UNIVERSITY OF KWAZULU-NATAL

SCHOOL OF LAW, PIETERMARITZBURG COLLEGE

A Critical Analysis of Derivative Misconduct Looking into National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others.

Mbalenhle Mkhize

216013103

This research is submitted in pursuance of the requirements for the degree of Master of Law Supervisor: Ms. N Whitear-Nel Date: February 2024

Declaration

I, Mbalenhle Mkhize, do hereby declare that this study on "A Critical Analysis of Derivative Misconduct Looking into National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others." is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources Ihave used or quoted have been indicated and acknowledged as complete references.

Mbalenhle Mkhize

216013103

Acknowledgements

Firstly, I would like to thank God for making it possible for me to complete my Masters.

My parents would have been so proud to know that I actually completed this degree because when I started my LLM they were both still alive and they supported me so much.

Unfortunately, they are no longer able to witness the fruits of their labor because they both passed away in a space of one month, 2 months before this submission. Nonetheless, I am glad that their wishes for my academics are becoming a reality and I will ensure that I live ina way that would have made them proud if they were still alive.

To my supervisor, Nicci Whitear-Nel, thank you so much for being patient with me. Thank you for guiding me and constantly pointing me in the right direction. Most importantly, thankyou for not giving up on me.

Thank you to my friends and family who were constantly encouraging me and praying for me. Thank you so much.

I am grateful to God for giving me the strength to hold on and not give up on my dreams

KEYWORDS/ PHRASES:

Derivative misconduct

Primary misconduct

Employee

Duty to disclose

Perpetrator

Good faith

Information

Justification

Knowledge

ACRONYMS / ABBREVIATIONS:

LC - Labour Court

LAC - Labour Appeal Court CC - Constitutional Court

CCMA - Commission for Conciliation Mediation and Arbitration

LRA - Labour Relations Act

ABSTRACT:

This dissertation seeks to explore the evolution of derivative misconduct by looking at various court decisions that have contributed immensely to developing the concept of derivative misconduct and which have further contributed to constructing the relevant legal framework which has resulted in the current scope and understanding of derivative misconduct. This research will also highlight the remaining gaps in our law. This dissertation traces the genesis and the development of the concept of derivative misconduct in South African labour law. The concept of derivative misconduct refers to a ground of dismissal where an employee chooses to remain silent and not disclose misconduct committed by another employee to the employer.

Our courts have established that a fair reason for dismissing an employee is when the employee would have had knowledge about perpetrators of the primary misconduct and refuses to disclose such knowledge to the employer even though they did not commit the primary misconduct themselves. The Constitutional court in *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) (28 June 2019) has recently made a final verdict on this concept and has highlighted that the duty of good faith is reciprocal duty. The Constitutional Court has signaled for a shift from the approach of placing a unilateral obligation on employees to come forward by also giving the employers a reciprocal duty to ensure that they afford protection to employees before expecting them to come forward.

TABLE CONTENTS:

CHAPTER 1 – INTRODUCTION

1.1 BACKGROUND:

This research traces the genesis and the evolution of the concept of derivative misconduct in South African labour law. The concept of derivative misconduct refers to a ground of dismissal where an employee chooses to remain silent and not disclose misconduct committed by another employee to the employer. Section 23(1) of the South African Constitution provides that everyone has a right to fair labour practices. This right was included in our Constitution to ensure that healthy employment relationships are maintained in South Africa and to avoid any form of labour exploitation. The Labour Relations Act1(LRA) was enacted pursuant to section 23 of the Constitution and in order to promote fair labour practices. Dismissal law is contained in the LRA, and schedule 8 thereto.

In order to prove that dismissal is substantively fair, one of the requirements is that the employee must have failed to keep to a rule or a standard that regulates behavior or conductin a working environment.[2] Secondly, the employer must further prove whether the rule or standard that was breached by the employee is valid and reasonable. Should it be found that the rule lacks legitimacy itself and is unreasonable, the employee will stand a chance of escaping liability.[3]

Thirdly, the employer must prove that the employee had knowledge of the rule or that the employee ought reasonably to have known of the rule. [4] Fourthly, it mustbe considered whether the employer has applied this rule consistently in the past to other employees in the past. This ensures that there is equal justice in the workplace and that employees are treated equally.[5] Lastly, it must be shown that dismissing the employee was the appropriate sanction. When all the above-mentioned requirements have been met and proven that is only when it is said that a dismissal was substantively fair.[6]

[1] The Labour Relations Act 66 of 1995.
[2] Schedule 8 of the LRA, The Code of Good Practice on Dismissals, Item 3.
[3] Ibid.
[4] Ibid.
[5] Ibid.
[6] Ibid.

When paying close attention to the last requirement which stipulates that employer must be able to show that dismissing the employee was the appropriate sanction, in the case of derivative misconduct this would invite a discussion on interrelated issues of breakdown of trust and intolerability of the continued employment relationship. To discuss the appropriateness of dismissal in the context of derivative misconduct, the employer should be able to illustrate that after they had guaranteed safety of the employee as required by the Constitutional Court, the employee willingly chose not to come forward and furthermore the employee did have knowledge of the misconduct but personally decided not to share it. As the result of the employee's conduct of choosing not assist the employer it can then be said that there has been a breakdown of trust and a failure to act in good faith. The existence of an employment relationship is inevitably anchored on the implied trust and confidence. Without trust and confidence an employment relationship could never begin or continue to exist.[7]

In *Council for Scientific & Industrial Research v Fijen*[8] case it was said 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."

This confirms that in as much as the employee is expected to act in good faith towards the employer, the employer bears the same level of responsibility to ensure that they safeguard the relationship by refraining from any conduct which may seriously damage it. In the *Moyo*[9] case the court ruled in favour of the employee because the employer dismissed the employee unfairly and further failed to protect the trust and confidence in the employment relationship. The court revisited the reciprocal obligations arising from the implied duty to protect trust and confidence[10] and in as much as this implied duty applies to both employer and employee but it appears that a greater obligation is placed on the employer. In *Malik v Bank of Credit*[11] the court held the employer cannot unreasonably act in a way which can possibly destroy or harm the employment relationship.[12] This goes to show that the employers are not discharged from the responsibility of having to act fairly in an employment relationship and this goes hand in hand with the recent Constitutional Court judgment in which it was held that good faith is reciprocal and in as much as the employee has to meet certain standards, the employer is expected to do the same. As a result of this view of parties holding mutual obligations, the Constitutional Court then placed an obligation for the employer to guarantee safety and extend protection to the employee when derivative misconduct is to be applied.

---

[7] Bosch. "*The implied term of trust and confidence in South African labour law"* (2006) 27 *ILJ* 28 51.
[8] [1996] 6 BLLR 685 (AD).
[9] *Moyo v Old Mutual Limited and Others* (22791/2019) [2019] ZAGPJHC 229
[10] Raligilia and Bokaba. *"Breach of the implied duty to preserve mutual trust and confidence: A case study of Moyo v Old Mutual Limited"* (2019) Obiter 42 714; Okpaluba and Maloka. *"The breakdown of the trust relationship and intolerability in the context of reinstatement in the modern law of unfair dismissal"* (2021) *Spec Juris* 140 718.
[11] *Malik v Bank of Credit & Commerce International (In liquidation)* [1998] AC 30
[12] *Malik* (note 11 above) at para 45.

Whenever there is a misconduct in the workplace, which is seriously threatening the interests of the employer, the least that could be done by a loyal employee is to assist the employer eliminate such a threat. So, if the employee who possesses knowledge of the misconduct and the identity of the perpetrators thereto, willingly chooses to remain silent with that information and does not share it with the employer. This results in the breach of the implied trust and confidence by the employee. The employer can justifiably dismiss the employee due to the lack of honesty and the continuity employment would be intolerable in the absence of trust and honesty.

However, it is important to note that our courts have established that a fair reason for dismissing an employee is when the employee would have had knowledge about culprits ofthe primary misconduct and refuses to reveal such knowledge to the employer even thoughthey did not commit the primary misconduct themselves.[13]

This research seeks to explore the evolution of derivative misconduct by looking at various court decisions that have contributed immensely in developing the concept of derivative misconduct and which have further contributed to constructing the relevant legal frameworkwhich has resulted in the current scope and understanding of derivative misconduct. This research will also highlight the remaining gaps in our law.

When tracing the origins of derivative misconduct, it is evident that the *Amalgamated Beverage Industries*[14] case was the first case to lay down the principles to be applied by an employer in situations where the employee/s choose to remain silent by not disclosing perpetrators responsible for the primary misconduct. These principles were further consideredin the *Chauke v Lee Service Centre* case.[15] These principles will be further explored and discussed in detail in the coming chapters of this thesis.

In the *Numsa v Dunlop*[16] case, the employer wanted to use derivative misconduct against employees who had refused to disclose information about their co - workers who were directly involved in the primary misconduct during a strike.[17] The matter went to arbitration,the Labour Court (LC), the Labour Court of Appeal (LAC) and lastly went to the Constitutional Court (CC) which made the final decision. The LAC had confirmed the fairness of the dismissal of some employees but when the matter arrived in the ConstitutionalCourt it ruled in favor of the employees and ordered their reinstatement. Unfortunately, it failed to give enough clarity as to what it meant when it said employees who might want to identify perpetrators and disclose information should be afforded some protection. The Constitutional Court did not provide a clear explanation on the kind of protection to be provided to employees.[18] This shows that it is possible for the employers' manner of approach to situations where they are seeking assistance in identifying perpetrators to be erroneous. Especially

[13] Poppesqou, T. The Sounds of Silence: The Evolution of the Concept of Derivative Misconduct and the Role of Inferences (2018) 39(1) *ILJ* 34-35.
[14] *Food & Allied Workers Union & others v Amalgamated Beverage Industries* Ltd (1994) 15 *ILJ* 1057 (LAC).
[15] *Chauke and others v Lee Service Centre CC t/a Leeson Motors* [1998] JOL 3076 (LAC).
[16] *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) (28 June 2019).
[17] *Dunlop CC* (note 15 above) at para 3.
[18] *Dunlop CC* (note 15 above) at para 76.

when they fail to afford protection to employees who are expected to help in identifying culprits. This can discourage these employees from disclosing any

information and they can rather choose to remain silent because in *Chauke*[19] the sameconcern was raised where Froneman J said:

> "It may be asked whether management's approach did not itself contribute to the workers taking a collective stand, in that the collective confrontations discouraged individual responses from the workers, because of solidarity or fear of intimidation."[20]

The Constitutional Court also emphasized the same point of employees being afforded protection if they are expected to come forward and disclose information. It is therefore important that the *Dunlop CC*[21] case is properly analyzed and fully comprehended because this decision resulted in strict restrictions being imposed when it comes to dependency on derivate misconduct as a dismissal ground. The court also indicated that the onus of proof remained on employers to prove any allegations against workers. This research will look at the reasoning used by the Constitutional Court in the *Dunlop*[22] case in arriving at its decision.

This work will, in addition to clarifying and discussing the concept of derivative misconduct, consider other interrelated concepts such as collective guilt, team misconduct, and common purpose because it is extremely important that proper knowledge about these concepts is acquired and the ability to draw a distinction between them is cultivated.

1.2 LITERATURE REVIEW

In the South African labour jurisprudence there is caselaw, journal articles and textbooks which have been codified, contributing immensely to the complex concept of derivative misconduct. Considering how knotty this concept has evolved over time, the question is, are some of these writings still relevant. Therefore, it is crucial to note that even though some literature may appear to be outdated nonetheless it remains useful and relevant because it contains information from which the genesis of the concept can be traced. This study will look at some of the literature that has contributed to the analysis of "derivative misconduct" such as the article of Prof CM van der Bank titled "Passive Employees and Failure to Assist in an Investigation: The Principles of Derivative Justification."[23] where the concept is unpacked and it is further discusses that where an employee possesses information which could be of great assistance to the employer in identifying wrongdoers but refuses to come forward when requested to do so, they violate the trust upon which the employment relationship is based and this may justify dismissal.[24] It is important to note that even though this article was written in 2014 and does not take into account the recent developments around the concept of derivative

[19] *Chauke* (note 14 above).
[20] *Chauke* (note 14 above) at para 44.
[21] *Dunlop CC* (note 15 above).
[22] *Dunlop CC* (note 15 above).
[23] Van der Bank CM "Passive Employees and Failure to Assist in an Investigation: The Principles of Derivative Justification" (2014*) Vol 5 No. 7 Mediterranean Journal of Social Sciences*, 92 -98.
[24] Ibid 1.

misconduct but it is mandatory to consider it because it has the strengthof discussing the judicial position before the more recent developments.

It is impossible to discuss the concept of derivative misconduct without touching on the topic of good faith because in any employment contract the employee is expected to act in good faith towards the employer and failure to do so may result in the trust been broken. The article[25] of Tumo Charles Maloka discusses the suitable way of disciplining an employee who has or might have actual knowledge of the wrongdoing of others and the employee still decides to retain that information while the employer's interests are jeopardized.[26] This article further dives into how the court expands on the scope of the duty of good faith. The court discourages an expansive understanding of good faith, by stating that it should not extend to the employee's personal financial status and private life, and this goes to show that as much an employee may be expected to act in good faith towards the employer but that does not mean the employee will be deprived of enjoying their life in privacy.

Existence of an employment contract does not give an employer the ticket to unrightfully invade the employee's private lifestyle. Privacy is a protected right under our Constitution. The article entitled 'Abuse of a Right to Dismiss not Contrary to Good Faith'[27] wrote by LHawthorne also assists in navigating the discussion on the topic of good faith and gives a detailed explanation about good faith as a principle and how it applies in an employment contract. Understanding the principle of good faith is also crucial for this study since the right of dismissal emanates from the derived duty to act in good faith.

Derivate misconduct is often confused with the interrelated concepts that exist in our law such as collective guilt, team misconduct, and common purpose. In an article entitled "Collective Misconduct in the Workplace."[28] The author, Lindiwe Maqutu, further explains how concepts such as "team misconduct" were developed in South Africa with the aim to protect enterprises and to combat crime.[29] This article is therefore valuable to the dissertation topic because it extensively unpacks concepts such as collective guilt, team misconduct, and common purpose. It further highlights how they can be interrelated and shows the importance of drawing clear distinctions between the concepts to avoid confusion.

Employment contracts are founded on trust which exists between the employer and employee at the beginning of the contract and trust has to be maintained through the existence of an employment relationship. As soon as the employee does something to destroy that trust, the employee is deemed to have failed to act in good faith. In an article[30] of K Bassuday, it is explained that the foundation which holds any employment relationship, is trust and confidence. There is a huge emphasis placed on how an

[25] Maloka TC "Derivative Misconduct and Forms thereof: *Western Refinery Ltd* v *Hlebela* 2015 36 *ILJ* 2280.
[26] Ibid 2.
[27] L Hawthorne 'Abuse of a Right to Dismiss not Contrary to Good Faith' (2005)17 SAMLJ 214.
[28] L Maqutu 'Collective Misconduct in the Workplace: Is 'Team Misconduct' 'Collective Guilt' in Disguise?' (2014) 25 *Stell LR* 566 -579.
[29] Ibid 2.
[30] K Bassuday "Derivative Misconduct and An Employee's Duty of Good Faith : Western Platinum Refinery Ltd v Leela & Others (2015) 36 ILJ 90.

employee must act in good faith towards the employer and not much attention is focused on what is expected from the employer as far as good faith is concerned.[31] K Bassuday shares the same sentiments with the article[32] written by Prof CM Van Der Bank which discusses and analyses the principles of derivative justification which are said to be the same as derivative misconduct. [33]As a result, that is why derivative misconduct is also referred to as 'residual misconduct' because the failure of employees to disclose information undermines the trust on which the employment relationship is founded.[34] It is important to note that as much as the genesis can be traced and a clear explanation is provided on how derivative misconduct emanates from the failure to act in good faith by not sharing information with the employer, these articles do not incorporate the perspective which was highlighted by the recent Constitutional Court decision which emphatically stated that good faith is to be reciprocal and that the employer has their own part to play by providing protection to employee.

The recent developments on the concept of derivative misconduct coming from the recent Constitutional judgment tend to be alarming as the court never specified on how the employer is to provide protection to the employees. Another scholar, who expresses the same concern is K Phungula, in an article[35] where he questions the uncertainty around the protection is to be provided to employees who are expected to come forward. There remains an unclosed gap which was opened by the Constitutional Court when it ceased to specify the kind of protection an employer is supposed to offer to an employee who would like to offer assistance by disclosing perpetrators responsible for the primary misconduct.

The new obligation imposed by the Constitutional Court makes the situation more difficult because there are no specifications on whether this protection extended to the employee should be confined to the internal borders of the work place or should they be extended outside of work because more harm is likely to occur externally.[36] If the protection is to be extended outside of work, it may be a massive challenge to the employer and it may almost be impossible to fulfill this obligation. On the other hand, if the protection offered remains within the borders of the workplace it would be achievable by the employer but the question is, who would protect the employee outside the borders of the workplace. The concept may be said to be a double-edged sword[37] which works in favor of the employer but when taking into consideration the new obligation of protection imposed by the Constitutional Court, it is clear that employers are faced with a predicament because going forward, they will not only be challenged by the difficulty of identifying perpetrator and proving misconduct but they are further expected to provide protection which is also in question.

Since derivative misconduct stresses the importance of disclosure of information to the employer. The question that should be posed, is whether there is a general duty for any person to disclose information. Grogan J states that there is no general duty to disclose information but the duty to disclose may arise if non-disclosure may be fraudulent[38] or non-disclosure may not work for the good of the employer resulting in the breach of the duty to act in good faith. When taking a close look at the duty to speak imposed by the concept of derivative misconduct, it indirectly challenges two protected Constitutional rights namely, 'the right to remain silent' and 'the presumption of innocence until proven guilty'. If precaution is not taken, the application of the derivative misconduct poses an elevated risk of infringement of these two

[31] Bassuday (note 29 above) 90.
[32] Van der Bank (note 22 above) 92.
[33] Ibid 92.
[34] Ibid 92.
[35] S Phungula. "The application of Derivative Misconduct in the Workplace: A critical analysis of *NUMSA obo Khanyile Nganezi and Others v Dunlop Mixing Services (Pty) Ltd 2019 (5) SA 354 (CC)"* (2023) *Obiter* 44(3) 613-625
[36] Phungula (note 35 above) 624.
[37] *Dunlop* CC (note 15 above) at para 44.
[38] Grogan, J "Workplace Law" 11 ed at page 57 – 58.

Constitutional rights.[39] Sibiya writes an article[40] in which focus is placed on the overlooked Constitutional right to remain silent. The right to remain silent is categorized into two and this beneficial to this study on derivative misconduct as it important to know when the right to remain silent may be raised as a defensive tool. The right to remain silent may not be applicable in a situation where there will be a balance between the rights of employees and employers but the right to remain silent may be applicable when the employee may self-incriminate themselves by speaking up.[41] It is therefore crucial that employees are not wrongfully deprived of their right to remain silent and the presumption of innocence until proven guilty. Simultaneously, there must be a balance maintained to ensure that guilty employees do not escape liability by hiding behind these two Constitutional rights.

Another article worth taking into consideration, is the article [42] of Poppesque which looks at the requirements of fair dismissal. This article also discusses the evolution of the concept of derivative misconduct in various labour courts which have resulted in the scope of derivativemisconduct in 2018. This article has the strength to discuss the development and evolution ofderivative misconduct up to 2018 but does not take into consideration the development of this concept which came with the Constitutional Court decision in 2019.

1.3 STATEMENT OF THE PROBLEM:

Taking into account the aforementioned summary of the concept of derivative misconduct. It is of great importance that parties of an employment relationship act in good faith towards each other. Employees should avoid partaking in any conduct that may lead to irretrievable breakdown of trust because in the absence of trust, the prospects of the continuity of that employment relationship get diminished. It is trite to ensure that in the application of derivative misconduct there is no infringement on constitutional rights such as the presumption of innocence until proven guilty and that it why employers should bear the burden of proof.

Furthermore, there must be no infringement to the right to remain silent if an employee may possibly be self-incriminated by the act of being expected to come forward with information. The Constitutional Court placed an obligation on the employers by stating that protection is to be offered for employees expected to disclose information about perpetrators involved in a misconduct. The main point of concern emanating from the Constitutional Court's decision is that no specifications were provided in terms of how this protection is to be offered. The Constitutional Court does not give clarity as to what type of protection is to be provided and whether it should remain within the borders of the workplace or whether this protection should be extended to the outside borders of the workplace.

1.4 STATEMENT OF PURPOSE:

This study aims to critically discuss 'derivative misconduct' as one of the justifiable reasons for which an employer can dismiss an employee and to give a comprehensive understanding of the concept of 'derivative misconduct.' It will further look into how the Constitutional Court has restricted the use of 'derivative misconduct.' Secondly, it will discuss the impact ofthe Constitutional

[39] SW Sibiya et. "Judicial scrutiny of Derivative Misconduct in South African Employment Law: A careful duty to speak" (2023) Obiter 44(1) 106-121
[40] Sibiya (note 38 above) 118.
[41] Sibiya (note 38 above) 120 - 121.
[42] Poppesque (note 7 above).

Court's decision on the proper conception of what has become known as 'derivative misconduct' in South African labour jurisprudence.

1.5 RATIONALE:

This research is worthwhile because it will contribute to the development of labour law concerning the dismissal of employees for 'derivative misconduct' in a working environment. The research will specifically look at derivative misconduct and look at how the*Dunlop* CC[43] case developed the understanding of the concept and placed some restrictions on the part of employers regarding their reliance on derivative misconduct as a dismissal ground.

1.6 RESEARCH QUESTIONS:

1.6.1 Where do we trace the genesis of derivative misconduct?
1.6.2 When does the duty to disclose arise and what kind of protection is to provided?
1.6.3 When does failure to act in good faith result in derivative misconduct?
1.6.4 How do we distinguish derivative misconduct from other interrelated concepts?

1.7 ANTICIPATED LIMITATIONS

This research will focus specifically on derivative misconduct and look into this concept more in detail by discussing case law which deals with this concept. This research will not deal extensively with the other forms of collective misconduct except for drawing a distinction between the existing interrelated forms of misconduct. This research is thereforefocused on examining the development and the current scope of derivative misconduct.

1.8 RESEARCH METHODOLOGY

The doctrinal methodology will be used. Research material utilized to construct the thesis will be data collected from online sources such as published journals through databases such as Hein Online and Sabinet. Published case law will be collected from Lexis Nexis, Saflii, Juta as well as other available databases. The writer will also collect data from textbooks available online and the University of Kwa-Zulu Natal (Pietermaritzburg campus) premises. This methodology is suitable for this study because it will enable the writer to rely on textbooks, published case law, and South African journals so that recent developments in our labour law can be identified and so that comparison can be drawn where needed. This methodology will not require doing fieldwork or interviewing people, but it is based on paper.

[43] *Dunlop* CC (note 15 above).

1.9 CHAPTER OUTLINE

Chapter 1- Introduction
This chapter will briefly explain what the research deals with; it will also outline what the aims of the research are and the general order of the research. This chapter will also deal withthe general background information on the concept of "derivative misconduct.

Chapter 2- This chapter will provide a discussion on how derivative misconduct remains distinguished from all other interrelated concepts. In this chapter derivative misconduct willbe compared to other forms of misconduct that exist in our law such as collective guilt, team misconduct, and common purpose.

Chapter 3 – This chapter will discuss the origins and judicial development of the concept of derivative misconduct and look at the judicial position prior to 2019. The chapter will further discuss the reciprocal duty of good faith and it will also look at the implications which come with breaching this duty. This chapter will address the issue of fiduciary duties and good faithas it was decided by the Constitutional Court.

Chapter 4 - This chapter will contain a detailed analysis from arbitration all the way to the Constitutional Court decision in the *Dunlop*[44] case. This chapter will also analyze how the Constitutional Court decision differed from the prior rulings coming from the lower courts. Itwill also discuss the Constitutional Court findings in depth and the judicial position after 2019.

Chapter 5- This will be the conclusion which will look at the summary of what has been discussed in the previous chapters as a whole. It will further discuss the findings, the impactof the Constitutional Court judgment on our law and recommendations of the research. It willalso highlight the remaining gaps in our law and give a summary of the current conception of derivative misconduct.

[44] *Dunlop* CC (note 15 above).

CHAPTER 2: SETTING THE SCENE: THE CONCEPT OF COLLECTIVE GUILT AND DISTINGUISHING DERIVATIVE MISCONDUCT

2.1 INTRODUCTION

When it comes to collective misconduct there has been confusion as there are interrelated concepts and there tends to be uncertainty on how these concepts differ, namely: team misconduct, common purpose, collective guilt and derivative misconduct. It is therefore imperative to have a comprehensive understanding of these concepts so that they are not incorrectly applied in situations where there was misconduct that might require collective dismissal of employees. In this chapter, a clear distinction between these interrelated concepts will be illustrate and extensively discussed.

2.1.1 COLLECTIVE GUILT

The collective guilt doctrine entails punishing a big group of employees who had participate in an act of misconduct. The employer is often unable to point at the culprits and therefore resolves to dismiss the whole group with no evidence or proof to prove whether all employees were really involved. The employer might decide to select some employees and dismiss them with the aim of teaching a lesson and setting a precedent for other employees.[45] Alternatively, the employer may dismiss a selected group of employees with the hope that the guilty individuals will be in that group.[46] Both these aforementioned options are unfair and unlawful because innocent employees may be unfairly dismissed in the process and that it why our South African labour courts discourage the notion of collective guilt.[47]

Collective guilt obviously infringes on many Constitutional rights, and justice, which says a person is innocent until proved to be guilty. The doctrine of collective guilt does not make provision for a person to be proved to be guilty, even innocent people tend to be adversely affected by the application of collective guilt doctrine. As a result, many courts have expressed that this doctrine of collective guilt is repugnant. This is also found in *Fedcraw oboMthimunye v Rewmoor Investment.*[48] The commissioner confirmed that the "collective responsibility approach was repugnant to the principles of natural justice."[49]

The notion of collective guilt is unacceptable because it goes against natural justice. This was further illustrated in the *PRASA*[50] case which involved the dismissal of 700 employees. The employees had committed violent acts during the strike, and they set alight coaches. PRASA had dismissed employees for derivative misconduct. The employer gave the employees an opportunity to disassociate themselves from the misconduct so that they would not be

[45] Grogan, Dismissal, 4th ed at page 293.
[46] Ibid.
[47] Ibid.
[48] [2008] 2 BALR 142.
[49] Ibid.
[50] *National Transport Movement & others v Passenger Rail Agency of SA Ltd* (2018) 39 *ILJ* 560 (LAC) (PRASA) 570 para 30.

dismissed and the union gave a collective response and denied liability on behalf of the employees.

PRASA refused this and required that every individual explained themselves. The court refuted this on the basis that the important elements of derivative misconduct had not been proved and held that the dismissal constituted dismissal for collective misconduct which isnot acceptable nor recognized in our law.

2.1.2 COMMON PURPOSE

Common purpose is a doctrine used in South African labour law to punish collective misconduct. Common purpose originates from criminal law where more than one person wasfound to be guilty, as will be indicated. This was also confirmed by the court in *NSCAWU and others v Coin Security Group*[51] where the court held that the common purpose doctrine applied when "two or more persons associated themselves in a course of conduct which resulted in a criminal act by one or more of them."[52]

In other words, even if the other individuals did not physically participate in the commission of the misconduct, they are found to be guilty if they had actively associated themselves withthe outcomes of the misconduct. They will be said to have shared in the 'mens rea' of the perpetrator. The guilt is also extended to them through the common purpose doctrine. They share the guilt of the perpetrator because of the guilty state of mind they had in common to propel the commission of the misconduct.

For common purpose, it is the employer who bears the onus of proving that the employees were guilty or shared the same state of mind. Wingfield mentions that in *Dunlop CC*[53] the court signaled a shift away from derivative misconduct, towards the concept of common purpose[54] when the court said:

> "Evidence, direct or circumstantial, that individual employees in some form associated themselves with the violence before it commenced, or even after it ended, may be sufficient to establish complicity in the misconduct. Presence at the scene willnot be required, but prior or subsequent knowledge of the violence and the necessary intention in relation thereto will still be required."[55]

Meaning that if the employer is able to prove prior/subsequent knowledge of violence and there is proof that the employees shared the same motive with the perpetrator and also encouraged this act, the employees will be dismissed for common purpose. It is therefore clear that while the principle of derivative misconduct seems to be dying slowly inour labour jurisprudence it seems like the doctrine of common purpose will continue to rise instead of dying off because in the Dunlop CC case the court also showed a shift away from

[51] [1997] 1 BLLR 85 (IC).
[52] Ibid 90.
[53] *Dunlop CC* (note 15 above).
[54] C Wingfield & N Coetzer "Common Purpose, Derivative Misconduct & Dismissal After Dunlop" (2021) http://www.chmlegal.co.za/common-purpose-derivative-misconduct-after-dunlop.(14-07-2021)
[55] *Dunlop CC* (note 15 above) at para 46.

derivative misconduct and moved towards common purpose[56] when the court raised a pointof determining liability of the employee by stating that:

"Evidence, direct or circumstantial, that individual employees in some form associated themselves with the violence before it commenced, or even after it ended, may be sufficient to establish complicity in the misconduct. Presence at the scene will not be required, but prior or subsequent knowledge of the violence and the necessary intention in relation theretowill still be required…"[57]

This is even evident in a recent judgment of *Numsa obo Dhludhlu & Others v Marley Pipe Systems*.[58] 41 members of Numsa's members had been dismissed because it was said they shared a common purpose with another group of 12 employees who had assaulted a managerand these 12 were directly involved and another additional 95 employees were identified by photographs as being physically present at the scene. So, the union disputed this saying that there was no evidence to prove that the 41 employees were physically present at the scene, and that there was no evidence to prove that they were aware of the assault or shared a common purpose with the perpetrators.

The employer opposed these contentions by proving that records showed that at the time of the assault all these employees were absent from their workstations. Based on this the LAC was able to draw an inference. Judging from the given facts before court the more probable inference that could be drawn was that the employees had associated themselves with the assault and supported it. They were therefore dismissed for common purpose.

Therefore, the difference between derivative misconduct and common purpose is that with derivative misconduct, for the employee to be found guilty, they must have had knowledge about the misconduct and the perpetrators but choose to remain silent about it and not assist the employer with identifying the perpetrators. On the other hand, with common purpose the employee must share the same motives and same state of mind with the perpetrators before or during or after the misconduct has taken place. The employee must desire for the same outcomes as of those of perpetrators even if they were not physically present. Should an employee want to escape punishment they had to prove how they disassociated themselves from the primary misconduct that was committed and further prove how they did not share the same intentions as those of the perpetrators. Likewise, the employer has to prove the intentions of the employees as mentioned by the LAC.[59]

After the LAC the *Marley* case[60] proceeded to the Constitutional Court in 2022 where the final decision was made. The Constitutional Court set aside the decision made in the court a quo and ordered the reinstatement of the 41 employees who had been dismissed for common purpose. The court concluded that the principles of common purpose were not met and further stated that:

[56] Wingfield (note 53 above).
[57] *Dunlop CC* (note 15 above) at para 46.
[58] *NUMSA obo Dhludhlu and Others v Marley Pipe Systems SA (Pty) Ltd (*JA33/2020) [2021] ZALAC 13
[59] *Dhludhlu* LAC (note 57 above).
[60] *Numsa obo Aubrey Dhludhlu and 147 Others v Marley Pipe Systems (SA) (Pty) Ltd* (CCT 233/21) [2022] ZACC 30.

> "If I accept all of this evidence, with what then do I take issue? I take issue with two conclusions. The first is that the 40 employees did not dissociate from the assault. The second is that they were rejoicing. As I said, from the proven facts, there is no evidence that they ever associated with the assault. Regarding rejoicing, the marching, singing and dancing were already taking place when the group left the canteen. The Labour Appeal Court's conclusions are thus insupportable. I think my refusal to be bound by them falls squarely within the exception highlighted in *Makate*. On the available facts, the above reasoning applies with more force to Mr Mokoena who was not even at the respondent's premises when the assault took place. I emphasize "on the available facts" to avert any possible misunderstanding that I am departing from the holding in *Dunlop* that, for purposes of complicity, presence at the time of commission of acts of violence is not a requirement. All that is said about Mr Mokoena is that upon arrival, he joined the group that was participating in the unprotected strike. The Labour Appeal Court's judgment says nothing concrete about how exactly he associated himself with the assault."[61]

As quoted in the above paragraph, Madlanga J stated that the court a quo failed to show how the 41 employees and those who were bystanders associated themselves with the assault and by merely watching the assault take place or being present had associated themselves with the misconduct. The LAC decision was set aside. Madlanga J also expressed that the LAC did not say anything concrete on how the employee who had arrived after the incident had happened had associated himself with the assault, as a result the Constitutional Court ordered that the abovementioned employees be reinstated.

In *Chauke*[62] the doctrine of common purpose was well illustrated when the employees associated themselves with the misconduct through their silence and continued to damage their employer's property. No employee came forward or tried to disassociate themselves from the misconduct. Hence, Cameron JA held that the court would infer that they all culpably participated in the sabotage of their employer's property.[63] So the onus rests with the employer but the employee should also be able to rebut allegations and show how they disassociated themselves from the misconduct.

2.1.3 Team Misconduct

Business owners who own retail stores often suffer a loss of stock which is massive, and which adversely affects their profits and growth of the business. In many cases these employers are unable to pinpoint the perpetrators or culprits who are responsible for this loss.[64] Hence the idea behind creating the concept of team misconduct was to combat or to control losses of stock. Team misconduct is therefore used in the dismissal of a group of workers where there has been shrinkage which cannot be accounted for and the loss of stockcannot be traced.[65] The purpose of team misconduct is to punish misconduct of one or more employees for their undeniable role in the misconduct or where they had knowledge of and failed to stop the misconduct. South African courts also deem it acceptable to dismiss

[61] *Dhludhlu* CC (note 59 above) at para 30 -31.
[62] *Chauke* (note 14 above).
[63] *Chauke* (note 14 above) at para 40.
[64] Maqutu (note 27 above) 566 -579.
[65] Ibid.

employees for shrinkage where the employer has evidence of loss of stock and employees are implicated.

In the matter of *True Blue Foods v CCMA (LC)*,[66] Shai AJ set aside a decision made by the arbitrator who said the dismissal of some employees was substantively unfair and ordered them to be paid six months compensation. Shai AJ set aside that arbitration award on the basis that it was unreasonable and that the arbitrator's decision was based on misconceptionand that he had misconstrued the issue before him.[67]

The labour court clarified that proving individual guilt is sometimes not the basis of deciding on a dismissal but rather the fact that an employee was a member of a team which failed toensure that there was no stock loss may be sufficient to warrant a dismissal based on team misconduct.[68] This was highlighted by Cameron JA in *Chauke*[69] where he stated that the relationship between employer and employee is in its essentials one of trust and confidence, even at common law.[70] Therefore, conduct clearly inconsistent with that essential level of trust and confidence warranted termination of employment.[71]

It is imperative to remember that every employee has a duty to act in good faith towards their employer and to ensure that they do not act in a way which breaks the trust in their employment relationship, by protecting the employer's interests. This was confirmed in *SA Commercial Catering and Allied Workers Union v PEP Stores*[72] where the whole staff was dismissed for stock loss of 81%. The arbitrator held that the stock loss was so high it would have been impossible for this to escape the attention and knowledge of the staff members. It was held that all staff members each had a responsibility to protect their employer's interest.[73]

In *Fedcraw v Snip Trading,*[74] the arbitrator said that if it is found that the employee could have prevented stock loss they will be dismissed for team misconduct. However, it is trite to note that in a workplace, employees perform different tasks and occupy different positions.So, before an employee could have prevented stock loss they must have been in a position todo so. As mentioned by Cohen,[75] managers in retail stores should be able to account for stockthat goes missing.[76] Failure to do so will lead to a dismissal. It would also be unfair to hold employees who occupy lower positions liable for something they had no power over. However, it is also very important to do proper investigation because the fact that some employees occupy lower positions will not necessarily eliminate the possibility that they maybe also responsible for stock loss.[77]It is also crucial to remember that the onus of proving guilt lies with the employer. Before dismissing employees, an employer has a duty to prove and justify why the dismissal is lawful and is consistent with the labour laws.

---

[66]*True Blue Foods (Pty) Ltd t/a Kentucky Fried Chicken (KFC) v Commission for Conciliation Mediation and Arbitration and Others* (D441/11) (2015) 36 ILJ 1375 (LC).
[67] Ibid.
[68] *Chauke* (note 14 above).
[69] Ibid.
[70] Ibid.
[71] Ibid.
[72] (1998) 19 *ILJ* 939 [CCMA]
[73] *True Blue foods* (note 65 above) at para 45.
[74] *FEDCRAW/Snip Trading (Pty) Ltd* [2001] 7 BALR 669 (P)
[75] T Cohen 'Collective Dismissal: A Step Towards Combating Shrinkage in the Workplace' (2003) 15 *SA Merc LJ*, 25.
[76] Ibid.
[77] K Pillay "Derivative Misconduct and the Reciprocal Duty of Good Faith: Employee silence in identifying perpetrators of misconduct." (2020) UKZN Thesis 38.

The presiding officer in *Fedcraw,*[78] highlighted that the moment a company has proved thatstock loss has exceeded a particular percentage they have automatically discharged their general onus of proof. Once stock loss has been proved, a rebuttable presumption arises thatthe employees might have stolen the goods or they could have failed to comply with certain rules of the company. The burden then shifts to the employees to prove to their employer otherwise and there is therefore no reversal of the onus but what merely happens is that the employees are expected to disassociate themselves with the misconduct. [79] But should employees choose to remain silent the court may perceive it as a sign of guilt like in the matter of *FAWU v Amalgamated*[80] where the employees remained silent and gave no assistance to the employer and no explanations. The same thing happened in *True Blue Foods,*[81] where the employees gave no evidence or explanation nor filed an affidavit to counter the evidence of their employer.[82] Hence they were found to be guilty and their dismissals were said to be justified.

In *South African Commercial Catering and Allied Workers Union and Other v Makgopela and Others*[83] the employer had experienced a significant stock loss which increased as the months continued.[84] The employer had dismissed the employees for their failure to combat stock loss and shifted all the blame to the employees. On the employees' appeal, the court[85] overturned the decision on the Labour Court's decision by stating that the employees were unfairly dismissed[86] because the employer had failed to discharge the onus of proof.[87] The court discouraged reliance on generalised facts. As much as the stock losses were undoubtedly taking place it could not be easily inferred that all the employees were guilty taking into consideration that the employer has a big store and that all of these employees worked with different tasks. If it was a smaller store where the employees worked in close proximity at all times like in *Chauke*,[88] it could have been easier for the court to infer that all the employees were guilty for the stock loss. Another point of concerned raised by the presiding judge was that unlike *Amalgamated Beverage Industries* [89], the employees did not merely remain silent but when they became aware of the stock loss, they participated in shrinkage workshops and helped the employer by making suggestions and proposals of how security can be improved to avoid stock losses and the employer never bothered to implement any of those ideas.[90] Furthermore, evidence provided by the employees revealed that the employer never set up systems in place to try curb the stock losses.[91]

It is therefore important to be able to disassociate yourself as an employee in cases of misconduct because should there be no not answer or given evidence to prove your innocence you may be held accountable. The only version the court will have is that of the employer which was not rebutted. So, disassociating yourself from the misconduct should not be misconstrued as a reversal of onus.

---

[78] *FEDCRAW* (note 73 above).
[79] *FEDCRAW* (note 73 above) at para 46.
[80] *Amalgamated Beverage Industries* (note 13 above).
[81] *True Blue foods* (note 65 above).
[82] *True Blue foods* (note 65 above) at para 49.
[83] (JA38/2021) [2023] ZALAC 8
[84] *Makgopela* LAC (note 83 above) at para 3.
[85] Ibid.
[86] *Makgopela* LAC (note 83 above) at para 31.
[87] *Makgopela* LAC (note 83 above) at para 29.
[88] *Chauke* (note 14 above).
[89] *Amalgamated Beverage Industries* (note 13 above) at para 27.
[90] *Makgopela* LAC (note 83 above)at para 27 – 28.
[91] Ibid.

It is also worth mentioning that there are many issues that are associated with the applicationof the concept of 'team misconduct' because it is often baffling as to whether the dismissal was done on the basis of under-performance or misconduct. This is a serious problem because at a workplace under-performing and misconduct are dealt with differently. When looking into the origins of team misconduct it is evident that the main purpose of creating this doctrine was to deal with stock loss which was caused particularly by misconduct such as theft or negligence.

This confusion was sparked by the court in *Foschini v Maidi.*[92] Maqutu expresses how the court in *Foschini*[93] made it difficult to practically apply team misconduct when it merged theliability of misconduct and that of underperforming. It is often not clear whether you will dismiss an employee for team misconduct based on incapacity or misconduct.[94]Hence the reason why it is crucial that each time uncertainties arise, they are properly addressed by tracing back the roots of the doctrine and to try to comprehend why it was created in the firstplace, namely to eliminate confusion.

When not careful, it is easy for employees to be unfairly dismissed relying on team misconduct that is why in Maluleke v Cashbuild,[95] the commissioner requested for the employer to produce proof of how the employees were directly or indirectly involved in the stock loss. The commissioner held that the employer failed to discharge their onus of proof because the employer was only able to provide information which showed that the employees were employed at the store which was experiencing stock loss problems and that was insufficient to warrant for a dismissal. This shows that employers bear the burden of proof and that our law will not permit unwarranted dismissals of employees with no evidence. In Saccawu v Makgopa[96] the court emphasized that our law also does not permit for guilt to be inferred simply by association and reliance on generalized facts does not suffice either.[97] Am employer has to produce proof of how the employees were involved in the stock loss before dismissal can be deemed fair. Therefore, proving mere association will not automatically amount to team misconduct in the absence of proper proof.

Considering the aforementioned expansive discussion on these interrelated concepts, it can be deduced that even though these concepts may appear to be similar and interrelated, they are all different. It is therefore fundamental to have a proper understanding of all these interrelated concepts toensure that the correct and relevant one is applied in any given circumstances to avoid unnecessary lack of clarity. Employers who desire to collectively dismiss employees should ensure that they obtain a clear understanding of these interrelated concepts before haphazardly applying the incorrect one leading to wasted litigation costs.

[92] *Foschini Group v Maidi & others* (2010) 31 *ILJ* 1787 (LAC).
[93] Ibid.
[94] Maqutu (note 27 above) 573.
[95] *Maluleke & Others/Cashbuild Orange Farm* 2012 1 BALR 50 (CCMA)
[96] Ibid.
[97] *Makgopela* LAC (note 83 above) at para 29.

CHAPTER 3: THE ORIGIN AND DEVELOPMENT OF DERIVATIVE MISCONDUCT AND THE POSITION PRIOR TO 2019

3.1 INTRODUCTION

It is fundamental to recognize that the concept of derivative misconduct has evolved over the years and has been undergoing constant development. This chapter will serve to trace the genesis and the expansion of the concept of derivative misconduct in South African labour law. The concept of derivative misconduct refers to a ground of dismissal where an employee chooses to remain silent and not disclose misconduct committed by another employee to the employer. It is therefore crucial for all parties which participate in the South African labour relations to have an in-depth understanding of the concept from it's genesis all the way to the recent developments to ensure that the application of the concept is correct. Possessing such knowledge can further assist both employees and employers to know what are their rights and obligations as far as the concept of derivative misconduct is concerned. In as much as the Constitutional Court's decision resulted in confusion and uncertainty regarding the protection that is to be provided to employees. The Constitutional Court can be lauded for advising that there must always be a balance of rights for both employees and employers.

3.2 THE BEGINNING OF THE CONCEPT OF "DERIVATIVE MISCONDUCT"

The doctrine of derivative misconduct is first spotted in the case of *Amalgamated Beverage Industries.*[98] In an obiter dictum, Nugent J mentioned that:

> "In the field of industrial relations, it may be that policy considerations require more of an employee than that he merely remain passive in circumstances like the present and that his failure to assist in an investigation of this sort may in itself justify disciplinary action."[99]

This obiter dictum was articulated to support the concept of derivative misconduct being a justified ground for dismissal. The employee had been brutally assaulted by his co-employeeswith the intention of punishing him for coming to work during a strike.[100] The employer could not point out the perpetrators who had actively participated in the assault and no employee came forward to assist with information when the investigations were being conducted. As a result of the failure of the other employees to come forward with information, rather choosingto remain passive, they were dismissed. The employees who were dismissed were approximately 150 assistants who were referred to as "crewman" and 50 drivers. When they were dismissed, they made an application to the Industrial Court and challenged the dismissal on the basis that it amounted to

[98] *Amalgamated Beverage Industries* (note 13 above).
[99] *Amalgamated Beverage Industries* (note 13 above).
[100] *Amalgamated Beverage Industries* (note 13 above) at para 4-7.

an unfair labour practice.[101]

This application was unsuccessful and they appealed this decision. It was argued that one or more appellants were absent when the misconduct took place and that some of these employees who had been dismissed in the court a quo were unintentionally caught up in the happening of the events. Nugent J mentioned that the failure of the employees to come forward and give an innocent explanation when given an opportunity to do so worked against them.[102] The reason why it worked against them is that they never used the opportunity given to them to prove their innocence before the court. So, by them choosing to remain silent theygave the court no choice but to utilize the evidence given by the respondents which then worked against them and this further justified their dismissal.

After taking into consideration all the evidence provided, the court gave a final verdict to the effect that the most probable inference in the given circumstances was that all the appellants were present directly participating in the misconduct or lending support to those who were actively involved in the misconduct and the dismissal was said to be justified.[103] This goes to show how the court in this case was in support of the concept of derivative misconduct having found that employers are justified by the law in dismissing employees who choose to be of no assistance to their employers and who remain silent, failing to expose perpetrators who participated actively in the wrongdoing. The dismissing of employees who deliberately choose to remain passive and withhold helpful information about their co-employees who were actively involved in a primary misconduct is referred to as 'derivative misconduct' which qualifies as a justified ground for dismissal in certain circumstances, as will be explored.

When tracing the origins of derivative misconduct, it is evident that the *Amalgamated Beverage Industries*[104] case was the first case to lay down the principles to be applied by an employer in situations where the employee/s choose to remain silent by not disclosing perpetrators responsible for the primary misconduct. These principles were further consideredin the *Chauke v Lee Service Centre* case.[105]

In *Chauke*[106] it is where we first hear the term 'derivative misconduct' to refer to the concept described above, where employees are found guilty of misconduct in the form of failing or refusing to implicate their co-employee perpetrators of the primary misconduct. 'Derivative misconduct' is now a commonly understood term utilized in our labour jurisprudence. This concept of 'derivative misconduct' arises when the employee has information that might assist an employer in identifying perpetrators who are involved in primary misconduct but chooses to withhold that information from the employer. In this matter, *Chauke*,[107] the employer was faced with the problem that his business was dwindling down to nothing because of his employees who were sabotaging vehicles which were at the business. This jeopardized the business and as

[101] *Amalgamated Beverage Industries* (note 13 above).
[102] *Amalgamated Beverage Industries* (note 13 above) at para 16.
[103] Ibid.
[104] *Amalgamated Beverage Industries* (note 13 above).
[105] *Chauke* (note 14 above).
[106] *Chauke* (note 14 above).
[107] *Chauke* (note 14 above).

such had a negative impact on the interests of the business.[108] The employer tried to address this issue several times but the employees refused to cooperate and chose to remain silent.[109] The labour court, which was the court of first instance, ruled infavor of the employer finding that it was fair in the given circumstances to dismiss the employees. This shows that it is important for employees to explain themselves before the court when afforded an opportunity because silence means that the employee's position is notcommunicated.

The Labour Appeal Court (LAC) in *Chauke*[110] was of the view that the facts provided justified, or were reasonable enough, to draw a primary inference of culpable participation bythe dismissed employees because it was impossible for the dismissed employees not to have seen the misconduct take place, because the vehicles were always in an open space. This alone was proof that the employees were either actively participating the misconduct or that they witnessed it and chose to be silent about it. Secondly, the workers of this company weremade up of a small group of 20 and they worked in close proximity to each other. The physical set-up of the workplace and the close proximity in which they worked, justified theinference drawn by the court. Their silence was questionable and was the main indicator that they all had one collective motive, namely to sabotage the business because their employer had refused to cater for their pay demand.[111]

The LAC further discussed the various reasons which may fairly justify a dismissal. The court unfolded the two different categories of justification for so-called no-fault dismissals. The first was dismissal based on operational grounds where the dismissal has to take place inorder for the company to meet its operational requirements. A dismissal based on operationalrequirements is also known as a retrenchment and it does not only apply in situations where the business or company needs to be saved from economic calamity. Retrenchments can takeplace simply because the company wants to increase profits, amongst other reasons, and this is in accordance with the interpretation of operational requirements in section 213 of the LRA. The definition states that the term operational requirements mean "requirements based on the economic, technological, structural or similar needs of an employer."[112] With operational requirements terminations, even innocent employees may be affected and dismissed fairly. The second category of termination stems from misconduct and is made upof two justifications. The first justification insinuates that the employees participated in the primary misconduct. The second justification is called a 'derived justification' which concept was created in the case of *Amalgamated Beverages Industries.*[113] It emanates from the action of employees who refuse to help the employer in bringing the blameworthy to book.[114] Withthe given background it can confidently be said that the real genesis of the concept of derivative misconduct can be traced from the two cases, *Amalgamated Beverages Industries*[115] and *Chauke*.[116] In the instance of derivative misconduct, the second category is the one that is applicable and relevant because it addresses dismissal based on primary misconduct andderivative misconduct.

[108] *Chauke* (note 14 above) at para 16.
[109] Ibid.
[110] *Chauke* (note 14 above).
[111] *Chauke* (note 14 above) at para 16.
[112] Section 213 of LRA.
[113] *Amalgamated Beverage Industries* (note 13 above).
[114] *Chauke* (note 14 above) at para 10.
[115] *Amalgamated Beverage Industries* (note 13 above).
[116] *Chauke* (note 14 above).

Another case which reconsiders the application of the concept of derivative misconduct, is the *Hlebela* case.[117] Considering that the *Chauke* case[118] does not touch on the various aspects of a justified dismissal as a result of non- disclosure, the court in the *Hlebela*[119] matter discusses fundamental issues when it comes to the application of derivative misconduct.

The court advises that the following main elements are to be met before an employee can be said to be guilty of derivative misconduct:

a. " Non-disclosure must be deliberate
b. The employee must be actual knowledge of the misconduct if not, blameworthiness cannot be attributed to them.
c. The rank of the employee may also be a contributing factor to the gravity of non-disclosure
d. An employee cannot be charged for derivative misconduct on the grounds of failure to take steps to acquire knowledge of the primary misconduct
e. The employee does not need to have made common purpose with the perpetrator."[120]

The *Hlebela*[121] case remains significant because of the tremendous contribution it made to the development of derivative misconduct at its earliest stages by adding more substance to the concept so that its application will be orderly and fair.

3.3 UNDERSTANDING FIDUCIARY DUTIES AND GOOD FAITH IN EMPLOYMENT RELATIONSHIPS

An employment relationship emanates from a contractual agreement between an employer and an employee. The two parties reach an agreement in terms of which they serve each other's interests. Usually, the employer will employ an employee for the furtherance of commercial needs and in exchange the employee gets remunerated for doing the work. SouthAfrica has law in place that regulates the employment relationship to ensure fair dealings between the two parties and to ensure that the employer does not act unfairly or exploit the employee.

It is worth mentioning that good faith is one of the essential principles that are used when weighing the fairness of the contract between the parties in an employment relation .[122] It is therefore worthwhile to recognize and acknowledge that the South African common law of contract has been cultivated by colonial legal tradition, which happens to be a blend of English law, Roman law, and uncodified Roman-Dutch law.[123] However, it should be notedthat the duty of good faith in our labour jurisprudence emanates from English law.[124]

[117] *Western Platinum Refinery Ltd v Hlebela and Others* (JA32/2014) [2015] ZALAC 20.
[118] *Chauke* (note 14 above).
[119] *Hlebela* (note 116 above).
[120] *Hlebela* (note 116 above) at para 10 - 15.
[121] *Hlebela* (note 116 above).
[122] A Hutchison 'Good faith in contract: A uniquely SA perspective' (2019)1 The Journal of Commonwealth Law 239 – 243.
[123] Ibid 3.
[124] *Robb v Green* [1895] 2 QB at 10 – 1.

It is further imperative that recognition is given to the common law principles that govern employment contracts and relationships between the employer and an employee in the context of dismissals and breaches of employment contracts. In the *Council* case,[125] Harms JA mentioned that the connection between an employer and employee is established on trust and confidence in terms of the South African common law and that an innocent party would reserve the right to terminate that contract should there be any conduct inconsistent with the employment agreement.[126] The duty of goodfaith is said to be the same as 'trust and confidence' and this has been confirmed by South African courts.[127] Again, in the *Murray v Minister of Defence* case[128] the court emphasized thattrust and confidence were one of the pillars which held an employment relationship together.[129] With South African courts holding 'trust and confidence' in the employment relationship in the highest regard, it has become an acceptable view that good faith is an implied term in the contract of employment and it is automatically expected of an employee to act honestly and faithfully towards the employer.[130]

This view was affirmed by Froneman J in the *Numsa v Dunlop CC*[131] case, where he expressed that the good faith principles are implied into the contract of employment meaning that they are automatically part of every employment contract regardless of whether good faith was discussed or written in the employment contract. This is unlike fiduciary principles which are not implied in an employment relationship.[132] Good faith automatically applies in all employment contracts and is reciprocal in nature. In contrast the fiduciary duties are not reciprocal but place a greater responsibility and promote or favors a beneficiary's interest. Fiduciary duties are not implied in the context of employment contracts unless parties choose to agree otherwise.[133]

Taking into consideration all that has been mentioned in the above paragraph, it is imperative that in an employment relationship both the employer and employee have to conduct themselves in such a way that does not break their trust relationship. Secondly, it is important to recognize that the duty of good faith is an implied duty and applies to both the employee and the employer. In other words, it is a reciprocal duty that requires fairness on both sides of an employment contract.[134] So, it can be concluded that in terms of *Amalgamated Beverages Industries* case[135] that when an employee deliberately refuses to disclose information about misconduct that they might have knowledge about, they breach the duty of good faith and can be found guilty of derivative misconduct.

However, regarding the concept of good faith not much has been said about why it was necessary to introduce it into the South African law. It is crucial to note that the foundation ofany

[125] *Council* (note 8 above).
[126] *Council* (note 8 above) at 691.
[127] C Bosch 'The Implied Term of Trust and Confidence in South African Labour Law' (2006) 27 ILJ 29 where Bosch refers to the case of *Mahmud & Malik v BCCI* [1998] AC 20 (HL) at 34 (Lord Nicholls) and 45 (Lord Steyn).
[128] [2008] JOL 21598 (SCA).
[129] *Murray* (note 127 above) at para 5.
[130] *Murray* (note 127 above).
[131] *Dunlop* CC (note 15 above).
[132] *Dunlop* CC (note 10 above) at para 62.
[133] *Dunlop* CC (note 10 above) at para 57.
[134] *Dunlop* CC (note 10 above) at para 63.
[135] *Amalgamated Beverage Industries* (note 13 above).

employment relationship is contract law. In English law, good faith is not viewed as being a general principle in the sphere of contractual law. The English law does not hold good faith as underpinning the substantive law of contract[136] and this also applies in South African Law. L Hawthorne expresses that,

> "In recent years, in South Africa, good faith has regularly been brought out of the display cabinet, dusted off and heralded as the basis of all law of contract, only then to be put away having become nothing more than a glass figurine."[137]

As a result, it often appears that the topic of good faith is a very thorny and fragile subject as some academics hold the view that the introduction of the concept of good faith as means of incorporating equity in our contractual law might result in uncertainty and unnecessary bafflement.[138] Currently, good faith remains an important underlying principle used in our South African Contract Law.

There is no precise and clear definition of good faith and as a result, courts tend to misapply this concept. This was confirmed by Froneman J in *Dunlop CC* [139] who indicated that "proper delineation between trust, confidence and good faith has not yet been at the forefront in our case law."[140] It is, therefore, undeniable that there is a bit of confusion when it comes to properly distinguishing concepts such as good faith and mutual trust. They appear as if theyare the same thing but they are not. This is further explained by Joellen Riley in his article,where he gives an explanation to make sense of 'good faith' and 'mutual trust' in contractsof employment and he emphasizes that these concepts are "Siblings but not Twins."[141] This means that even though these concepts may appear to be closely linked or related it is imperative that we recognize that they are distinguishable when it comes to employment contract and they further serve different functions when it comes to solving disputes that emanate from such contracts.

Hence the Riley emphasizes that:

> "The better view is that these are separate if related obligations. Like siblings, they derive from the same source, i.e. the existence of a relationship of employment, but they are best understood as separate concepts, performing different functions."[142]

This was also confirmed in an article written by Idensohn, who criticizes the inaccurate use of concepts such as the duty of good faith and fiduciary duties. She expresses that:

> "[m]uch of this confusion is due to loose use as 'good faith', 'trust', 'confidence', 'faithfulness' and 'loyalty' are used interchangeably in descriptions of employee duties without any recognition or acknowledgment that they have functionally different meanings in different contexts and those meanings have changed over time. Both fiduciary duties and duties of good faith, for example, require 'loyalty'."[143]

Nonetheless, it is safe to note that even though the concept of good faith has played a consequential

[136] Hawthorne (note 26 above).
[137] Ibid 214.
[138] Ibid.
[139] *Dunlop* CC (note 15 above).
[140] *Dunlop CC* (note 15 above) at para 53
[141] J Riley "Siblings but not Twins: Making Sense of 'Mutual Trust' and 'Good Faith'" (2013) *Melb U Law Rw* 522.
[142] Ibid 536.
[143] Idensohn "The Nature and Scope of Employees' Fiduciary Duties" (2012) 33 *ILJ* 1550.

role in the contractual law of South Africa. it remains under the banner of "transformative constitutionalism" and is constantly being reshaped by our courts to ensure it accords with the spirit and purposes of our Constitution.[144] It is therefore crucial that courts are extra careful when using these terms and Froneman J raised this as one of his concerns. [145] The courts should endeavor to provide clarity on terms such as 'trust', 'good faith'and 'confidence'to avoid further confusion. The courts should also minimize the use of imprecise and ambiguous terminology to avoid further confusion.

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

The concept of good faith is said to be implied in all employment contracts with the purpose of limiting negative effects of bargaining power that is unequal.[146] Most importantly, good faith is reciprocal in nature and it obliges each party to allow the other party to obtain certain benefits from the existence of the employment relationship. In other words, good faith prevents each party from acting in a way that might undermine the spirit of the agreement.[147]

It is important not to be ignorant of the fact that many courts acknowledge that an employment contract is a relationship between the employer and employee which is based on trust and as a result numerous courts[148] have held that it is an implied term of any employment contract to act in good faith and for the employee to serve the employer faithfully and honestly.[149] This duty also extends to employment relationships where there is no written contract.[150] It is therefore crucially important to determine at all times whether the relationship that existed between an employer and employee was one of a fiduciary nature orone of good faith because these are two different concepts. Idensohn also highlights that thereis a huge recognizable difference between good faith and fiduciary obligations even though they might both require loyalty. However, the intensity of their obligations differs immensely.[151] The intensity of the obligations differs because fiduciary obligations place a heavier responsibility on the employee when compared to good faith obligations where the reciprocal nature brings in a balance of the rights of both the employee and the employer.

The labour courts never really addressed the topic of reciprocal duties including in the cases of *Chauke*[152] and *Hlebela*[153] which are the leading cases when dealing with the topic of derivative misconduct and the breach of good faith by the employees. Fortunately, the court in the *Dunlop CC*[154] matter was able to address the subject of good faith and fiduciary duties. The Constitutional Court interrogated and looked more intently into the scope and nature ofthe duty of good faith. The Constitutional Court eradicated the confusion that exists when itcomes to fiduciary duty and the reciprocal duty of good faith.

---

[144] Hutchison (note 121 above) 4.
[145] *Dunlop CC* (note 15 above) at para 53.
[146] A Bagchi "Unions and The Duty of Good Faith in Employment Contracts" (2003) 112 The Yale Law Journal 1881.
[147] Riley (note 109 above) 540 – 541.
[148] Bassuday (note 29 above) 90.
[149] Ibid.
[150] *Ganes v Telecom Namibia Ltd* (2004) 25 ILJ 995 (SCA) at para 25.
[151] Idensohn (note 142 above).
[152] *Chauke* (note 14 above).
[153] *Hlebela* (note 116 above).
[154] *Dunlop CC* (note 15 above).

Froneman J clearly explained and further highlighted the bright lines between these two concepts which have been continuously confusing. Froneman J expressed that:

> "Fiduciary duties are duties that apply to persons who have access to, or power in relation to, the affairs of a beneficiary. These duties must be exercised for the sole purpose of promoting the beneficiary's interest. The two core fiduciary duties are the no conflict duty to avoid all potential conflict of interest situations and the no-profit duty which prohibits fiduciaries from obtaining any unauthorized profit for themselves that has not been properly discussed or consented to by the beneficiary."[155]

In simple terms, fiduciary duties impose a higher level of responsibility and trust on an employee than good faith. In contrast, one could agree that there are situations where an employee has the right to behave in a way that will only benefit their interests which may becontrary to the interests of their employer. A perfect example of that situation would be that of a legal strike. When employees participate in a strike, they strike for their own interests and not those of their employer and this does not necessarily result in breach of thecontractual duty of good faith.

It is imperative to highlight that because of the high level of responsibility that comes with a fiduciary duty, it is not implied by law into all employment relationships but parties have tochoose to agree to including fiduciary duties to their employment contract for them to be effective.[156] In addition, fiduciary duties impose a unilateral obligation.[157] They place a heavyduty on one party which is unilateral in nature. Conversely, the duty of good faith is an implied term of an employment contract and it is reciprocal in nature, meaning it requires both parties to act fairly towards each other.

Pargendler also emphasizes the heavy duty which comes with a fiduciary duty and how demanding they are when she states that:

> "Fiduciary duties are usually thought to impose very high standards of behavior on the parties named fiduciaries. These demanding standards contained in the notion of fiduciary duties, I argue are 'untailored' defaults".[158]

The *Dunlop CC*[159] case confirms the view of Pargendler, that fiduciary duties are not implied but should be agreed on before an employee can be expected to carry the heavy duties that come with fiduciary duties.[160] On that basis the Constitutional Court held that the reciprocal duty of good faith imposes a duty on both the employer and employee to act fairly towards each other.[161]

The Constitutional Court also took it into consideration that these were not normal circumstances but a strike was involved. In addition, it was a protected strike which happenedto turn out violently. The fact that the strike became violent does not mean the right to strike is no longer relevant or important in the court's analysis.[162] On that basis, the court then held that to impose a duty to disclose on the employee in the context of a strike would be no different from imposing

---

[155] *Dunlop CC* (note 15 above) at para 55.
[156] *Dunlop CC* (note 15 above) at para 62.
[157] Ibid.
[158] M Pargendler "Modes of Gap Filling: Good Faith and Fiduciary Duties Reconsidered" (2008) 82 SSRN 1325. https://ssrn.com/abstract=1008400
[159] *Dunlop CC* (note 15 above).
[160] *Dunlop CC* (note 15 above) at para 62.
[161] *Dunlop CC* (note 15 above) at para 63.
[162] *Dunlop CC* (note 15 above) at para 70.

a unilateral obligation on the employees which is the same as a fiduciary duty.[163] So the court held that it would be unfair to expect that from an employee with no co-operation from the employer. Secondly, the court highlighted that there is no law which requires a person to be a neighbor's keeper. So, it would be asking for too much from the employee and this would undermine the collective bargaining power of workers by requesting them to act in the interests of the employers without any obligation on the employer to act reciprocally.[164] Bargaining power refers to the ability of an individual/company to negotiate and obtain what they desire in the labour market or at their workplace. So, expecting employees to be their employer's keeper would be undermining their collective bargaining power.

The court held that the employer should also meet the employees halfway by guaranteeing their safety and protection so that employees will be confident to disclose information with no fear of intimidation.[165] Practically speaking, guaranteeing non-disclosure of identity to employees and anonymity would suffice in meeting this requirement. Employees would haveno fear of intimidation where they will be kept anonymous.

Froneman J also uses the African philosophy when he mentioned 'Ubuntu,' which was incorporated into the new Constitutional dispensation, when he says,

> "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"[166]

So, the principle of good faith is closely linked to the concept of Ubuntu. Therefore, good faith is a highly important concept in our labour law which disallows opportunistic manipulation and promotes fair dealings in an employment relationship. The concepts of Ubuntu and good faith play an important role in our contractual law and they are in line withthe spirit of our Constitution.[167] There is no precise meaning for these concepts but they are manipulated to accommodate given circumstances and facts of particular case.[168]

The concept of Ubuntu was first mentioned in *Barkhuizen v Napier CC*[169] in dealing with the development of contractual law to be built in a way to put it in line with the values of our Constitution. Yacoob J in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers* [170] also touched on the topic of Ubuntu, he did this by referencing the *S v Makwanyane*[171] case and heexplains Ubuntu as a concept that constitutes of values such as social justice, fairness and humanity. He further added that Ubuntu placed an emphasis on the communal nature of a society and included values of humanity such as respect, human dignity, compassion and collective unity.[172]

It is therefore evident that the concept of Ubuntu together with good faith, play a significant role in ensuring that contractual dealings are in line with the values and principles of our current Constitution which also discourages unfairness and unlawfulness. This also applies toemployment contracts between an employee and an employer.

---

[163] *Dunlop C*C (note 10 above) at para 73.
[164] *Dunlop CC* (note 15 above) at para 71 – 72.
[165] *Dunlop CC* (note 15 above) at para 73.
[166] *Dunlop CC* (note 10 above) at para 66.
[167] *Barkhuizen v Napier* 2007 (5) SA 323 (CC).
[168] Pillay (note 127 above).
[169] *Barkhuizen* (note 166 above).
[170] 2012 (1) SA 256 (CC).
[171] 1995 (3) SA 391 (CC) 484.
[172] Ibid.

Over the years our courts have adopted a stance that if the duty of good faith has been breached by the employee this may warrant their dismissal and this was confirmed in the *RSAGeological Services v Grogan* (LC)[173] case. This includes misconduct such as 'derivative misconduct' which is the failure of the employee to disclose information to their employer about a primary misconduct. Since the duty of good faith is an implied term in contracts, an employee is automatically expected to act in a way that is loyal and trustworthy to his employer. In situations where the employee would choose to withhold valuable informationfrom their employer when they had knowledge of the misconduct that would amount to a breach of good faith and the employee may be dismissed for derivative misconduct.[174] However, it should be noted that as much as the employee has a duty to come forward and disclose information with the intention of assisting the employer, the employer also has to return the same favor by providing protection to the employee because good faith is reciprocal is nature and is not one-sided.[175]

It is worthwhile mentioning that good faith promotes honesty in an employment relationship. In the recent matter of *Tshabangu*[176] an employee was dismissed for dishonesty and not derivative misconduct.

The commissioner draws a distinction between dishonesty and derivative misconduct. The employee was dismissed for dishonesty.[177] The employee only admitted to having knowledge about his colleagues stealing from the employer during disciplinary hearing.[178] When the matter came before the commissioner, he made it clear the employee's dishonesty amounted to breach of good faith and further explained that there was no need for him to further look into whether he was guilty of derivative misconduct because his colleagues have already put it out in the open that this employee also participated in the primary misconduct. [179] Dishonesty of an employee to their employer also amounts to breach of good faith. [180]

Good faith is therefore a very important principle in our law that plays a crucial role of ensuring that power is not abused, and it further infuses the balancing of the rights of bothemployees and employers.

This chapter has successfully traced the origins of derivative misconduct and has extensively drawn a distinction between the fiduciary duties and the duties imposed by good faith. In the application of derivative misconduct is therefore crucial to ensure that both employees and employers play their part in ensuring that they reciprocate good faith. The employer must guarantee the employee's safety by offering protection and a trustworthy employee who possesses knowledge of the misconduct would have to come forward and assist the employer by sharing useful information.

[173] *RSA Geological Services (a division of De Beers Consolidated Mines Ltd) v Grogan & Others* 2008 2 BLLR 184 (LC) (De Beers (LC)).
[174] *Dunlop CC* (note 15 above) at para 76.
[175] Ibid.
[176] *Tshabangu / Mgwezi Brand Manufacturer* (2022) 31 MEIBC.
[177] Ibid.
[178] Ibid.
[179] Ibid.
[180] Ibid.

CHAPTER 4: CRITICAL ANALYSIS OF *NUMSA V DUNLOP* CASE FROM ARBITRATION TO CONSTITUTIONAL FINAL DECISION (POSITION AFTER 2019)

4.1 INTRODUCTION:

The concept of derivative misconduct has been evolving over the years ever since it made its entry into South African labour law jurisprudence via the case of *FAWU v Amalgamated Beverage Industries Limited* (*FAWU*)[181] and the *Chauke*[182] case. There are a number of judgments of the labour courts[183] that have contributed immensely to the understanding of theconcept and scope of derivative misconduct. However, it is imperative to mention that the judgment which resulted in a significant change in the way the concept of derivative misconduct was viewed was the Constitutional Court in the *Dunlop*[184] case in 2019, which isto be discussed in detail.

The Constitutional Court (CC) in the *Dunlop*[185] case recently gave us certainty and direction regarding the concept of derivative misconduct, where Froneman J set aside the decisions incorrectly made at the Arbitration, Labour Court (LC) and Labour Appeal Court (LAC). In this case, the employees of the first, second and third respondents participated in a protected strike that lasted for more than a month.[186] This strike commenced on 22 August 2012.[187] A number of serious violent acts followed. An interdict was pursued and granted on the same day to stop the violence.[188] Even after the interdict was obtained the violence continued. The employees burnt the homes of the foreman and the manager. They also damaged several motor vehicles which belonged to their staff and visitors. The violence kept escalating and the employees participated in stone-throwing, physical violence, blockading entrances of theworkplace and they also stole the camera utilized to record the violence. The employees wereout of control to the extent of throwing petrol bombs.[189]

The employer tried to get assistance from the union to help stop the violence and identify the perpetrators, but this was fruitless.[190] This led to the employer taking a decision to dismiss the employees who were the culprits and others who were dismissed on the basis of not disclosing the identity of culprits who were involved in the primary misconduct. The dismissed employees were informed that should they wish to appeal the decision, a collective appeal was to be held, and they had to present evidence on the appeal if they believed that[191]They were innocent and did not deserve to be dismissed for 'derivative misconduct'. [192] Onlyone employee attended and

[181] *Amalgamated Beverage Industries* (note 13 above).
[182] *Chauke* (note 14 above).
[183] *Dunlop CC* (note 15 above).
[184] *Dunlop CC* (note 15 above).
[185] Ibid.
[186] *Dunlop CC* (note 15 above) at para 12.
[187] Ibid.
[188] Ibid.
[189] Ibid.
[190] *Dunlop CC* (note 15 above) at para 13.
[191] Ibid.
[192] Ibid.

they were reinstated after they gave strong evidence which was able to prove their innocence to their employer. The unfair dismissal dispute was thereafter referred to arbitration.[193]

4.2 ARBITRATION DECISION:

The strike was subjected under an interdict which had been issued by the court 22 August 2012 which was restricting employees from committing further unlawful conduct on the employer's premises.[194] It is evident from the records of arbitration that this interdict did nothelp in compacting the violence because it continued in presence of the interdict until the employer started dismissing the employees.[195] On 26 September 2012 the employer dismissed the employees for derivative misconduct[196] and it was found that derivative misconduct arose when the striking employees refused to provide details on culprits who were directly involved in the acts of harassment and violent intimidation.[197]

At arbitration, the arbitrator classified the employees into three groups:

(a) The ones who were positively identified to have committed the primary misconduct (violence).
(b) Those who were said to have been present when the violence took place but did not participate physically in that violence.
(c) Those who were not positively and individually identified to had been physically present when the violence was committed.

The arbitrator reached the conclusion that the dismissal of the first two groups of employees was substantively fair. After listening to the evidence of the employer's witnesses the arbitrator was convinced that the misconduct of violence and harassment took place. When itcomes to the incident that happened in the Induna Mills Road,[198] the arbitrator explained thatif any of the employees were present it was either they were perpetrators who committed themisconduct or they saw who were the perpetrators but failed to come forward with that information which makes them guilty of derivative misconduct. The arbitrator further explained that the since the employer failed to prove that the last group was present or in the vicinity of the group that was responsible for the misconduct they should be reinstated.[199]

When this was reviewed and proceeded to further courts both the LC and LAC critiqued the arbitrator's decision.

4.3 The Labour Court Judgment:

When the matter proceeded to the LC the issue before the court was whether it would be consistent with evidence given by the employer to draw an inference that all the employees

were present during the strike. This raises a question of whether it was established that they were present and whether they were then automatically obligated to provide an explanation tothe employer on what transpired. Lastly, whether their deliberate choice of remaining silent strikes

[193] Ibid.
[194] *Dunlop Mixing & Technical Services (Pty) Ltd & others v National Union of Metalworkers of SA obo Khanyile & others* (2016) 37 *ILJ* 2065 (LC) at para 5.
[195] *Dunlop LC* (note 193 above) at para 6.
[196] *Dunlop LC* (note 193 above) at para 7
[197] Ibid.
[198] *Dunlop CC* (note 15 above) at para 16.
[199] Ibid.

at the core of the employment relation.[200]

The LC found that the arbitrator's finding was unreasonable when he said there was no evidence that proved that the applicants were physically present when the violence took placeduring the strike, and he ignored circumstantial evidence and inferential reasoning which would have proved that the workers were present in the scene and still chose to remain silent with that information.[201]

Circumstantial evidence refers to indirect evidence which does not prove the fact at face value but holds enough weight for logical inference to be drawn that the fact does exist.[202] Inferential reasoning is used to arrive at a conclusion depending on the cumulative weight ofdifferent pieces of circumstantial evidence which do not prove a fact when they are individually used in isolation.[203] The LC explained that the evidence given by the employer was sufficient enough to discharge their onus and it further created room for an inference tobe drawn.[204] Meaning that the evidence provided by the employer enabled the court to use inferential reasoning to finalizing the matter and this goes to show the significant role playedby circumstantial evidence in law. Perpetrators do not escape liability in the absence of directevidence because in the presence of indirect evidence an inference can still be drawn which ensures that culprits face the consequences of their actions.

The LC set aside the arbitrationdecision and all the employees were found liable for derivative misconduct on the basis of their failure to come forward and assist with identifying the perpetrators or to exonerate themselves by explaining that they had knowledge about the incident or the culprits responsible for the misconduct.[205] The reason why the LC reached this conclusion was because evidence presented of the violence and harassment made it clear that there was a high probability that even the employees who did not participate directly in the misconduct were present on the premises and must have had knowledge of the identity of the perpetrators.[206] As a result, the LC viewed this as a breach of their duty of good faith in their employment relationship by failing to either exonerate themselves or to disclose information.[207]

The court also highlighted that the employees were incorrect in relying on the right to remain silent because this right was only applicable in criminal matters not civil matters.[208] In addition, the arbitrator failed to consider evidence that was placed before him because the employer had led strong circumstantial evidence which showed that all employees were

involved in a violent strike and the employees chose to remain silent. To be specific, there was video footage which showed how some of these employees were on the premises and were busy blocking the entrance of vehicles and intimidating non-striking employees e.g managers.[209] The

[200] *Dunlop LC* (note 193 above) at para 27.
[201] *Dunlop LC* (note 193 above) at para 46 – 48.
[202] Circumstantial evidence | Wex - Law.Cornell.Edu LII / Legal Information Institute https://www.law.cornell.edu › Wex.
[203] Aukema & Naidoo 'When There is No Thread of Evidence: Inferential Reasoning in Cartel Cases Clarified by The Competition Appeal Court in Alleged Blanket Cartel' 2023 https://www.cliffedekkerhofmeyr.com › Corporate › c.
[204] *Dunlop LC* (note 193 above) at para 79.
[205] Ibid.
[206] *Dunlop LC* (note 193 above) at para 46 – 49.
[207] *Dunlop CC* (note 15 above) at para 18.
[208] *Dunlop LC* (note 193 above) at para 59.
[209] *Dunlop LC* (note 193 above) at para 36.

commissioner did not properly weigh evidence before him and he did not take into consideration whether or not an inference could be drawn, in finding whether or notthe employees were guilty of derivative misconduct.[210]

The ignorance of circumstantial evidence and inferential reasoning was one of the reasons why the arbitration award was set aside in the LC decision. The LC was able to conclude thatthe most reasonable inference to draw in the given circumstances was that all the respondent employees were present when the violence took place. It is important not to overlook the significant role played by inferences in assisting courts when deciding on certain matters.

In the *FAWU v Amalgamated*[211] case, the topic of inferences was addressed by Nugent J, who shares the same sentiments with those of judgment delivered in *R v Blom*[212] in reaching his final decision. The sentiments shared are basically an emphasis on that, an inference drawn should be aligned with logic and should make sense. In this matter the respondents sought to draw an inference from the evidence provided which suggested that the appellants were present at the time when their colleague was assaulted by actively participating in the assault or by at least encouraging or supported this behavior. The employer had tried to obtain information regarding who were culprits behind this assault and no one came forward.[213] The employees elected to remain silent and did not disclose any information to the employer.[214] Nugent J mentioned that it is a cardinal rule of logic that when the court wants to reason by inference, that inference should be consistent with all the proven facts and if it is not aligned with all the proved facts then the inference cannot be drawn.[215] The second part of the cardinal rule is that the inference must be the most probable inference to be drawn from the circumstantial evidence.[216] This test was also applied in *Dunlop LC*[217] and the courtwas of the view that it would not be unreasonable to conclude that all striking employees were participating and engaged in the strike in absence of explanations and this inference wasbased on evidence given the employer.[218] Part of the evidence included photographic evidence and video footage which showed the intensity of the strike.[219]

As a result, the employer had to rely on the witnesses who were present when the strike took place and also relied on the electronic clock-in system that was used to record the presence of workers at work on that particular day. Nugent J also mentioned the fact that just because evidence is in line with a particular inference this does not guarantee its correctness but eitherthan that the court must strive to select an inference when it will be more plausible or natural one.[220] This statement verbalized by Nugent J was an eye opener and encouraged an approachof open-mindedness when dealing with the subject of inferences and that courts should always strive for the most reasonable inference. Gush J in the LC in the *Dunlop*[221] matter at hand also shared the same sentiments and heavily relied on what had been said by Nugent J in reaching his conclusion, saying that he was certain that the only plausible and reasonable inference that could be

[210] *Dunlop CC* (note 15 above) at para 18.
[211] *Amalgamated Beverage Industries* (note 13 above).
[212] *R v Blom* 1939 AD 188 at 202 – 3.
[213] *Amalgamated Beverage Industries* (note 13 above).
[214] *Amalgamated Beverage Industries* (note 13 above).
[215] *Amalgamated Beverage Industries* (note 13 above) at 31.
[216] *Amalgamated Beverage Industries* (note 13 above).
[217] *Dunlop LC* (note 193 above).
[218] *Dunlop LC* (note 193 above) at para 38.
[219] *Dunlop LC* (note 193 above) at para 35.
[220] *Amalgamated Beverage Industries* (note 13 above) at 32.
[221] *Dunlop LC* (note 193 above).

drawn from the evidence was that the employees were physically attending the strike and the misconduct that took place thereafter. In addition, the court
expressed the fact that employees' failure to come forward and exonerate themselves justified the drawing of this inference.[222]

4.4 The Labour Appeal Court Judgment:

In the LAC there were two members, Sutherland JA handing down the majority judgment with whom Coppin JA concurred. The LAC therefore supported and agreed with judgment ofthe LC in reaching a conclusion that the dismissal of the workers who were striking was justified. However, Savage JA was dissenting and chose to distance herself from what was to be an extension of the doctrine in the labour court[223] and separated herself from by handing down her separate dissenting judgment.

It should be noted that the requirement of the coming forth of an employee and exonerating themselves raised in the LC judgment was viewed as an 'extension' to the law of derivative misconduct which opened up many discussions and disapproving arguments.[224] The reason why it is viewed as an extension of the law is that under normal circumstances it is the employer who is supposed to bear the onus of proving the guilt of the employee. Coppin JA raised some concerns, relating to the extension of law established by Gush J in the court a quo, about the dicta which suggested that even employees who were not physically present inthe scene were under a duty to come exonerate themselves too, by giving an explanation.
Coppin JA expressed that "this view was wrong".[225] He further explains that according to the court a quo it seems like expanded notion unfairly implied that the employer had the right to question an employee based on their subjective suspicions. This includes situations where the employer could not reasonably assume that the employee had actual knowledge about the wrongdoing but still expected them to come forth and exonerate themselves. Coppin JA further discusses how this new conception of this extension of the doctrine overlooked the fundamental rights of the employee such as the right to be deemed to be innocent of any wrongdoing because it imposed a duty on the employees to prove or establish their innocence.[226]

He further stated that an important point which must be kept in mind that it is generally provided even in disciplinary codes that it is the employer that carries the burden to prove that the misconduct alleged took place and that completely denying an employee the right toremain silent and the privilege against self-incrimination was inconsistent with the ethos the Labour Relation Act 66 of 1995 (LRA) aims to promote.[227] It is important to note that the ethos and aim of the LRA is to balance out the rights of both employers and employee. The LRA further ensures that there is harmony in the workplaces and that is why Coppin JA verbalizes that completely refusing the employee a right to remain silent does not accord withthe ethos of the LRA.

He also highlighted that the right to silence and the privilege against self- incrimination were not protections only confined to the criminal law as incorrectly stipulated by the LC. Coppin JA

[222] Ibid.
[223] *National Union of Metalworkers of SA obo Nganezi and others v Dunlop Mixing and Technical Services (Pty) Ltd and others* [2018] 10 BLLR 961 (LAC) at para 8.
[224] *Dunlop LAC* (note 222 above) at para 113.
[225] *Dunlop LAC* (note 222 above) at para 65.
[226] *Dunlop LAC* (note 222 above) at para 67.
[227] Ibid.

supports his argument by quoting section 14 of the Civil Proceedings Evidence Act[228] (CPEA) which is to be read with section 42 of the Act which clearly recognizes and also aimsto protect witnesses in civil matters against self- incrimination and this has an effect of giving this privilege a extensive ambit than in criminal cases. So, it is evident that Coppin JA does not entirely agree with the decision of the LC but only agrees with certain parts of the judgment not all of it.

Savage AJA in her minority judgment disagrees with the views adopted in the majority judgment by Sutherland JA in the LAC but agrees with the majority judgment of LAC led byCoppin JA particularly on the point of the supposed extension of the doctrine to exonerate oneself. Savage AJA also expressed that this 'extension of the law' established by Gush J had an effect of shifting the onus to employees to come forth and exonerate themselves. Thisincorrectly shifted the onus of proof to the employee, whereas the onus of proof is meant to rest on the employer to prove actual knowledge of wrongdoing when alleging derivative misconduct.[229] This point raised by Savage AJA is in agreement with what was expressed in Coppin JA's judgment where he said "such notions negate what was held in *Western v Hlebela*[230] case, namely that the duty to speak is triggered by actual knowledge of those facts."[231]

In *Hlebela,*[232] the court added more flesh to the concept of derivative misconduct when it was held that:

> "The undisclosed knowledge must be actual, not imputed or constructive knowledge, of the wrongdoing. Proof of actual knowledge is likely to be established by inferences from the evidence adduced but it remains necessary to prove actual knowledge."[233]

It is therefore imperative to note that in order to dismiss an employee based on derivative misconduct successfully it is essential for the employer to be able to prove that the employee possessed knowledge about the primary misconduct and the culprits but deliberately chose to remain silent. Therefore, properly proving the employee's guilt in South African labour law and possessing knowledge is one of the important elements an employer is to prove in order to be successful in discharging their onus. In support of this, in the *PRASA*[234]*case*, Kathree - Setiloane AJA held that:

"This would require the employer to prove the following the 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 sheknew."[235]

In cases of derivative misconduct, the standard of proof used is proof on balance of probabilities. A civil definition of proof on a balance of probabilities was provided by Le Roux-Kemp who says it is where the applicant has to out prove the defendant to show that the relevant facts in question are more probable than not. If they are accepted as being moreprobable they are taken to be the truth.[236]

The employer is also required by item 7(a) of the Code of Good Practice: Dismissals[237] to prove

---

[228] Act 25 of 1965.
[229] *Dunlop LAC* (note 222 above) at Para 113.
[230] *Hlebela* (note 116 above).
[231] *Dunlop LAC* (note 222 above) at Para 66.
[232] *Hlebela* (note 116 above).
[233] Hlebela (note 116 above) at Para 10 – 11.
[234] *PRASA* (note 49 above).
[235] *PRASA* (note 49 above) at para 30.
[236] A Le Roux-Kemp 'Standards of Proof: Aid or Pitfall?' (2010) 31 (O) (3) 692.
[237] Schedule 8 of LRA.

on a balance of probabilities that the employee is truly guilty of the misconduct alleged. However, this is a big challenge when the misconduct involves a large number of employees like in the situation of strikes. Nonetheless, our labour law also contains guidelines to be followed by employers prior dismissing employees.[238] Three factors which have to be considered before concluding that dismissal is the appropriate punishment are asfollows: The employee's circumstances; the circumstances of the infringement; and the nature of the job.[239]

Even our labour legislation mentions that the onus of proof to rests on the employer in cases of dismissals and alleged misconduct.[240] It is therefore evident that the argument advanced by Savage AJA is consistent with our current legislation on the issue of the employer bearing the onus discharging proof the misconduct before dismissing the employee.[241]

Item 7 of Schedule 8 is also in line with Savage AJA's views of the employer being the one who must bear the onus of proving misconduct because it stipulates that the employer must show that the following requirements are met in order to fairly dismiss an employee becauseof any misconduct. These requirements are as follows:

"That the employee contravened a rule or a standard; That the rule or standard was valid and reasonable; That the employee knew or should have known the rule or standard; That the ruleor standard was applied consistently; and That dismissal was a fair and appropriate sanction."[242]

It is also worthwhile to pay close attention to the views advanced by Savage AJA in her minority judgment as she discusses some interestingly valid points. One interesting point she brings to our attention is that she discourages further use of the term of derivative misconductbecause it is "plagued by a lack of clarity".[243] By this she makes it clear that the term of

derivative misconduct has not been clearly and plainly defined. She also highlighted the factthat most of the judgments such as *FAWU,*[244] *Chauke*[245] and *Foschini*[246] that have been usedin an attempt to clarify or develop this baffling concept have either not found derivative misconduct to exist on their particulars or they elect to express obiter views on the issue. She also points out that as much as high reliance is placed on these judgments when dealing withthe issue of derivative misconduct, we should not discard the fact that the reasons for dismissals in these various judgments was not derivative misconduct but something else.[247] That is why Savage AJA confidently expresses that she considers it both "appropriate and in the interests of fairness" not to encourage the use of the term of derivative misconduct.[248]

Savage AJA emphasizes that the application of this concept is difficult because of the lack of clarity.[249] In *Hlebela,* it was also expressed that this concept was 'elusive' given that:

> "serious confusion existed among those responsible for instituting disciplinary

[238] Schedule 8 of the LRA, The Code of Good Practice on Dismissals, Item 7.
[239] Item 3(5) of the Code of Good Practice: Dismissals and reaffirmed by Item 105 of The CCMA Guidelines: Misconduct Arbitrations. https://www.worklaw.co.za/SearchDirectory/PDF/Codeofgoodpractice/CCMA - Guidelines-Misconduct-arbitrations_Feb2015.pdf.
[240] Section 192 of Labour Relations Act 66 of 1995.
[241] *Dunlop LAC* (note 222 above) at para 113.
[242] Item 7 of Schedule 8 of the LRA.
[243] *Dunlop LAC* (note 190 above) at para 100.
[244] *Amalgamated Beverage Industries* (note 13 above).
[245] *Chauke* (note 14 above).
[246] *Foschini Group v Maidi & others* (2010) 31 *ILJ* 1787 (LAC)
[247] *Dunlop LAC* (note 222 above) at para 82.
[248] *Dunlop LAC* (note 222 above) at para 100.
[249] Ibid.

process about the concept and how to apply it appropriately."[250]

The finding of both the LC and LAC was that the arbitration award was incorrect and unreasonable which then resulted in both courts giving judgments which were in favor of Dunlop, the employer, and further expressed that an obligation existed on the part of the employees to come forward and assist with identifying the culprits and failing to come forward resulted in them being guilty of derivative misconduct.

4.5 THE CONSTITUTIONAL COURT JUDGMENT:

After the LAC, the matter went to the Constitutional Court (CC) where the final judgment was delivered concerning the doctrine of derivative misconduct in which the court tried to give clarity and direction as to how this concept is to be approached and utilized. In this recent *Dunlop* CC Judgment[251] Froneman J sets aside the LC and LAC judgment and ruled infavor of the employees. The CC's jurisdiction was engaged because of Section 23(1) of the Constitution which guarantees their right to fair labour practices but in normal circumstances the CC is slow to hearing matters coming from the labour appeal court unless there is a realConstitutional issue which needs special attention from the CC bench.[252]

One of the issues which was before the CC was that it had to assess the 'bounds of reasonableness' on the arbitrator's finding on the unfair dismissal. The employees disputed the correctness of the LAC's majority judgment specifically on the point of inferences drawnfrom circumstantial evidence. They were of the view that, even though the inference drawn led to a conclusion confirming the attendance of the employees at the scene but derivative misconduct still needed to be established and this was a valid point because the onus of proving misconduct rests with the employer. In this instance, they could not prove it. Numsa also raised the point about *Dunlop* unfairly placing an obligation on employees to comeforward and exonerate themselves.[253]

The CC had to carefully apply its mind to this matter and to put it into consideration that this misconduct did not take place under normal circumstances but there was a strike. Both interests of the employee and employer had to be balanced bearing in mind that in the con textof strikes, a duty to disclose information could undermine the history of collective bargaining and the solidarity between workers.[254]

As a result, the court left it to the amicus curiae (friend of court), the Casual Workers Advice Office to comment on the issue of 'ratting' your co- employees or rather giving out information about them in the context of a strike. The amicus curiae supported Numsa and stated that in the context placing an obligation or a duty on an employee to disclose information would undermine collective bargaining of workers and their solidarity which plays a big role. Additionally, it was established that even in our law there is no rule or law that requires a person to be their 'neighbor's keeper'. They further stipulated that this duty was more of a fiduciary duty and not a reciprocal duty of good faith as it placed the burden more on the employee.[255]

The CC also dealt with the issue of inferences and expressed that at least three possible inferences

[250] *Hlebela* (note 116 above) at para 7.
[251] Concurred in unanimously by Mogoeng CJ, Cameron J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Nicholls AJ and Theron J.
[252] *Dunlop CC* (note 15 above) at para 10.
[253] *Dunlop CC* (note 15 above) at para 26.
[254] *Dunlop CC* (note 15 above) at para 27.
[255] *Dunlop CC* (note 15 above) at para 71 – 72.

could be drawn concerning the presence of other employees during the incidentsof violence which could be:

"(a) None of the applicants were present.; (b)All of the applicants were present or; (c)Some of the applicants were present."[256]

The CC was of the view that most probable inference to draw would be the last one. However, it was not good enough because there is no information on who were these workersexactly and it was held that to dismiss all of employees in absence of clear identification of each individual would be unjustified.[257] This opinion of the CC did not support the decisionmade by LC and LAC saying the inference drawn was not sufficient enough to justify dismissal of workers. Hence, that is one of reasons the court ordered the reinstatement of the workers who had been dismissed. This was in line with what was said by Savage JA in her minority judgment:

> "The view I take of the matter is that arbitrator concluded reasonably on the facts before him that it had not been proven that the appellants were present at any of the scenes of misconduct and had actual knowledge of the misconduct and/ or any of the perpetrators of it."[258]

Froneman J explains his finding on the right balance between the employee and employer inthe context of fair labour practice. He expressed the reciprocal duty of good faith should notbe taken as to automatically imply that a unilateral fiduciary duty is imposed on the employees to disclose information because good faith can never be unilateral but must be followed by a reciprocal 'concomitant duty' on the part of the employer to protect theemployees who come forward and exonerate themselves.[259]

This accords with what Savage JA highlighted in her minority judgment on the issue of dutyof disclosure of information to the employer, where she states that regard should be taken ofboth parties in an employment relationship and this included an assessment of the 'appreciable risks' which may occur should the employee speak out by naming the culprits for the purposes of exoneration.[260] By raising, this concern Savage JA was cautioning the court not to be biased or ignorant about possible danger that may put the employee in jeopardy or in a unfairly vulnerable position.

This was also once touched on by Cameron JA in *Chauke*,[261] where he highlighted that "fearof intimidation and the impulse to solidarity are such obvious motive factors in South African workplace that the industrial court should have taken judicial notice of them."[262] So, this goesto show how imperative it is for courts to bear in mind the possible danger which the employee may be caused by disclosing information and employers should also be careful on how they approach such matters in order to get a positive feedback.

4.6 EXAMPLE OF CASE LAW WHERE PROTECTION WAS AFFORDED TO EMPLOYEES

The CC did not really state how that protection is to be provided by employer. However, there

[256] *Dunlop CC* (note 15 above) at para 80.
[257] Ibid.
[258] *Dunlop LAC* (note 222 above) at para 109.
[259] *Dunlop CC* (note 15 above) at para 73 – 76.
[260] *Dunlop LAC* (note 222 above) at para 102.
[261] *Chauke* (note 14 above).
[262] *Chauke* (note 14 above) at para 44.

are a number of examples in other cases where the employers would provide securityand protection for employees making it easier for them to come forward with no fear of intimidation like in this instance. In this case, the employer did not do so.

In the *Mossawu/ Mr Price Weekend Material*[263] case the customer's cellphone had been stolen and the applicant had full information of who the culprit was but chose to remain silent. The employer had set up a whistle-blowing hotline where employees could assist the employer by disclosing information if they any knowledge. The applicant only disclosed thathe knew all along after his colleague who was the culprit had been arrested. The employer then approached the Commission for Conciliation, Mediation and Arbitration (CCMA) and this was taken very seriously by CCMA, the applicant was held guilty of derivative misconduct. The CCMA found in favor of the employer.

However, when looking at this matter through the lenses of the decision made recently by the CC, the employer did create a whistle- blowers hotline but he had not adequately provided security for employees because it was not indicated if this hotline was an anonymous hotline.So, the employer failed to create a safe environment for the employees and the issue of fear of intimidation is something which courts should not overlook easily and deserve judicial attention as once mentioned by Savage JA.[264]Another case which dealt with derivative misconduct was the *De Beer Case*.[265] In this case the employees working in a mineral laboratory were dismissed after someone had secretly informed the management that large numbers of kimberlite samples were being thrown awayin a borehole despite knowing that the company policy stipulated that these samples were to be preserved in order to efficaciously report back to clients even though they contained no precious minerals or diamonds.

The employees were then interviewed, one employee admitted to discarding the kimberlite and implicated two employees. The other employees were offered to go on a polygraph testand disagreed after being advised by their union. They had been given with a telephone number on which they could call the manager anonymously if they had any knowledge.
Despite all of this the employees refused to come forward and refused to co- operate or to disclose any information and whatsoever.[266]

Taking into consideration the large quantity of kimberlite that had been discarded, it was practically impossible and would have been unreasonable to conclude that all of this was done by only two/three employees. As a result, the court had to use inferences to arrive at a conclusion. Unlike in *Mossawu*[267] case, one could confidently say the employer had done hisoutmost best to provide security to the employees as stipulated by the CC in *Dunlop*[268] and the employer had done his part of reciprocal duty by creating circumstances that guaranteed the employees safety when he gave them an option of phoning the manager anonymously. So,in this *De Beer*[269] matter the employees did not have any valid excuse for not disclosing information.

The employer still had to prove on a balance of probabilities that the workers had knowledge but chose to remain silent in order to be successful in dismissing them based on derivative

[263] [2005] 9 BALR 961 (CCMA).
[264] *Dunlop LAC* (note 222 above) at para 102.
[265] *De Beers LC* (note 172 above).
[266] *De Beers LC* (note 172 above) at para 7.
[267] *Mossawu* (note 262 above).
[268] *Dunlop CC* (note 15 above).
[269] *De Beers LC* (note 172 above).

misconduct. It is obvious from our case law that many employers encounter a difficulty in discharging the burden of proof placed on them to prove that the employees had knowledge of the primary misconduct. In most cases the employers are unsuccessful when relying on derivative misconduct.

Hence, it is fundamental to comprehend the basis on which you seek to depend on derivative misconduct when intending on dismissing employees to avoid a situation where the court willfind the principle is being unfairly abused or is being applied incorrectly. It further important for employers to properly discharge the onus of proof and to further afford protection to employees who are expected to come forward to disclose information. The rights of both employees and employers should be properly balanced.

4.7 CRITIQUE AND REFLECTION ON THE CONSTITUTIONAL COURT JUDGEMENT

The Constitutional Court has touched on two significant points which have impacted the way in which the concept of derivative misconduct is to be approached going forward and in future. Firstly, the court emphatically unfolds that for the derivative misconduct to be fairly applied in a strike context, there must be a balance of rights of both employee and employer.[270] Furthermore the Constitutional Court is to be lauded for providing understanding in terms of the reciprocal obligations which are triggered if derivative misconduct is to be applied. This will help with protecting the employees from the unfairly imposed unilateral duty to disclose and in as much this concept is said to be a double-edged sword which works in favor of the employer, the newly imposed obligation of providing protection will limit that, by no longer working entirely in the favor of the employer as they will be faced with a reciprocal responsibility. It can be confidently said that the Constitutional Court has introduced a higher level of fairness in terms of the application of the concept which is in line with the South African labour laws which promote fairness in workplace issues.

After providing such an in-depth discussion the concept of derivative misconduct, the constitution court has fell short on elaborating whether this protection that is to be provided by the employer is to be within the workplace or it is to be extended beyond the borders of the workplace. The Constitutional Court further omits to explain the kind of protection to be included and this has created a gap in the labour law as far as the derivative misconduct is concerned. Only assumptions can be made regarding the kind of protection to be offered in a strike context because expecting an employee to come forward during a strike would be expecting too much from them.[271] As employees reserves a legal right to strike when not they are not satisfied with the working conditions. A strike may be lawful at first but when it becomes violent the rights of the employer become threatened and that is why there must be a balance of rights. In balancing those rights the least the employer can do is to ensure that the employees safety is guaranteed so that they may be free to come forward.[272]

The second important point underlined by the Constitutional Court is that derivative should not be used as means of immediate reliance but other avenues should be exhausted before resorting to derivative misconduct and moving forward this will limit abuse of the concept because it cannot be denied that some employers are cruel and can easily resort to derivative misconduct as a shortcut for dismissing employees. It seems that straight reliance on this concept is greatly discouraged and this is concerning as this may lead to possible death of the concept of derivative misconduct in future. Nonetheless, only time will tell if derivative misconduct survives for long in the South African labour law.

Another significant omission made by the constitutional court is not addressing the two

[270] *Dunlop CC* (note 15 above) at para 75.
[271] *Dunlop CC* (note 15 above) at para 71.
[272] *Dunlop* CC (note 15 above) at para 76.

constitutionally protected rights which are the right to remain silent and the presumption of innocence, which get affected and are potentially infringed upon when derivative misconduct is applied. Hopefully South African courts will be able to discuss the most important parts on the presumption of innocence till proven guilty and the right to remain silent. This is an outstanding discussion which needs to be addressed to ensure that there is a proper balance of rights and that the application of derivative misconduct does not result in infringement of these two Constitutional rights.

Overall, it can be confidently said that the Constitutional Court decision was well fashioned, and it has assisted in the balancing of the rights of employees and employers as far as derivative misconduct is concerned. It has further placed a restrain on the application of derivative misconduct by emphatically reminding participants in labour relations that good faith is actually reciprocal and this will serve as protection against abuse of the concept. Nonetheless, only time will tell if derivative misconduct ceases to exist in future or it will grow stronger within the South African labour jurisprudence.

CHAPTER 5 - CONCLUSION

This dissertation has extensively discussed the principle of derivative misconduct from the time it was birthed in the *Chauke*[273] and *FAWU*[274] cases and has further discussed its development over the years. It is evident from earlier years when this concept was introducedthat it placed an unfair unilateral approach on employees to disclose information and the Constitutional Court in *Dunlop*[275] has dismissed the unilateral approach of placing an obligation on employees to speak and has placed emphasis on that, the rights of both employees and employers must be well balanced in any employment contract as highlighted in the judgment.[276] Further, it is imperative for courts to remember that good faith is reciprocal in nature. Since good faith is reciprocal, both employer and employee have a duty to ensure that they do not act in a way that breaches or compromises the terms of their employment contract.

It is important that recognition is given to the common law principles that govern employment contracts and relationships between the employer and an employee in the context of dismissals and breaches of employment contracts. The duty of good faith is said tobe the same as 'trust and confidence' and this has been confirmed by South African courts.[277] With South African courts holding 'trust and confidence' in the employment relationship in the highest regard, it has become an acceptable view that good faith is an implied term in the contract of employment, and it is automatically expected of an employee to act honestly and faithfully towards the employer.[278]

This view was confirmed by Froneman J in the *Numsa v Dunlop CC*[279] where he expressed that the good faith principles are implied into the contract of employment meaning that they are automatically part of every employment contract regardless of whether good faith was discussed or written in the employment contract, unlike fiduciary principles which are not implied in an employment relationship.[280] Good faith automatically applies in all employmentcontracts and is reciprocal in nature. In contrast the fiduciary duties are not reciprocal but place a greater responsibility and promote or favors a beneficiary's interest. Fiduciary duties are not implied in the context of employment contracts unless parties choose to agree otherwise.[281]

The Constitutional Court also placed a restriction in the application of derivative misconduct by indicating that should employers wish for employees to come forward with information, they should in return provide protection to those employees because it cannot be denied that by coming forward, they will be viewed as 'snitches' and might have to face resentment fromtheir fellow employees. When taking into consideration the level of violence in South Africaand the serious consequences which the perpetrators would have to face as soon as information has

[273] *Chauke* (note 14 above).
[274] *Amalgamated Beverage Industri*es (note 13 above).
[275] *Dunlop CC* (note 15 above).
[276] Ibid.
[277] Bosch (note 126 above).
[278] *Murray* (note 127 above).
[279] *Dunlop* CC (note 15 above).
[280] *Dunlop* CC (note 15 above) at para 62.
[281] *Dunlop* CC (note 15 above) at para 57.

been disclosed, it is crucially important that the employers protect the employees who come forward and to further handle these kinds of situations with due care and diligence.

The best way of protecting employees that has been demonstrated in previous cases is when employees who disclose information are kept anonymous. However, the employers should be careful that they assess the information provided carefully to avoid a situation where culprits frame innocent employees in instances where the employees coming forward remain anonymous because it can be easy for a culprit who wants to escape liability to also disclose false information anonymously.

Currently as it stands, the *Dunlop CC*[282] has provided the final verdict when it comes to the concept of derivative misconduct. Nonetheless, it further remains to be seen how the South African courts will grapple with important aspects of the right to remain silent and the presumption of being innocent[283] when it comes to derivative misconduct because the LAC inDunlop[284] expressed that completely denying a person the right to remain silent is not in line with the ethos of our South African labour law.[285] The South African courts still have to properly discuss the extent to which an employee can go with regard to exercising the right toremain silent in the case of derivative misconduct.

The Constitutional Court also discouraged resorting to derivative misconduct with immediate reliance[286] until all available avenues have been exhausted. The Constitutional Court stated that immediate recourse to derivative misconduct was premature and opened a door for injustice.[287] Secondly, the court highlighted that if immediate reliance would be permitted it would pave the way for employers to easily dismiss their employees.[288] Thirdly, the court was of the view that employees who did not participate in the primary misconduct would facea risk of facing harsher consequences than the culprits. The court implemented this to avoidabusing of the concept.[289]

Additionally, the Constitutional Court highlighted that it is important for employers to acknowledge that there are various ways in which an employee can associate themselves with a misconduct either directly or indirectly and failing to acknowledge that as an employer can lead to easy dismissals.[290] Employers usually face difficulties in proving individual liabilityin instances where the primary misconduct was done by a collective group. Nonetheless, no individual should be merely found guilty because they were in a group if there is no evidence to prove their guilt.[291]

It is recommended that before resorting to derivative misconduct the employer must first attempt charging the group of perpetrators with common purpose and if the elements of common purpose are not fully met, the employer can charge them as accomplices to the primary misconduct and should all of that fail the employer can then resort to derivative misconduct. With derivative misconduct the employer still has a duty to prove that the employee had knowledge about the

---

[282] Ibid.
[283] S Sibiya, C Ramaccio, & I Desan. (2023). Judicial scrutiny of derivative misconduct in South African employment law: a careful approach to the duty to speak. *Obiter*, *44*(1), 106-121. Retrieved November 29, 2023, from http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1682 - 58532023000100007&lng=en&tlng=en.
[284] *Dunlop* LAC (note 222 above).
[285]Ibid.
[286] *Dunlop* CC (note 15 above) at para 45.
[287] Ibid.
[288] Ibid.
[289] Ibid.
[290] *Dunlop* CC (note 15 above) at para 48.
[291] Ibid.

misconduct, in absence of knowledge the elements of derivative misconduct is not met and the employee cannot be charged. An employee being charged with derivative misconduct must have been a witness or possessed knowledge aboutthe primary misconduct.

It is worth mention that above and beyond all consideration. The employers should not neglect that they still reserve a greater responsibility to prove the guilt of the employees and burden of proof still remains with the employer. In addition, we are yet to see if South African courts will end up doing away with derivative misconduct as a concept in our labourlaw sphere or whether it will continue to remain in force because at it stands courts are slowlydrifting away from it.

Employers should also be careful to ensure that they apply the correct concept to avoid wasting litigation costs because collective misconduct, common purpose, team misconduct and derivative misconduct are all interrelated concepts.

Lastly, employers are to ensure that they provide a safe environment for their employees should they desire their assistance in identifying perpetrators as per the final verdict of the Constitutional Court.

BIBLIOGRAPHY

BOOKS:

1. Grogan, J Dismissal 4 ed: Juta

2. Grogan, J Workplace Law 11 ed: Juta

JOURNAL ARTICLES:

1. Bassuday K, "Derivative Misconduct and an employee's duty of good faith: Western Platinum Refinery Ltd v Hlebela & others" (2015) 36 ILJ 2280 (LAC) (2016)
2. Bosch, C 'The Implied Term of Trust and Confidence in South African Labour Law' (2006) 27 ILJ 28
3. Cohen, T 'Collective Dismissal: A Step Towards Combating Shrinkage in the Workplace' (2003) 15 SA Merc LJ, 25.
4. Hawthorne, L 'Abuse of a Right to Dismiss not Contrary to Good Faith' (2005) 17 SAMLJ (2) 214 – 221
5. Hutchison, A 'Good faith in contract: A uniquely SA perspective' (2019)1 *The Journal of Commonwealth Law* 239 – 243.
6. Idensohn K "The Nature and Scope of Employees' Fiduciary Duties" (2012) 33 ILJ 1539 at1550
7. Le Roux-Kemp, A 'Standards of Proof: Aid or Pitfall?'(2010) 31 (O) (3) 686 - 701
8. Maloka, TC "Derivative Misconduct and Forms thereof: *Western Refinery Ltd* v *Hlebela* 201536 *ILJ* 2280.
9. Maqutu, L 'Collective misconduct in the workplace: Is "team misconduct" "collective guilt" in disguise?' (2014) Stell LR 566 -579
10. Poppesqou, T 'The Sounds of Silence: The Evolution of the Concept of Derivative Misconduct and the Role of Inferences' (2018) 39 ILJ 34
11. Riley, J "Siblings but not Twins: Making Sense of 'Mutual Trust' and 'Good Faith'" (2013) *Melb U Law Rw* 522.
12. Van der Bank CM "Passive Employees and Failure to Assist in an Investigation: The Principles of Derivative Justification" (2014*) Vol 5 No. 7 Mediterranean Journal of Social Sciences,* 92 -98.

LAW REPORTS:

1. Barkhuizen v Napier CC 2007 (5) SA 323 (CC)
2. Chauke and Others v Lee Service Centre t/a Leeson Motors (1998) 19 ILJ 1441 (LAC)
3. Council for Scientific & Industrial Research v Fijen (1996) 17 ILJ 18 (A)
4. Dunlop Mixing & Technical Services (Pty) Ltd & others v National Union of Metalworkersof SA obo Khanyile & others (2016) 37 ILJ 2065 (LC)
5. ` Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers Ltd 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) 276
6. *Fedcraw obo Mthimunye v Rewmoor Investment* (2008, 2 BALR 142)
7. FEDCRAW/Snip Trading (Pty) Ltd [2001] 7 BALR 669 (P)
8. *Foschini Group v Maidi & others* (2010) 31 *ILJ* 1787 (LAC)
9. MOSSAWU obo Khoza / Mr Price Weekend Material [2005] 9 BALR 961 (CCMA)
10. *Murray v Minister of Defence* [2008] JOL 21598 (SCA)
11. National Transport Movement & others v Passenger Rail Agency of SA Ltd (2018) 39 ILJ560 (LAC)

12. National Union of Metalworkers of SA obo Nganezi and others v Dunlop Mixing and Technical Services (Pty) Ltd and others [2018] 10 BLLR 961 (LAC)
13. 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) (28 June 2019)
14. 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))
15. Nobhabha and Gammid Trading (Pty) Ltd (2012) 33 ILJ 1523
16. NSCAWU v Coin Security [1997] 1 BLLR 85 (IC)
17. NUMSA obo Dhludhlu and Others v Marley Pipe Systems SA (Pty) Ltd (JA33/2020) [2021] ZALAC 13
18. Numsa obo Aubrey Dhludhlu and 147 Others v Marley Pipe Systems (SA) (Pty) Ltd (CCT 233/21) [2022] ZACC 30.
19. *R v Blom* 1939 AD 188 at 202 – 3.
20. Robb v Green (1895) 2 QB (CA)
21. *RSA Geological Services (a division of De Beers Consolidated Mines Ltd) v Grogan & Others* 2008 2 BLLR 184 (LC) (De Beers (LC)
22. S v Makwanyane and Another 1995 (3) SA 391 (CC) 484
23. *SA Commercial Catering and Allied Workers Union v PEP Stores* (1998) 19 *ILJ* 939 [CCMA]
24. *True Blue Foods (Pty) Ltd t/a Kentucky Fried Chicken (KFC) v Commission for Conciliation Mediation and Arbitration and Others* (D441/11) (2015) 36 *ILJ* 1375 (LC)
25. Tshabangu / Mgwezi Brand Manufacturer (2022) 31 MEIBC
26. *Western Platinum Refinery Ltd v Hlebela and Others* (JA32/2014) [2015] ZALAC 20.

STATUTES:

1. Constitution of the Republic of South Africa 1996.
2. The Labour Relations Act 66 of 1995

WEBSITES:

1. Aukema & Naidoo ‘When There is No Thread of Evidence: Inferential Reasoning in Cartel Cases Clarified by The Competition Appeal Court in Alleged Blanket Cartel’ 2023 https://www.cliffedekkerhofmeyr.com › Corporate › c.
2. Circumstantial evidence | Wex - Law.Cornell.Edu LII / Legal Information Institute https://www.law.cornell.edu › Wex.
3. M Pargendler “Modes of Gap Filling: Good Faith and Fiduciary Duties Reconsidered” (2008)82 SSRN 1325. https://ssrn.com/abstract=1008400
4. Wingfield C & Coetzer N “Common Purpose, Derivative Misconduct & Dismissal After Dunlop” (2021) http://www.chmlegal.co.za/common-purpose-derivative-misconduct-after-dunlop.(14-07-2021)
5. Sibiya, S, Ramaccio, C & Desan, I. (2023). Judicial scrutiny of derivative misconduct in South African employment law: a careful approach to the duty to speak. *Obiter*, *44*(1), 106-121. Retrieved November 29, 2023, from http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1682-58532023000100007&lng=en&tlng=en.

UNIVERSITY OF KWAZULU-NATAL
INYUVESI YAKWAZULU-NATALI

Miss Mbalenhle Mkhize (216013103)
School Of Law
Pietermaritzburg

Dear Miss Mbalenhle Mkhize,

Protocol reference number: 00012823
Project title: A Critical Analysis of Derivative Misconduct Looking into National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others.

Exemption from Ethics Review

In response to your application received on 20 August 2021 , your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

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.

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

Yours sincerely,

[redacted]

Mr Simphiwe Peaceful Phungula
obo Academic Leader Research
School Of Law

INSPIRING GREATNESS