were present when the acts of violence had occurred and that he was ignorant to the circumstantial evidence and inferential reasoning that followed from this. Had he given regard to this, he would have reached a conclusion which placed the striking workers in the vicinity of the impugned misconduct and would have hence reached a conclusion that the workers were in breach of the duty of good faith towards their employer in failing to come forth to identify the perpetrators or alternatively exonerate themselves.[77]

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[74] Ibid, para 44.

[75] *Dunlop (CC)* (note 11 above) para 12.

[76] The Arbitrator found that the dismissals of the striking employees responsible for the primary misconduct to be fair. The dismissals of the striking employees found to be in the vicinity of the primary misconduct to be fair on the basis that it was serious enough to sanction such dismissal in their non-disclosures of the perpetrators.

[77] *Dunlop (CC)* (note 11 above) para 18.

The LAC agreed with the finding of the LC in its majority judgment in reaching a conclusion that the dismissals of the striking workers were justified, however, with a few opposing views.[78]

This "extension" to the law of derivative misconduct by coming forth and exonerated oneself as well by Gush J in the LC judgment opened up many discussions and criticisms.

Coppin JA in his LAC judgment, referring to Poppesqou[79], held that this extension of the law was in fact misinterpreted and misconstrued and only placed an onus on employers to come forth if they had actual knowledge of the perpetrated misconduct. In this instance, and following the *Hlebela* case, there rests an onus on the employees who have knowledge to come forth and exonerate themselves. Coppin JA held that if this is what was meant by Gush J, then he concurs.

However, Coppin JA held that if the court *a quo* was suggesting an obligation on striking employees who were not even present when the said acts of violence occurred and whom had no knowledge whatsoever of the primary misconduct to come forth and exonerate themselves by providing an explanation then this statement by Gush J was unnecessary and "is in fact wrong."[80]

Coppin J expressed concerns with Gush J's judgment in that he made mention to the fact that the right to remain silent and the right to be presumed innocent until proven guilty had no place in labour law because it only fits into criminal law by accused, arrested or detained persons. What Coppin J had been insinuating was that he could not understand how an employee with no knowledge of particular events must come forward to exonerate themselves, failing which could be disciplined for "some form of unspecified misconduct."[81]

Grogan states that Coppin J's reservations on the right to remain silent could have meant that it extended "to those employees who have no knowledge of the primary misconduct".[82]

Savage AJA, in a minority judgment of the LAC, agreed with the majority judgment of the LAC led by Coppin JA regarding the supposed extension of the law to exonerate oneself.

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[78] *National Union of Mineworkers v RSA Geological Services (A Division of De Beers Consolidated Mines Ltd)* (2004) 25 *ILJ* 410 (ARB) (*De Beers (ARB)*) para 20.
[79] See Poppesqou (note 10 above).
[80] *Dunlop (LAC)* (note 15 above) para 65.
[81] Grogan (note 70 above).
[82] Ibid.

Savage AJA held that the supposed 'extension of the law' put forward by Gush J seemed to shift the onus of proof towards the employee to come forth and exonerate themselves, whereas onus actually rests on the employer when alleging derivative misconduct to prove actual knowledge of wrongdoing. [83]

The CC, however, had overturned both the LC and LAC judgments in favour of the employees.

The issue before the CC was based on the arbitrator's application of the reasonableness standard in finding the workers dismissal unfair. NUMSA argued that the LC and LAC incorrectly placed an obligation on striking employees to also come forth and exonerate themselves by providing explanations and this is not in keeping with the employee's constitutional rights.

The amicus curiae being the Casual Workers Advice Office supported NUMSA, however, further added that a duty to disclose, in the context of derivative misconduct, does not exist in the context of strike action as this kind of duty could only flow from a fiduciary relationship and not a reciprocal duty of good faith. They further remarked that the duty to disclose would undermine collective bargaining in the context of strike action.[84]

The CC differentiated between fiduciary duties and that of the reciprocal duty of good faith.

Froneman J specifies that a fiduciary duty is one which is not always relevant in an employment relationship and is one which can be very one sided in nature and affect bargaining rights. Whereas, a contractual duty of good faith is an implied duty which requires the duty to be reciprocal in nature. By using the term reciprocal, it means that there must exist fairness on both sides of the employment relationship.[85]

The CC stated that Dunlop's argument could in no way be sustained as it is one which is fiduciary in nature. It was one sided in that it called those innocent employees who did not participate in any of the direct attacks to the business of Dunlop and who were in the vicinity of the violent strike to come forward and pinpoint those individuals who were directly involved in the misconduct or have any knowledge of those said perpetrators and not to merely remain silent when called upon to do so. Furthermore, if those employees did not have any knowledge

[83] *Dunlop (LAC)* (note 15 above) para 113.
[84] *Dunlop (CC)* (note 11 above) para 27.
[85] Ibid para 63.

of whom the perpetrators were, Dunlop called for them to come forth and exonerate themselves.

The CC decreed that to allow Dunlop's basis for dismissal was against the very principles of the values of morals, good faith morals and Ubuntu which the CC seeks to promote into all unequal hierarchal contractual relationships that seeks to favour one party over the other.[86] This is against the essence of fair labour practice which is trite in our democratic Constitution which ensures fairness for both the employer and the employee, more especially in this case of exercising the right to strike.

Furthermore, Froneman J '*observed that a duty to disclose might have an impact on the right to strike*.'[87]

Dunlop (CC) held that there is no basis in our law to be "our neighbour's keeper".[88] What the CC meant by this is that in the context of this matter involving strike action by workers, it is common cause that the workers were engaging in the strike as a team against their employer with a common interest in order for their employer to submit to their wage dispute.[89] Asking these employees to come forth and disclose information "would be asking too much"[90] from them without the employer providing some reciprocity on their part. [91] A reciprocal obligation on the part of the employer would be that they provide some sort of guarantee to the workers that once they disclose this information, they would be protected from victimisation at the workplace. [92] In this case, Dunlop did not do so.

Comparative examples of derivative misconduct cases prior to the Constitutional Court case of Dunlop are as follows:-

In *MOSSAWU obo Khoza / Mr Price Weekend Material*[93] a customer's cellphone had been stolen in store and the applicant knew that his colleague had stolen the phone however did not divulge this information initially. He continued with the façade of assisting to try and locate

[86] Ibid para 65 n 66.
[87] Ibid para 70.
[88] Ibid para 72.
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] Ibid para 73.
[93] [2005] 9 *BALR* 961 (CCMA).

the phone by even dialling the number. There had even been a "whistle-blowers" hotline where he could have called to divulge whom the thief was. It was only after the arrest of the culprit employee that he divulged that he knew all along who the culprit was but resisted in assisting the employer due to fear. The CCMA did not take this lightly and found in favour of the employer in holding the applicant guilty of derivate misconduct in that he knew of the primary misconduct, however, remained silent when called upon by his employer to divulge information that could lead to the arrest of the culprit.

In this case, the employer had proved all elements of derivative misconduct. If the limitations where to be applied in this case as set in place by *Hlebela*, it is seen that employee is not guilty of the primary misconduct. He deliberately withheld pertinent information when confronted by his employer that could have led to his colleague being identified on time and this information was pertinent in bringing him to book, which information only he seemed to have possessed.

However, it is worthy to mention that the employee did in fact divulge such information but only after the culprit's arrest. This is an ultimate breakdown in the trust relationship and a breach of the duty of good faith as and when your employer calls upon you to furnish such information. A defence, that he resisted ratting on his colleague due to fear, will not hold in this case as the employer had set up a whistle-blowers hotline wherein he could have divulged such information confidentially.

One could argue that from what has shed in *Dunlop (CC)*, a reciprocal duty of good faith requires more from an employer in this instance and to actually secure the safety of the worker from victimisation, in the event of "whistle-blowing". In this case the employer had not adequately secured the employee against such victimisation as it did not indicate that the hotline was an anonymous one or even if the employee's name was divulged, it would not be to the actual culprit of the misconduct and any other person besides the employer.

Nobhabha and Gammid Trading (Pty) Ltd[94]*(Gammid Trading)* was a case which found the dismissal of an employee justified on the basis of derivative misconduct. Precious metals where being removed from the employer's enterprise and it was common cause that 5 of the employees were guilty in that they participated directly in the misconduct or that they ought to have known who was involved in the misconduct and ought to have prevented it from

[94] (2012) 33 *ILJ* 1523.

occurring. Mr Nobhabha, the applicant employee had also freely taken a polygraph test and failed dismally[95] which supplemented the basis of his dismissal. The employee denied any involvement in the theft as well as having any knowledge pertaining to such theft.

Given the fact that this case was an internal disciplinary hearing, the arbitrator had to give regard to three basic requirements of natural justice which was founded in the case of In *Khanum v Mid-Glamorgan Area Health Authority*[96], namely:-

a. 'the person *should know the nature* of the accusation against him (in this case the employee knew that the accusation was based on derivative misconduct);
b. he should be given an *opportunity* to state his case (the employee was given an opportunity to state his case and be heard);
c. The tribunal should *act in good faith*.'[97]

The arbitrator found the dismissal to procedurally and substantively fair. Procedural fairness was found on the basis that the employer had followed the *audi alterum partum* rule in that prior to the dismissal of the employee, it gave him an opportunity to state his case and be heard.[98]

Substantive fairness was based on the notion of derivative misconduct where the Arbitrator made reference to the *FAWU* and *Chauke* cases. An inference can be drawn from the silence of the employee in resisting to come forth and divulge information that could be pertinent in determining who the culprits are. The Arbitrator, whilst firm in his insinuation that the employee was lying, stated that the employee must have known (or ought to have known) that the precious metals where being stored away to later be colluded and had an obligation of good faith to his employer to divulge the theft, even if he had no direct dealings with the theft.[99]

The facts in *Gammid Trading* was strikingly similar to the facts presented in the case of the unpublished case of *Shoprite Checkers (Pty) Ltd v CCMA & others* (JR 1046/02) wherein the

[95] Ibid para 9 and 15.
[96] 1978 *IRLR* 215.
[97] Ibid para 25.
[98] Ibid para 26-27.
[99] Ibid para 31.

dismissed employee blatantly denied any wrongdoing and persisted with a glaringly dishonest defence. [100]

It is important to understand the basis on which to rely on derivative misconduct in seeking to dismiss employees on that basis to avoid the courts finding the notion being incorrectly applied[101] or finding the principle to be abused[102].

It is evident from our case law that it is difficult to rely on derivative misconduct to dismiss workers due the evidentiary burden placed on employers to prove the misconduct and in most instances, the employer is unsuccessful on arbitration. Grogan[103] refers to two examples of cases that are of importance to illustrate this point. In *National Union of Metalworkers of South Africa obo Ntuli and others / Argent Steel* Group *(Pty) Ltd t/a Gammid Trading* [2013] 2 *BALR* 129 (MEIBC)), the arbitrator held that there needs to be actual knowledge of the primary misconduct. In *SATAWU obo Makhema & Thubakgoale / Jedidja Couriers* [2005] 9 *BALR* 942 (NBCRFI), it was found that derivative misconduct will only apply in instances where the employees resist disclosing material information to employees.

3.3 CONSTITUTIONAL IMPLICATIONS ON EMPLOYEES' RIGHTS WHEN THEY CHOOSE TO REMAIN SILENT AND ARE SUBSEQUENTLY DISMISSED BY THEIR EMPLOYER

Section 23(1) of the Constitution states that everyone has the right to fair labour practices and the LRA was enacted to promote this. Nobody has the right to be unfairly dismissed as per the LRA. Froneman J[104] states that:

> *'The right not to be unfairly dismissed is one of the most important manifestations of the constitutional right to fair labour practices.'*[105]

[100] Ibid para 39.
[101] Finding of the court in the *Hlebela* LAC judgment.
[102] Finding of the court in the *PRASA* case.
[103] Grogan (note 57 above).
[104] *Dunlop (CC)* (note 11 above) para 10.
[105] Ibid para 55; *Fedlife Assurance v Wolfaardt* [2001] *ZASCA* 91; 2002 (2) All SA 295 (A) para 14 (judgment of Nugent AJA) and para 4 (judgment of Froneman AJA).

In South Africa, the Constitution provides that everyone has the 'right to remain silent'[106], but this only pertains to arrested, detained and accused persons[107] to avoid self-incrimination. This right is not extended to employment contracts. No protection is afforded to innocent employees who choose to remain silent when called upon by his employer to pinpoint the perpetrators of a misconduct. This employee chooses to not blow the whistle against any of his colleagues who may be the actual perpetrator or potential perpetrator to a misconduct due to fear that they may be victimised in the workplace or out of the workplace.

The law only protects employees who whistle blow against their fellow colleagues in terms of The Protected Disclosures Act[108] ('PDA) which confirms job security.

It ultimately happens that this employee who remains silent, is dismissed for derivative misconduct unscrupulously by their employer for choosing to remain silent and this employee could merely be a loyal employee to his fellow colleagues in the workplace. Some may argue that it could be a harsh sanction imposed especially when some employers are actually good and loyal workers. The Constitutional Court has held that for there to be a fair sanction imposed that results in dismissal for misconduct, there must be a value judgment balancing the employer's economic interests with the employee's right to job security.[109]

Van Niekerk states that:-

> 'The Labour Relations Act 66 of 1995 fails to articulate a normative foundation from which the right not to be unfairly deprived of work security might be derived. While the courts have established that the determination of a fair sanction for workplace misconduct necessarily entails a value judgment, they have failed to recognise that principled decision-making requires a coherent conception of justice.'[110]

[106] Section 35(1)(a).
[107] Ibid.
[108] Act 26 of 2000.
[109] *Dunlop (CC)* (note 11 above) where Froneman J makes reference to *Sidumo & another v Rustenburg Platinum Mines & others* (2007) 28 *ILJ* 2405 (CC).
[110] A Van Niekerk 'Dismissal for misconduct – Ghosts of justice past, present and future' AJ 2012 (1) 102.

Van Niekerk states that justice should be closely aligned to the employees' rights to dignity[111] and employers must treat their employees with dignity [112] and that work security must be consistent to the dignity of the employee and 'promotion of autonomy'.[113]

> 'In practical terms, a respect-based approach at least requires the employer to establish some rational connection between its goals of economic efficiency and the sanction of dismissal.'[114]

Hawthorne indicates that whilst freedom of contract is recognised in our South African Law, this should not overpower other values such as human dignity and that *'justice cannot remain blind to unfairness resulting from unfettered freedom of contract.'*[115]

Section 67(1) and (4) of the LRA indicates that 'an 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.'[116] It so happens that in terms of the law surrounding derivative misconduct, employees who are found to be in the vicinity of the impugned misconduct are dismissed when due to their silence in misconduct investigations where they know whom the culprits of the primary misconduct are. The CC in Dunlop has now provided more security to exercising the right to strike without fear that you may be fired if you are found to be in the vicinity of misconduct. The CC has observed that a duty to disclose can have a major impact on exercising the right to strike. Unless employers provide some sort of protection to employees in the event of violent protests during collective bargaining from victimisation or job security, there is no duty to disclose any information to employers. That is the true essence of the duty of good faith being reciprocal in duty. It cannot be hierarchical in nature to suit the needs of employees. It is common cause that strike action is due to employers not keeping up to their end of the stick in negotiations and not acceding to certain reasonable demands. When misconduct occurs, asking

[111] Section 10 of the Constitution provides that 'Everyone has inherent dignity and the right to have their dignity respected and protected'.
[112] Niekerk (note 108 above) where reference is made to the cases of *Minister of Home Affairs and others v Watchenuka and another* 2004 (4) *SA* 326 (SCA) para 27 and *Kylie' v Commission for Conciliation, Mediation & Arbitration* (2010) 31 *ILJ* 1600 (LAC) at para 26.
[113] Niekerk (note 108 above) 116.
[114] Ibid.
[115] L Hawthorne 'Abuse of a Right to Dismiss not Contrary to Good Faith' (2005)17 *SAMLJ* (2) 221.
[116] This is reiterated by Froneman J in *Dunlop (CC)* (note 11 above).

innocent employees to rat on the culprits without providing any form of security 'would be asking too much from them' as per the CC.

The LAC in *PRASA* found that the employer had somewhat disguised collective misconduct and used derivative misconduct when dismissing striking employees due to misconduct which was the incorrect form of misconduct used.[117] 700 employees where dismissed due to damage to trains during strike action, and only a few employees had testified and the rest chose to remain silent when called upon by *PRASA* to assist in misconduct investigations. In essence the court found that the employer had actually used collective misconduct when dismissing all employees. Kathree-Setiloane AJA held that:-

> 'I accordingly consider PRASA's reliance upon the principle of derivative misconduct to be misplaced and unjustified. In essence, the striking employees were dismissed not for derivative misconduct but rather for 'collective misconduct', a notion which is wholly repugnant to our law, not only because it runs counter to the tenets of natural justice but also because it is incompatible with the established principle of innocent until proven guilty. This, in my view, renders the employees' dismissals both substantively and procedurally unfair.'[118]

Froneman J echoes the sentiments of Maqutu when he holds that a means to dismiss becomes easier when there exists a failure to appreciate that it's very easy for employees to associate themselves with the primary misconduct, either directly or indirectly.

Maqutu states:-

> '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.'[119]

[117] The Labour Court found the dismissals to be substantively and procedurally fair on the basis of derivative misconduct.
[118] Ibid 575 para 46.
[119] L Maqutu 'Collective Misconduct in the Workplace: Is 'Team Misconduct' 'Collective Guilt' in Disguise?' (2014) 25 *Stell LR* 566 at 568. See also *Association of Mineworkers and Construction Union*

In essence, some employers are extremely ruthless and have no remorse when dismissing employees at mass with the mind-set that these workers can easily be replaced given the high employment rate in South Africa. There needs to be a reciprocal duty of loyalty and good faith by the employer to their employees and not act in a just manner to terminate employment contracts at their peril. It goes in direct contravention with the tenets of natural justice and reminds us of the injustices of the past.

If the misconduct is so severe that the employment relationship can be tendered as intolerable there is just reason for termination of contract. However, where the reason for dismissal is based on mere silence of a loyal worker, there needs to be more protection offered to such employer, in that dismissal cannot be the ultimate sanction. A warning can be imposed at the first instance and should such conduct manifest again, dismissal would be an appropriate sanction. Industrial action generally occurs when an employer does not accede to an employee's demand unreasonably and hence when damage occurs to an employer's property, the employer is to reflect on the reasons same has occurred and the frustrations that led to the ultimate damage.

Dunlop (CC) has ensured that the law that was supposedly extended to include that employees ought to come forth and exonerate themselves has been rebuked. The courts have recognised this as a potential for abuse inherent and could be used as tyrannical in nature, silence as a ground for dismissal. [120]

Hlebela did in some way limit the scope of the duty of trust and good faith that employees are required to take in favour of their employers in that it should not extend to the employees private life and personal financial state of affairs.[121] The court held that if at times the employee is silence or his explanations are inadequate or seem to be evasive, there must be sufficient evidence against this employee to dismiss on the basis of derivative misconduct.[122]

v KPMM Road and Earthworks (Pty) Ltd [2018] ZALAC 28; (2019) 40 *ILJ* 297 (LAC) (*KPMM Road and Earthworks*) para 48 of CC judgment.

[120] *Dunlop (CC)* (note 11 above) para 21.

[121] Ibid para 28.

[122] Ibid para 29.

3.4 DERIVATIVE MISCONDUCT COMPARED TO OTHER FORMS OF MISCONDUCT

More often than not the different forms of collective misconduct (common purpose, team misconduct and collective guilt) get distorted with each other by employers who seek to collectively dismiss employees. They have striking differences and employers ought to understand which would be the appropriate legal doctrine to rely on when seeking to collectively dismiss. This would impede costly litigation by the employer which would not find in their favour if the incorrect type of misconduct is used. It is hence imperative for an employer to ensure that they properly assess the facts of a particular matter to the type of collective misconduct properly before applying it against an employee.

3.4.1 TEAM MISCONDUCT

In instances where there is massive stock loss in the employer's enterprise which is known to be due to theft in the workplace by certain staff members, but management is unable to pinpoint whom the culprits are, employers can rely on team misconduct when seeking to collectively dismiss these staff members.

In order to combat stock loss in the retail sector, employers are entitled to put rules and sanctions in place in an attempt to prevent such stock losses. A breach of such rules can warrant dismissal even where there had just been negligence and not intent on the part of the accused employee.[123]

However, it is important to note that even though an employee may have agreed to the rules and sanctions imposed by his employer in a contract of employment, such a contract has to be in keeping with the provisions of the LRA and such a contract cannot warrant dismissal merely because an employee is bound explicitly by the terms of the contract of employment. The employee must have been in a position to prevent such a stock loss. This principle is seen in the case of FEDCRAW/*Snip Trading (Pty) Ltd* [2001] 7 BALR 669 (P) (*FEDCRAW).* The arbitrator found that stock loss could lead to dismissal in the form of misconduct if it could be found that the stock loss could be prevented by the accused employee.

[123] Maqutu (note 119 above) 568.

Furthermore, Cohen also states that it is trite that managers are able to account for the stock losses and prevent shrinkage.[124] A blatant inability to do so can lead to dismissal.

However, it is trite to note that low-level employees cannot be responsible for the misconduct of employees who have a higher position within a company and hence individual disciplinary actions need to be taken instead of collective action. It is against the very principles of natural justice. It would hence be regarded as an unfair labour practice to allow employers to dismiss employees at their peril on the basis of team misconduct merely because the business experienced stock loss. Consideration needs to be made on the facts and merits of the case, the type of employee involved and their specific role and function in the workplace.

SAGAWU obo Mdiya & others/Pep Stores (Pty) Ltd [125] recognised the principles set out in *FEDCRAW* and further found that it is adequate to hold individual employees accountable for stock losses on the basis of team misconduct. These accused employees ought to prove that they had tried everything in their power to prevent the stock losses in question and that they did not contribute in any way to the impugned shrinkages. [126]

In the case of *Foschini Group v Maidi & others (2010) 31 ILJ 1787 (LAC*) (*Foschini Group*), the court has accepted that the term 'team misconduct' falls within the ambit of collective misconduct.[127] The case almost solely relied on the principles laid out in the CCMA private arbitration of *FEDCRAW*. Dismissal in this case was justified because each individual member of the group culpably failed to ensure that the group complied with the rule set in place by the employer in question.

Maqutu states that whilst the concept of team misconduct has been readily used and adopted by the courts, it is difficult to practically use the concept in the CCMA as it is not apparent whether the term actually relates to misconduct or incapacity ('by failure to meet a performance standard'). It is hence not apparent that when having to dismiss an employee on the basis of

[124] T Cohen 'Collective Dismissal: A Step Towards Combating Shrinkage in the Workplace' (2003) 15 *SA Merc LJ*, 25.
[125] 2003 10 *BALR* 1172 (CCMA).
[126] Ibid 1180.
[127] Maqutu (note 119 above) 567.

team misconduct which provisions of the LRA will be applicable, dismissal on the basis of misconduct or that of incapacity.[128]

Maqutu further states that this concept of team misconduct has not been adequately distinguished from the totally repugnant notion of collective guilt in our law. [129] She submits that the true essence of it is that it is not really different. The Labour Court in the Foschini Group case has not given a satisfactory explanation of how theft by an employee relates to failure to meet a performance standard. [130]

3.4.2 COMMON PURPOSE

Emanating from criminal law, common purpose refers to situations in which those who associate themselves with the primary misconduct before and during the commission of the misconduct can be dismissed on the basis of common purpose. [131]

Hence, the employees will be held accountable on the basis of the doctrine of common purpose if intention to commit the misconduct is proved as well as they must actively associate themselves with the primary misconduct in furtherance of a collective aim.[132]

Chauke illustrates the doctrine of common purpose well where certain employee's had failed to dissociate themselves from the other perpetrator employees who 'seemed to have a grudge against management'[133] when they continued to sabotage the employer's property. Cameron JA held that these employees had deliberately chose to associate themselves with the misconduct by their silence and hence held to be inferred by the court that they culpably participated in the sabotage of the employers property.[134]

The onus hence rests on the employer to prove common purpose.

The court in the case of *NSCAWU v Coin Security*[135] *(Coin Security)* explained common purpose in the context of Labour Law as follows:-

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[128] Ibid.
[129] Ibid.
[130] Ibid 575.
[131] Grogan Page 334.
[132] Maqutu (note 117 above) 568.
[133] *Chauke* (note 7 above) para 40.
[134] Ibid.
[135] [1997] 1 *BLLR* 85 (IC).

> 'Where those others are found to have actively associated themselves with the result and shared the perpetrator's mens rea [guilty state of mind], the guilt of the actual perpetrator is extended to them by virtue of the doctrine. It is not necessary to show that each party did a specific act towards the attainment of the joint object or contributed causally to the outcome: association in the common design makes the act of the principal offender(s) the act of all.'[136]

In this case, the court held that Coin Security had actually incorrectly relied on the doctrine of common purpose as its defence, whereas the correct modus operandi was collective guilt. [137]

So too in the unreported LC judgement of *Stocklush (Pty) Ltd t/a Meadow Meats v FAWU obo Setouto and Others*[138] *(Stocklush)* Rabkin-Naicker J held that the arbitrator erred in his application of the law when he stated that where common purpose was not proven, it is repugnant to the law and the rule of natural justice that all members of a group be punished for the misconduct of some.[139]

Rabkin-Naicker J held that it appeared that the Commissioner did not understand the distinction between collective guilt and common purpose.[140] Common purpose involved individual culpability whereas collective guilt assumes that all members of a group are guilty because of their association with that group.[141]

Hence the striking difference between common purpose and derivative misconduct is that common purpose is when one member of a group commits an offence with the rest of the members positively supporting the committing of this offence even though they may have not committed this primary offence. Common purpose is hence narrower than derivative misconduct which holds employees liable even if they were merely in the vicinity when the impugned offence occurred and did not participate in the primary offence.[142]

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[136] Ibid para 73.
[137] Ibid para 74.
[138] (C880/14) [2015] *ZALCCT* 61.
[139] Ibid para 3.
[140] Ibid para 4.
[141] Ibid.
[142] J Grogan 'Derivative misconduct- drawing in the net' 2018 *ELJ* (34).

3.4.3 COLLECTIVE GUILT

Collective guilt involves a situation where a large number of workers engage in misconduct, and it is impossible for the employer to recognise whom the actual perpetrators of the misconduct are. Based on this inability to pinpoint actual culprits, the employer then elects to dismiss some of the employees in an attempt to set an example to the rest of the workforce. Alternatively, the employer elects to dismiss those employers who are conceived to have been involved in the impugned misconduct, with the hope that the perpetrators to the misconduct are in this group of the dismissed. Grogan states that the former scenario is blatantly unacceptable as there is no direct evidence linking these employees to the misconduct. He states that the second scenario is also seen as unacceptable.[143] It tends to run counter to the principle of natural justice and being innocent until proven guilty. [144] There cannot be justice where a person is presumed to be guilty and made to suffer with the rest and infringes on valuable Constitutional rights.[145]

The courts have described the notion of collective guilt as "being wholly repugnant in our law" and have completely condemned it.[146]

It happens at times that courts find employer's actually bringing a case of collective guilt against dismissed employees disguised in one of the other forms of misconduct being derivative misconduct, team misconduct or common purpose. It is imperative for employers to research and educate themselves on what the appropriate legal doctrine would be to rely on before bringing costly applications that could eventually lead to their detriment.

The case of *TAWUSA v Barplats Mine Ltd (Crocodile River Mine)*[147] was a case wherein the court found that the employer actually relied on collective misconduct and not that of "team liability" which it brought its application on when dismissing employees in the workplace for failure to meet a performance standard. The employer in the case dismissed 306 workers based on this failure to meet a performance standard without giving them an opportunity to be heard prior to dismissal. The court held found that the incorrect procedure had been adopted in bringing arbitrary proceedings against these workers and ought to have firstly given them an opportunity to be heard. They were reinstated by the court.

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[143] Grogan, J *Dismissal* 2 ed: Juta (2014) at 330.
[144] *PRASA* (note 12 above) 575 para 46.
[145] *NUM v Durban Roodepoort Deep Ltd* (1987) 8 *ILJ* 156 (IC) at 162H-I..
[146] Ibid.
[147] 2009 (30) *ILJ* 2791 (LC).

PRASA was another case which dealt with a scenario wherein the employer had used derivative misconduct in seeking to dismiss 700 striking employees who had set alight coaches and committed other acts of violent misconduct during strike action. In this case, the employer did offer an opportunity to the workers to give reasons as to why they should not be dismissed. The union representative provided a collective response refuting any liability on the part of their members and this was rejected by *PRASA* holding that each individual ought to provide an explanation. The court rejected this on the basis that an application of derivative misconduct had been brought. The main elements of derivative misconduct (discussed above) had not been met. The dismissal in essence constituted collective misconduct, which is not recognised in our labour law.

3.5 REMEDIES AVAILABLE TO EMPLOYERS

In circumstances where derivative misconduct was unsuccessful by the employer or cannot be relied upon, and in instances where it is known by the employer that employees are indeed suspects of misconduct that cannot be proved, the courts have offered advice to employers in trying to get rid of these employees.[148]

For example in the case of *DHL Supply Chain (Pty) Ltd and others v National Bargaining Council for the Road Freight Industry and others*[149] *(DHL)* where large amounts of cigarettes were being stolen from the employer's warehouse and it was obvious that the culprits where employees who worked at the warehouse, however the employer was unable to pinpoint who the precise culprits were, the employees were subjected to polygraph tests. The employees who failed the polygraph tests where dismissed. These dismissals where ruled as unfair and these employees were reinstated. The LC dismissed the review application and the LAC dismissed the appeal on the basis that the only evidence which DHL relied on was the polygraph tests. There was hence insufficient corroborating evidence to hold the employees guilty.

Sutherland JA, offered valuable obiter advice prior to handing down judgement that could assist the employer and held that:-

> 'The point of departure in this case is to ask what a fair minded employer is to do when a crew falls under a reasonable suspicion of dishonesty. The proper defence of commercial interests and a prudent response is not limited to misconduct dismissals. If

[148] Grogan (note 57 above).
[149] [2014] 9 *BLLR* 860 (LAC).

> a misconduct process is unavailable, or fails for absence of proof of guilt, must the employer be forced to just lump the risk of losses? The answer is no. There are other processes, dictated by operational needs, which must obviously be considered too (c.f. FAWU obo Kapesi and others v Premier Foods t/a Blue Ribbon Salt River [2012] 12 BLLR 1222 (LAC)). It is unnecessary to speculate on the outcomes of such options, nor if all the necessary requirements are indeed present in this case.'[150]

Employers can also can damages on the basis of breach of the duty of good faith. *Sime Darby Hudson and Knight (Pty) Ltd v Lerena* [151] *(Lerena)* was a case which dealt with theft by an employee who was a Manager at the time of his dismissal. He had been secretly diverted sales opportunities of the company's sunflower oil away from his employee so that he could gain exorbitant amounts of profit. The employee was also able to prove that *Lerena* also sold their sunflower oil to other companies and much lower prices which caused a huge amount of financial loss to the company.

In reaching its decision to award the company their claim for damages, the court held as follows:-

> ´In order to succeed in its claim for a disgorgement of profits the plaintiff must establish that the defendant owed it a fiduciary obligation; that in breach of that obligation the defendant placed himself in a position where his duty and his personal interest were in conflict and, finally that the defendant made a secret profit out of corporate opportunities belonging to the plaintiff.'[152]

Hence, the employee had breached the duty of good faith, trust and confidence in failing to put the business of his employee before his and gained a profit for himself at the expense of his employer.

It is also important to note that employers can not only dismiss employees for a breach of the duty of good faith, they may also sue these employees if there had been intentional proprietary loss caused by the employee through its misconduct. However, there is not just the civil lawsuit available to employees, it is also regarded as a criminal offence if there had been sabotage to the employer's enterprise. Criminal misconduct must be reported by employers and the relevant

[150] Ibid.
[151] (2018) 39 *ILJ* 2413 (WCC).
[152] Ibid para 95.

authorities can run investigations and thereafter prosecute if they have subsequently found criminal intent that jeopardises the employer.

Some advice that has been offered by the courts in respect of dismissing on the basis of a deliberate non – disclosure of material facts that could lead to identification of the perpetrators was summed up by Sutherland JA in the *Hlebela* case:-

'An appropriate way to discipline an employee who has actual knowledge of the wrongdoing of others or who has actual knowledge of information which the employee subjectively knows is relevant to unlawful conduct against an employer's interests would be to charge that employee with a material breach of the duty of good faith, particularizing the knowledge allegedly possessed and alleging culpable non-disclosure (or words to that effect)'.

Given the recent *Dunlop (CC)* case, to rely directly on the notion of derivative misconduct without proper consideration to the facts at hand and not properly proving all elements causes cumbersome delays and negative outcomes. Hence the advice by Sutherland JA should be acceded to by employers.

CHAPTER 4

THE DUTY OF GOOD FAITH IN NEW ZEALAND COMPARED TO SOUTH AFRICA

4.1. INTRODUCTON

As we know, The English Common Law governs the principle of good faith in South Africa. However, parliament of New Zealand in 2000 had decided to legislate the common law principle of "mutual trust and confidence" and brought into being the ERA. Thereafter, the New Zealand Parliament had introduced the Employment Relations Amendment Act (No. 2) of 2004 wherein they removed the words "mutual trust and confidence" and substituted it with "good faith".[153]

4.2. COMPARITIVE ANALYSIS

Whilst New Zealand scholars admit that there is a nervousness to the common law concept of good faith in employment law[154], the ERA comprehensively regulates the duty of good faith that governs all employment contracts. [155]

Anderson states that good faith codified in the ERA has the characteristic of 'constraining employer powers and discretions and takes into account the legitimate economic interests of the worker as well as physical and psychological security in the workplace'.[156]

In terms of Section 4 of the ERA, there are 3 main elements of the duty of good faith, according to Anderson, namely 'that the parties to an employment relationship:-

- must not do doing anything that does or is likely to mislead or deceive the other party,
- it is also a positive duty: the parties must be "active and constructive" and be "responsive and communicative," and,
- There is a positive obligation to consult with the employees before a decision likely to have an adverse effect on their continuation of employment is made.'[157]

[153] Schedule 1 to the Act dealing with the Objectives of the Act.
[154] G Anderson 'Good Faith in the Individual Employment Relationship in New Zealand' 32 *Comp. Lab*, 686.
[155] Ibid 685.
[156] Ibid 686 – 687.
[157] Ibid 687.

> 'The requirement that employers must objectively justify a dismissal or a decision that disadvantages an employee provides both a remedy for employees and an incentive for balanced decision-making by employers.'[158]

It is common course that codifying the principles of mutual trust and confidence in 2000 in terms of ERA came with some difficulties, with New Zealand Courts still applying the restrictive approach of the common law. Hence there had been a need to implement and codify the principles of good faith into the law. The aim of the Amendment Act in 2004, however was to 'amend the Act's lack of success in promoting real growth in collective bargaining through discouraging freeloading and strengthening the good faith obligations'[159].

Anderson confirms however, that the law and the legislation surrounding the principles of good faith is still developing. The only way it can develop is through the common law and not by statute. He confirms that the statutory provisions provided for in the ERA is merely in existence to consolidate and accelerate procedures in New Zealand, however they have not yet represented any major changes between the parties of an employment relationship. He states that this 'area of the law remains strongly subject to changing judicial moods'[160]. He points out dictum by a New Zealand court stating that, 'the courts sometimes apply the accelerator and sometimes the brake'. The difference in New Zealand is that by incorporating the common law term into a statute founded on a particular vision of labour law, parliament has reformulated the road code by which the courts must abide.[161]

Good faith has recently been described as a "glass figurine" by Hawthorne. She remarks that this is so because it is seen to be regularly used recently, touched on and thereafter flagged as being of such importance that it actually is the basis of our contract law. However, not much has been said to give precise definition to the term. This is so because this term creates much inconsistency and uncertainty that we cannot think to actually codify this term.[162]

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[158] Ibid 721.
[159] G Anderson 'Transplanting and Growing Good Faith in New Zealand Labour Law' 19 *AJLL* 1 (2006) 10.
[160] Ibid 27.
[161] Ibid.
[162] L Hawthorne 'Abuse of a Right to Dismiss not Contrary to Good Faith' (2005) 17 *SAMLJ* (2) 214 – 221.

Hawthorne also recognises that good faith is an imprecise concept that actually needs to be properly construed by the courts. [163] She indicates that this is required to end an abuse on the right to freedom of contract.[164]

Bosch, on the other hand, indicates that it will serve as a vehicle through which to regulate conduct of employers. Regrettably, there has been no debate on what the implications of codifying the concept might be given its endorsement by the SCA in *Fijen*.

Following from the above-mentioned study of New Zealand's codification of good faith into their legislation, South Africa also faces uncertainty in terms of the doctrine of good faith. However like with New Zealand, the position is likely to remain the same as the common law will still be the vehicle through which statute is implemented and developed.

If good faith is codified into statute, referral still needs to be made to our South African common law and depending on the facts of the case, past dicta will also need to be used in conjunction with the legislation. The legislature will serve as a vehicle through which our common law can be developed in a structured manner in terms of good faith principles as Bosch indicates. However, it is worthy to note that Hawthorne, and rightfully so, that actually codifying this principal will actually cause a great deal of inconsistency and render our classical law of contract unworkable.

[163] L Hawthorne (2004) THRHR 301.
[164] Ibid.

CHAPTER 5

CONCLUSION

The generality is that it is inappropriate to dismiss employees for a first time offence with the exception that if the offence is of such a serious nature that it renders the employment relationship intolerable, dismissal would be the appropriate sanction. [165]

Employers must obviously afford employees an opportunity to be heard prior to making a dismissal decision. Should employees not follow this, dismissal on the basis of derivative misconduct falls short of the *audi alterum partum* rule. This is quite an injustice to some employees who cannot all practically be afforded an opportunity to respond due to the large volumes of workers involved in strike action in certain instances and also the time frame within which they are given to respond, which in most instances are too short a period of time for trade union representatives to engage with each and every employee charged with an offence.

However, employers expect employees to act in good faith to them, in that they will not act in a manner that is detrimental to their business. However, when applying good faith to any employment relationship, one needs to have regard to the fact that this duty is reciprocal in nature. This means that if an employee expects an employee to act in good faith towards it in instances of strike action involving misconduct and coming forth to assist in identifying perpetrators to the primary misconduct, the law requires that the employer must afford a reciprocal protection to these employees that they will be protected once they disclose pertinent information relating to the misconduct as there would be an abundant fear of victimisation. Nobody likes a snitch! If no protection is afforded, it is seen as somewhat hierarchal in expecting too much from these employees and considered and abuse of power.

It is much complex when dealing with mass dismissals especially when some employees in a group of accused are totally innocent of the misconduct or cannot be attributed to the misconduct.

It is submitted that there is no need for the codification of good faith principles and its breach thereof in our South African law as seen as what was done to New Zealand's legislature. The reason for this is that New Zealand is still referring back to their common law when applying

[165] Schedule 8 of the LRA, The Code of Good Practice: Dismissals – Item 3(4).

this principle as it is such a complex notion that to actually codify it, it would render our classical law unworkable. New Zealand's codification of the principles of good faith in their labour legislation is still ever developing. In South African law, our democracy has brought into being concepts such as Ubuntu which goes hand in hand with concepts such as good faith, value and morals. To codify good faith, would mean we would need to give a precise definition to all of these concepts, which is submitted would not be possible, as they are not capable of precise definition given that its nature would be to use them on a case by case basis.

Derivative misconduct has recently fallen short of dismissal as seen in *Dunlop (CC)* in that the CC has now imposed stricter a stricter application for the use of the concept. There is a huge burden on employers to prove the misconduct on the part of the employee and that inferences of guilt from employee silence cannot be seen to always tip the scale in favour of employers. Mass dismissals on the basis of derivative misconduct are treated with due caution by the courts who have also found that there is no obligation of employees to further come forth and exonerate themselves from the misconduct during investigations.

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UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

3 September 2018

Mrs Karyn Pillay 210502855
School of Law
Howard College Campus

Dear Mrs Pillay

Protocol reference number: HSS/1416/018M
Project title: Derivative Misconduct and the reciprocal duty of good faith: Employee silence in identifying perpetrators of misconduct

FULL APPROVAL – No Risk/Exemption Application

In response to your application received 2 August 2018, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL.**

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

.....
Professor Shenuka Singh (Chair)
Humanities & Social Sciences Research Ethics Committee

/pm

cc Supervisor: Lindiwe Maqutu
cc. Academic Leader Research: Dr Shannon Bosch
cc. School Administrator: Ms Robynne Louw/ Mr P Ramsewak

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