IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

JA 32/2014

WESTERN PLATINUM REFINERY LTD	**Appellant**
and	
HLEBELA, ARNOLD	**First Respondent**
VAN WYK, NO	**Second Respondent**
CCMA	**Third Respondent**

Heard: **07 May 2015**

Delivered: **03 June 2015**

Summary: Review of arbitration award – principle of derivative misconduct reconsidered – employee under a duty of good faith to disclose knowledge of employee/s responsible of wrongdoing towards employer – employee failing to discharge his duty committing misconduct –employee may be dismissed if employee fails to disclose actual knowledge of relevant information. Employee dismissed for not disclosure of his personal financial information which employer suspected would implicate him in irregular wealth acquisition sourced from culpable involvement in wrongdoing against the employer ie, the theft of platinum from the employer – personal financial information is not information of wrongdoing– such information is not knowledge about the theft – an appropriate way to discipline an employee for non-dislosure of actual knowledge of wrongdoing towards employer is to charge employee with

breach of a duty of good faith, alleging the actual knowledge relied upon and that non- disclosure is culpable

Cross- appeal on remedy – Labour Court refusing reinstatement and ordering compensation because employee dishonest – such factual finding not borne out by the evidence – Labour Court judgment partially upheld and substituted with an order to the effect that the employee is reinstated with full benefit and back pay.

Coram: Landman, Sutherland JJA and Mngqubisa-Thusi AJA

JUDGMENT

SUTHERLAND JA

Introduction

[1] In this matter, an Arbitrator held that the dismissal of the first respondent, Arnold Hlebela by the appellant employer was fair. A review of the award brought by Hlebela resulted in the Labour Court reversing that finding and declaring that the dismissal was substantively unfair, but further finding that reinstatement was inappropriate, whereupon compensation equivalent to 12 months' wages was granted. The appellant has appealed against the decision setting aside the award, and, Hlebela, in turn, has cross-appealed against the compensation order, seeking a substituted order of reinstatement.

[2] On review, the sole real issue was the substantive fairness of a conviction of misconduct allegedly perpetrated by Hlebela. The misconduct for which he was dismissed was framed as:

> 'It is alleged that you have knowledge of the enormous losses of PMGS at PMR but you have made no full and frank disclosure to PMR about what you know that could assist PMR in its investigations herein.'

The reference to PMR means the employer, and PMG is a reference to "Platinum Group Metals", a short-hand term from several related precious

metals, which it is the business of the appellant to refine. The "losses" refer to unexplained losses of stock over several years.

[3] Hlebala had initially been charged and tried in a disciplinary enquiry on an additional charge of culpable participation in the theft of PMGs. On this charge, he had been acquitted for lack of evidence.

The nature of the charge

[4] Before addressing the facts, it is appropriate to deal first with the concept of "derivative misconduct" alluded to in the award and in the judgment on review, and in particular, the non-disclosure species of that concept, because, as shall be made plain, serious confusion existed among those responsible for instituting the disciplinary process about the concept and how to apply it appropriately.

[5] The phrases "derived justification" and "derived violation of trust and confidence" were coined by Cameron JA (as then he was in the LAC) in *Chauke and Others v Lee Service Centre CC t/a Leeson Motors* (*Leeson Motors*).[1] Later, the label "derivative misconduct" has tended to prevail in several awards given in the CCMA and was used in the judgment of Pillay J in *RSA Geological Services (A Division of De Beers) v Grogan N.O (RSA Geological Services*)[2]. a review of an award reported *as NUM and 7 Others v RSA Geological Services (A Division of De Beers).*[3]

[6] In *Leeson Motors*, the critical issue was the reliable identification of the persons who committed several acts of sabotage over a period of time. The management were unable to pinpoint the culprits. A request to the staff to disclose information pointing towards the perpetrators drew no response. Eventually, an ultimatum was issued that any further sabotage in respect of which the individual culprits remained unidentified would result in the dismissal of all. So it came to pass. The dismissal was upheld in the Industrial Court and on appeal. On the facts, the Labour Appeal Court held that it was

[1] (1998) 19 ILJ 1441 (LAC).
[2] (2008) 29 ILJ 406 (LC).
[3] (2004) 25 ILJ 410 (ARB).

properly to be inferred that the 20 workers were all culpably involved in the "primary misconduct", ie the actual acts of sabotage. By this, I understand the judgment to mean that the evidence did not warrant a conclusion that each and every worker physically sabotaged a vehicle in the workshop, but that all had associated themselves with the sabotage; an instance of common purpose.

[7] In an *obiter* observation, the court addressed the generic dilemma which confronts an employer faced with clear evidence of misconduct, but is unable to identify the specific culprits. Upon the premise that to tolerate such a problem by inaction was itself intolerable, the court recognised the propriety of an employer addressing the dilemma based either on the operational needs of the business or based on misconduct. Cameron JA then stated:

> '[31] In the second category [ie misconduct cases], two lines of justification for a fair dismissal may be postulated. The first is that a worker in the group which includes the perpetrators may be under a duty to assist management in bringing the guilty to book. Where a worker has or may reasonably be supposed to have information concerning the guilty, his or her failure to come forward with the information may itself amount to misconduct. The relationship between employer and employee is in its essentials one of trust and confidence, and, even at common law, conduct clearly inconsistent with that essential warranted termination of employment (*Council for Scientific & Industrial Research v Fijen* (1996) 17 ILJ 18 (A) at 26D-E). Failure to assist an employer in bringing the guilty to book violates this duty and may itself justify dismissal.
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> [32] This rationale was suggested, without being decided, in *Food & Allied Workers Union & others v Amalgamated Beverage Industries Ltd* (1994) 15 ILJ 1057 (LAC) (*FAWU v ABI)*. There a large group of workers had assaulted a 'scab' driver, leaving him severely injured. The company was unable to prove which of those present at the workplace at the time actually perpetrated the assault. All those who had clocked in and who were thus in the vicinity of the incident when it occurred were charged with the assault. None came forward at the workplace hearings or in the Industrial Court to affirm their innocence or to volunteer any evidence about the perpetrators. Nugent J, sitting with assessors John and Satchwell, suggested at 1063B that:

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

[33] This approach involves a **derived justification,** stemming from an employee's failure to offer reasonable assistance in the detection of those actually responsible for the misconduct. Though the dismissal is designed to target the perpetrators of the original misconduct, the justification is wide enough to encompass those innocent of it, but who through their silence make themselves guilty of a **derivative violation of trust and confidence.**

[34] In *FAWU v ABI*, the court held that, on an application of evidentiary principles, the failure by any of the workers concerned to give evidence, either in the workplace hearings or in the Industrial Court, justified the inference that all those present at the workplace on that day 'either participated in the assault or lent it their support' (at1064B-C). There were other inferences compatible with the evidence. But the inference of involvement was the most likely since (at 1064E):

'This is pre-eminently a case in which, had one or more of the appellants had an innocent explanation, they would have tendered it, and in my view their failure to do so must be weighed in the balance against them.'

[35] On the same basis, the court rejected the unattested suggestion that the appellants may have declined to come forward because of intimidation or from a sense of 'collegiality' (at 1064E-F). The court concluded, in effect from the absence of evidentiary self-absolution, that it was 'probable that all the appellants were indeed present when the assault took place and either participated therein or lent their support to it' (at 1064H).'[4] (emphasis added)

[8] Several important aspects of these *dicta* require clarification. Important to appreciate is that no new category of misconduct was created by judicial *fiat*. The effect of these *dicta* is to elucidate the principle that an employee bound implicitly by a duty of good faith towards the employer breaches that duty by remaining silent about knowledge possessed by the employee regarding the business interests of the employer being improperly undermined.

[4] *Leeson Motors* at paras 31-35.

Uncontroversially, and on general principle, a breach of the duty of good faith can justify a dismissal. Non-disclosure of knowledge relevant to misconduct committed by fellow employees is an instance of a breach of the duty of good faith. Importantly, the critical point made by both *FAWU v ABI* and *Leeson Motors* is that a *dismissal* of an employee is *derivatively justified* in relation to the *primary misconduct* committed by unknown others, where an employee, innocent of actual perpetration of misconduct, consciously chooses not to disclose information known to that employee pertinent to the wrongdoing.

[9] *Leeson Motors* does not elaborate on certain other dimensions of a justified dismissal for non-disclosure in such circumstances. I mention those that seem to be axiomatic.

[10] 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. The moral blameworthiness intrinsic in the non-disclosure implies a choice made not to tell, which is incompatible with actual ignorance of relevant facts as a result of incompetence or negligence.

[11] The non-disclosure must be deliberate. In my view, this too, follows logically from the value-choices intrinsic in the concept of a duty of good faith.

[12] More problematically, whilst the duty to disclose is uncompromised by the degree of seriousness of the wrongdoing, ie it ought to apply to late-coming as much as to theft, in my view, whether, in a given case the non-disclosure warrants dismissal, would be related, in part, to the degree of seriousness of the wrongdoing and to the effect of non-disclosure by a person in the position of that employee on the ability of the employer to protect itself against the given wrongdoing.

[13] The rank of the employee is irrelevant to culpability, but higher rank might be material to the degree of blameworthiness and to the appropriate weight to be given to circumstances which might reasonably be taken into account as

mitigation, given the role fulfilled by the given employee as regards security and adherence to procedures.

[14] Perhaps obvious, but important to stress in relation to the facts of this case, the disclosure of information relevant to the wrongdoing, pursuant to the duty of good faith, ought not be dependent upon a specific request for relevant information; often the wrongdoing *per se* might not be known to the employer. Mere actual knowledge by an employee should trigger a duty to disclose. Where a request for information about known wrongdoing or suspected wrongdoings has indeed been made, culpability for the non-disclosure is simply aggravated.

[15] Furthermore, the anterior premise of these considerations is that an employee is a witness to wrongdoing not a perpetrator. The misconduct lies within the bosom of a general duty of good faith to rat on the wrongdoers, not on culpable participation, even in a lesser degree than other perpetrators. The employee is thus not a person who has made common cause with the perpetrators. A disinclination to disclose the wrongdoing from a sentiment of worker solidarity or some other subjective sentiment of solidarity, falling short of common purpose is likely to be a typical explanation for non-disclosure, but is *per se* not a defence to a charge of a breach of a duty of good faith.

[16] Grogan A, in *National union of Mineworkers and 7 Others v RSA Geological Services (Supra)* addressed the issue and used the label "derivative misconduct". After citing *Leeson Motors* and *FAWU v ABI,* he held:

> '[29] None of the applicant employees was expressly charged with failing or refusing to assist the respondent in its efforts to bring the perpetrators to book. I accept, however, that wilful non-cooperation by employees with their employer's efforts to investigate serious misconduct, which has either been perpetrated (vide *ABI*) or is being currently perpetrated (vide *Leeson Motors*) can in the labour context constitute 'association' with the culprits of a type sufficiently close to be covered by the charges. In any event, a refusal to disclose information relating to an offence can in certain circumstances make a person an accessory. I accordingly accept that if any of the individual applicants deliberately withheld information relating to the scam from the

> respondent, he or she would be guilty of residual misconduct of the kind contemplated in *ABI* and *Lesson Motors*.
>
> [30] There are two requirements for proof of derivative misconduct: first, that the employee knew or could have acquired knowledge of the wrongdoing; second, that the employee failed without justification to disclose that knowledge to the employer, or to take reasonable steps to help the employer acquire that knowledge.'[5]

[17] These remarks in paragraph [30], in my view, require qualification. The notion that a breach of good faith occurs if an employee "could have acquired knowledge of wrongdoing" seems to me to too broadly or loosely stated. In my view, negligent ignorance of circumstances of which an employee ought to have been aware should found a basis for culpability within the compass of negligence itself rather than intrude into the realm of breaches of good faith. Furthermore, if as I have stated, actual knowledge is required to trigger the duty to speak up, the employer must prove actual knowledge not merely putative knowledge, and no room exists for considerations of negligent ignorance. Secondly, the notion that a refusal to disclose, pursuant to a duty of good faith, might be capable of justification in order to avoid *guilt* of a breach of the duty of good faith, seems to me to be incorrect. Logically, there is no room for such a defence. As alluded to above, the explanation for non-disclosure may afford, in a given case, mitigation of the culpability, but it would not stretch to a defence to the charge.

[18] In the review of that award, Pillay J in remarking upon the nature of derivative misconduct stated that:

> 'In the opinion of this court, derivative misconduct may diminish the culpability of the employee for the principal misconduct. In no way does it diminish the standard of proof. The employer must prove on a balance of probabilities that the employees knew or must have known about the principal misconduct and elected without justification not to disclose what they knew. If the employer discharges this onus then it may well, as in this case, also discharge the onus of justifying the dismissal on the principal misconduct of participating in,

[5] At paras 29-30.

> lending support to or associating themselves with the offence. In this case all the employees were charged with participating in the principal misconduct. On the facts the court must infer that all the employees participated in the principal misconduct in the absence of their evidence to the contrary. Derivative misconduct may therefore be an appropriate charge if employees who participated in the principal offence can be distinguished from those who knew about it. That distinction cannot be made in this case. As the employees failed to discharge the burden of rebuttal, the court must find that they all probably knew about the scam and participated in it.'[6]

[19] The remarks of Pillay J albeit not drawing attention to these qualifications mentioned above are to the same effect. Again, it is worthy of note, that the case was decided ultimately against the employees without resort to the concept of derivative misconduct.

[20] In my view, an appropriate way to discipline an employee who has actual knowledge of the wrongdoing of others or who has actual knowledge of information which the employee subjectively knows is relevant to unlawful conduct against the employer's interests would be to charge that employee with a material breach of the duty of good faith, particularising the knowledge allegedly possessed and alleging a culpable non-disclosure. This observation does not mean that the gravamen of such a charge might not also be articulated in another way, provided it is plain what is alleged and why it is alleged to be culpable.

[21] In the present case, there was an absence of an appreciation of these considerations.

The Facts and the merits of the case against Hlebela

[22] Hlebela was an operator in the appellant's platinum refinery. He was not a person of interest in the on-going losses of stock which had been experienced at the refinery for decades until, ostensibly, out of the blue, the SAPS informed the appellant that Hlebela was a person of interest in police investigations. Significantly, the police gave no information about Hlebela being engaged, to their knowledge, in particular nefarious acts. Instead, the

[6] *RSA Geological Services* at para 49.

police gave the appellant information about the "wealth" of Hlebela and his immediate family. The family possessed a house worth some R582,000, bonded for R200,000 and another house acquired for R14,000 which had been substantially improved, and four cars. He was also the owner of a business, Ceba Construction CC. Hlebela earned R14,000 per month. Apparently, it was thought that such wealth might be the proceeds of theft of PMGs because it was not plausible that he could have earned accumulated such a sum of capital from that salary.

[23] As a result, the very sophisticated security apparatus of the appellant was focussed onto Hlebela. Apparently one in four employees fulfils a security function.

[24] One line of enquiry was to use the police information to track down the assets known to be possessed by Hlebela or members of his family. The other step taken was to examine the employer's clocking security system.

[25] A sophisticated clocking system was in place which records employees clocking in and out of the various sections of the plant. Every swipe of an access card is time and place recorded and a pattern of movement throughout the plant is captured on record. A compendium of Hlebela's movements on several days was compiled. This reflected frequent movements through several sections of the plant, including sections in which ostensibly, so it was alleged, he had no apparent reason to be. It was not explained why an employee should be in possession of a swipe card that allows him access into places where he is, ostensibly, forbidden to be. The data so compiled was thought to justify an inference that the movements were suspicious.

[26] Thus it was that Hlebela was charged, in the terms described above, with culpable involvement in theft and of non-disclosure of information about wrongdoing.

[27] The disciplinary enquiry outcome was that the evidence of his wealth did not prove his culpable participation in theft. He was however found guilty of the non-disclosure charge. The "information" not disclosed, relied upon to convict

him, was information specified in demands, made to him *after he had been charged*, to reveal details of his personal financial affairs. He refused, claiming he did so on union advice that he was under no obligation to do so.

[28] It is difficult to grasp what the prosecutors in the disciplinary enquiry could have had in mind when the charge was put to Hlebela, if what was relied on to substantiate it, was a refusal to respond to *ex post facto* demands. Moreover, the undisclosed information relied on to substantiate the charge was not about wrongdoing and consequent stock losses, but about his personal finances. In my view, the demands made to reveal personal information were in the nature of a demand for discovery of information to be used in the enquiry. Even assuming, without deciding, that this information was pertinent to the enquiry and appropriate to demand from an employee, this information is not of the species of information that could form the substance of culpable non-disclosure pursuant to a duty of good faith. If a right to discovery in those terms existed, it ought to have been ventilated in the disciplinary enquiry, or at least in the arbitration. No attempt to do so was made. It was argued that had Hlebela 'confessed', in response to these demands, to the effect that his assets were acquired with the proceeds of bribes or rewards for other nefarious services rendered by him to other employees or strangers, such data could have been useful to detect the manner of the thefts and other culprits. There can be no doubt that this notion must be true on its own terms, but the contention does not address the real issue. Even an unreasonable refusal to disclose the employee's personal finances and a reasonable inference that he did so to conceal the manner of their acquisition is not capable of being logically linked to the fact that he has actual knowledge of wrongdoing by others. When the employer is thwarted by a non-disclosure to procure information, it cannot be argued that the employer can infer proof of what it suspects.

[29] Hlebela denied knowledge of how the losses occurred in both the disciplinary enquiry and the arbitration. The cross-examination of Hlebela addressed several issues but no evidence that he had actual knowledge was put to him; indeed, no evidence to substantiate such a contention was adduced. It must

be inferred that had the appellant possessed such evidence to substantiate such a contention, the evidence would have been adduced and the cross-examiner would have material with which to challenge Hlebela. Ironically, the cross-examination served to elicit answers which went some way to explaining that the so-called wealth was the fruits of the efforts of not only himself but also his wife, his mother and the occupants of a house who contributed to the bond payments on the house. The explanations may have been evasive, and also inadequate, but it is manifestly plain that the inadequacy of evidential material implicating Hlebela seriously undermined the prosecution of the case. Even cross-examiners need more than straw if they are asked to make bricks,

[30] The evidence about his movements around and about the plant also established nothing of value as no complementary evidence was adduced that he was in places he ought not to have gone to or that he had an opportunity to steal when he was up and about. To the extent he was challenged, he protested he was going about his work and no rebuttal was offered. The high watermark of the evidence about his "suspicious"; movements was the unsubstantiated opinion (not evidence) offered that his travels around the workplace were to "network" with other co-conspirators. This was complete speculation.

[31] In short, there simply was no case made against him. The award convicting him is one to which no reasonable arbitrator could have come upon a proper appreciation of the evidence adduced. It must be set aside.

The Relief and the cross-appeal

[32] The Labour Court, after setting aside the award, thereupon ordered compensation. That order is the subject of the cross-appeal.

[33] The sole basis relied on by the Labour Court to refuse reinstatement is the view taken of a portion of the cross-examination of Hlebela, in which, according to the judge *a quo*, Hlebela manifested mendacity. A reading of the record shows this conclusion to be flawed.

‘MR VENTER ….Besides having been employed as an operator, did the applicant have any outside business interests, like a business that he ran?

INTERPRETER: That he had?

MR VENTER: Did he have like an outside business, anything?

INTERPRETER: A business like what?

COMISSIONER: Any other business, he has no business? Basically, does he have any other means of income except his salary?

INTERPRETER: During the hearing I said I did not have

MR VENTER: I put to the applicant he is …. (intervenes)

COMMISSIONER: Excuse, ask him to answer the question. He was not asked what happened in the hearing. He asks him indeed a very simple question.

INTERPRETER: The answer is no.

MR. VENTER: I put to the applicant that he is either the owner or co-owner of Ceba Construction Projects CC.

INTERPRETER: What is the name of the company?

COMMISSIONER: Why do you say that thing? Just help me out.

MR. VENTER: Mr. Commissioner, I have not started leading evidence on page 43 (page 551). I am asking ancillary questions and I put to the applicant whether or not he has earned any outside outcome or does he have any business, and he said no. And I have now put to him that he is either the owner or the co-owner who has a vested interest in Ceba Construction and Project CC. I would like him to answer.

COMMISSIONER: So is he a member, a co-owner?

MR. VENTER: Member, co-owner of Ceba Construction and Project CC.

COMMISSIONER: Is the CC reflected somewhere on this one?

MR. VENTER: No, I am not leading evidence on page 43 yet, I have just asked to open there so long.

COMMISSIONER: Okay.

INTERPRETER: Through you, Mr. Commissioner, the applicant is not answering the question. I am the owner.

MR. VENTER: All right. Then why two questions before that, does he say no, now he says, "Yes, I am the owner?" Why does he do that?

INTERPRETER: Maybe it is the way you have put your question according to what you said, when you opened this page, you asked me if I am the owner or I am in the kind of business, so maybe it is because of the way you put your question.

MR. VENTER:q How does the applicant fund Ceba Construction and Project CC?

INTERPRETER: It depends on the job, when there is any job that I get."

[Record: v5/460 – 462]:

[34] The taking of the evidence in this matter was significantly muddied by what seems to be poor and inept interpretation, constant interjections from the arbitrator and abundant repetitions of questions which sowed confusion about what was being asked, and what supposed question was being supposedly answered. The cited passage is a splendid example of the mess that resulted.

[35] Upon a reading of this exchange, the Labour Court held that Hlebela contradicted himself by denying he had a business but when the name of Ceba Construction Products CC was put to him, he admitted he was the owner. Thus, so it was held, Hlebela lied and when caught out was forced to

retract his lie. However, in my view, on this record of the evidence, it cannot be concluded that Hlebela lied; the factual finding is incorrect.

[36] The confusion about what is being asked, what the answers were supposedly addressing and the confusion, in turn, about what was meant is painfully apparent. In my view, the answer "no" is probably given to the question about what means other than his wages does he have, and was not offered to the question about having another business. Later counsel, confused by the exchange assumed, *bona fide,* but incorrectly, that he has solicited an answer "no" to having no outside income *and* to not having a business. Of course, it is conceivable that the answer given meant what counsel contended it meant, but it is unsafe, on this record, to conclude that this understanding should be the preferred reading.

[37] In this regard, it is apposite to remark that it is the function and responsibility of arbitrators to oversee the taking of evidence in a manner that avoids this sort of morass. A disciplined exchange of questions and answers is essential to produce an intelligible body of evidence that accurately records what witnesses mean to say and from which inferences can safely be drawn when an adjudicative analysis is performed.

[38] Once the factual foundation relied upon by the Labour Court falls away, the order self –evidently must be set aside. Accordingly, no case exists why the default outcome of re-instatement should not follow.

Costs

[39] Both parties sought costs. Despite that stance, I am of the view that it would be inappropriate to order costs. Hlebela was represented by the union throughout the arbitration, the review and the appeal. The union and Hlebela, in terms of the order made by this Court, have a continuing relationship with the appellant. In the interests of promoting that relationship, no costs order shall be made.

[40] The parties took up the stance during the review application that it was worth squabbling about the costs incurred by the appellant in filing a practice note in

the review application, whereas it was Hlebela's responsibility to do so. The Labour Court indulged that pettiness and ordered Hlebela to pay those costs. That order of the Labour Court shall remain undisturbed as a memento for the parties of a tangential frivolity.

The order

[41] The Appeal is dismissed.

[42] The cross-appeal is upheld.

[43] The order of the Labour Court awarding compensation is set aside and substituted with an order that the first respondent:

43.1. be reinstated from the date of his dismissal,

43.2. be paid the remuneration he would have been paid, but for the dismissal, such payment to be effected within 30 days of the date he reports for work.

[44] The first respondent shall report for work not later than the first working day after one clear calendar month after the date upon which this judgment is delivered.

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Sutherland JA

Landman JA and Mngqubisa-Thusi AJA concurred.

APPEARANCES:

FOR THE APPELLANT:	Adv M Van As,
	Instructed by Cliffe Dekker Hofmeyr Inc
FOR THE FIRST RESPONDENT:	Adv J S Mphalani
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