Derivative Misconduct and the Employee’s Duty to Act Bona Fide: Ncukana / AF Brands (Pty) Ltd [2022] 7 BALR 737 (CCMA)

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ABSTRACT

In what circumstances may an employer dismiss an employee who deliberately chooses not to disclose information even though she/he was expressly requested to do so? Can a negative inference be drawn against the said employee? These questions are examined within the context of derivative misconduct which emphasises a duty placed upon employees to disclose any misconduct perpetrated by fellow employees. This duty arises out in the implied common law duty of good faith that an employee owes to his/her employer by virtue of the contract of employment. The duty of good faith is a sacrosanct principle of any employment relationship, the breach of which justifies an employee’s dismissal.

INTRODUCTION

It is trite that an employee can be dismissed for contravening a rule in the workplace. Dismissal may also take place incidentally to a primary offence committed by another employee. This is termed derivative misconduct which is a species of collective misconduct. The import of the concept of derivative misconduct into the South African labour law jurisprudence has been no less than controversial over the years as it has been subjected to various interpretations. This note will briefly provide a historical account of the application of the doctrine in labour law. Suffice at this juncture to say that the concept first explicitly came to the fore in Chauke & others v Lee Service Centre CC t/a Leeson Motors (1998) 19 ILJ 1441 (LAC) (Chauke) and found its way into the award under consideration and the Constitutional Court’s judgment in NUMSA obo Dhludhlu and 147 others v Marley Pipe System SA (Pty) Ltd (2022) 43 ILJ 2269 (CC).

It is an implied term of a contract of employment that an employee will act in good faith towards his or her employer. As the employment relationship is based on trust, an employee who fails to disclose information to his or her employer breaches that duty and may be dismissed as a result. Employees are dismissed based on derivative misconduct when they fail to aid the employer in identifying employees who had committed acts of misconduct.

This is normally the case in a strike where the employer is unable to identify employees responsible for the breach of the picketing rule or those that acted violently.

This case note will look at the case of Ncukana / AF Brands (Pty) Ltd [2022] 7 BALR 737 (CCMA) which applied the concept of derivative misconduct in an unfair dismissal matter.

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The authors apply a doctrinal method in this paper, generally referred to as desktop research. This entails the use of textbooks, articles journals, case law and legislation to distil from the literature the essence, and the manner in which the concept of derivative misconduct is conceivably used to lawfully dismiss employees.

**The forms of collective misconduct**

Four main categories or forms of collective workplace misconduct are interchangeably applicable in South African labour law. The first is the doctrine of common purpose, which is of popular use in criminal law. The doctrine of common purpose implies that in a situation where two or more people have committed or conspired to commit a crime, they will both be held accountable for their actions and for the actions of another. It means that when two or more persons act in association to undertake an illegal activity or commit an offence, each one of them is individually liable for their collective action (R v Garnsworthy 1923 WLD 17). This is to say that active participation in the commission of an unlawful activity rendered any participant guilty under the doctrine of common purpose. This doctrine now includes people who have consented to the commission of the offence but for some reason were not party to the offence. Hence, in Tshabalala v The State; Ntuli v The State 2020 (5) SA 1 (CC) (Tshabalala), the Constitutional Court in applying the doctrine of common purpose to the common law crime of rape found that prior agreement is necessary for the doctrine to apply regardless of whether the person participates or not. What is relevant is the fact that there was a prior agreement to commit an offence.

The doctrine of common purpose has been subject to various interpretations (see all the judgments in Tshabalala). Nevertheless, the authors argue that the requirements as outlined in S v Mgedezi [1989] 2 All SA 13 (A) provides a better approach to the application of the doctrine i.e.:

i. that the accused or suspect must be present at the scene where violence ensued;
ii. that the person must have been aware of the assault;
iii. that the person must have intended to make common purpose with those who were actually perpetrating the assault;
iv. that a person must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others and lastly;
v. the person must possess the necessary mens rea.

As stated in the introductory part of this paper, the doctrine of common purpose has now extended its application to labour law. In terms of this doctrine, an employee may be dismissed for misconduct based on common purpose if he or she was part of a group that committed the primary misconduct. The participation of the employee in the primary misconduct is proved through the application of the requirements set out above (i) to (v) viz, the employee was present at the scene of the misconduct; was aware of the misconduct; intended to make common cause with those who were perpetrating it; manifested some common purpose with the perpetrators of the misconduct by performing an act of association with the conduct of the others; and possessed the requisite mens rea (see SA Commercial Catering & Allied Workers Union & others v Makgopela NO & others (2023) 44 ILJ 1229 (LAC)).

Thus, in National Union of Metalworkers of SA on behalf of Nganezi & others v Dunlop Mixing & Technical Services (Pty) Ltd & others (Casual Workers Advice Office as Amicus Curiae) (2019) 40 ILJ 1957 (CC) (Dunlop), the doctrine of common purpose received further clarification. The Constitutional Court ruled that in applying the doctrine of common purpose, the presence at the scene is not needed, however, direct or circumstantial evidence that individual employees associated themselves with the misconduct before it commenced, or even after it ended, is sufficient to establish complicity in the misconduct and that prior or subsequent knowledge of the misconduct and the necessary intention in relation thereto is still required.

In its subsequent interpretation of the doctrine of common purpose in NUMSA obo Dhludhlu and 147 others v Marley Pipe System SA (Pty) (2022) 43 ILJ 2269 (CC), the Constitutional Court reaffirmed that employees could be found guilty if they actively associate themselves with the misconduct, during, or after the act and that mere presence at the scene does not attract liability.

The second leg of collective workplace misconduct is team misconduct. In the case of team misconduct, a number of employees are disciplined collectively as a team for the same conduct on the basis that the individual responsibility of each employee cannot be apportioned. In this case, all employees in the team are dismissed because it is impossible to establish each individual’s responsibility for the misconduct. Thus, all members of the team suffer the same fate because the responsibility for the collective conduct of the group is indivisible (Grogan, 2022). Team misconduct or team liability was endorsed in Foschini Group v Maidi and Others (2010) 31 ILJ 1787 (LAC) (Foschini) wherein the Labour Appeal Court quoted with approval the arbitrator in Federal Council Retail and Allied Workers v Snip Trading (2007) 7 BLAR 669 (T) to the effect that in team misconduct, employees are dismissed because as individual components of the group, each has culpably failed to ensure that the group complies with a rule or attains a performance standard set by the employer. Team misconduct is generally applicable when employees as a group failed to adhere to the rule or meet a set of targets. On this note, the fact that one cannot dissociate the individual responsibility in the misconduct leads to the group being sanctioned as a whole, hence the label of team misconduct. For instance, in Foschini, when the individual employees could not explain the stock losses, the court clearly stated that if employees in a small store could not explain stock losses in that store, the only possible inference is that they were each individually guilty due to team liability.
The third form of collective misconduct is derivative misconduct. In this instance, the dismissal of an employee on account of derivative misconduct arises where unidentified employees misconducted themselves and the employer expressly requested the employee to disclose information known to him or her in relation to the misconduct, but consciously elected not to disclose. This form of collective misconduct came to light in the seminal case of *Chauke* (Poppesqu, 2018; Sibiya, Calvino & Iyer, 2023). In *Chauke*, the employees had been dismissed for malicious damage to the employer and client properties. Cameron J used the phrases “derived justification” and “derived violation of trust and confidence” which later translated into derivative misconduct in various awards as it is now known (see *National Union of Mineworkers & others and RSA Geological Services (A Division of De Beers Consolidated Mines Ltd)* (2004) 25 ILJ 410 (ARB)) (RSA Geological Services). The court defines derivative misconduct to mean a situation where employees are in possession of information that would enable an employer to identify those who had misconducted themselves and those employees who fail to disclose the information when asked to do so breach the trust relationship upon which the employment relationship is founded (*Chauke*, 1998). The basis of the dismissal terms from the implied employees’ duty of good faith which in this case related to the duty to disclose information of which the employees are aware of regarding the misconduct of fellow employees in the collective misconduct. Building on the *Chauke* case, the Labour Appeal Court in *Western Platinum Refinery Ltd v Hlebela & others* (2015) 36 ILJ 2280 (LAC) (*Hlebela*) further elucidated the application of the doctrine of derivative misconduct when it added that the ‘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’ (*Hlebela*, 2015). This presupposes two requirements: i.e. that the employee knew or could have acquired knowledge of the wrongdoing; and that the employee had failed without justification to disclose that knowledge to the employer, or to take reasonable steps to help the employer acquire that knowledge (RSA Geological Services, 2004).

These requirements were further buttressed in the *Hlebela* judgment wherein the court laid down the following principles relevant to the determination as to whether an employee is culpable of derivative misconduct:

i. the undisclosed knowledge of the wrongdoing must be actual rather than imputed or constructive. This knowledge must be adduced by evidence. The moral blameworthiness intrinsic to the non-disclosure implies a choice made not to tell;

ii. the non-disclosure must be deliberate, which shows a lack of good faith;

iii. whether, in a given case, the non-disclosure warranting dismissal is related, in part, to the degree of seriousness of the wrongdoing and to the effect of the nondisclosure by a person in the position of that employee on the ability of the employer to protect itself against the wrongdoing;

iv. the rank of the employee is irrelevant to culpability, but might be important to the degree of the blameworthiness;

v. mere actual knowledge of the misconduct triggers the duty to disclose, and it is not dependant on a request from the employer. Where a request to disclose has been made and not fulfilled, culpability for the non-disclosure is simply aggravated.

At the heart of the doctrine of derivative misconduct lies the duty of good faith that an employee owes towards his or her employer. Thus, the failure to disclose relevant information amounts to a breach of the duty of good faith. In this perspective, the Constitutional Court in *Dunlop* reaffirmed the employee’s common law duty to act in good faith (*Dunlop*, 2019). It means that an employee has a duty to disclose knowledge of the misconduct of fellow employees. It then follows that an employee’s breach of the duty of good faith can justify dismissal and that the deliberate withholding of information relevant to misconduct committed by fellow employees is an instance of a breach of the duty of good faith (*Hlebela*, 2015).

Despite the above, there may be circumstances justifying an employee’s failure to disclose information to the employer. Such an instance is when an employee is afraid of reprisal from fellow employees. In this case, the employer must provide and guarantee the safety of the employees beforehand so that the employee may disclose the relevant information. Thus, in *Dunlop* where about 100 employees present at the scene where violence erupted during a protected strike action were dismissed for derivative misconduct, the Constitutional Court found the dismissal unfair. In this case, the employer could not identify the perpetrators and the employees refused to expose the perpetrators for fear of reprisal. The court held that should have guaranteed the employee’s safety before expecting them to disclose the perpetrators. This is so because the court expressed the view that the duty to act in good faith is reciprocal. This signifies that both the employer and employees owe one another a duty to act in good faith. On the employees, this entails a full disclosure of relevant information that the employer requires of them. The employer in a similar manner must ensure the safety of the employees who are afraid to make a disclosure that may lead to a threat to their life.

The last coin of collective misconduct arises in circumstances in which the individual culpability of employees cannot be determined leading to the operational requirements for their dismissal. This fourth collective misconduct was identified in *Chauke* and found application in *Food & Allied Workers Union on behalf of Kapesti v Premier Foods Ltd t/a Blue Ribbon Salt River* (2012) 33 ILJ 1779 (LAC). In this case, the employer dismissed several employees based on operational requirements as a result of a violent strike in which the culpability of individual employees could not be proved. The court found the dismissal unfair because the employer failed to prove that applying the selection criteria was fair and objective.

**Factual matrix**

The employee, Ms Neukana, was prior to her dismissal, employed as a depot assistant. On 20 July 2020, money was reported missing at the branch where the employee was stationed. An investigation into the missing money revealed a shortfall of R 4 997.90 declared.
but not deposited into the bank account. However, on 23 September 2020, when G4 Security collected money from the Store, Lisakhanya, another employee, discovered a grey bag in the money drop safe which was not recorded anywhere. The applicant then reported the discovery to the management and was instructed to open the bag when she discovered about the same amount that went missing about two months earlier. The matter was investigated. During the investigation conducted by Mrs Tessa, the employee, denied knowing the person who may have dropped the bag into the money safe. Another employee later testified in a disciplinary hearing that he had informed the employee that she was responsible for the money dropped into the safe. The employee was consequently charged and dismissed for failing to disclose the information to the employer. Dissatisfied with her dismissal, the employee referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).

CCMA proceedings

During the arbitration proceedings, Mrs Tessa testified on behalf of the employer. The essence of her testimony was that the employer could no longer trust the employee as she had failed to disclose the person who dropped the bag in the safe, information which she voluntarily withheld from the employer. The employee under cross-examination, conceded that she knew who dropped the grey bag into the safe but contended that she expected the said employee to disclose to Mrs Tessa, not her. The commissioner in his analysis, reasoned that the employee was charged with derivative misconduct in that she failed to help the employer to detect dishonesty. Further that as a rule, an employee must act honestly in the best interests of the employer. Applying the principles set out in *Hlebela*, the commissioner found that the employee was, based on her duty to act honestly, under an obligation to report Lusanda’s conduct to management more specifically when she was asked to do so.

Analysis

It is trite that employees must act honestly and in good faith towards their employer. This duty is implied in the contract of employment. Moreover, the duty to act in good faith often referred to as a fiduciary duty entails that one person stands in a position of confidence and trust to protect the other person’s interest (Bassuday, 2016). Although the duty of good faith was not explicit in *Neukana*, its implied significance can be gleaned from the case. However, the duty of good faith is reciprocal, which entails both the employer and employee acting in a manner consonant with the employment contract. Hence in *Council for Scientific & Industrial Research v Fijen* (1996) 17 ILJ 18 (A) Harms JA held in paragraph 26 that:

‘It is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitles the ‘innocent party’ to cancel the agreement…On that basis it appears to me that our law has to be the same as that of English law and also that a reciprocal duty as suggested by counsel rests upon the employee…It does seem to me that, in our law, it is not necessary to work with the concept of an implied term. The duties referred to simply flow from naturalia contractus.’

Such breach of the trust and confidence may be the failure to disclose relevant information to the employer as in *Neukana*. This means that if an employee failed to disclose important information to her employer would be acting in violation of her duty of good faith to her employer (*Bakenrug Meat (Pty) Ltd t/a Joostenberg Meat v Commission for Conciliation, Mediation & Arbitration & others* (2022) 43 ILJ 1272 (LAC)). Thus, if an employee does anything incompatible with his or her duty or faithful discharge of his or her duty to his or her master, the latter has a right to dismiss him or her (*Sappi Novoboard (Pty) Ltd v Bolleurs* (1998) 19 ILJ 784 (LAC)). The failure to carry out his or her duties in the best interest of the employer may result in the employer dismissing the employee as the trust relationship between the employer and employee would have broken down irretrievably. Hence as the employee Neukana withheld vital information which could assist the employer in finding the perpetrator, she breached the implied duty of good faith warranting her dismissal. And this dismissal is based on derivative misconduct. In other words, in the case of derivative misconduct, the employees’ misconduct is founded in the fact that they failed to take positive step to assist so that those employees that actually participated in the unlawful behaviour could be disciplined thereby breaching their duty of good faith and trust towards their employer (Maloka, 2016).

To this effect, Grogan argues that derivative misconduct is the term given to an employee’s refusal to divulge information that might help his or her employer identify the perpetrator of some other misconduct. The author further opines that it is termed “derivative” because the employee who is guilty of that form of misconduct is taken to task, not for involvement in the primary misconduct, but for refusing to assist the employer in its quest to apprehend and discipline the perpetrator(s) of the original offence (Grogan, 2004). Because the employment relationship is based on trust, derivative misconduct is founded on the breach of the duty to act in good faith. Hence the commissioner was of the view that the employee was under the obligation to disclose to her employer that Lusanda was responsible for the sudden reappearance of the money in the safe some two months after not being accounted for.

Once she had knowledge of the culprit, the employee was expected to disclose such information to the employer. Applying the *dictum* in *Hlebela*, the fact that the employee was requested to disclose whether she knew who deposited the money in the safe was an aggravated factor. Therefore, the non-disclosure of information relevant to misconduct committed by Lusanda or by a fellow employee in general is an instance of a breach of the duty of good faith. As Sutherland JA aptly put it, 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 (*Hlebela*, 2015). In so doing, the said employee through his or her silence makes his or herself guilty of a derivative violation of the trust and confidence (*Chauke, 667
1998). Hence through her silence, the employee made herself guilty of derivative misconduct and her concession under cross-examination evinces that she deliberately withheld the information from her employer, and this may constitute aggravating circumstances. The employee breached her duty of good faith, trust, loyalty, and confidence warranting her dismissal.

Conclusion

There can be no doubt that the issue in Ncukana in Hlebela illustrates the employee's duty of good faith to report perpetrators of misconduct to the employer. This case applied the derivative misconduct’s principles laid down. The basis of which is that an employee can be charged with a material breach of the duty of good faith, in relation to the withholding of information and the non-disclosure thereof. Where a request for information about known facts has in fact been made, culpability for the non-disclosure may be an aggravating circumstance.

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