IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: DA 16/2016

In the matter between:

NATIONAL UNION OF METALWORKERS of SA

(NUMSA) obo KHANYILE NGANEZI AND OTHERS **Appellants**

and

DUNLOP MIXING AND TECHNICAL

SERVICES (PTY) LTD **First Respondent**

DUNLOP BELTING PRODUCTS (PTY) LTD **Second Respondent**

DUNLOP INDUSTRIAL HOSE (PTY) LTD **Third Respondent**

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **Fourth Respondent**

COMMISSIONER ALMEIRO DEYZEL N.O. **Fifth Respondent**

Heard: **14 September 2017**

Delivered: **17 July 2018**

<u>The Order: (Sutherland and Coppin JJA; Savage AJA dissenting)</u>

(1) The appeal is dismissed with costs.

(2) The Order of the Labour Court is confirmed.

(3) The appellant shall bear the costs of the appeal.

Summary: Derivative misconduct – employer dismissing its entire workforce for strike-related misconduct – a category of employees dismissed for derivative misconduct because of their failure to provide the employer with information concerning the identities of the perpetrators of violent acts during the strike – Principle of derivative misconduct restated -central to this appeal is the question as to whether employees charged with derivative misconduct must be identified by the employer – or whether employer must prove their presence during the misconduct to be able to infer that they have actual knowledge of the perpetrators and that their silence makes out case with the perpetrator thereby breaching their duty of good faith towards the employer – the arbitrator was of the view that failure to positively place each employee at the scene where the misconduct occurred is detrimental to the employer's case of dismissing those employees based on the principle of derivative misconduct.

The Labour Court distanced itself from this approach and held that sufficient evidence on the probabilities placed the dismissed employees on the scene of the misconduct and drew an inference that on the probabilities, the employees had knowledge of the perpetrators –

Appeal

The Labour Appeal Court endorsed the Labour Court's view:

Held: The arbitrator did not give consideration to the fact that such presence and knowledge was capable of proof by means of indirect evidence, or by inference, and, accordingly, did not determine whether those facts had indeed been proven by inference. Further that the arbitrator adopted a narrow approach to the evidence by requiring the individual identification of each employee as being present as a *sine qua non* for the employees falling into a category of employees implicated on the basis of derivative misconduct. On the premise that presence or absence had to be established on a preponderance of probabilities, it must follow that indirect evidence in the form of inferences drawn from the whole body of evidence was a necessary category of evidence to assess. There is nothing in the evidence to gainsay the inference that, on the

probabilities, they each were present for at least some of the time, and equally probable, that they were each present most of the time, even if not everyone was religiously present on each and every day. From these circumstances, the inference can be drawn that it is improbable that each and every one of them could not have acquired actual knowledge of the misconduct perpetrated, more especially because the misconduct, as described earlier, was so spectacular.

Labour Court's judgment upheld and appeal dismissed.

The concurring judgment addressed the expanded version of the principle of derivative misconduct by the Court *a quo* if not attended to would novate the principle established thus far – the court is critical of the court *a quo´s* stance which found inapplicable in labour disputes the duty to speak and the right to silence applicable to criminal law - the court held that such notions negate what was held, namely, that the duty to speak is triggered by actual knowledge of those facts. This new notion of the principle also implies that an employee, who is otherwise totally ignorant of the misconduct and identity of any of the perpetrators, but who does not speak or exonerate himself, or herself, may be disciplined for some form of unspecified misconduct. Further that the protections in criminal law, which include the right to silence and the privilege against self-incrimination, were intended to protect citizens from unfair police and judicial interrogation. Similar protections would accordingly not be out of place in labour relations where potential tyranny by the police, State and the courts is replaced with potential tyranny at the hands of employers.

Further that the right to silence and the privilege against self-incrimination are, in any event, not protections that are confined to the criminal law. I do not agree with a blanket statement that there is no place for the right to silence in labour relations. The court ended with a word of advice to employers to define derivative misconduct in their disciplinary codes.

Minority

While appreciating the duty of good faith owed by an employee to his/her employer, the dissenting judgment (much as did the concurring judgment albeit for lack of another word) cautioned the use of the term derivative misconduct in

light of the victimisation that may suffer employee willing to come forward to divulge information – The court emphasised that any judicial development of the principle of derivative misconduct which had so far up to *Hlebela* be used only *obiter* in a number of decisions, would include an assessment of the appreciable risks which may arise for an employee in speaking out, in naming perpetrators or for purposes of exoneration and the dangers inherent which may arise in doing so. The court advocated for an inclination towards the policy considerations which *FAWU* suggested in the development of this complex area of law.

The minority espoused the view of the arbitrator in finding that the *onus* rests on the employer to prove that the employee had actual knowledge of the information sought before there is any duty on the employee to raise a defence. On the evidence before the arbitrator, actual knowledge could not, in its view, be inferred on the facts before the arbitrator.

Coram: Coppin JA, Sutherland JA *et* Savage AJA.

JUDGMENT

SUTHERLAND JA

Introduction

[1] On 26 September 2012, the first, second and third respondents, all associated companies (referred to collectively as Dunlop) dismissed their entire workforce. The context, broadly, was that a protected strike endured for about a month which was characterised by serious violence in defiance of an interdict by the Labour Court.

[2] The fairness of that dismissal was challenged by NUMSA on behalf of the dismissed employees and the matter was arbitrated.

[3] The arbitrator concluded that no procedural unfairness was perpetrated.

[4] In respect of substantive fairness, the arbitrator concluded that there were three categories of dismissed employees.

4.1. First, a category that had been positively identified as committing violence. Their dismissal was found to be fair.

4.2. Second, a category of employees who were identified as present when violence took place but who did not physically participate. Their dismissal was fair, according to the arbitrator, on grounds of what was called "derivative misconduct".[1]

4.3. A third category of employees who were not positively and individually identified as being present when violence was being committed. Their dismissal was found to be unfair. This category of employees was reinstated and comprises the appellant employees.

[5] Dunlop brought a review application in respect of the finding of substantive unfairness in the dismissal of the third category. The review application succeeded. This appeal lies against that outcome.

The controversy

[6] Central to the controversy is the meaning and scope of "derivative misconduct" and the question of whether the third category of employees, ie, the present appellant employees, is culpable in terms of its prescripts. The concept of derivative misconduct and in its application to the facts of this case is addressed in this judgment.

[7] It is important to grasp what this case is not about. It is not about the right to strike, which is Constitutionally guaranteed. The exercise of the right to strike presupposes that a strike is embarked upon within the parameters of prescribed norms and rules. Striking is an appropriate choice of collective action if it is functional to collective bargaining. When a strike is marred by violence and

[1] The arbitrator did not invoke the doctrine of common purpose, although that concept had been alluded to in pleadings by Dunlop along with the invocation of the idea of derivative misconduct. (Cited in paragraphs 18-20 of this judgment).

ceases to be functional to collective bargaining, the right to strike is not itself impaired by the employer's actions to address the violence.

[8] Equally important to the evaluation of the case, is the need to bear in mind two basic principles. First, the critical question and enquiry in every alleged unfair dismissal case is are whether the employer's decision to dismiss can be objectively justified; the proper approach to this question is always fact – specific. Second, in a review, the critical question is whether the decision of an arbitrator is one which a reasonable arbitrator could reach.[2] Accordingly, in keeping with an approach based on those basic principles, the critical facts, largely common cause, are narrated, and the application of the relevant principles to those facts are thereupon assessed.

<u>The relevant facts</u>

[9] A protected strike began on 22 August 2012. At once, violence became its hallmark. An interdict against the violence was sought and granted on the same day. The evidence put up to the Labour Court which led to the interdict included incidents of blockades in violation of picketing rules, attacks on cars and on the throwing of stones.

[10] In defiance of the interdict, the violence not merely continued but escalated over the following month, until the entire workforce was dismissed. The catalogue of barbarism included the following:

10.1. Arson: setting alight the homes of a manager and of a foreman.

10.2. Damaging several vehicles belonging to staff and visitors by stone throwing., smashing windows, beating people with sticks and on one occasion, throwing a petrol bomb.

10.3. Blockading the entrances with cut-down trees and with rubble.

10.4. Throwing stones at staff and visitors.

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[2] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC).

10.5. Assaults on staff, by stone throwing, kicking and intimidation.

10.6. Theft of a camera being used to record the violence.

10.7. Scrawling death threats on a billboard.

10.8. Violation of the agreed picketing rules.

10.9. Defiance of a court interdict.

[11] The dismissal was not preceded by any hearings. Dunlop invoked the justification for not doing so as contemplated in the code of good conduct on dismissals.[3]

[12] Calls to come forward and identify the individuals who were violent were made by Dunlop to the union and to the strikers during the strike. This aspect of the happenings is significant.

12.1. On 22 August, a letter was sent to the union, the letter described the acts of violence and demanded that the identities of the culprits be given to management. The letter made it clear that the culprits would be disciplined. Moreover, it declared that failure to provide the relevant information would lead to a collective hearing at which all employees were at risk of dismissal.

12.2. On 29 August, a further letter to the attorney of the strikers described more acts of violence, including notably, arson, death threats, and theft of the camera. Again, the strikers were called upon to identify the actual culprits, preparatory to a formal enquiry.

12.3. On 12 September, a further list of violent acts was given to the union. The letter drew attention to the contempt of the court order. The union's intervention was requested.

[3] Paragraph 4(4) schedule 8 to LRA; read also with paragraph 6. Also, the arbitrator held, at [143] of the Award, that the failure to hold a pre-dismissal hearing was justified, a finding that has gone unchallenged on appeal.

12.4. On 26 September, the strikers were told, *via* the union and by SMS to each, that they had been dismissed. The written dismissal notice alluded to a list of named culprits of violence and to "… other individuals…. dismissed on the basis of derivative misconduct".[4] The notice went further to state that the levels of violence inhibited it from convening disciplinary enquiries. Moreover, it stated:

> 'Your union and attorneys have been called on numerous occasions to provide information and details of who in fact are participating in the specific acts of misconduct and have failed to do so. The company therefore believes that the employment relationship has irretrievably broken down …. Should any individual wish to appeal the decision to summarily terminate the contracts of employment, a collective appeal will be held … on 3 October…. If the individuals have any reasons to believe why they should not be dismissed for derivative misconduct they should present evidence at the appeal hearing.'

[13] The letters were communicated to the strikers by the union, and their awareness thereof was not in dispute.

[14] A hearing was convened. Save for one employee, not one of the others, including the appellant employees, attended. The employee who did attend accounted for herself and she was reinstated on the strength of her evidence exonerating herself from any participation in violence or knowledge of who were the perpetrators of violence.

[15] An unfair dismissal dispute in respect of all three categories of employees made its way to arbitration by the CCMA. Prior to the commencement of the proceedings, the critical issues were articulated in an exchange of pleadings and in a pre-arbitration conference, duly minuted.

[16] The Statement of Claim, alleged that:

> 'The given reason for the dismissal of the remaining applicants was that they did not inform the respondents who were responsible for the alleged acts of violence, intimidation and damage to property that took place during the strike'.

[4] Appeal Record: Vol 24, p2434.

[17] Dunlop's plea in answer to this averment reads:

> ' ….the remaining [workers] have been dismissed for actual misconduct, derivative misconduct, or that all the [workers] were in common purpose, on the basis there were various incidents of violence and intimidation and aggression on the part of the [said workers] and after numerous attempts of calling on [Numsa] to furnish details of these specific individuals that are guilty of this misconduct and this resulted in acts of violence, aggression and intimidation escalated to such an extent that [Dunlop] dismissed employees for the said misconduct'. (sic) (underlining supplied)

[18] Paragraph 3.3 of the minute of the pre-arbitration conference records that:

> '…in the context of the background set out in the dismissal letters. The specific reason given by [Dunlop] for the dismissal of the 78 union members ….was derivative misconduct'.[5]

[19] In the arbitration proceedings, the witnesses for the strikers denied any violence had occurred, or, if it had, none of them were aware of it and hence not culpable. This version was held by the arbitrator to be patently false based on the rebuttal evidence, including video footage supporting the employer case. This factual finding was not challenged on appeal.

[20] A dismissal of some employees and the reinstatement others followed, premised on the category distinctions already described.

The concept of derivative misconduct [6]

[21] It must be recognised that the phrase "derivative misconduct" cannot be thought of as more than a label, a term of art to capture a rather complex idea. Its genesis is in the *obiter* articulation of *an example* of a breach of the employee's

[5] The 78 employees comprised both category 2 and category 3. It was in the award that the two categories were distinguished by reference to whether the employees had been individually identified as being present during the violence, on the facts as found by the arbitrator.

[6] *John Grogan* analysed the case law on this topic in *"Derivative misconduct" Not a trap to snare the (apparently) innocent* 2015 (31) Employment Law journal and again in *"Derivative misconduct- drawing in the net"* 2018 (34) Employment Law, including dealing with the judgment *a quo. Tarryn Poppesqou* has addressed the topic and the judgment of the court *a quo* in *"The sounds of silence and the concept of derivative misconduct and the role of inferences*" 2018 (39) ILJ 34-50.

duty of good faith by Cameron JA in *Chauke and Others v Lee Service Station CC t/s Leeson Motors*[7] *(Chauke)*.[8] The critical passages are these:

> '[27] The case presents a difficult problem of fair employment practice. Where misconduct necessitating disciplinary action is proved, but management is unable to pinpoint the perpetrator or perpetrators, in what circumstances will it be permissible to dismiss a group of workers which incontestably includes them?
>
> [28] Two different kinds of justification may be advanced for such a dismissal. In Brassey & others The New Labour Law (1987) at 93-5, the situation is posed where one of only two workers is known to be planning major and irreversible destructive action, but management is unable to pinpoint which. Brassey suggests that, if all avenues of investigation have been exhausted, the employer may be entitled to dismiss both.
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> [29] Such a case involves the dismissal of an indisputably innocent worker. It posits a justification on operational grounds, namely that action is necessary to save the life of the enterprise. That must be distinguished from the second category, where the justification advanced is not operational. It is misconduct. And no innocent workers are involved: management's rationale is that it has sufficient grounds for inferring that the whole group is responsible for or involved in the misconduct.
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> [30] The present case illustrates the second category. Management did not advance an operational rationale for the dismissal. It charged the 20 workers in the paint-shop and cleaning and polishing sections with misconduct - malicious damage to property - and concluded that they had all been guilty of it. Was this unfair?
>
> [31] In the second category, 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

[7] (1998) 19 ILJ 1441 (LAC).

[8] In *Chauke* the issue was the pattern of continual sabotage to vehicles in the employer's paint shop. Ultimately, the court held the employees culpable without resorting to the concept of derivative misconduct.

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.

[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' (at 1064B-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).' (underlining supplied)

[22] The notion of derivative misconduct was again addressed by Revelas AJA in *Foschini Group v Maidi* (*Foschini)*[9] esp at [47] where the Labour Appeal Court (LAC) endorsed the decision in *Chauke* without further comment on the concept.[10] Then in *Western Platinum Refinery Ltd v Hlebela and Others* (*Hlebela),*[11] the LAC again addressed the notion.[12] At paragraph [8], with reference to the cited passages in *Chauke*, it was stated that:

'Several important aspects of the dicta require qualification. 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. And, uncontroversially, and on general principle, a breach of the duty of good faith can justify dismissal. Nondisclosure of knowledge relevant to misconduct committed by fellow employees is an instance of a breach of the duty of good

[9] (2010) 31 ILJ 1787 (LAC).
[10] The case involved a stock shrinkage of 28% in a branch workshop which had only five employees. Tolerable shrinkage was 2%. They were all dismissed for "team misconduct". Despite the opportunity none of the five offered any testimony to rebut the accusations of complicity in the theft. (see paragraphs 41– 49 of that judgment on the approach to proof of their culpability).
[11] (2015) 36 ILJ 2280 (LAC).
[12] In *Hlebela*, the issue was whether the employee was withholding information about the theft of platinum ores which the employer was engaged in refining, and how it might be proven that he had such knowledge. In *National Transport Movement v M Tau and Others* (2018) 39 ILJ 560 (LAC*),* a decision heard before the hearing of this appeal and in respect of which judgment was delivered afterwards, Kathree- Setiloane AJA dealt with the topic of derivative misconduct, and endorsed *Hlebela.* In that case, it was found that the employer had failed to make out a case to invoke derivative misconduct to justify a dismissal and had rather conceived its case on the basis of collective misconduct, an illegitimate premise.

<u>faith</u>. Importantly the critical point made by both *FAWU* and *Leeson Motors* is that a dismissal of an employee is <u>derivatively justified in relation to the primary misconduct</u> committed by unknown others, where an employee, innocent of actual perpetration of misconduct, <u>consciously chooses not to disclose information known to that employee pertinent to the wrongdoing.</u>' (Underlining supplied)

[23] As is plain from the cited passages in *Chauke*, and in *Hlebela*, the use of the term "derivative" was used in relation to the "justification" for the attribution of culpability for a breach of the duty of good faith. It is not obvious that Cameron JA intended to coin a new noun-phrase: "derivative misconduct" but the term, used in that way, has passed into the lexicon of labour jurisprudence, and has endured.[13] Accordingly, in terms of *Chauke* and *Hlebela*, the utility of the label "derivative misconduct" is to succinctly label a species of misconduct evidencing a breach by an employee of the duty of good faith comprising a refusal to disclose information relevant to harm being perpetrated by other persons against an employer's interests. Accordingly, by reason of such omission, the culpability of the actual perpetrators of particular misconduct, is fairly attributed to them too.[14]

[24] Importantly, the foundational passages in *Chauke* must be read for their substantive allusions to the elements of fairness about an employee's dismissal, other than as an "actual perpetrator".[15] The question posed by Cameron JA was: "Where misconduct necessitating disciplinary action is proved, but management is unable to pinpoint the perpetrator or perpetrators, in what circumstances will it be permissible to dismiss a group of workers which incontestably includes them?" The analysis in *Chauke* is directed at giving the answer to this question, and is rooted in the nature of the employment

[13] The question arises whether the label "derivative misconduct" is one that deserves to be retained, or whether another formulation might be attempted. Notwithstanding the temptation to theorise the proposition and clad it in fresh linguistic garments, in my view, no real usefulness can come of that exercise, and I am content that it lives on as a term of art. My colleague, Savage AJA is more critical of the use of the term; See para99 of her judgment.

[14] This species of misconduct is not to be conflated with criminal doctrine of common purpose which addresses the notion that persons who identify with a course of action by their acts of association with its perpetration are equally guilty of the deed perpetrated.

[15] The significance of the point that persons guilty of derivative misconduct are not 'actual perpetrators' must be emphasised. The breach of the employment relationship is rooted not in the act itself but in the failure to render support to the employer.

relationship, the critical significance of which was illuminated by the remarks of Nugent J in *Fawu and Amalgamated Beverage Industries Ltd (FAWU*[16] (as cited in *Chauke*) about the sound policy rationale within a labour relations context that an employee's passivity and silence which denies help to an employer to protect its legitimate interests is intolerable.

[25] The true enquiry remains whether the facts adduced constitute convincing evidence of a breach of the duty of good faith, and accordingly, the elements of a good faith relationship dictate the scope of the enquiry. The practical application of the concept of derivative misconduct must be confined within limits that serve the sustainability of trust and confidence in an employment relationship. Accordingly, derivative misconduct finds appropriate application to proven circumstances in which a number of employees find themselves potentially implicated in misconduct by reason of their membership of a relevant group or category, and in respect of which, on reasonable grounds, suspicion arises that the persons comprising the group or category must know of material information relevant to the perpetration of harm to the employer by persons within that group or category. Critically, such knowledge includes knowledge of facts that may help to identify the actual culprits within the group.[17] Thus, to illustrate: if acts of misconduct occur at a time when the night shift are on duty, the employees on the day shift cannot, logically, be implicated because they are not members of the relevant group. By contrast, where a number of employees make common cause with a (legitimate) course of conduct over time those participants form a relevant group. If and when the propriety of acts carried out *en passant* that course of conduct is placed into question, all those employees who are identified being participants in the course of conduct in which the relevant group is implicated because they must, in those circumstances, *on the probabilities,* be possessed of information relevant to the *en passant* misconduct.

[26] *Hlebela* went on to address the issue of negligent ignorance of relevant facts and held that imputed or constructive knowledge of relevant facts was not the

[16] [1994] 12 BLLR 25 (LAC).
[17] See *Chauke* at para 31.

kind of circumstances capable of being encapsulated by the concept of derivative misconduct. In *Hlebela,* at [10] – [11] it was held:

> '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. The non-disclosure must be deliberate….' (underlining supplied)

[27] This exclusion is justified because the gravamen of derivative misconduct is, on policy grounds, limited to deliberate non-disclosure. The exclusion of these mentioned circumstances ought not to be thought, in any way, to inhibit the proof of actual knowledge being established by inferences to be drawn from a matrix of proven facts and relevant circumstances. What is in the head of any person is, logically, unknowable. In real life, proof of knowledge is established by adducing evidence that, taken as a whole, results in proof that the person must have had the relevant knowledge, as the most reasonable inference. *Prima facie* proof of facts, from which such an inference can be fairly drawn, *which remain unrebutted*, results in proof on a balance of probabilities that the relevant knowledge was indeed possessed by the employees.

[28] Because of the conclusions reached about the evidence adduced and the proper inferences that are to be drawn therefrom, which are dispositive of the factual issues, it is unnecessary, in my view, that this judgment explore, as did the court *a quo,* the delicate issue of the obligations, if any, of an employee to respond to an employer upon being interrogated about alleged or actual misconduct of others and whether or not the concept of derivative misconduct as explicated in *Hlebela* may in an appropriate case, be expanded or extended.[18]

[18] *See: Grogan (2018) Supra, and Poppesqou, supra,* at 44. In both articles the writers deal with the notion of an extension being evidenced in the judgment *a quo.*

<u>The application of the concept of derivative misconduct to the facts</u>

[29] The decision in *RSA Geological Services v Grogan NO*[19] alludes at [93] to an *onus* on an employer to prove, on the probabilities, that the employees "knew or must have known about the principal misconduct". We agree that this is an appropriate approach. Accordingly, once it can be inferred from the evidence that the appellant employees probably were present during the violence, that *onus* shall be satisfied, and absent a positive rebuttal, proof that the employees "knew or must have known" who perpetrated violence is established.

[30] The reason why the arbitrator held that the employees could not be culpable on the basis of derivative misconduct was because they had not been identified *individually* as being present when violence occurred and therefore, so it was reasoned, no obligation could arise to offer a response to the employer's demand for information about the real villains. In line with this thinking, the arbitrator held that culpability in terms of derivative misconduct could only be triggered when the employer discharges an *onus* to show that the employees *must* have the relevant knowledge, and if in respect of each employee, their presence during violence was not individually proven, *ergo*, there was no reason to suppose they could have the relevant knowledge, and thus culpability was unproven.[20]

[31] Gush J in the Labour Court held that this approach was a material misdirection because the arbitrator did not apply his mind to the proper inferences that could be drawn from the evidence as a whole, which included the inference that the employees were indeed present during the perpetration of the violence. Thus, it was in this respect that the Labour Court and the arbitrator differed on the appropriate *factual* findings. The basis for the finding by the arbitrator that the second category of strikers was fairly dismissed was premised on the factual finding that they were individually identified as present. That distinction made by the arbitrator was therefore critical to the rationale of the award.[21]

[19] (2008) 20 ILJ 406 (LC).
[20] The award at paras 78, 79 and 81.
[21] Judgment a *quo* at paras 55 and 61.

[32] It must be correct that the arbitrator indeed adopted too narrow an approach to the evidence by requiring the individual identification of each employee as being present as a *sine qua non* for the employees falling into a category of employees implicated on the basis of derivative misconduct. On the premise that presence or absence had to be established on a preponderance of probabilities, it must follow that indirect evidence in the form of inferences drawn from the whole body of evidence was a necessary category of evidence to assess. Inasmuch as it is plain that the arbitrator did not do so, as he viewed individual positive identification as the threshold, Gush J *a quo* was correct to hold that this was a decision to which a reasonable arbitrator could not come, *if* a proper inference could, indeed, be drawn that, on the probabilities, the employees were present during some, or all, of the violence.

[33] The Labour court alluded to several aspects of the evidence to reach the conclusion that there were indeed inferences to be drawn from the whole body of evidence that, on a balance of probabilities, supported the conclusion that the appellant employees were present during the violence.

[34] First, Dunlop's case was that all the dismissed employees were on strike. This contention went unchallenged; indeed, the evidence from the employees accepted that they were all on strike. Accordingly, the question arises whether strikers would absent themselves from the picket line? Put differently, over the course of the month that the strike endured, it may be asked whether it is at all probable that the appellant employees were each present on at least some occasions, even if it be assumed that they might have not all been present on every day? Moreover, the very act of striking, being a collective activity in which worker solidarity is a critical dimension, it may be asked, how likely would it be that strikers would absent themselves from the demonstrations of resolve and solidarity which are the very fibre of strike culture? On this aspect, the employees chose to be silent. Thus, there is nothing in the evidence to gainsay the inference that, on the probabilities, they each were present for at least some of the time, and equally probable, that they were each present most of the time, even if not everyone was religiously present on each and every day.[22] From

[22] See the *dictum* of Nugent JA in *Fawu* at 1064E, cited in *Chauke* (Supra).

these circumstances, the inference can be drawn that it is improbable that each and every one of them could not have acquired actual knowledge of the misconduct perpetrated, more especially because the misconduct, as described earlier, was so spectacular.

[35] Second, the case advanced on behalf of all the employees was that no violence occurred, or if it had occurred they were ignorant of it. This version was proven to be a palpable lie. That finding is pertinent to the issue of the inferences to be drawn in respect of those persons not individually identified as being present. 37 of their co-employees were positively identified as perpetrating violence in the presence of a throng of employees.[23] The appellant employees, along with all other employees, made common cause with this lie. An inference adverse was justified.

[36] Third, the opportunity both at the appeal hearing (which they spurned, and at the arbitration hearing where they remained silent) to distance themselves from the violence by claiming they were absent, or were innocent bystanders and, if they could, identify the culprits was deliberately not seized.

[37] It was argued that it was not the case of Dunlop that the appellant employees were present during the violence; ie their culpability would rest simply on their participation in the strike and their refusal to speak up. Ignoring for the purposes of analysis that it was not a defence advanced by the employees that they were absent during the violence, the contention is at cross purposes with the issues that arise for decision. The rationale of the award was that proof of presence dictated whether an employee was fairly dismissed or not; employees in category 2 were held to fairly dismissed on that premise and have not appealed that outcome and employees in category 3 who were found guiltless are the subject of this appeal. This is the crux of the controversy before the appeal court. The Court *a quo* addressed that key finding in the award and overturned it. The issue of the presence of the appellant employees was, at worst for Dunlop, always latent in the dispute, even if not articulated in as many words.

[23] This finding did not mean that only the 37 persons, so identified, were the only culprits of violence. The *locus* of the controversy is the identity of the other culprits not caught on camera or pointed out by managerial staff.

The consideration that some employees may not have been present on every occasion violence was committed was not left out of account; however, no one ever advanced a case of absence, preferring instead, a cat and mouse approach to the adducing of evidence. Without doubt, the issue of presence during the violence was central to the dispute, regardless of the exact articulation of the issues before or during the proceedings.

[38] Gush J, *a quo,* held:

> [74] 'By failing to consider whether or not the applicants evidence created [an]inference that the respondent employees were present or under an obligation to exonerate themselves the third respondent does not consider whether the failure to give evidence or provide an explanation was acceptable or whether such conduct constituted derivative misconduct.
>
> [75] In the *ABI* matter the court when considering the inference to be drawn said the following:
>
>> The inference which the respondent seeks to draw from the evidence is that all the appellants were present at the time the assault took place, and either actively participated in the assault or at least supported and encouraged the actual perpetrators. It is a cardinal rule of logic when reasoning by inference that the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn (*R v Blom* 1939 AD 188 at 202-3). In my view all the evidence in the present case is consistent with that inference.
>>
>> The appellant's counsel submitted that the evidence shows no more than that most of the crewmen were present when the assault took place, and that this does not assist in establishing as a matter of probability the presence of any one of the appellants. The reasoning is undoubtedly correct, but in my view, none of the evidence establishes that it was only a majority of the appellants who were present. The evidence is equally consistent with them all being there.
>>
>> The fact that the evidence is consistent with the inference sought to be drawn does not of course mean that it is necessarily the correct inference. A court must select that inference which is the more

> plausible or natural one from those that present themselves (*AA Onderlinge Assuransie Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A)). In the present case however no alternative inferences have been advanced which have a foundation in the evidence. It was suggested in argument that one or more of the appellants may have been absent, or may have been unwittingly caught up in the events. This, however, is no more than speculation, as there is no evidence to suggest that this is what occurred. In my view 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.

> [76] I am satisfied that the only reasonable and plausible inference that can be drawn from the evidence is that the respondent employees were present during the strike and accordingly during the misconduct. If they weren't present or had no information regarding the perpetrators they would have said so. They, despite the opportunities afforded them, did not.

[39] I agree. In summary, therefore:

39.1. Proof of the presence of the appellant employees during violence has been proven on a balance of probabilities. The Labour Court was correct to find that the arbitrator acted unreasonably in failing to conclude that the appellants were present at any of the scenes of misconduct and had actual knowledge of the misconduct and of the identity of any of the perpetrators thereof.

39.2. It had been implicit in the employer's case that the appellants were present and had such knowledge. The absence of direct evidence to that effect seems to have persuaded the arbitrator to arrive at his impugned conclusion. The arbitrator did not give consideration to the fact that such presence and knowledge was capable of proof by means of indirect evidence, or by inference, and, accordingly, did not determine whether those facts had indeed been proven by inference.

39.3. Circumstantial evidence relating to the appellants' presence at the scenes of misconduct and their knowledge of the misconduct and/or any of its perpetrators was placed before the arbitrator. Since it constituted an important component of the evidential material in the arbitration, it was incumbent upon the arbitrator to consider whether to draw the required inferences, by complying with, well established, rules of logic.[24] The failure to do so was not reasonable.

39.4. The inference sought to be drawn in this case was whether the appellants were present at any of the scenes, or incidents of misconduct, but more crucially, whether each of them had actual knowledge of any of the misconduct, or of any of the perpetrators thereof. All of the appellants were on strike with the other workers. The inferences that each of the appellants was present at some or all of the incidents where the misconduct occurred, and that they had actual knowledge of such misconduct and/or of the perpetrator(s) thereof, are consistent with the proven facts and are the only plausible inferences that can be drawn.

39.5. There was enough evidence, although not conclusive, that called for an explanation. The false evidence tendered through the witnesses called by the Union, and the failure by the appellants to give evidence themselves in those circumstances, are factors that could, justifiably, be placed in the balance against them.

39.6. A reasonable arbitrator would not have found otherwise.

<u>The Sanction of Dismissal</u>

[40] Accordingly, applying basic principles, as alluded to earlier, the conclusion must be reached that the appellant employees' breach of the duty of good faith was serious enough to warrant dismissal and was wholly appropriate in the circumstances. Gush J articulated the position thus, which warrants endorsement:

> '[77] It is entirely reasonable for an employer to expect protected industrial action to be accompanied by orderly conduct by those employees who have embarked on the industrial action. This is particularly so in circumstances

[24] *Minister of Safety and Security v Madikane and Others* (2015) 36 ILJ 1224 (LAC) at para 4*; P J* Schwikkard and S E van der Merwe *Principles of Evidence* 4 ed (2015) p 23.

where the employer has not only entered into a picketing rules agreement with the representative trade union regulating the conduct of striking employees but has as a result of the conduct of the employees been forced to obtain an interdict restraining the striking employees from committing misconduct. That strikes are often visited with violence and misconduct does not justify such acts'.

Conclusions

[41] Accordingly:

41.1. The arbitrator erred in not assessing the evidence for inferences from which, on the probabilities, the appellant employees were shown to have been present during the perpetration of violence;

41.2. The evidence supported an inference of their presence during violence;

41.3. The Labour Court was correct to conclude that the award ought to be set aside;

41.4. The appellant employees breached their duty of good faith towards their employer by failing to disclose the identity of the culprits.

41.5. The appeal must fail.

Costs

[42] Both parties seek costs. Accordingly, costs shall follow the result.

The Order

(4) The appeal is dismissed with costs.

(5) The Order of the Labour Court is confirmed.

(6) The appellant shall bear the costs of the appeal.

____

Sutherland JA

Sutherland JA (with whom Coppin JA concurs)

COPPIN JA

[43] I agree my colleague Sutherland JA that the appeal must be dismissed, but I respectfully do not agree with certain aspects of the concept of "derivative misconduct" espoused by the court *a quo* in this matter, which commentators regard as a radical extension of the concept.[25] They relate particularly to the duty to speak and the right to silence. I consider this separate judgment to be necessary, lest my silence on those aspects is construed as concurrence.

[44] The background facts have been elegantly narrated by Sutherland JA in his judgment and the detail of it does not require repeating here, save for those facts, or aspects thereof, that require mention in the course of this judgment.

[45] As pointed out by Sutherland JA, the review before the Labour Court and consequently, this appeal, only concern the fate of those employees who were not identified by direct evidence as being present in the crowd at various incidents of misconduct that marred the strike, and whose reinstatement was ordered by the fifth respondent (the arbitrator) in terms of his impugned award. I shall refer to the first to third respondents collectively as "the employer" and by their individual names where the context requires it.

[46] The appellants were dismissed for "derivative misconduct" because of their failure to provide the employer with information concerning the identities of the perpetrators of the various acts of violence, intimidation and harassment committed in the course of what would have been a lawful strike, which started

[25] See, *inter alia* J Grogan "*Derivative Misconduct - Drawing in the net*" 2018 (34) part (February) ; and T Poppesquo:"*The sounds of Silence: The Evolution of the Concept of Derivative Misconduct and the Role of Inferences"* 2018 (39) ILJ 34-50.

on 22 August 2012 and endured until about almost the end of September 2012. The term "derivative misconduct" might not be ideal, or truly descriptive of the nature of the misconduct referred to, but is used in this judgment for convenience and for want, at this juncture, of a distinctive and easily useable, alternative term.

Decisiveness of the circumstantial evidence

[47] This appeal in my view is capable of being decided on the, relatively, simple basis that the arbitrator had not concluded reasonably that it had not been proven by the employer that the appellants were present at any of the scenes of misconduct, had actual knowledge of the misconduct and/or any of the perpetrators thereof, and had deliberately withheld the information.

[48] It is apparent from the arbitrator's award that even though it had been implicit in the employer's case that the appellants were present and had such knowledge, the absence of direct evidence to that effect seems to have persuaded the arbitrator to arrive at his impugned conclusion. The arbitrator did not give consideration to the fact that such presence and knowledge was capable of proof by means of indirect evidence, or by inference, and, accordingly, did not determine whether those facts had indeed been proven by inference.

[49] Circumstantial evidence relating to the appellants' presence at the scenes of misconduct, their knowledge of the misconduct and/or any of its perpetrators, and their failure to disclose what was in their knowledge, was placed before the arbitrator. Since it constituted an important component of the evidential material in the arbitration, it was incumbent upon the arbitrator to consider whether to draw the required inferences, by complying with, well established, rules of logic.[26] The failure to do so was not reasonable.

[50] The inferences sought to be drawn in this case was whether the appellants were present at any of the scenes, or incidents of misconduct, but more crucially, whether each of them had actual knowledge of any of the misconduct,

[26] *Minister of Safety and Security v Madikane and Others* (2015) 36 ILJ 1224 (LAC) para 4*; P J* Schwikkard and S E van der Merwe *Principles of Evidence* 4 ed (2015) p 23.

or of any of the perpetrators thereof, and if whether their failure to disclose the information of which they had actual knowledge, was deliberate.

[51] All of the appellants were on strike with the other workers. There were several incidents of misconduct that occurred over the period of the strike. The arbitrator found that the employers' witnesses' evidence "proved an overwhelming balance of probabilities that the acts of misconduct testified to, did in fact occur". My colleague, Sutherland JA, has listed these acts of misconduct.

[52] The employer requested the union, and the striking workers (which included the appellants), through the union, to assist with the identification of the perpetrators of the various acts of misconduct committed during the course of the strike. There was no prompt response to the request and, significantly, no denial that any of its members were present when the acts of misconduct were perpetrated, or of their members' knowledge of such wrongdoing, or of the identity of any of the perpetrators thereof. Instead, the Union, whom its members, including the appellants, entrusted with their interests, including their legal interests relating to this matter, denied that there were any acts of misconduct committed during the course of the strike. The evidence presented at the arbitration, to that effect, by the union on behalf of its members, including the appellants, was rejected as false, and rightly so.

[53] The inferences that each of the appellants were present at some or all of the incidents where the misconduct occurred, that they had actual knowledge of such misconduct and/or of the perpetrator(s) thereof, and that their failure to disclose such knowledge was deliberate, are consistent with the proven facts and are the only plausible inferences that can be drawn. There was enough evidence, although not conclusive, that called for an explanation. The false evidence tendered through the witnesses called by the union, and the failure by the appellants to give evidence themselves in those circumstances, are factors that could, justifiably, be placed in the balance against them. A reasonable arbitrator would not have found otherwise.

[54] Culpability for the derivative misconduct in question consisted of no more than the following: there was a duty on appellants as individuals to speak, because they had actual knowledge of one, some, or all of the incidents of misconduct and/or of the identity of the perpetrators thereof; their failure to exonerate themselves, by either disclosing such knowledge to the employer, or raising a defence that justified the non-disclosure of such information, such as for example, intimidation, or the fear of reprisals and absence of any effective protections against the same, was deliberate and therefore culpable. In my view, this is consistent with what was held by this Court in *Hlebela.*

[55] The version of the principle seemingly espoused by the court *a quo*, in a passage of its judgment[27] quoted by Grogan,[28] does not articulate that the duty to speak only arises once the employee has actual knowledge of the primary wrongdoing and/or the identity of the perpetrator(s) thereof, and that to be culpable, the failure to disclose the knowledge must be deliberate, as was held in *Hlebela,* and creates the impression that the mere presence of an employee at a scene where misconduct occurred triggered a duty for him to exonerate himself. Read in context, it is my view that it is clear that that is not what the court *a quo* meant, but if I am wrong, and that was indeed what the court *a quo* held, then it was wrong.

[56] To provide context to my views on the aspects I do not agree with, it is necessary to briefly trace the development of the principle of derivative misconduct.

Brief history of the development of the principle

[57] In *FAWU*, in the course of considering what weight if any ought to be given to the failure of the appellants in that case to give evidence, Nugent J, having referred to the trite approach in civil proceedings stated: “in the field of industrial relations, it may be that policy considerations require more of an employee then 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

[27] See: *Dunlop Mixing & Technical Services (Pty) Ltd and Others v National Union of Metalworkers of SA obo Khanyile and Others* (2016) 37 ILJ 2065 (LC) at para 79.
[28] See above.

action". Nugent J pointed out that even though this had been an issue raised in the hearing before the Industrial Court, it was not necessary to deal with it in view of the conclusion to which he had come, namely, that the employees' complicity and involvement in the assault had been proved by inference. The quoted *dictum*, however, contained the seed which eventually blossomed into the notion of the principle of "derivative misconduct" that is the subject of this discussion.

[58] In *Chauke,* Cameron JA briefly elaborated on the nature of and rationale for the principle, but did not find it necessary to apply it in light of the court's view in that matter, namely, that the shared responsibility for the primary misconduct was properly inferred by the employer and that the dismissals were, accordingly, justified. Whereas, it was merely stated in *FAWU* that there may be "policy considerations" in the field of industrial relations that required more of an employee than to remain passive in circumstances as dealt with there, in *Chauke*, where a number of workers had been charged with malicious damage to property, and had, in the absence of direct evidence that they were involved, been found guilty of it, Cameron JA elaborated on the principle, stating: "…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 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 26 D-E). Failure to assist an employer in bringing the guilty to book violates this duty and may itself justify dismissal."[29].

[59] Cameron JA went on to explain that: "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.

[29] Ibid at para 31 at p1447.

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."[30].

[60] In *National Union of Mineworkers and Others v J Grogan NO and Another,*[31] *(NUM)* this Court had another opportunity to consider the nature and application of the concept. It followed and endorsed what had been said about the concept in *FAWU* and in *Chauke*. McCall AJA, writing for the court, made it clear that "it must be accepted that an employee may, in appropriate circumstances, have a duty to assist management by bringing forward information within his knowledge about the wrongdoing of other employees….'. There the court also appears to have endorsed the view (of the arbitrator in that matter) that the employer had to prove on a balance of probability that each employee was in possession of information that could have assisted the employer in its investigations.[32]

[61] In *Foschini*, this Court referred to what was stated in *Chauke* concerning the principle and seemingly concluded in light of it, although as an alternative, that the employees in that case had been fairly dismissed. There the entire team of five employees was found guilty on a charge of gross negligence. It was alleged that they collectively failed to prevent stock losses resulting in financial loss for the employer and causing an irretrievable breakdown in the trust relationship between them and the employer. The employees had represented themselves at the disciplinary enquiry and their explanation for the stock losses had been rejected. The court confirmed that the dismissals of the employees were justified on the basis of collective misconduct. But the court did not say anything more about the principle than what was stated in *Chauke*.

[30] Ibid at para 33 at 1447.
[31] *National Union of Mineworkers and Others v J Grogan NO and Another* (JA 30/08) [2010] ZALAC 12 (1 June 2010) ('NUM').
[32] See *National Transport Movement (NTM) and Another v Passenger Rail Agency of South Africa Ltd (PRASA)* [2018] 2 BLLR 141; (2018) 39 ILJ 560 (LAC) at para 31.

[62] In *Hlebela,* this Court put more flesh on what, until then, had largely been *obiter* views concerning the principle. This Court found it necessary to clarify important aspects of those *dicta.* Sutherland JA, writing for this Court, stated:

> '[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 properly undermined. 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 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] …
>
> [10] The undisclosed knowledge must be actual, not imputed destructive knowledge of 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, i.e. 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] …
>
> [14] …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 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 duty of good faith. . . .'[33].

[63] It is noteworthy that in *Hlebela,* this Court emphasised that "actual knowledge is required to trigger the duty to speak up, the employer must prove actual knowledge not merely putative knowledge, and no rule exists for considerations of negligent ignorance".[34] A view was also expressed as to how to deal with an employee with actual knowledge of the main wrongdoing. Sutherland JA stated: "An appropriate way to discipline an employee with 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 the 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."[35]

[33] *Hlebela (*above) at paras 8-15 at 2284-2285.
[34] *Hlebela* (above) at para 17 at 2286.
[35] *Hlebela* (above) at para 20 at 2287D-E.

[64] It is also noteworthy that in *PRASA,*[36] in a decision handed down by this Court after we had heard argument in this matter, the elements of this concept of misconduct, as explained in *Hlebela* and in *NUM,* were confirmed.[37]

Alleged Expanded version of the principle

[65] Poppesquo[38] refers to certain *dicta* in the court *a quo*'s judgment that is said to suggest that all employees, even those who were not present at any of the scenes of violence, had a duty to come forward to exonerate themselves by providing an explanation. That view is wrong for the reasons I have already mentioned earlier. Those remarks were made by the court *a quo* in the course of its discussion of the duty of good faith and the right to remain silent. The court *a quo* stated, *inter alia*, that the "right to remain silent is sacrosanct in criminal matters where accused persons are presumed to be innocent until found guilty. This is not a criminal investigation and the presumption of innocence does not apply". In my view, this statement was unnecessary, and is in fact wrong.

[66] Such notions negate what was held in *Hlebela,* namely, that the duty to speak is triggered by actual knowledge of those facts. This new notion of the principle also implies that an employee, who is otherwise totally ignorant of the misconduct and identity of any of the perpetrators, but who does not speak or exonerate himself, or herself, may be disciplined for some form of unspecified misconduct. Further, according to this notion, there is no place in labour relations for the right to remain silent, and, by implication, for safeguards, similar to those found in the criminal law to protect the liberty of accused, arrested and detained persons. The notion, seemingly, draws no distinction between the privilege of self-incrimination and the right to remain silent that is essential to give effect to that privilege.

[67] This expanded notion implies the employer may question any employee whom it, in effect (based on its subjective suspicions) chooses to question, and it is for that employee to exonerate himself or herself. That would include, establishing that the employer had no reasonable basis for assuming that the

[36] *PRASA* (above) at paras 30 and 31.
[37] *NUM* (above) at para 62.
[38] See above.

employee had actual knowledge of the principal wrongdoing and/or the perpetrator(s) of it. This, in my respectful view, besides (effectively) imposing a duty on an employee to establish his or her innocence, overlooks or discards certain fundamental rights of employees, including the right to be deemed innocent of any wrongdoing. Since it is generally provided in disciplinary codes, consistent with the (generally) adversarial nature of disciplinary proceedings, that the employer bears the *onus* to prove the misconduct alleged, completely denying the employee the right to silence and the privilege against self-incrimination, seems to be inconsistent with the ethos the Labour Relations Act 66 1995 (LRA) seeks to promote, and to be unfair. An employee should be able to freely exercise his or her (hopefully informed) choice concerning the answering of questions, even though the choice made might be detrimental to him, or her.

[68] While one appreciates that the employer must at least be able to invite an employee to disclose his or her actual knowledge (if any) of misconduct, and warn the employee of the consequences of refusing to do so, the absence of rules regulating more extensive questioning by the employer leaves ample room for abuse. The very notion that an employee can be sanctioned for not speaking, irrespective of whether he or she has actual knowledge of the principal misconduct, or the identity of any of its perpetrators, is in itself potentially tyrannical. The protections in criminal law, which include the right to silence and the privilege against self-incrimination, were intended to protect citizens from unfair police and judicial interrogation.[39] Similar protections would accordingly not be out of place in labour relations where potential tyranny by the police, State and the courts is replaced with potential tyranny at the hands of employers.

[69] The right to silence and the privilege against self-incrimination are, in any event, not protections that are confined to the criminal law. Section 14 of the Civil Proceedings Evidence Act (CPEA), read with section 42 of that Act, not only recognises and seeks to protect witnesses in civil cases against self-

[39] See generally, P J Schwikkard *'Silence and Common Sense'* (2003) *Acta Juridica 92;* Henry Lerm *'The right to silence under siege'* (May 2010) *De Rebus* 30.

incrimination, but has the effect of giving that privilege a wider ambit than in criminal cases.[40] Section 14 provides: "a witness may not refuse to answer a question relevant to the issue, the answering of which has no tendency to incriminate himself, or to expose him to penalty or forfeiture of any nature whatsoever, by reason only or on the sole ground that the answering of such question may establish what tend to establish that he owes a debt or is otherwise subject to a civil suit". Notably, in the area of labour relations, it is recognised that where the conduct of an employee amounts to a criminal offence, the employee may assert a right of silence (i.e. the privilege against self-incrimination) during the internal hearing and request that those proceedings be postponed pending the conclusion of the criminal proceedings, although the employer is not obliged to comply with that request.[41] Therefore, I do not agree with a blanket statement that there is no place for the right to silence in labour relations.

[70] Until *Hlebela,* the principle of derivative misconduct was merely referred to in passing, or otherwise not in much detail. It was first briefly mentioned, albeit not by the label "derivative misconduct", in *FAWU.* In *Chauke,* this Court seemingly elaborated on the rule mentioned in *FAWU*, but once again did not find it necessary to apply it to the facts in that case, and consequently, no certainty was provided regarding its ambit. In *Foschini,* this Court applied the rule merely on the limited basis it was mentioned in *Chauke,* but added nothing further to its understanding. In *NUM,* roughly the same occured, although the court added singular highlights, as mentioned earlier. In *Hlebela,* which was only decided in 2015, this Court found it necessary to elucidate and further explain this form of misconduct. Most recently, in *PRASA,*[42] this Court confirmed what was held in *Hlebela.*

[71] Even though the principle of derivative misconduct was (arguably) not created by judicial *fiat*, as pointed out in *Hlebela,*[43] employers would be well advised to

[40] P J Schwikkard and S E van der Merwe *The Principle of Law of Evidence* 4 ed (Juta 2015) at 158; DT Zeffert and A P Paizes *The South African Law of Evidence* 5 ed (LexisNexis 2009) at 579.
[41] See: *Davis v Tip NO* 1996 (1) SA 1152 (W); *Straub v Barrow NO and Another* [2001] 6 BLLR 679 (LC); *Fourie v Amatola Water Board* (2001) 22 ILJ 694 (LC).
[42] See above
[43] See (above) para 8.

clearly define this form of misconduct in their disciplinary codes, so that all interested parties, including the trade unions and employees, know with reasonable certainty what is expected of them and what conduct would be culpable and subjected to discipline.

Conclusion

[72] For the reasons mentioned at the outset of this judgment, I agree that the appeal be dismissed with costs.

P Coppin

Judge of Appeal

SAVAGE AJA

Introduction

[73] I have had the benefit of reading the judgment of my colleague, Sutherland JA, with which I am regretfully unable to agree. In my view, the appeal should succeed with costs.

[74] This matter raises, once again, the difficult problem of strike violence, appropriate responses to serious misconduct committed during strike action and the concept of "derivative misconduct". The appeal is only concerned with those employees who were dismissed for "derivative misconduct" on the basis that they had knowledge of acts of violence, intimidation and harassment but acted in breach of the trust relationship with the employer by failing to come forward and identify the perpetrators, and failed to exonerate themselves by explaining that they were not present or could not identify the perpetrators.

[75] The knowledge attributed to the appellant employees included, but was not limited only to, acts of misconduct for which other employees were dismissed.

The dismissal of those employees who were identified as having been present when, or who were shown to have committed serious acts of violence or intimidation during the course of the strike action, is not in issue in this appeal. Their dismissals were found at arbitration to be fair and that finding has been left unchallenged.

Judgment of the Labour Court

[76] The arbitrator, whilst rejecting the evidence of the witnesses led by the union as lacking credibility and reliability, found that the dismissal of the employees for derivative misconduct had been unfair since the employer had failed to discharge the *onus* to prove that the appellant employees had knowledge of the acts of violence, intimidation and harassment.

[77] Aggrieved with that decision, the employer sought the review of the arbitration award by the Labour Court. That Court set aside the arbitrator's decision on the basis that, in respect of the employees dismissed for derivative misconduct, it was one that a reasonable arbitrator on the evidence could not have reached. The Court noted there to be a clear distinction between proving on a balance of probabilities that the employees knew who the perpetrators were and failed to disclose this information and considering whether the employees were under a duty, consistent with the essential of trust and confidence to come forward with an explanation to the employer. Issue was taken with the arbitrator's failure to consider whether the evidence of the employer's witnesses was sufficient to do more than simply remain silent, with the Court finding that the arbitrator had failed to consider whether a reasonable inference could be drawn that the employees dismissed for derivative misconduct were present during the strike and accordingly when strike misconduct occurred. If such an inference could be drawn, then the arbitrator ought to have considered whether "*their failure to come forward and provide either an explanation exonerating themselves or providing the names of the perpetrators constituted derivative misconduct*".

[78] This led the Labour Court to conclude that –

> '…the only reasonable and plausible inference that can be drawn from the evidence is that the…employees were present during the strike and

> accordingly during the misconduct. If they weren't present or had no information regarding the perpetrators they would have said so. They, despite the opportunities afforded them, did not.'

<u>Derivative misconduct</u>

[79] My colleague states that "derivative misconduct" cannot be thought of as more than a label, a term of art to capture a rather complex idea. With reference to *Hlebela*,[44] he states that the term creates "*no new category of misconduct…by judicial fiat*", but that "(u)n*controversially, and on general principle, a breach of the duty of good faith can justify dismissal"*. Nevertheless, in *Hlebela,* it was recognised that the concept has been "*elusive*" given that "serious confusion existed among those responsible for instituting disciplinary process about the concept and how to apply it appropriately." [45]

[80] The notion of a derived misconduct arising from an employee's non-disclosure to the employer in particular circumstances and in the context of the employment relationship is not isolated to circumstances in which there has been collective misconduct alleged, yet has arisen more often in that context. In *NUM v Durban Roodepoort Deep Ltd,*[46] it was made clear that:

> 'The concept of ''collective' guilt is wholly repugnant to our law and any policy in terms of which all members of any group.... must bear collective punishment for the wrongdoings of some of the members is unacceptable to this court because it runs counter to the tenets of natural justice and is a violation of the well-known principle that a person is presumed to be innocent until proved guilty. There is a failure of justice even if a single person is presumed to be guilty and made to suffer with the rest.'

[81] This Court in *Chemical Energy Paper Printing Wood and Allied Workers Union v National Bargaining Council for the Chemical Industry and Others*,[47] made it clear that:

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[44] (2015) 36 ILJ 2280 (LAC).
[45] At at para 4. *PRASA* at) at para 31.
[46] (1987) 8 ILJ 156 (IC) at 162H-I.
[47] (2010) 31 ILJ 2836 (LAC) at para 20.

> ‘While the principle is correct that all employees who have committed misconduct must be treated similarly unless there is some justification to treat them differently - in cases of collective misconduct an employer can only act against those employees it can prove to have committed the misconduct complained of. An employer is therefore obliged, in situations as obtained in this matter, to charge only those employees against whom it has evidence. If such employees are found guilty the employer may impose an appropriate penalty. An employer cannot, in matters such as this, simply dismiss all of its striking employees because some from amongst them committed serious misconduct. As a consequence, some employees who commit serious misconduct may not be charged or when charged, the employer is unable to satisfy the disciplinary enquiry that each of the employees who is charged is in fact guilty of the misconduct. Hence, where there has been collective misconduct and the employer only charges some of the employees because it only has evidence against them and from amongst those charged some are found to have committed the wrong and are dismissed and a few acquitted, it does not and cannot follow that the dismissal was unfair because of any selective application of discipline.’

[82] Within this framework, a consideration of the judgments which have considered the scope and application of “derivative misconduct” on a particular set of facts, illustrates the difficulties which have arisen with the concept and its application. Importantly, those decisions which have been used as the basis on which to develop or attempt to clarify the concept (upgraded to a “principle” in some decisions) either have not found derivative misconduct to exist on their particular facts or have expressed *obiter* views on the issue. Derivative misconduct was not the basis for the dismissals in *FAWU*, *Chauke* or *Foschini*. In *NUM, Hlebela and PRASA*) no derivative misconduct was found to exist and in each case dismissal on such basis was found to be unfair.

[83] In *FAWU,* this Court raised, but did not determine, whether an employee’s failure to assist an employer in an investigation and remain passive may justify disciplinary action. The Industrial Court found that although the identities of the employees who participated directly in an assault of a fellow employee were not known, the dismissed employees had acted with common purpose. On appeal, it was accepted that the *onus* of establishing that the appellant

employees had associated themselves with the assault rested on the employer. This Court found that the evidence was consistent with the inference that all the employees present when the assault took place either participated in the assault or lent it their support; and that it was probable that all the appellant employees were present and, consequently, had either participated in the assault or lent their support to it. Having regard to the extent to which a party's failure to give evidence may properly give rise to an inference against him (or her), it was stated that:

> 'What emerges from the decided cases is that his failure to do so cannot by itself constitute proof of what is alleged against him. Nevertheless, the evidence against him, though not conclusive, may be such than an explanation would be expected if one was available. In such cases his failure to provide an explanation may be placed in the balance against him. The approach in civil cases is illustrated by the following extract from the judgment of Schreiner JA in *Galante v Dickson* 1950(2) SA 460 (A) at 465:
>
> > 'It is not advisable to set down any general rule as to the effect that may properly be given to the failure of a party to give evidence on matters that are unquestionably within his knowledge. But it seems fair at all events to say that in an accident case where the defendant was himself the driver of the vehicle the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of evidence from the defendant, to select out of two alternative explanations of the cause of the accident which are more or less equally open on the evidence, that one which favours the plaintiff as opposed to the defendant.'[48] [Own underlying]

[84] Although the matter was not determined on the basis of derivative misconduct, the Court stated *obiter* 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. This was an issue which was raised in the court

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[48] 1062H- 1063B.

> *a quo*, but in view of the conclusion to which I have come it is not necessary to deal with it in the present case.'[49]

[85] In the subsequent decision of *Chauke,* this Court found that, despite the absence of direct evidence of involvement, the shared responsibility of paint shop employees for the primary misconduct of malicious damage to property was properly inferred by the employer and that the dismissals were justified. This followed a request to the staff to divulge information regarding the sabotage, which request drew no response. An ultimatum was then issued that any further sabotage in respect of which individual perpetrators remained unidentified would result in the dismissal of all employees. The employer thereafter dealt with the matter on the basis of common purpose and not on application of the concept of derivative misconduct. While in *FAWU* reference was made to the "policy considerations" in the field of industrial relations that may require more of an employee than to remain passive in circumstances as dealt with there, in *Chauke* it was stated:

> 'In the second category, 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 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 26 D-E). Failure to assist an employer in bringing the guilty to book violates this duty and may itself justify dismissal'.[50]

[86] The Court continued that:

> '…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

[49] At 1063B.
[50] At para 31.

> encompass those innocent of it, but who through their silence make themselves guilty of a derivative violation of trust and confidence'[51].

[87] In *NUM,* the employer found *inter alia* that kimberlite had been poured down boreholes and interviewed 15 employees who denied any knowledge of the misconduct. All employees were charged with misconduct on the basis that they had acted with common purpose, alternatively that they had failed to disclose information about the misconduct of fellow employees relating to the matter. The arbitrator took the view that proof of derivative misconduct was subject to it being shown that the employee knew or could have acquired knowledge of the wrongdoing; and that the employee failed without justification to disclose that knowledge to the employer, or to take reasonable steps to assist the employer to acquire that knowledge. On the facts, it was found that it was possible that the employees had information relating to the issue but that the employer's evidence did not discharge the *onus* upon it to prove its case on a balance of probabilities, with the refusal to undergo polygraph tests and an un-cooperative attitude not proving that they had something to hide.

[88] The Labour Court endorsed the arbitrator's view that the employer had to prove that each employee was in possession of information that could have assisted the employer in its investigations while accepting that in appropriate circumstances an employee may have a duty to assist management by providing information about workplace wrongdoing. On appeal, this Court accepted that an employee may have such a duty in appropriate circumstances but that in the absence of *prima facie* evidence of such knowledge it could not be concluded that the employees' failure to co-operate necessarily meant that they either did have or must have had something to hide. On the issue as to whether an adverse inference could be drawn against the employees from their failure to give evidence, with reference to *FAWU*, it was found that this was an issue to be "placed in the balance against" the employees. This Court found that the arbitrator's finding that the employer had not discharged the *onus* fell within the ambit of reasonableness required.

[51] Ibid at para 33 at 1447.

[89] In *Foschini,* an entire team of five employees was dismissed for gross negligence due to their collective failure to prevent stock losses. On appeal, this Court considered the issue of collective accountability for stock losses with reference to *Federal Council Retail and Allied Workers v Snip Trading*[52] (*Snip Trading*) and SA *Commercial Catering and Allied Workers Union v Pep Stores*[53] *(Pep Stores).* In *Snip Trading,* the arbitrator accepted that collective guilt is repugnant to the principles of natural justice unless responsibility for the collective conduct of the group is indivisible. Dismissal was warranted because, as individual components of the group, each had culpably failed to protect the interests of the employer and ensure that the group complies with a rule or attains a performance standard set by the employer to protect its assets; each member had been given an opportunity to explain the team's failure; and the person to whom the explanations are given must be objectively satisfied that the team's failure cannot be blamed on any particular member of that team. It was stated that it is therefore unnecessary to prove individual culpability, "derivative misconduct" or common purpose, the three grounds on which dismissal for collective misconduct can otherwise be justified. With no issue taken by the employees with the legal principles, this Court accepted that the employees had colluded to keep the stock losses from their employer and gave unacceptable explanations for such losses. This resulted in an irretrievable breakdown in the trust and dismissal was appropriate.

[90] In *Hlebela* the employee was dismissed for failing to disclose information concerning his personal financial affairs, on request, to his employer. On appeal, this Court found the dismissal to have been unfair in that the employee had not committed misconduct through his non-disclosure. The Court elaborated on what, until then, had largely been *obiter* views concerning what constituted derivative misconduct:

> '[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 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

52 (2001) 22 ILJ 1945 (ARB); [2001] 7 BALR 669 (P).
53 (1998) 19 ILJ 939 (CCMA).

> remaining silent about knowledge possessed by the employee regarding the business interests of the employer being properly undermined. 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 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.'

[91] The Court set out a number of considerations relevant to a determination of derivative misconduct. The employee must have "*actual, not imputed destructive knowledge of wrongdoing"*, otherwise blameworthiness cannot be attributed to him or her. The Court stated that 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.'[54]

[92] Furthermore, the non-disclosure must be deliberate and the gravity of the non-disclosure must be proportionate to the gravity of the primary misconduct: it is 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".[55] The rank of the employee may affect the gravity of the non-disclosure. However, it -

> '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...Furthermore, the anterior premise of these considerations is that

[54] At para 10.
[55] At para 12.

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 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 duty of good faith…*'* [56]

[93] Issue was taken with the "t*he notion that breach of good faith occurs if an employee 'could have acquired knowledge of wrongdoing*"' as stated in *RSA Geological Services*, which was considered to be "*too broadly or loosely stated*."[57] The Court emphasised that "*. . . . actual knowledge is required to trigger the duty to speak up, the employer must prove actual knowledge not merely putative knowledge, and no rule exists for considerations of negligent ignorance"*.[58] In this regard, the Court continued that "*no room exists for considerations of negligent ignorance*" and that "*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*"*.*[59] The employee needs not to have made common purpose with the perpetrator and cannot be guilty of derivative misconduct on the basis of negligently failing to take steps to acquire knowledge of the wrongdoing.

[94] It was found that -

'*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*.[60]

[56] At paras 8-15.
[57] At para 17.
[58] At para 17.
[59] At para 17.
[60] At para 28.

[95] The decision of this Court in *PRASA*[61] was handed down after argument had been heard in the current appeal. *PRASA* concerned the fairness of the dismissal of over 700 employees, who were on a protected strike. After a forensic fire investigation concluded that a train burning was "*probably as a result of riot, strike and/or public disorder*", the employer gave the striking employees notice of their contemplated dismissal following five incidents of train burning which the employer indicated it believed had "been carried out by striking workers and/or persons acting in concert or association with striking workers…as a means of putting unlawful pressure to PRASA Rail to accede to the unreasonable demands of NTM". The employer indicated that despite all reasonable steps taken to identify the responsible individuals it "has been unable to do so and cannot do so unless the striking employees identify the culprits". In addition, it gave employees notice that it "holds you and all striking employees jointly and severally responsible for the torching of trains and train coaches and intends dismissing you for this reason, unless otherwise dissuaded by your representations". A collective response to the letter was provided by the union in which it was denied that its members had been responsible for the train burnings and challenged the employer's belief that the striking employees were responsible. The union distanced itself from the unlawful conduct and offered assistance to identify those responsible. The employer found the representations "*unpersuasive*" and summarily dismissed the employees.

[96] The union challenged the dismissals in the Labour Court, which found the dismissals both procedurally and substantively fair. This was so *inter alia* given that the employees had breached their duty of good faith to the employer by remaining silent about their actual knowledge of the misconduct, failed to dissociate themselves from the misconduct and failed to help the employer identify the culprits. The Labour Court determined that the dismissals were justified on the grounds of derivative misconduct as the employees had failed, without justification, to disclose their knowledge of the culprits, had failed to provide an innocent explanation or dissociate themselves from the misconduct

61 At paras 30 and 31.

and had preferred general collective representations which prevented the employer from deciding who to dismiss.

[97] On appeal, this Court reiterated that the *onus* rests on the employer to prove on a balance of probabilities that the employee committed the alleged misconduct. It found it unlikely on the probabilities that the union had advocated the burning of train coaches and the forensic report obtained by the employer had not concluded that the striking employees were responsible for setting the train on fire, but rather that it was set on fire "*probably as a result of riot, strike and/or public disorder*".[62] Furthermore, no credible evidence had been presented that the employer "*had taken reasonable steps to identify the culprits*";[63] and the employer had not called on the employees to disclose evidence about the actual perpetrators of train burnings. In the circumstances, this Court found the Labour Court's reliance on derivative misconduct to be misplaced, with its essential elements not proved.

[98] This Court stated that "*in the decisions of Hlebela and* [ABI]*, where the principle of derivative misconduct was applied*", the facts were materially distinguishable and that "(i)*n both those cases, the employer succeeded in showing that all of the dismissed employees had knowledge or ought to have had knowledge of the primary misconduct, owing to their physical presence at or near the place, and time, of the occurrence of the primary misconduct*".[64] Factually, this statement is not correct given that in *FAWU* "derivative misconduct" was not the basis for the dismissal and in *Hlebela* the dismissal on that basis was found to be unfair.

[99] The Court in *PRASA* found that the employer's "*reliance on principle of derivative misconduct*" was misplaced and unjustified and that "(i)*n essence, the striking employees were dismissed not for derivative misconduct but rather for "collective misconduct", a notion which is wholly repugnant to our law, not only because it runs counter to the tenets of natural justice but also because it is incompatible with the established principle of innocent until proven guilty*."[65]

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[62] At para 37.
[63] At para 40.
[64] At para 44.
[65] At para 46.

The dismissal of the employees was therefore found both procedurally and substantively unfair.

[100] With regard had to the cases considered above and to the development of the concept of “derivative misconduct”, I consider it both appropriate and in the interests of fairness not to encourage further use of the term to name a species of misconduct which is so often plagued by a lack of clarity. Clarity is served by calling things what they are in plain language, whether a breach of a duty of good faith, of trust or confidence or a failure to disclose material information to the employer. Item 4(1) of Schedule 8 to the LRA requires as much when it provides that the employee be notified of allegations of misconduct “*using a form and language that the employee can reasonably understand*”. Notice to an employee of a complaint of, or dismissal for, “derivative misconduct” fails, in my view, to achieve this and I consider that use of the term should, therefore, be discouraged.

<u>Duty to disclose information</u>

[101] We live in a complex society, still suffering from the devastating consequences of a system of entrenched racial discrimination, plagued by pervasive and deep-rooted inequality and, very often, reflecting the deep divisions which continue to exist between people. The workplace closely mirrors these challenges and complexities. What constitutes sound policy within a labour relations context must reflect appropriate and careful regard to this broader context. Developing our labour jurisprudence to include an expansive duty upon on employee to act in good faith or with trust and confidence towards his or her employer, with a duty to *“rat”*, as is suggested by this Court in *Hlebela*, on fellow employees must therefore be a careful process, one which ensures that there is appropriate regard to the context and tensions inherent in the contractual relationship between the employer and employee, the position of the employee and the circumstances and conditions under which employees work and live.

[102] The record indicates the high level of fear experienced by the one employee who did attend the disciplinary hearing in order to exonerate herself. In the context of a violent and dysfunctional strike, this clearly illustrated the extent of

personal risk faced by the employee even after her dismissal, when she sought only to exonerate herself and when her attendance at the hearing was not aimed at the disclosure of any material information to the employer concerning other employees. While I accept that the relationship between employer and employee has as one of its essentials, trust and confidence, and conduct clearly inconsistent with it may warrant termination of employment, in considering the scope of such duty, it is as well to have regard to the fact that the emergence of an expansive duty on an employee to act in good faith towards the employer has been the subject of some academic criticism in reflecting the vulnerable position of an employee within an inherently asymmetric contractual relation with the employer.[66] The "*policy considerations*" referred to in *FAWU* which require consideration in determining the scope of an employee's duty to assist an employer protect its legitimate interests must, therefore, in my view, reflect appropriate regard for the position of both parties in the relationship. This would include an assessment of the appreciable risks which may arise for an employee in speaking out, in naming perpetrators or for purposes of exoneration and the dangers inherent which may arise in doing so.

[103] In Hlebela, this Court took the stance that an employee is "bound implicitly by a duty of good faith towards the employer" and that he or she "breaches that duty by remaining silent about knowledge possessed by the employee regarding the business interests of the employer being properly undermined". It continued that "(u)ncontroversially, 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 duty of good faith."

[104] I consider a less unequivocal recordal of such duty to be appropriate, one which seeks to strike a balance between the rights and duties of both employers and employees in the workplace. While a harsh view may be taken of an employee's

[66] See Maloka, TC '*Derivative Misconduct and Forms thereof: Western Refinery Ltd v Hlebela 2015 36 ILJ 2280 (LAC)'* in (Vol 19) [2016] PER 36 at footnote 25 with reference to Klare 1981 *Berkeley J Emp & Lab L* 450-482; Klare 1985 *Md L Rev* 731-840 and Klare "Countervailing Workers' Power" 63; Epstein 1983*Yale LJ* 1357; Stone 2001 *UCLA L Rev* 519; Collins 2001 *ILJ (UK)* 17; Mitchell *Redefining Labour Law*; Deakin and Wilkinson *Law of the Labour Market*; Arup *et al Labour Law.*

passivity and silence when the employer's best interests could be advanced by disclosure, in determining the fairness of a dismissal account must be taken of all relevant factors which include the risk of serious mortal or other danger to the employee.[67] I am consequently unable to align myself with the view expressed in *Hlebela* that "(a) disinclination to disclose the wrongdoing from a sentiment of worker solidarity or some other subjective sentiment 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 duty of good faith…'[68]. In my view, this statement fails to encourage an appropriate regard for the policy considerations which *FAWU* suggested would require consideration in the development of this complex area of our law.

<u>Decisiveness of the circumstantial evidence</u>

[105] It is actual knowledge by an employee that in *Hlebela* has been said to trigger a duty to disclose*.* I turn now to consider whether the Labour Court was correct in finding that the arbitrator had not concluded reasonably that it had not been proven by the employer that the appellants were present at any of the scenes of misconduct, or that they had actual knowledge of the misconduct and/or any of the perpetrators thereof and thus were under a duty to disclose the information sought by the employer.

[106] It is apparent from the arbitration award that it was the absence of direct evidence against the employees that led the arbitrator to the conclusion reached that their dismissals had been unfair. My colleague takes the view that the arbitrator did not give consideration to the fact that the presence of the employees and their knowledge of the misconduct and/or its perpetrators was capable of proof by means of indirect evidence, or by inference, and, accordingly, did not determine whether those facts had been proven by inference. The inferences sought to be drawn were whether the appellants were present at any of the scenes or incidents of misconduct; and whether each of

[67] In *Hlebela* it was recognised that the gravity of the non-disclosure must be proportionate to the gravity of the primary misconduct; and that the rank of the employee may affect the gravity of the non-disclosure.
[68] *Hlebela* at paras 8-15.

them had actual knowledge of any of the misconduct, or of any of the perpetrators thereof.

[107] The facts relied upon by my colleague in order to draw the inferences arrived at are that:

i. all of the appellant employees were on strike with the other employees;

ii. there were several incidents of misconduct that occurred over the period of the strike, which the arbitrator found on the employer's evidence had proved on an overwhelming balance of probabilities;

iii. the employer requested the union, and the striking employees, including the appellant employees, through the union, to assist with the identification of the perpetrators of the various acts of misconduct committed during the course of the strike. There was no prompt response to the request and, significantly, no denial by the union that any of its members were present when the acts of misconduct were perpetrated, or of their members' knowledge of such wrongdoing, or of the identity of any of the perpetrators thereof and no later attempt made to exonerate themselves; and

iv. the union, whom its members, including the appellant employees, entrusted with their interests, including their legal interests relating to this matter, denied that there were any acts of misconduct committed during the course of the strike; and the evidence presented at the arbitration, to that effect, by the union on behalf of its members, including the appellants, was rejected by the arbitrator as false, and rightly so.

[108] Given these proved facts, my colleague asks "how likely would it be that strikers would absent themselves from the demonstrations of resolve and solidarity which are the very fibre of strike culture?" He takes the view that the inferences drawn that each of the appellant employees were present at some or all of the incidents where the misconduct occurred, and that they had actual knowledge of such misconduct and/or of the perpetrator(s) thereof, are consistent with the proved facts and are the only plausible inferences that can be drawn. Since

there was enough evidence, although not conclusive, that called for an explanation, the false evidence tendered through the witnesses called by the union, and the failure by the appellants to give evidence themselves in those circumstances, are factors that could, justifiably, be placed in the balance against them. Furthermore, "there is nothing to gainsay the inference, on the probabilities, that they were present for at least some of the time, and equally probable, that they were each present most of the time, even if not everyone religiously present on each and every day"; and "it is improbable that each and every one of them could not have acquired actual knowledge of the misconduct perpetrated, more especially because …[it] *was so spectacular.*" My colleague therefore considers that the arbitrator adopted too narrow an approach to the evidence in requiring individual identification of each employee present and that a reasonable arbitrator would have found otherwise.

[109] I am not persuaded that this is so. S192(2) provides that if the existence of the dismissal is established, the employer must prove that the dismissal is fair. The view I take of the matter is that the arbitrator concluded reasonably on the facts before him that it had not been proven by the employer 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.

[110] As was stated in *Govan v Skidmore,*[69] the Court must "…. by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one".[70] In my mind the more plausible or natural inference to be drawn from those that present themselves in this matter is not that the employees were present at some or all of the incidents where the misconduct occurred, and that they had actual knowledge of such misconduct and/or of the perpetrator(s) thereof. This is all the more so since a number of employees were dismissed for the misconduct committed, having been identified committing it, and still others were dismissed for being on the scene when misconduct was committed by way of eyewitness testimony and

[69] 1952 (1) SA 732 (N).
[70] See too *AA Onderlinge Assuransie Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A).

photographic evidence. Furthermore, the arbitrator found the dismissal of the two employees who testified at arbitration for the union to have been fair given their identification on the scene.

[111] The fact that the employees did not exonerate themselves, by either disclosing any knowledge to the employer, or raising a defence such as intimidation, or the fear of reprisals and absence of any effective protections against the same does not lead me to a different conclusion; nor does it, in my mind, allow a finding in the circumstances that the employees can as a result be inferred to be culpable.

[112] Whilst inferential reasoning may obviously be used in considering whether misconduct has been proved, appropriate regard must be had to the cautions sounded by the Labour Court in *SATAWU v Collet Armed Security Services CC:*[71]

> 'It is, however, critical that even such derivative misconduct cannot diminish the standard of proof an employer must still comply with to establish the existence of misconduct. The fact is that employees that attract culpability must still be identified. To illustrate this with a simple example – assuming an employer has 100 employees and during a strike some employees participated in unlawful behaviour. Does this now mean that all employees, just because they are employed by the same employer and may have participated in the strike, can now be held accountable for this misconduct by certain individuals on the basis of derivative misconduct just because they are all employed by the same employer and participated in the same strike? Surely not. What if a particular group of employees were not even present when the unlawful behaviour took place and never witnessed or was aware of the same?'

[113] To explain this away simply on the basis that the employees are required to exonerate themselves in my mind has the effect of shifting the *onus*. The employer must prove that the employee had actual knowledge of the information sought before there is any duty on the employee to raise a defence. On the evidence before the arbitrator, actual knowledge could not, in my mind, be inferred on the facts before the arbitrator. While the trade union should

[71] [2013] ZALCJHB 301 at para 61.

properly have acted at all relevant times in a manner which was both responsible and displayed leadership, it is patently apparent that it failed to do so. Following the dishonest testimony of union witnesses, numerous employees were nevertheless found on the evidence before the arbitrator to have been fairly dismissed for the misconduct committed.

[114] The dishonesty of the union witnesses did not however, in my mind, allow an inference to be drawn that all employees charged with misconduct as a result of their silence held actual knowledge of misconduct and were consequently culpable by virtue of such silence. If this were so, it raises the obvious question: what of those employees who were on strike but chose not to be on the picket line and knew nothing of the misconduct committed; or those employees who were on the picket line but did not witness strike misconduct? I am not persuaded that there was an obligation on those employees to testify individually to exonerate themselves, whether at the disciplinary hearing or the arbitration hearing, in the manner suggested by the employer given the burden which rested on the employer to prove the existence of the misconduct alleged and the fairness of their dismissals.

[115] For all of these reasons, I would find that the decision of the arbitrator fell within the ambit of reasonableness required and would grant an order that the appeal succeeds. There is, in my mind, no reason in law or fairness why costs should not follow the result.

Savage AJA

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