



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA38/2021

In the matter between:

**THE SOUTH AFRICAN COMMERCIAL CATERING AND
ALLIED WORKERS UNION**

Appellant

THE EMPLOYEES LISTED IN ANNEXURE "A"

**Second to Further
Appellants**

and

PATRICK PERCY MAKGOPELA

First Respondent

THE COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

Second Respondent

CASHBUILD (PTY) LTD

Third Respondent

Heard: 15 February 2022

Delivered: 14 March 2023

Coram: Phatshoane ADJP, Savage AJA and Phatudi AJA

JUDGMENT

SAVAGE AJA

Introduction

- [1] This appeal, with the leave of the Labour Court, is against the judgment and order of that Court (Prinsloo J) which dismissed the appellants' application for the award of the first respondent ('the commissioner') to be set aside on review.
- [2] The third respondent, Cashbuild (Pty) Ltd, is a national wholesaler and retail supplier of hardware and building materials. It operates in excess of 200 stores. The second to further appellants are 12 employees ("the employees") who were employed at Cashbuild's Klerksdorp branch in various capacities as cashiers, forklift drivers, general assistants, a sales assistant, a system supervisor, sales coordinators and an assistant manager.
- [3] In January 2016, following a stock-take, stock losses were detected at the Klerksdorp branch in the amount of R21 871,00, equivalent to 0,47% of sales. This exceeded Cashbuild's acceptable shrinkage level of no more than 0,4% of sales. The following month, in February 2016, a further stock-take revealed stock shrinkage of R24 845,00, equivalent to 1.5% of sales. In the March 2016 stock-take, stock losses of R88 000,00, equating to 2.74% were detected. A "shrinkage workshop" was held with the employees the same month. They were interviewed and given a questionnaire to complete in which they were asked to indicate the cause of stock losses. The employees were also encouraged to use an anonymous tip-offs line. As a result of the continued stock losses, in March 2016, the employees were issued with final written warnings valid for 12 months for failing to control shrinkage collectively or individually. After a June 2016 stock-take, stock losses in the amount of R106 848,00, equivalent to 3.63% of sales, were uncovered. Of the items missing included 6-metre lengths of timber and doorframes. As a result, a further shrinkage workshop was held in June 2016.
- [4] A number of deficiencies in Cashbuild's systems were identified by the employees in the shrinkage questionnaires they completed. These included staff shortages, with a number of employees noting that the lack of a permanent end controller stationed at the exit to the store was a systemic cause of shrinkage; the lack of adequate controls at the stock receiving section; control of keys to the receiving area; and close circuit television (CCTV) cameras at the store not being

operative. Following the second shrinkage workshop, the employees were charged with:

‘1. Collective Misconduct/Team Misconduct in that:

‘You on or during the period 28 March 2016 to 25 June 2016 as individual components of the group each culpable failed to ensure that the group complies with a rule or attains a performance standard set by the employer where shrinkage reaches unacceptable levels in the amount of R202 317,72.’

[5] After a disciplinary hearing, all employees were found guilty and in July 2016 were dismissed from their employment.

Arbitration award

[6] Dissatisfied with their dismissals, the appellants referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (‘CCMA’). At arbitration Cashbuild’s divisional manager, Mr Andries Mahlaba, testified that someone in the group knew who was responsible but that employees would not come clean in order that it could have been investigated. Employees were allowed to undertake all duties in the store, including those outside of their job descriptions. Mr Mahlaba accepted that employees had raised staff shortages in the questionnaires completed, but in evidence reiterated that they were required to stem the stock losses. He did not review the footage from CCTV cameras to attempt to identify theft or other causes of shrinkage, although it was available and had been put in place to curb stock losses, given the time that this exercise would take. He accepted that the store manager did not analyse security requirements and implement the necessary changes.

[7] There was no dispute that the Klerksdorp store was large, being 1200m² in extent, which meant that the employees were placed in different roles in different areas of the store. Mr Mahlaba, who was supervising eight stores, did not follow up on the issues which had emerged at the Klerksdorp store. When asked in evidence whether he would accuse the employees of causing shrinkage, Mr Mahlaba replied that he would not.

[8] Mr Juan-Pierre Smith, the divisional manager who followed Mr Mahlaba, testified that the formula used to determine staff numbers did not support the appointment

of a front-end controller, as proposed by the employees; and that he decided to hold the second shrinkage workshop to give employees a chance to disclose information regarding stock losses, although Cashbuild's policy did not require that a further workshop be held. This second workshop, he stated, evinced no indication from employees as to the cause of the stock losses.

- [9] Six of the dismissed employees testified at the arbitration hearing. Mr William Malungana, a forklift driver, never loaded an item that was not paid for and was not aware that the delivery trucks were leaving the premises without being checked. He raised his concerns in the shrinkage questionnaire he completed relating to the receiving office not being locked when it was not in use, that boxes received were not opened when they came in, that all employees had access to the keys for the receiving area, with anyone able to open the gates to the receiving area and the key register not in use. In addition, daily searches of employees were not undertaken and he recommended that such security checks be strengthened by the manager. He also noted that there was a need for an end controller to be stationed at exit points. He stated that in his view the managers were incompetent and did not care about their work. He did not see any employee stealing and if he had he could have reported this to the manager or called the employee to order. Other employees testified that they had raised the same or similar concerns in their shrinkage questionnaires but that this information was not acted upon by management. All denied having been responsible for breaching Cashbuild's rule in respect of stock losses.
- [10] The commissioner did not accept that the employees had undertaken their duties in the manner required, finding that they had contravened the employer's rule, had failed to disclose the cause of stock losses and that had they "done their duties as required there should have not been a stock loss of such huge money". With reference to the decision of this Court in *Western Platinum Refinery Ltd v Hlebela and others*,¹ the commissioner set out the requirements for derivative misconduct and found that the employees had "implicated each other on the shrinkage workshops questionnaire" by referring to others among them who were not doing their duties. For example, when the receiving office was found

¹ [2015] ZALAC 20; [2015] 9 BLLR 940 (LAC); (2015) 36 ILJ 2280 (LAC).

unlocked, no employee testified that they had locked it which “would imply that they exacerbated the wrongdoing which might have led to shrinkage”. The fact that deliveries were not checked indicated that the employees “encouraged the wrongdoing” and that they “all tried to disown their unacceptable actions by implicating each other”. The commissioner found that the employees had failed to report irregularities and “who [did] what”, although it was accepted that issues were raised and information was provided at the shrinkage workshop.

[11] The employees were found to have failed to report “all they saw to be irregularities”, what they “might have been involved in”, and refusing to “come clean”. This had the result that it had been proved that they had committed the misconduct. Their dismissals were therefore found to be both procedurally and substantively fair.

[12] The appellants thereafter sought the review of the arbitration award in the Labour Court. The Court found that the arbitration award fell within the bounds of reasonableness required and dismissed the review application.

Submissions on appeal

[13] On appeal the appellants contended that the arbitration award did not fall within the bounds of reasonableness required since the commissioner committed an error of law in that he mischaracterised the dispute as one concerned with derivative misconduct, with the result that he did not understand the nature of the dispute he was required to arbitrate and did not deal with the merits of the true dispute. With reference to the decision in *FEDCRAW v Snip Trading*² it was argued that Cashbuild had failed to put up evidence of the procedures implemented to prevent stock losses and evidence that those procedures had not been followed, with the evidence being only that stock losses had been suffered.

[14] In addition, it was argued that no steps were taken to address the problems identified by the employees in the March and June 2016 questionnaires as contributing to shrinkage. The CCTV footage was not reviewed to attempt to determine the cause of the stock losses. The large size of the store was a

² [2001] 7 BLLR 669 (P).

material factor which ought to have been considered since employees were stationed at different parts and it was unfair to expect them to point to the reason for stock losses in all parts of the store. No permanent end controller was in place to monitor the premises. There was no evidence of steps taken by Cashbuild to curb stock losses or of a corrective action plan to be implemented by employees and no evidence that systemic and administrative deficiencies had been ruled out. As a result, the finding that the employees were guilty was one no reasonable commissioner could not have reached.

- [15] It was submitted for Cashbuild that the Labour Court correctly dismissed the review application in that the commissioner identified the dispute before him, considered the totality of evidence and rejected the version advanced by the appellants. In doing so, it was submitted, the commissioner arrived at a reasonable conclusion. It was argued, without any evidence to this effect, that the employees had engaged in barcode swapping and that Cashbuild was entitled to assume that they had colluded with each other and had failed to protect Cashbuild's interests or provide it with assistance to stop the stock losses. When asked by the Court why the stock losses incurred were not the subject of a full and proper investigation, it was stated that the investigation was limited by Cashbuild's financial constraints. Since the commissioner carefully assessed the evidence, the arbitration award was argued to have fallen within the bounds of reasonableness required and, for these reasons, it was argued that the appeal should be dismissed.

Evaluation

- [16] This matter concerns collective workplace misconduct in circumstances in which no individual employees were identified as having committed particular acts of misconduct and all employees in the branch were dismissed. Four different approaches to collective misconduct are discernable in our law. The first is that the employees may be charged collectively, with reliance placed on the doctrine of common purpose as the basis on which the misconduct was committed. A dismissal for misconduct based on common purpose arises as a consequence of the deemed participation of the employee as part of the group which committed the primary misconduct.

[17] Involvement with the primary misconduct is proved through application of the general principles required to prove common purpose, as set out in cases such as *Makhubela v S*,³ *S v Mgedezi*,⁴ *S v Thebus*,⁵ and *Dewnath v S*.⁶ In general, common purpose will be proved if the individual was present at the scene of the misconduct; was aware of the misconduct; intended to make common cause with those who perpetrated it; manifested some common purpose with the perpetrators of the misconduct by performing an act of association with the conduct of the others; and possessed the requisite *mens rea*. In *National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others*⁷ the Court clarified 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 thereto will still be required...’.⁸

[18] The second form of collective misconduct discernable in our law is that of team misconduct, in which a number of employees are disciplined collectively as members of a team for the same misconduct, on the basis that the individual responsibility of individual employees in the team cannot be determined. Common purpose may be applied to cases of team misconduct but is not a necessity to prove the existence of such misconduct. As Grogan⁹ has stated:

‘Team misconduct’ is ...distinguishable from cases in which a number of workers simultaneously engaged in conduct with a common purpose. In cases of ‘team misconduct’ the employer dismisses a group of workers because responsibility for the collective conduct of the group is indivisible. It is accordingly unnecessary in cases of team misconduct to

³ [2017] ZACC 36; 2017 (2) SACR 665 (CC); 2017 (12) BCLR 1510 (CC) at paras 36 – 38.

⁴ 1989 (1) SA 687(A) at 705I-6C.

⁵ *S v Thebus* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) at para 49.

⁶ *Dewnath v S* [2014] ZASCA 57 at para 15.

⁷ [2019] ZACC 25; 2019 (8) BCLR 966 (CC); (2019) 40 ILJ 1957 (CC); [2019] 9 BLLR 865 (CC); 2019 (5) SA 354 (CC); (2019) 40 ILJ 1957 (CC).

⁸ *Id* at para 46.

⁹ T Grogan Dismissal (Juta 2002).

prove individual culpability, derivative misconduct or common purpose- the three grounds upon which dismissal for collective misconduct can otherwise be justified. The essence of team misconduct ...is that the employees are dismissed because, as individual components of the group, each has culpably failed to ensure that the group complies with a rule or attains a performance standard set by the employer.'

[19] In *FEDCRAW v Snip Trading (Pty) Ltd*¹⁰ the arbitrator stated that:

'In situations [where] a group of workers is dismissed, the justification is that each culpably failed to ensure that the team met its obligation. Blame cannot be apportioned among members of the group, as it can in cases where it is known that some of the individuals in the group are innocent. It seems to me that the notion of 'team liability' underlies the line of cases in which it has been held that it is fair to dismiss the entire staff of a branch or store where 'shrinkage' reaches unacceptable levels'.

[20] The third form of collective misconduct recognised is that of "derivative misconduct". In such a case the dismissal of an employee may be derivatively justified where misconduct was committed by others who have not been identified, in circumstances in which the employee was expressly requested by the employer to disclose information known to that employee pertinent to the wrongdoing, but consciously elected not to do so.¹¹ Dismissal on this basis is recognised as arising from a derivative duty on employees to disclose information about the commission and participation of their co-employees in the collective misconduct.¹² Reliance on derivative misconduct to justify a dismissal has however been recognised to be "premature until all avenues of some form of individual and culpable participation in the collective [misconduct]...are excluded".¹³

¹⁰ [2001] 7 BALR 669 (P).

¹¹ *Western Platinum Refinery Ltd v Hlebela* [2015] ZALAC 20; (2015) 36 ILJ 2280 (LAC) at para 8; *National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others (Dunlop)* [2019] ZACC 25; 2019 (8) BCLR 966 (CC); (2019) 40 ILJ 1957 (CC); [2019] 9 BLLR 865 (CC) ; 2019 (5) SA 354 (CC).

¹² *Dunlop (supra)* at para 44.

¹³ *Ibid* para 45.

[21] In *Chauke v Lee Service Centre CC Motors (Chauke)*,¹⁴ reference to a fourth approach to collective misconduct was made, namely that dismissals for collective misconduct may arise in circumstances in which the individual culpability of employees cannot be determined as a result of which there exists an operational rationale for their dismissal. The fact that misconduct is concerned with fault while operational requirements are not, means that reliance on the latter as a consequence of the former risks creating difficulties, such as those that arose in *Food & Allied Workers Union on behalf of Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River*.¹⁵ In that matter this Court found a number of dismissals on grounds of operational requirements unfair in circumstances in which these had arisen as a consequence of a violent strike in which the culpability of individual employees in certain acts of violence was not proved. The employer was found to have failed to prove the fair and objective application of selection criteria, with “nothing more” proved “than that the selection was made subjectively”.¹⁶

[22] In dismissing the employees, despite the confusion created by the commissioner’s reference in the arbitration award to *Western Platinum Refinery Ltd v Hlebela*,¹⁷ Cashbuild relied on team misconduct, the essence of which related to the failure of the employees as members of a team to adhere to its rule to prevent and halt shrinkage at the Klerksdorp store. There was no dispute that the shrinkage had occurred. In issue was whether it was proved that the employees, as members of a team, had culpably failed to ensure that the team complied with the rule or attained the performance standard set by the employer to prevent shrinkage. To prove this required Cashbuild either to rely on direct evidence of the failure on the part of the employees as members of the team to adhere to the rule or performance standard sufficient to warrant a finding of team liability; on circumstantial evidence that showed that this was the most probable inference to be drawn from the proved facts; or on the doctrine of common purpose.

¹⁴ *Chauke and Others v Lee Service Centre t/a Leeson Motors (Chauke)* (1998) 19 ILJ 1441 (LAC).

¹⁵ [2012] ZALAC 46; 2012 33 ILJ 1779 (LAC).

¹⁶ At para 33.

¹⁷ *Supra* at note 11.

[23] In *Chauke*,¹⁸ 20 employees from the employer's paint shop and polishing and cleaning section were dismissed after embarking on a "systematic course of conduct" of deliberate sabotage.¹⁹ This Court found that given the relatively small and defined group of employees, as well as the nature of the team and the location of their work meant that the company was warranted in drawing a primary inference of culpable participation of all employees in the misconduct.²⁰ The employees were found to share responsibility for this primary misconduct, about which they had decided collectively to remain silent.²¹ The Court in *Chauke* distinguished the matter from that of *FAWU v ABI*,²² in which the failure by any employees to give evidence regarding collective misconduct was found to justify a secondary inference arising from the absence of any self-exculpatory evidence. This was so in that, while it was not the most probable inference that a group of more than 100 employees were all involved in the misconduct, it became the most probable inference only because none of the employees came forward to absolve themselves.²³

[24] The reasoning in *Chauke* was applied in *True Blue Foods (Pty) Ltd t/a Kentucky Fried Chicken v CCMA and Others (KFC)*,²⁴ in which a number of measures were implemented to cap continued stock losses, all of which failed, following which all employees working at the store were dismissed.²⁵ In the arbitration of *SA Commercial Catering and Allied Workers Union v PEP Stores (PEP)*,²⁶ stock losses of 81% were found so glaring that it could not have escaped the attention and knowledge of every member of staff whose responsibility it was to protect the interest of their employer. In *The Foschini Group v Maidi and Others (Foschini)*,²⁷ stock losses exceeded

¹⁸ *Chauke (supra)*.

¹⁹ *Chauke (supra)* at paras 24 and 39.

²⁰ *Chauke (supra)* at para 41.

²¹ *Chauke (supra)* at paras 36 and 39.

²² *FAWU v ABI* [1994] 12 BLLR 25; (1994) 15 ILJ 1057 (LAC).

²³ At 1064 B-C. See *Chauke (supra)* at para 38.

²⁴ *True Blue Foods (Pty) Ltd t/a Kentucky Fried Chicken (KFC) v CCMA and Others* [2014] ZALCD 70; [2015] 2 BLLR 194 (LC); (2015) 36 ILJ 1375 (LC).

²⁵ At paras 5 and 13.

²⁶ *SA Commercial Catering and Allied Workers Union v PEP Stores* (1998) 19 ILJ 939 (CCMA).

²⁷ *The Foschini Group v Maidi and Others* [2010] ZALAC 5; (2010) 31 ILJ 1787 (LAC) ; [2010] 7 BLLR 689 (LAC).

28%, with extensive evidence put up of the employer's systems, controls and investigation into the losses, which led to the dismissal of all five employees in the store.

- [25] The existence of the rule to prevent stock losses was not in dispute in the current matter, nor was the fact that stock losses continued to occur and that employees were warned of these losses and of Cashbuild's attitude to them. There are, however, a number of distinguishing features between the facts of this matter and other instances which have been found to justify the dismissal of all employees in a team. In this matter no evidence was presented by Cashbuild as to the details of the systems and controls in place at its Klerksdorp store to prevent stock losses. There was no evidence of any attempt to ascertain through an investigation how stock was being lost or from which part of the large store this was occurring, including relying on CCTV footage or available documentary evidence. There was also no evidence which indicated that, given the size of the store, employees in one section of the store would have been aware of stock being lost in another section. Unlike *Chauke*, *KFC*, *PEP* and *Foschini*, the result was that in this matter there was an absence of evidence that the proximity of employees to each other in the store and the varied nature of their work warranted a primary inference being drawn of the culpable participation of all of the employees in the misconduct.
- [26] This was not a case of a small shop in which it could be inferred that all of the limited number of employees would reasonably have borne knowledge of stock losses. No evidence indicated why it was probable that all employees were aware of the stock losses occurring in the Klerksdorp branch, where and how these were occurring or why their responsibility should be indivisible.. The evidence indicated that employees performed diverse functions across the large area of the store and that when they raised a number of concerns and made proposals for system improvements to prevent such losses, these were not acted upon by Cashbuild. It was furthermore of direct relevance that Mr Mahlaba, who was responsible for supervising eight stores at the time, accepted that he did not follow up on the issues which had emerged at the Klerksdorp store; and when asked in evidence whether he would accuse the employees of causing shrinkage he replied that he would not. It followed that without more, the proved facts did

not support an inference being drawn of the culpable participation of all employees employed at the store in the primary misconduct.

- [27] Furthermore, unlike *FAWU v ABI*,²⁸ the employees did not remain silent. They participated in shrinkage workshops and completed shrinkage questionnaires in which they identified system difficulties and made proposals to solve the problem of stock loss. Six employees testified at the arbitration hearing. This was therefore not a case in which a secondary inference could be drawn from the absence of any self-exculpatory evidence by employees.
- [28] Cashbuild set out to prove that either that the facts showed directly, or that the most probable inference to be validly drawn from the facts was that the employees as a team knew of the stock losses taking place and that they either participated in causing these losses or supported those who did and did nothing to put an end to such losses. However, from the evidence it is apparent that Cashbuild failed to prove as much.
- [29] This case illustrates the caution to be adopted where reliance is placed on collective misconduct as a basis for dismissal. This is so given that workplace discipline must at all times be fair and just. As much is required by the Labour Relations Act²⁹ in giving meaning to the constitutional right to fair labour practices. Our law does not allow a determination of guilt simply by association. Where team misconduct is relied upon there must exist either a factual basis or sufficient grounds for inferring that all employees were indivisibly culpable as members of the team for failing to ensure compliance with the employer's rule. A reliance on generalised facts, arising from a scant investigation into the alleged misconduct, does not provide a sufficient basis on which to infer that collective responsibility exists.
- [30] It follows that on the evidence before the commissioner, the most probable inference to be drawn from the facts in this matter was not that the employees were guilty of the collective misconduct alleged, in the sense that they failed to ensure compliance with Cashbuild's rule, were aware of the stock losses, did not halt such losses or alert Cashbuild to their continued existence. To find that the

²⁸ *FAWU v ABI* [1994] 12 BLLR 25; (1994) 15 ILJ 1057 (LAC) .

²⁹ Act 66 of 1995.

dismissal of all employees, one of whom had almost thirty years of service, was fair, was a decision to which a reasonable commissioner, on the material before him, could not reach. The Labour Court erred in finding differently.

[31] For these reasons, the appeal must succeed. The review application ought properly to have succeeded and the arbitration award set aside. This is so since the dismissal of the employees was substantively unfair and there is no reason why the imposition of the primary remedy of reinstatement, which was sought by the employees, is not warranted. Given the nature of the matter, the ongoing relationship between the parties and considerations of law and fairness, no costs order would be appropriate.

[32] Due to an administrative error which could not be explained by the Registrar this judgment was to have been delivered in March 2022, yet was only handed down on 14 March 2023.

Order

[33] For these reasons, the following order is made:

1. The appeal succeeds.
2. The order of the Labour Court is set aside and the substituted as follows:
 - ‘1. The review application succeeds.
 2. The arbitration award is set aside and replaced with a finding that:
 - i. the dismissal of the applicants was substantively unfair.
 - ii. The applicants are to be retrospectively reinstated into the same or similar positions of employment with Cashbuild (Pty) Ltd within ten (10) days.
 - iii. The applicants are to be paid back pay from the date of their dismissals until date of their reinstatement, with all benefits of employment restored, within ten (10) days.’



SAVAGE AJA

Phatshoane ADJP and Phatudi AJA agree.

APPEARANCES:

APPELLANTS: R Itzkin
Instructed by Dockrat Attorneys

THIRD RESPONDENT: A Jansen van Vuuren
Instructed by Snyman Attorneys