



DISMISSAL FOR STOCK LOSS

**DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE
REQUIREMENTS FOR THE DEGREE LLM (LABOUR), SCHOOL OF
LAW, UNIVERSITY OF LIMPOPO**

BY

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DECLARATION

I, **Bonga Justice Monama**, declare that *Dismissal for Stock Loss* is my own work, that it has not been submitted for any degree or examination in any other University, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Signed: _____

Date: _____

DEDICATION

This is dedicated to my parents, late Mr Shiba Johannes Monama and late Mrs Maxim Dikeledi Monama for their love, words of encouragement and push for tenacity ring in my ears. I will always love them. And also dedicated to my brilliant and outrageously loving and supportive wife, Patricia Sefularo Monama.

ACKNOWLEDGEMENTS

The greatest gratitude goes to my **Comforter, God of Abraham Isaac and Jacob**, whose grace got me into this course, sustained me through it and has brought me to the end.

I would also like to express my deep appreciation to my supervisor Mr Tumo Charles Maloka for the support and guidance in writing this dissertation. It was an honour to write this dissertation under your supervision.

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1. SETTING THE SCENE

Theft, particularly employee theft, is a pervasive problem.¹ In the retail industry,² shrinkage or stock loss remains a thorny issue to most employers. The problem of protecting goods against theft is compounded by the fact that in many cases, especially in the retail sector, it is difficult to if not impossible to apprehend and prove a case against a dishonest employee.” Ira M. Shepard and Robert Duston in their *BNA Special Report* accurately capture the nature of internal crime:³

[C]orporate reaction to the discovery of employee theft is similar to the reaction of many crime victims. The first reaction is denial. Businesses do not like to admit that the trust they have placed in employees has been misplaced; such admissions reflect badly on the business hiring process. Management consultants who specialize in helping organizations investigate and control theft say the initial reaction of most companies is to focus their suspicions on the organization, such as cleaning crews or outside vendors who have access to the company's premises. More often than not, the source of the problem turns out to be internal. The employer's second reaction is anger at the thief's lack of company loyalty. This usually results in the employee's immediate discharge in an effort to stop this "cancer" from spreading. Third reaction is corporate fear and embarrassment, leading to an attempt to keep the story quiet. The fourth reaction is a demand that the company take some sort of direct action to prevent the problem from occurring again. All too often the response is increased technological security devices, installation of more cameras and monitors, or a search for new methods to screen out dishonest job

¹ It has been noted in *Medico-Legal-Articles* <http://www.hasa.co.za/generic-article.asp?id=17-Date> 2004-06/18 that “increasing levels of crime within the workplace, and the sophisticated nature of institutionalised fraud and corruption has resulted in employers frequently utilising traps to identify those employees guilty of such misconduct. Although such entrapment can be understood within the context of institutionalised crime, employers should guard against undermining the constitutional guarantees of their employee, thereby making null and void any evidence so obtained. In particular, the use of traps within the workplace should be seriously considered within the broad definition of the exclusionary rule of evidence, and the concerns vocalised by the constitutional court in this regard.” See also Note, ‘Theft, unauthorised possession and related issues’ (1988) 1(9) *Labour Law Briefs* 59.

² Myburgh, A ‘Worker courts: A democratic solution to shrinkage’ (1996) *EL* 72, 72 made telling observation: ‘It is an established if regrettable fact that many employees steal from their employers, and trite that theft by an employee is a breach that generally warrants summary dismissal. And summary dismissal on an *ad hoc* basis is in the fact the most employers deal with inside jobs. The problem is that this seldom has a sufficient deterrent effect – more employees are caught, more dismissed, and annual budgets continue to reflect losses through “shrinkage”.’

³ A *BNA Special Report -Thieves at Work: An Employer's Guide to Combating Workplace Dishonest* at 3.

applicants. These responses are very visible reminders that the company is fighting the employee theft problem...'

It is undeniable that combating internal theft remains an overarching objective of all retail employers. For example, in the matter of *Metro & Cash v Tshehla*⁴ the majority of the court stated that:

'Employers especially those in the retail industry are frequently faced with the situation where it is necessary to introduce measures to control losses of stock, merchandise and money. An employer is entitled to introduce procedures to protect its commercial integrity and to expect compliances therewith. It is further entitled to treat disregard or non-compliance with such procedures with severity such as dismissal.'⁵

Retail employers have tackled the problem of unacceptable high stock by introducing stock loss policies. This process includes stringent stock control measures, motivation, training and retraining of staff and staff members in the planning process to contain losses to at least the acceptable norm of 2% of stock holding. Generally employees are cautioned that continued stock losses in excess of the norm would lead to disciplinary action for misconduct and/or incapacity and possible dismissal for misconduct, incapacity and/or operational reasons. Despite the stepped up measures to contain stock losses to an acceptable level, the losses still exceed the norm by far, a fact borne by series of arbitration awards and Labour Court decisions.

This study primarily sets out to examine the developments in the field of employment and labour law with reference to dismissal of employees for stock loss.

⁴ (1996) 17 ILJ 1126 (LAC); [1997] 1 BLLR 35 (LAC).

⁵ *Metro & Cash v Tshehla supra* at 1133B-F. In *SACCAWU obo Nyusela v Woolworths (Pty) Ltd* [1999] 8 BLLR 947 (CCMA) at 953B-G, the arbitrator observed: "it is well settled that an employer may introduce strict rules in order to protect its property. Such rules may take the forms of prohibiting certain types of conduct, which, though closely associated with offence involving misappropriation of company property, do not themselves necessarily have dishonesty as an element. This makes it unnecessary to prove that actual theft was intended." See also: *Mphatane v Shoprite Checkers (Pty) Ltd* (1996) 17 ILJ 964 (IC); *Molekane/Shoprite Checkers* [2002] 9 BALR 945 (CCMA); *SACCAWU obo Nhlapo & others/Shoprite Checkers* [2003] 3 BALR 347 (CCMA); *Hafiz v RSA Market Agents* [2003] 4 BALR 431 (CCMA); *Empangeni Transport (Pty) Ltd v Zulu* (1992) 13 ILJ 352 (LAC); *Eskom v Mokoena* 1997 (2) LLD 214 (LAC).

The purpose is to isolate some of the difficult and interesting questions which have been raised in recent times concerning the substantive and procedural fairness of dismissal of employees in response to a collective failure to comply with the employer's standards/procedures regarding stock losses. In the first instance, the study will delve into the all-encompassing duty of mutual trust and confidence upon which the employer-employee relationship is founded. The net effect of shrinkage is irretrievable breakdown of the requisite trust between the employer and employee.

In the second instance, the grounds of justification preferred by an employer for dismissing some cases the entire staff of a branch for failing to control shrinkage will be explored. The determination of this question will be informed by answers to questions such as whether stock loss constitutes misconduct; whether employees other than managers should be held accountable for a general stock loss at a store; and whether a general stock loss at a store can be said to be collective misconduct for all store employees doing specific duties in terms of their job description. In this regard, attention will be given to dismissal for misconduct, incapacity and for operational reasons. The purpose of this discussion is to delineate the fine distinction between collective guilt misconduct, team liability/misconduct and derivative misconduct.

In the third instance, the requirements of the fair procedure in relation dismissal of employees for stock loss are examined. Foremost amongst strategies for combating employee theft is entrapment. The overriding motivation behind the use trapping system in employment is most cogently summed up Grogan as follows:

“As employers struggle to contain ever rising levels of shrinkage, many are resorting to employing “undercover agents” to tempt workers to expose dishonest inclinations. These “agents” pose as receivers of stolen goods, and arrange illicit transactions. When the employees succumb to temptation, they are caught red handed and dismissed. Courts throughout the world have recognised that entrapment is morally dubious, but effective: effective because it secures the arrest and conviction of criminals who might otherwise not be caught; dubious

because it can result in the conviction of those who might never have gone wrong had they not been tempted.”⁶

Another commentator has put this use of entrapment in employment in further perspective:⁷

‘The primary purpose of a trap in the employment sphere is not to obtain a criminal conviction but to reduce theft in the workplace. A too strict an approach towards such evidence would fail to take into account the legitimate interests of employers (who will usually not have the resource of the State at their disposal) in combating what appears to be an increasing rate of dishonesty (and often at a more organised level than petty pilfering) in the workplace. The employment relationship is clearly more intimate than that between the State and the individual.’

Trapping system raises important questions about the importation of criminal law doctrines⁸ and methods of securing conviction in the employment context in general. This aspect raised complex evidential questions of constitutional nature⁹ concerning the admissibility of illegally obtained evidence to prove the facts of employee misconduct. In turn, this raises the question of the interpretation of fundamental rights provisions designed to protect the individual's right to his/her privacy. The other aspect of constitutionality results entrenchment of the fundamental right to a fair labour practice in the South African Constitution.¹⁰

⁶ *Sibergramme* 10/2000 quoted in the case of *Metrorail and SA Transport & Allied Workers Union on behalf of Magagula* (2002) 23 ILJ 1641 (BCA) at 1646 H-I.

⁷ Hutchison 'The entrapment of employees: *Cape Town City Council vs. SAMWU*' (2000) 10(5) *Contemporary Labour Law* 45 at 48.

⁸ For Criminal law on common purpose: *S v Mgedezi* 1989 (1) SA 687 (A); *S v Memani* 1990 (2) SACR 4 (TkA); *S v Sefatsa & others* 1998 (1) SA 868 (A); *S v Singo* 1993 (1) SACR 226 (A); *S v Gaseb* 2001 (1) SACR 438 (NmS); *S v Thebus & others* 2003 (10) BCLR 1100 (CC). See further Sibanda, O 'There is nothing wrong with the doctrine of common purpose: *Thebus & another v the State CCT 36/02 2004* (1) *Turf Law Review* 34. . Hutchinson, W. 'The entrapment of employees: *Cape Town City Council vs. SAMWU*' (2000) 10(5) *CLL* 45, criticizes the strict approach adopted by the court in applying the principles of criminal law to the employment context. He argues that such approach would be wrong, further that criminal law should not be easily imported into labour law. See also Le Roux, P.A.K. 'Discipline and group misconduct' 2(11) *CLL* 119; Le Roux & Van Niekerk, *The South African Law of Unfair Dismissal* (1994) Ch. 10.

⁹ See e.g.: *Protea Technology Ltd & Another v Weiner & others* [1997] 9 BCLR 1225 (W); *Geerds v Multichoice Africa (Pty) Ltd* [1998] 9 BLLR 895 (LAC); *De Beers Consolidated Mines Ltd v NUM* [1998] BLLR 1201 (LAC); *Olivier v African Hide Trading Corporation (Pty) Ltd* (1998) 19 ILJ 417 (CCMA); *Moonsamy v The Mailhouse* (1999) 20 ILJ 464 (CCMA); *Mhlongo v AECI* (1999) 20 ILJ 1129 (CCMA); *AWUSA obo Ncube v Northern Crime Security CC* (1999) 20 ILJ 1954 (CCMA).

¹⁰ See s 27, Constitution of the Republic of South Africa Act 200 of 1993 (interim Constitution); s 23, Constitution of the Republic of South Africa Act 108 of 1996 (the final Constitution).

Finally, particular attention is paid to the emerging case law on stock loss. An attempt is made to demonstrate how the concept of “collective” guilt hitherto condemned by the Industrial Court as being “wholly foreign to our system and repugnant to the requirements of natural justice”¹¹ has now surfaced under the guise of team/group misconduct and derivative misconduct.

2. TRUST RELATIONSHIP

The relationship between the employer and employee is one of trust.¹² Trust, from the employer’s perspective, entails the belief, or confidence, that the employee is adhering to the common law duty to act in good faith towards the business. Although this duty has various facets, it essentially entails the obligation, on part of the employee, to constantly strive to act in the best interest of the employer’s business.¹³

Dishonesty in the employment context can take various forms, including theft, fraud and other forms of dishonesty. Theft is regarded by the labour courts as one of the most serious form of disciplinary offence, normally justifying dismissal at first instance.¹⁴ In *Central News Agency (Pty) Ltd v Commercial Catering & Allied Workers Union & another*,¹⁵ the Labour Appeal Court had the following to say about theft in the employment context:

‘In my view it is axiomatic to the relationship between an employer and employee that the employer should be entitled to rely upon the employee not to steal from the employer. This trust which the employer places in his employee is basis to and forms the substratum of the relationship between them. A breach of this duty goes to the root of the contract of employment and of the relationship between the employer and employee’.¹⁶

¹¹ Per Grogan AM in *NSCAWU v Coin Security Group (Pty) Ltd t/a Coin Security* [1997] 1 BLLR 85 (IC) at 91F-G. See also *NUM v Durban Deep Roodepoort Ltd* (1987) 8 ILJ 156 (IC).

¹² *Council for Scientific Research v Fijen* (1996) 17 ILJ 18 (A) at 26D-E.

¹³ Bassoon *et al Essential Labour Law: vol 1: Individual Labour Law*, 3 ed (2002) LLP 230

¹⁴ Grogan, *J Workplace Law*, (2005) 169.

¹⁵ (1991) 12 ILJ 340 (LAC)

¹⁶ *Central News Agency (Pty) Ltd v Commercial Catering & Allied Workers Union & another* at para 34.

In *Chauke & others v Lee Service Centre CC t/a Lesson Motors*,¹⁷ Learned Judge Cameron (as he then was) held as follows:¹⁸

'where a worker has or may reasonably be supposed to have information concerning the guilty, his or her failure to come forward with the information may itself amount to misconduct. The relationship between employer and employee is its essentials one of trust and confidence, and, even at common law, conduct clearly inconsistent with that essential warranted termination of employment. Failure to assist an employer in bringing the guilty to book violates this duty and may itself justify dismissal.'

An employer has two reasons for wanting to rid itself of a dishonest employee. One is that the employee can no longer be trusted. The other less frequently acknowledged but less legitimate, is the need to send a signal to other employees that dishonesty will not be tolerated. This consideration relates to the deterrence theory of punishment. The question to be asked is whether a repetition of the misconduct, either by the same employee or by others, will adversely affect the employer's business, the safety of the workforce and/or the employer's trading reputation.¹⁹ The point was made similarly in *De Beers Consolidated Mines Ltd v CCMA & others*²⁰, where the court held:

"Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise"²¹

Also in *Toyota South Africa Motors (Pty) Ltd v Radebe & others*,²² Nicholson JA held as follows:

'Theft and fraud have always constituted good grounds for dismissal as they frequently constitute a fundamental breach of the employment contract. The cases have in the past emphasized, with good reason, the breach of the relationship of trust that occurs where an employee is guilty of such a misdemeanour. The employer and employee are parties to an enterprise that produces goods or services which generates profit. If one party is dishonest to

¹⁷ (1998) 19 ILJ 1441 (LAC).

¹⁸ *Chauke & others v Lee Service Centre CC t/a Lesson Motors* at 1447C-D.

¹⁹ Grogan, J *Dismissal* (2002) 99.

²⁰ (2000) 9 BLLR 995 (LAC).

²¹ *De Beers Consolidated Mines Ltd v CCMA & others* at para 22.

²² [2000] 3 BLLR 243 (LAC).

such a degree that the enterprise or a part of it is jeopardized then I am sure there has been such a fundamental breach.²³

If the facts show, on a balance of probabilities, that this duty (trust) has been breached, the employee is guilty of misconduct and, if the misconduct is serious, the employer may dismiss the employee. If the employer is unable to prove such breach on a balance of probabilities, the employee cannot be dismissed for misconduct. However, the employer may dismiss the employee for operational reasons. The employer could argue that, although there is insufficient proof that the employee has indeed breached this duty, the latter is suspected of having done so, or that he or she might do so in the future, and that this mistrust is counter productive to the operation of the business.²⁴

In *Census Tseko Moletsane v Ascot Diamonds (Pty) Ltd*,²⁵ the Industrial Court held that the employer's dismissal of an employee on suspicion of theft had been fair. Moletsane was employed as a bottom-polisher of diamonds. He was accused of having swapped a diamond for one of lesser quality. When he was unable to present the original diamond, he was summarily dismissed. After considering the evidence, the court concluded that such a substitution had taken place. However, the court also found that it could not be established that Moletsane had been responsible for the substitution. Nevertheless, Moletsane's dismissal was still found to be fair on the basis that Ascot Diamonds had an economic reason for dismissing him. It found that, as a diamond polisher, Moletsane was employed in the position of trust. This, together with the fact Ascot Diamond had a strong and valid suspicion that Moletsane was guilty of dishonest conduct, meant that the employer had a valid economic reason for dismissing Moletsane.

3. COLLECTIVE GUILT

²³ *Toyota South Africa Motors (Pty) Ltd v Radebe & others* at para 43.

²⁴ Basson *et al*, *Essential Labour Law vol 1: Individual Labour Law*, (3ed) (2002) 230.

²⁵ (1993) 2 ICD 310 (IC).

When a large or unknown number of employees have engaged in collective misconduct, and the actual perpetrators cannot be identified, the employer may be tempted either to select some employees for dismissal as an example to others, or to dismiss all employees who could conceivably have been involved, whether innocent or otherwise, in the hope that the guilty employees will be caught in the net. The first option is plainly unacceptable; the dismissal of the selected employees is unfair unless there is evidence to link them to the commission of the offence. Such dismissals will be stigmatized as arbitrary. On the face of it, the second option is equally unacceptable, as it appears to offend against the principle, endorsed by all civilized legal system, that it is preferable for guilty party to go free, than to convict an innocent person. The labour courts have condemned the principle of 'collective guilt'.²⁶

NUM v Durban Roodepoort Deep Ltd produced the following principle:²⁷

'[T]he 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 (sic)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.'

This passage became influential in *DICHAWU obo Qwabe & others v Pep Stores*.²⁸ The facts in *DICHAWU* were that the applicant employees were employed by the Idutywa branch of the respondent, which had experienced high shrinkage levels. The store was visited by management on several occasions and the staff was warned that, if shrinkage did not drop to below two per cent, action would be taken against them. The employees of the store all signed documents to this effect. Six months later, shrinkage had risen to 28 per cent, but after further intervention by management, had dropped to 6 per cent in the following three months. Further "action plan" were taken, but shrinkage did not drop to below 8 per cent during the subsequent months. The manager of the

²⁶ Grogan, J *Dismissal Discrimination & Unfair Labour Practices*, (2007) 369–370.

²⁷ (1987) 8 ILJ 156 (IC) at 162H-I.

²⁸ [2000] 2 BALR 130 (CCMA).

store was then instructed to rotate cashiers and discipline them for cash shortages and failure to complete daily control sheets. The manager did not heed this instruction and was given a final warning. After stock losses continued, the entire staff was suspended. They refused to hand over the keys to the store. It could not be reopened for three days, causing losses of about R17 000.00. The respondent conceded that none of the applicant employees could be individually linked to the stock losses, but claimed that they were collectively responsible.

The commissioner noted as follows:²⁹

'The "collective responsibility" approach is repugnant, not only to the basic principles of natural justice, but also to the principle that one employee should not suffer because of the poor performance of his colleagues, save of course where it is the particular responsibility of that employee to see that the others perform. The way in which and extent to which it was relied upon to dismiss the applicants shows elements of the controversial doctrine known as "collective guilt" which rests on the assumption that where some act of wrongdoing is performed by an individual member of a particular group, the entire group can be punished for that act...[A]ny policy in terms of which all members of any group must bear collective punishment for the wrongdoings of some of the members is 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 proven guilty. There is a failure of justice even if a single innocent person is presumed to be guilty and made to suffer with the rest.

...[T]he respondent should not escape the responsibility to prove that each of the individual applicant were poor performers, because that is the only way to separate the poor performers from the others and to ensure that some members of the group do not suffer because of the performance of others'.

Collective punishment is the obverse of selective punishment. In the latter case, only one or a few guilty employees are punished, but other guilty employees go free; when collective punishment is imposed, the innocent are punished with the guilty.

4. DERIVATIVE MISCONDUCT

²⁹ *DICHAWU obo Qwabe & others v Pep Stores* at 134H-135B.

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 – it is termed “derivative” because the employee 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. Trust forms the foundation of the relationship between employer and employee. Derivative misconduct is founded on this notion. There is no general obligation on employees to share information about their colleagues with their employers, but at the very least employees must inform on their colleagues when they know that those colleagues are stealing from their employer, or that they have been guilty of some other misconduct which warrants disciplinary action.³⁰

The concept of derivative misconduct first passed judicial scrutiny in *FAWU & others v Amalgamated Beverage Industries*.³¹ The facts in *Amalgamated Beverage Industries (ABI)* were that on the day upon which the workers had agreed to return to work after illegal strike, a temporary driver, who had made deliveries prior to the workers' return, was assaulted. Crewmen were seen leaving the room in which the assault took place, but they could not be individually identified. With the use of an electronic clock-in system the respondent identified the crewmen (the appellants) who had been on the premises at the time the assault occurred. A mass disciplinary enquiry was convened at which the appellants faced charges of , inter alia, assault and intimidation. They led no evidence, were found guilty and dismissed. Their application to Industrial Court (where they again led no evidence) was unsuccessful.

On appeal the respondent alleged that it was justified in dismissing the appellants as they had either participated directly in the assault, or had made

³⁰ See Grogan, J 'Derivative misconduct: The offence of not informing' (2004) 20(3) *EL* 15.

³¹ [1994] 12 *BLLR* 25 (LAC).

common cause with those who actually assaulted the temporary driver. There was no direct evidence linking any of the appellant to any particular act in relation to the assault, and the respondent's case was on inference alone. The appellants argued that it was for the respondent to establish their complicity, and that no case had been made out which called for reply.

Nugent J (as he then was) suggested that:³²

'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'.

In *Amalgamated Beverage Industries (ABI)*, the court did not find it necessary to apply the notion of derivative misconduct, because it found that, on the probabilities all the dismissed workers "were indeed present when the assault took place, and either participated therein or lent their support to it". They were all accordingly guilty of the primary misconduct because they either took part in the assault themselves or had associated with the assailants.

In *Chauke & others v Lee Service Centre CC t/a Lesson Motors* the Labour Appeal Court clarified the concept of 'derivative misconduct'. The facts were that the appellant employees who worked in certain section of the respondent company had committed acts of sabotage pursuant to dismissal of a fellow-employee. After several incidents of damage to motor vehicles, and failure of the trade union to become involved and the unsuccessful intervention of the police, the company issued an ultimatum to the employees in those sections. In the ultimatum the company advised the employees that any further sabotage where the culprit could not be identified would result in their instant dismissal. A further incident of deliberate damage to a vehicle took place and, after meeting with the employees and the union, the company dismissed 20 employees.

³² *FAWU & others v Amalgamated Beverage Industries* at 1063B.

Cameron JA (as he then was) held as follows:³³

"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?

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 destruction, 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. Such a case involves the dismissal of an indisputably innocent worker.

He continued:³⁴

It posits a justification on operational grounds, namely that action is necessary to save the life of the enterprise. That must be distinguished from 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.

And further:³⁵

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 included the perpetrators may be under 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. Where a worker has or may reasonably be supposed to have information concerning the guilty, his or her failure to come forward with the information may itself amount to misconduct. The relationship between employer and employee is its essentials one of trust and confidence, and, even at common law, conduct clearly inconsistent with that essential warranted termination of employment. Failure to assist an employer in bringing the guilty to book violates this duty and may itself justify dismissal...

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'

³³ *Chauke & others v Lee Service Centre CC t/a Lesson Motors* at paras 27-28.

³⁴ *Chauke & others v Lee Service Centre CC t/a Lesson Motors* at para 29.

³⁵ *Chauke & others v Lee Service Centre CC t/a Lesson Motors* at paras 31 and 33.

*RSA Geological Services (a Division of De Beers Consolidated Mines Ltd) v Grogan & others*³⁶ arose out of a dispute between the National Union of Mineworkers and De Beers over the dismissal of almost the entire staff of a mineral laboratory, fifteen in number, after a sample intended for analysis was found dumped down two boreholes in the laboratory grounds. The staff was interviewed and asked to disclose the identity of the culprits, and to undergo polygraph tests. None did so. However, after further grilling, a worker admitted to discarding the sample, and implicated two others. The rest of the staff was warned that if they were withholding information, they could be dismissed. They kept mum. The entire staff of the laboratory below senior management level was then called to a disciplinary inquiry and dismissed. At a subsequent private arbitration, the arbitrator identified two questions for decision: first, whether any of the employees discarded the sample or failed to assist the employer in identifying the perpetrators; second, whether dismissal for either of these offences was fair. The arbitrator found that the employee who had admitted to discarding the sample and those he had implicated had been fairly dismissed, as well as those who had worked overtime during the period in which the kimberlite had been dumped. However, he ruled that the remaining 10 employees had been dismissed unfairly because the employer had failed to prove that they had either discarded the sample or that they knew who had done so.

On review, the parties agreed that the arbitrator had applied two criteria – the period over which the sample had been discarded and the motive for discarding it. In applying these criteria the arbitrator had relied on the submissions of the union representatives and one of its witnesses. The court found that the evidence did not support the arbitrator's finding that kimberlite had been dumped only in the period he had determined. The evidence indicated that the dumping had continued for much longer. This meant that the workers who the arbitrator had placed outside the net in fact fell within it. The court agreed with the arbitrator that wilful non-co-operation by employees with their employer "can in the labour

³⁶ [2008] 2 BLLR 184 (LC). See *NUM & others / RSA Geological Services, a Division of De Beers Consolidated Mines Ltd* [2004] 1 BALR 1 (P).

context constitute 'association' with the culprits of a type sufficiently close to be covered by the [main] charges", and that employees who deliberately withhold knowledge of misconduct by colleagues can be guilty of "derivative misconduct".³⁷

The court also accepted that the dismissal of the five employees who the arbitrator had found were implicated in the dumping had been fairly dismissed, because the probabilities indicated that they either dumped the sample, or knew or must have known that their colleagues were doing so. As for the remaining ten, the court held that derivative misconduct does not weaken the standard of proof required of employers; the employer must prove on a balance of probabilities that the employees knew of the principal misconduct and elected without justification to disclose their knowledge. However, a burden also rests on the employees to disprove a strong *prima facie* case against them. The court found the circumstantial evidence against the ten so strong that they could only have rebutted the inference to be drawn from it by testifying themselves. They had not done so³⁸. The arbitrator had correctly found the five guilty of at least derivative misconduct, but had without justification exonerated the others. The court upheld the arbitrator's findings in respect of the employees whose dismissals were found to be fair, but set aside his findings that the dismissal of some of the employees was substantively unfair. The union's cross-application was dismissed, and the award amended to uphold all the dismissals³⁹.

5. TEAM LIABILITY

In an attempt to combat stock loss/ shrinkage, some employers resort to dismissing groups of employees who are unable to explain how stock losses occurred. Employers typically approach the problem of "shrinkage" (inside jobs of

³⁷ *RSA Geological Services (a Division of De Beers Consolidated Mines Ltd) v Grogan & others* at para 44.

³⁸ *RSA Geological Services (a Division of De Beers Consolidated Mines Ltd) v Grogan & others* at para 49.

³⁹ *RSA Geological Services (a Division of De Beers Consolidated Mines Ltd) v Grogan & others* at para 51.

theft by staff) in one of two ways. They either accept that loss is inevitable, and budget for such loss, or they devise means of catching the thieves. The latter objective is often difficult, if not impossible to achieve. So employers have devised more innovative measures to combat shrinkage.⁴⁰

5.1 Stock loss policy

In addressing the problem, the employers introduced stock loss policies, in which, the control of shrinkage is a team responsibility rather than one resting on management alone. The Industrial Court decision in *SACCAWU & others v Cashbuild Ltd*⁴¹ gave a stamp of approval to company's shrinkage policy. In *Cashbuild* the entire staff of the respondent's Queenstown branch were dismissed for failing to adhere to the respondent's shrinkage control policy. The respondent had budgeted within its group of retail outlets for a shrinkage level of 0,4 per cent, but viewed it as intolerable if it reached 0,6 per cent. In the 1980s it introduced a system of worker participation, a central feature of which was a "Great Indaba" which formulated company policy on a democratic basis. The Indaba ratified a shrinkage control policy, which made shrinkage control a team responsibility. A system called "Venturecom" was introduced in terms of which staff members were elected to fill management portfolios. Venturecom members were responsible for the daily running of the branches. Provision was made for a "Loss Prevention Bonus", which was divided equally among all employees at the end of each year. Shrinkage losses were subtracted from the amount allocated for the bonus. All employees were instructed in the respondent's shrinkage control procedures, which was regarded as a team responsibility in that if one employee saw that another was not adhering to it he was expected to report the matter. The respondent claimed that this policy had saved the company some R22-million in shrinkage losses over the 11 years it had been in operation.

⁴⁰ See Landman, A 'Team misconduct: The final solution to shrinkage?' (2001) 7(5) 17(5) 3 *EL* 3.

⁴¹ [1996] 4 BLLR 457 (IC). For discussion see Myburgh, A 'Worker courts: A democratic solution to shrinkage' (1996) *EL* 72.

The respondent's Queenstown branch had, however, suffered unacceptable shrinkage losses in 1990, resulting in a final written warning being issued to all staff. This was withdrawn in 1991. In 1992 a policy was adopted by the Great Indaba which provided for disciplinary action against teams which failed to keep shrinkage below 0,6 per cent. They would be issued a final warning after an inquiry. If shrinkage continued, a disciplinary hearing would be convened, presided over by a neutral Venturecom. The staff at the Queenstown branch, including the individual applicants, were issued a further final warning in 1993 and an action plan was adopted to control shrinkage there. Despite numerous meetings to discuss the action plan, shrinkage continued. In mid-1994 a shrinkage control workshop was conducted, during which the individual applicants were requested to fill in questionnaires. A disciplinary hearing was then convened, presided over by a special Venturecom of five employees, and the individual applicants elected to be heard as a group. On the basis of their answers to the questionnaire, they were found guilty of failing to adhere to the respondent's shrinkage control policy. They appealed unsuccessfully.

The court found that the individual applicants knew of the Action Plan and the shrinkage control procedures, and rejected their witness's attempt to show that they had in fact adhered to the Action Plan in view of their answers to the questionnaires and the claim in their statement of case that it was impossible to follow the Action Plan.

It also found that the procedures followed by the Venturecom were fair. As to the allegation of substantive unfairness, the court found that the respondent had a clear rule regarding shrinkage and, that such rule was justified by its operational requirements. The concept of team control of shrinkage was to be evaluated in the light of the respondent's overall philosophy of participative management. The individual applicants had been placed on final warning for not reducing the unacceptable level of stock losses, and were aware that they faced dismissal if

they did not do so. In these circumstances, it was permissible for the respondent to hold the individual applicants liable as a group, notwithstanding the fact that the notion of collective guilt was generally repugnant to our law. Furthermore, the individual applicants, by choosing a group hearing, had elected to be judged as a group. The application was accordingly dismissed.

The court did not see fit to explore the thorny issues of collective punishment in the employment context. The dismissals in *Cashbuild* appear to have passed muster because the procedures followed had been agreed between the employer and the employee's union.

5.2 Team misconduct

In *FEDCRAW v Snip Trading (Pty) Ltd*,⁴² an arbitrator found another justification for dismissing employees for failure control shrinkage – which he termed ‘team misconduct’. The arbitrator was required to determine three issues, formulated as follows in the arbitration agreement:

1. ‘whether stock loss constitutes misconduct;’
2. ‘whether employees other than managers should be held accountable for a general stock loss at a store’; and
3. ‘whether a general stock loss at a store can be said to be collective misconduct for all store employees doing specific duties in terms of their job description’

The facts in *FEDCRAW v Snip Trading (Pty) Ltd* were the company, which was founded some 20 years ago as a small family concern in the shoe trade, expanded into a general merchandise retailer, targeting the lower income group. Faced with fierce competition in this market, the company is obliged to keep its profit margins as low as possible. Stock losses, whether caused by theft or administrative error, can threaten the company's survival. The company has

⁴² [2001] 7 BALR 699 (P).

security systems in place to deter both customers and staff from stealing. These include turnstile exits, "parcel counters", and, in larger stores, security guards. As a further safeguard against "shrinkage", the company instituted a system some years ago in terms of which store managers complete a simple "stock accounting sheet" every week. An opening balance is recorded on the sheet. This represents either the total value of the stock as established by a stock count, or the figure representing the previous week's stock balance. All transactions that decrease the value of the stock are deducted. The final figure either balances or registers a loss. The stock accounting sheets are then sent to the company's head office for auditing. If "shrinkage" rises to a level unacceptable to the company, action is taken.

The company has for some time held the staff of its store collectively liable if stock losses exceed 1 percent of turnover. In 1996, the union declared a dispute over the policy, and threatened industrial action. This was averted when the company and the union agreed that individual employees below the level of store manager could not be held collectively responsible for a stock loss; they would henceforward be accountable only on an individual basis. Managers (some of whom were union members) were unhappy with the agreement. They claimed that they were dependent on their subordinates for restricting stock loss. A further collective agreement was entered into in February 1997. Under that agreement, stock loss was deemed to constitute "misconduct". All employees were again held accountable and could be disciplined if stock losses at their stores exceeded one per cent of gross turnover. Once that occurred, all the employees at the store concerned were required individually to explain how the stock loss occurred. If they could not furnish a satisfactory explanation, they were dismissed. A number of employees suffered this fate. The union objected again. After protracted negotiation and further treats of strikes and litigation, the matter was referred to private arbitration in terms of the Arbitration Act 42 of 1965.⁴³

⁴³ *FEDCRAW v Snip Trading (Pty) Ltd* at paras 5-13.

On the question whether stock loss constitute misconduct, the arbitrator held as follows:⁴⁴

'Stock loss, being a fact, cannot in itself constitute "misconduct". The term "stock loss" refers to situations in which stock has gone missing in circumstances that cannot be explained, and which results in loss to the employer. Can an employee be said to have committed misconduct solely because a stock loss has occurred at the store where he or she is employed?'

Each employee of the company is bound by a clause in his or her contract of employment in terms of which he or she expressly accepts "responsibility" and "personal accountability" for unacceptable stock losses, and accepts that stock losses exceeding 0,5 or 1 per cent "will be regarded as a serious breach of contract...which will be dealt with in terms of the provisions of the company's disciplinary code and procedure".⁴⁵

The Arbitrator next observed that, for purposes of establishing whether stock losses amount to "misconduct", the contractual provision is not conclusive. It is trite that an employer cannot circumvent the provisions of the Labour Relations Act 66 of 1995 (LRA) by compelling employees to enter into contractual provisions that conflict with the provisions of the LRA. Stock losses are defined in the company's disciplinary code as "[a]ny action whereby an employee, through negligence or on purpose, cannot account satisfactorily for stock entrusted to that employee". The necessity of proof of fault is therefore recognized.

The arbitrator noted that, generally speaking, misconduct entails a breach of contract, though not all breaches of conduct amount to "misconduct", as that term is generally understood in Labour Law. An "innocent" breach will not be regarded as misconduct because the essence of misconduct is some form of fault – either intentional wrongdoing or culpable negligence – on the part of the perpetrator. The terminology adopted in the LRA and Schedule 8 thereof (Code of Good Conduct: Dismissal), which distinguishes between dismissals related to the

⁴⁴ *FEDCRAW v Snip Trading (Pty) Ltd* at para 18.

⁴⁵ *FEDCRAW v Snip Trading (Pty) Ltd* at para 19.

conduct of employees, those relating to employees' capacity and work performance, and those related to the operational requirement of the employer. In term of LRA, the question the arbitrator was required to decide was whether the occurrence of stock loss could in principle be said to be a reason related to the employee's conduct that enables the employer to prove, if it could, that dismissal is justified in the particular circumstances of the case.⁴⁶

In respect of question whether employees other than managers should be held accountable for a general stock loss at a store, the arbitrator noted that the parties were *ad idem* that store managers can properly be held accountable for stock losses and that manager can be dismissed if stock losses occur. The only defence available to managers in cases of stock loss was to prove that stock went missing through circumstances beyond their control. If managers raised this defence, the onus rested on them to prove it. If managers could not do so, the only possible inference was that they had failed to exercise the required diligence and care required of them. However, the focus of the arbitration was whether employees other than managers could be held 'held accountable' (ie disciplined and dismissed) when stock losses occurred. Whether employees can be held accountable for stock losses without proof that they actually had a hand in the disappearance of the stock depended on whether the employees' work entailed activities which, if not properly performed, would result in stock loss. The arbitrator noted that the extent of employees' responsibilities diminish down the organizational ladder. However, the mere fact that a superior has greater responsibility is not enough to shield employees from disciplinary action if they fail to perform tasks falling within their job descriptions. On the other side of the coin, a subordinate cannot be held responsible for the acts or omissions of a superior merely because the situation created by the superior's default causes the employer loss. This was the balance that had to be struck by a fair stock loss policy.

⁴⁶ *FEDCRAW v Snip Trading (Pty) Ltd* at paras 20–23.

The company contended that all the employees in its stores shared responsibility for implementing procedures designed to prevent stock loss. This, claimed the company, meant that all employees can justifiably be required to explain a stock loss. The arbitrator accepted for purposes of his award that each employee is in a position to observe one cause of stock loss that would absolve the staff of liability – namely, theft by customers. If no member of the could not point to theft or some other cause or the loss not attributable to their own negligence of fault, the only logical inference was that one or more of the employees were responsible.

This observation brought the arbitrator to the question whether a general stock loss at a store can be defined as collective misconduct by employees doing specific duties in terms of their job descriptions. The arbitrator referred in this regard to the notion of “collective responsibility” which in the employment in the employment context has been condemned. The arbitrator decided that the concept of “collective misconduct” required refinement. He said that “collective guilt” refers to situations in which all members of a group are punished because of the actions of some of the group. The term “collective misconduct” is generally used to refer to misconduct in which a number of employees participate with a common purpose. The notion of “collective guilt” assumes that all members of a group are guilty (and deserving of punishment) simply because the perpetrator belonged to the group. One justification for holding all the members of a group liable for the acts some members of that group is the doctrine of common purpose. Another justification, peculiar to labour law, is the concept of “derivative”, which locates the misconduct not in the primary misconduct of the perpetrator, but in the refusal by his or her colleagues to inform the employer of the identity of the actual perpetrator.

The arbitrator agreed that the notion of “collective guilt” is conceptually flawed because it is not possible in law or logic to attribute criminal liability to a group unless either the doctrine the doctrine of common purpose or derivative

misconduct applies. However, the question was whether the company relied on the doctrine of “collective guilt”. According to the arbitrator, the company did not. The company relied, rather, on a different principle, which the arbitrator termed team misconduct. “Team misconduct”, according to the arbitrator, was to be distinguished from the kind of “collective misconduct” dealt with in cases such as *Chauke*, in which the employer dismissed a group of workers because they refused to identify the individual perpetrator, whose identity was known to them.⁴⁷ “Team misconduct” is also distinguishable from cases which a number of workers simultaneously engage in conduct with a common purpose. In these cases the employer dismisses the group because each member is individually culpable. In cases of “team misconduct”, the employer dismisses a group of workers because responsibility for the collective conduct of the group is indivisible. It is accordingly unnecessary in cases of “team misconduct” to prove individual culpability, “derivative misconduct” or common purpose- the three grounds upon which dismissal for collective misconduct can otherwise be justified. The essence of “team misconduct” said the arbitrator, is that the employees are dismissed because, as individual components of the group, each has culpably failed to ensure that the group complies with a rule or attains a performance standard set by the employer. The arbitrator concluded that dismissal for “team misconduct” is not inherently unfair. He said:⁴⁸

“As in many sports, productive and commercial activities of depend for their success, not on the uncoordinated actions of individuals, but on team effort. In such situations, when a group of workers is dismissed, the justification is that each culpably failed to ensure that the team met its obligation. Blame cannot be apportioned among members of the group, as it can in cases where it is known that some of the individuals in the group are innocent. It seems to me that the notion of ‘team misconduct’ underlies the line of cases in which it has been held that it is fair to dismiss the entire staff of a branch or store where ‘shrinkage’ reaches unacceptable levels”.

However, the arbitrator cautioned that the concept of “team liability” cannot be used in all circumstances to justify collective punishment. If one member of a team fails to pull his or her weight or is guilty of theft and the lax or guilty member

⁴⁷ *FEDCRAW v Snip Trading (Pty) Ltd* at paras 32 and 34.

⁴⁸ *FEDCRAW v Snip Trading (Pty) Ltd* at para 33.

is identifiable, he or she can be removed – either for misconduct or for incapacity – and replaced. When it is not possible to identify a guilty or deficient member of a team there are two possibilities in a competitive world. The first is to replace the entire team. The second is to replace the captain. The company wanted the entire staff of the branch to be replaced when unexplained stock losses occurred. The union wanted only managers (captain) to be dismissed for stock losses. The arbitrator said:⁴⁹

‘In situations of ‘team misconduct’ it is permissible to act against the entire team if each member has a role to play in attaining the performance standard set for the team. If that standard is not attained, each member must be given an opportunity to explain the team’s failure; 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.’

6. PROCEDURAL FAIRNESS

Section 188 of the LRA provides that, to be fair, dismissal that is not automatically unfair must be for a fair reason and in accordance with a fair procedure. The Code of Good Practice: Dismissal sets out the requirements of a fair pre-dismissal procedure in cases of alleged misconduct as follows:⁵⁰

‘normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal inquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in the response to the allegations. The employee should be entitled to as a reasonable time to prepare a response and to the assistance of a trade union representative or fellow employee. After the inquiry, the employer should communicate the decision taken, and preferably furnish the employee with a written notification of that decision’.

6.1 Investigation of the offence

The code requires employers to investigate reported cases of misconduct to determine whether there may be grounds for dismissal. Disciplinary action may itself be prejudicial to employees. It is only fair, therefore, that an employee

⁴⁹ *FEDCRAW v Snip Trading (Pty) Ltd* at para 36.

⁵⁰ Item 4(1).

should not be subjected to a charge of misconduct unless there are at least *prima facie* grounds for suspecting that the employee actually committed misconduct alleged. However, a pre-hearing investigation is not an inflexible requirement. If the employee is found guilty after a properly constituted and conducted hearing, it is unlikely that a dismissal will be ruled unfair merely because there was no prior investigation, unless the employee was somehow prejudiced in his or her defence by the absence of an investigation, or by the manner in which the investigation was conducted.⁵¹

A pre-hearing investigation is precisely what its name suggests. During this phase, the employer investigates the offence in order to decide whether formal disciplinary action may be justified. This will normally entail interviewing witnesses, including, possibly, the suspect(s), and inspecting relevant document. If suspects are interviewed, they should be informed of the reason for the interview and advised of their right to be accompanied by a union representative or fellow employee. It is also advisable to record the contents of pre-hearing interviews, either in writing or electronically. If a tape recorder or videotape is used, the interviewee should normally be informed. Statements may play an important role during the disciplinary inquiry. If they are not used for purposes of cross-examination or in evidence, the employer is not obliged to disclose them to the accused employee. It might also be a sensible precaution to require witnesses to depose their statement in affidavit form.⁵²

6.2 Entrapment

When employers uncover misconduct but cannot after proper investigation identify the culprits, they may be tempted to resort to 'trapping'. This entails appointing people, often outside 'agents', whose job is to try to conclude 'deals' with employees, usually as purported receivers of stolen goods. This practice,

⁵¹ See generally Okpaluba, C 'Employee's misconduct, employer's reasonableness and the law of unfair dismissal in Swaziland' (1999) 32 *CILSA* 386.

⁵² Grogan, J *Dismissal, Discrimination & Unfair Labour Practices*, (2ed) (2007) 326 – 327.

known as 'entrapment', is not unique to the workplace. The police sometimes resort to it when conventional detective work fails.

In *Cape Town City Council v SA Municipal Workers Union and others*,⁵³ the council had engaged the services of private investigators to trap dishonest employees. This was part of the council's action of stemming out the scourge of cable theft. The downfall of two electricity department employees of Cape Town City Council came as result of trying to help out with some cable needed to run electricity to a contained used as a day care facility for children in Khayelitsha township. Unfortunately, for the employees the female wearing provocative clothing who had persistently begged them to sell her a cable was part of the crew of undercover agents. A disciplinary hearing convened and the employees were charged with breach of trust and dismissed

The dismissed employees challenged the fairness of their dismissal before the CCMA. The Commission referred the matter to the Labour Court for adjudication as a 'test case' concerning the issue of entrapment in labour law. The question was whether the dismissal of the employees was fair? Although his lordship did not deem it necessary to decide whether or not the use of the trapping system is inherently unfair or not in the context of an employment relationship.

After a thorough enquiry into the pertinent law and academic thinking, Acting Judge Stelzner found that evidence of the entrapment was not admissible in the circumstances that prevailed in that case. He was at pains, however, to state that he would be 'reluctant if not unlikely to hold a system of trapping (obviously properly constrained) may never be fair in employment context'.⁵⁴ The judge goes on to say that law enforcement and the pursuit of justice would be impeded

⁵³ (2000) 21 ILJ 2409 (LC).

⁵⁴ *Cape Town City Council v SA Municipal Workers Union and others* at 2434F.

if the evidence obtained in a trapping situation were excluded provided the use of entrapment is properly scrutinised and constrained.

Stelzner AJ pointedly put the central issue as follows.⁵⁵

'The conduct of a trap/s is inevitably, in the absence of legislature intervention, in itself unlawful (as the inciter or accomplice to the crime committed) and yet that very conduct secures the conviction of the person 'trapped'. The concern is that in such situations otherwise 'innocent' person, not predisposed to crime, are induced to violate the law by the police or other government officials.'

However, courts throughout the world have recognised that entrapment is morally dubious, but effective: effective because it secures the arrest and conviction of criminals who might otherwise not be caught; dubious because it can result in the conviction of those who might never have gone wrong had they not been tempted.⁵⁶

The court also noted that section 252A of the CPA provides guidelines to deal with the issue of entrapment in the employment context. In this regard Stelzner AJ stated.⁵⁷

'I am of the view that guidelines and parameters not less rigid or strict than those set out in s 252A of the CPA should be applied in the contract of the employment relationship. This is assuming, of course, that entrapment /use of the trap system should be allowed at all in the employment content.'

Counsel for the employees further argued that the trapping in the workplace should be deemed impermissible. Put differently, an employer who instructs a person to act as buyer of stolen goods comes to court with unclean hand.⁵⁸ Employers should not therefore be allowed to defend themselves against an unfair dismissal action with evidence obtained by the unlawful conduct of its own

⁵⁵ *Cape Town City Council v SA Municipal Workers Union and others* at 2426 J-2427A.

⁵⁶ By John Grogan in *Sibergramme* 10/2000, quoted in the case of *Metrorail and SA Transport & Allied Workers Union on behalf of Magagula* (2002) 23 ILJ 1641 (BCA) at 1646 H-I.

⁵⁷ *Cape Town City Council v SA Municipal Workers Union and others* at 2433B.

⁵⁸ The clean hands doctrine traditionally emanates from equity. Equity law principles were developed based on the predominant 'fairness' characteristic of equity such as 'equity will not suffer a wrong to be without a remedy' or 'he who comes to equity must come with clean hands'. According to *Black's Law Dictionary* (2000) it is principle that a party cannot seek equitable relief or assert an equitable defence if that party has violated. See also Chafee, Z 'Coming into equity with clean hands' (1947) 47 *Michigan LR* 877; Payne, J "'Clean hands" in derivative action' (2002) *Cambridge LJ* 176; Kahn, E *Contract and Mercantile Law Through Cases* (1988) at 44 para 206.

agents. In assessing the fairness employer's decision to terminate, should the court will take into account the fact that the employer's hands are not completely clean, and this is so because the offending employee were lured into committing misconduct.

Although the argument may seem compelling, for Grogan it misses one essential point:⁵⁹

'This is the fact that employer who set traps are normally seeking to protect their property. If the state is allowed to use trapping techniques in appropriate circumstances to combat crime, there is nor reason in fairness why employers should not be allowed to do so where there is no other reasonable way of controlling internal theft. If, as is universally accepted, the employment relationship is based on trust, employees should be expected to resist temptation when it comes to illegally profiting at their employer's expense.'

In findings that the dismissals were both substantively and procedurally unfair, it appears that the court was strongly influenced by the agents that the agents had acted in bad faith by playing on the sympathies of the employees alleging that they needed the copper cable for the use of underprivileged children and by the female agent wearing provocative clothing. The agents had approached the employees several times in an effort to persuade them to commit the offence. The agents had also undermined their credibility by dishonestly pocketing a share of the monies paid to them by the council for the purpose of buying the cable.

The court described the two employees as 'innocent', but were lured into committing an offence by the conduct of the investigators, and prejudiced by the use of the trapping method used in the case. The court then concluded that the evidence was obtained in an improper, or at the very last unfair manner. The court went further to say permitting evidence in the present case would be detrimental to the interest of justice in the context of an employment relationship, and unfair to the employees.

⁵⁹ 'To catch a thief: Entrapment in the workplace' (2001) 17(1) *EL* 8, 9.

In determining the issue of appropriate remedy, the court held that, there were no facts put forward to suggest that reinstatement would be intolerable. The court found that the trust relationship had not been irreparably destroyed since the two respondents remained in service from the time their offence was discovered, until the day of the outcomes of the disciplinary proceedings, which took six months to complete. Further that the dismissals of the two therefore the decision was in favour of the respondents as the court ordered that they should be reinstated.

The lessons of the foregoing are that employers should be allowed to use entrapment to control internal theft. With the encouragement of the decision in *Cape Town Municipality*, Grogan sums up the key lessons for employers and employees as follows:

“Firstly, trapping as such will not necessarily be held to be unfair. Had independent evidence to link the employee with other proven thefts, the case would probably have had a different outcome. Trapping is permissible when its object is to identify a thief. If the trappers had been less zealous in their efforts to involve the employees, the Court would probably have taken a different view. In other words, a successful trap should not form the sole evidence linking against the trapped employee, but should be supported, even if circumstantially, by other evidence linking the employees concerned to dishonest practices other than their dealings with the trapper...the requirements of the Criminal Procedure Act are merely yardsticks for assessing an employer's actions in particular cases. So dishonest employees should not regard the judgment as an indication that they will never be dismissed if they dispose of their employer's property for personal gain to an undercover operative.”⁶⁰

Sometimes, the provisions of section 252A of the Criminal Procedure Act have been applied with excessive rigour. In *SACCAWU obo Libi & another v Weirs Cash & Carry*⁶¹ two employees were dismissed after they had sold goods belonging to the company to ‘undercover agents’. The agents were posing as workers assigned to fit closed-circuit television cameras in the store. Both employees denied they had sold the goods to the agents. The commissioner rejected the employees’ version of the illicit deals; he found that the company had proved that both employees had stolen company property. According to the

⁶⁰ ‘To catch a thief: Entrapment in the workplace’ (2001) 17(1) *EL* 8, 10.

⁶¹ [2002] 7 BALR 759 (CCMA).

commissioner, however, the admissibility of the company's evidence depended on whether the manner in which that evidence had been procured was consistent with the provisions of section 252A. Applying the requirements of that provision to the facts, the commissioner found that the company had suffered massive losses through theft; it had held regular stocktakings in an attempt to reduce these losses. Both employees had been approached only once by the undercover agents; both were aware that the transactions were being filmed. The agents had not exploited any vulnerability of the employees. Nor had any force been used on them. According to the commissioner, however, there was 'reason to suspect' that the agents had tricked the employees into believing that they (the agents) were taking part in a company project. Furthermore, the agents' conduct went beyond merely providing the employees with an opportunity to commit the offence. In short, according to the commissioner, the traps were conducted unfairly and in a manner 'inconsistent with the spirit of the Constitution'. Because the company's evidence had to be rejected, there was nothing to justify the dismissal of the employees.

In *Phadu & others v Department of Health: Free State*⁶² the applicants were dismissed after they were captured on video tape selling medical supplies belonging to the respondent for their own gain to an undercover agent posing as a "doctor". The video was also recorded by agents of a security company employed by the respondent. One of the applicant denied having sold anything belonging to the respondent; the other claimed that he had sold the goods on the instructions of the agent. Both claimed that the "trapping" operation was conducted unfairly.

The arbitrator held that the applicants were involved in a transaction they knew was unauthorised. The respondent had been plagued by stock loss, and had done everything in its power to detect the culprits. The employee had not been tempted by the agents to sell the goods.

⁶² [2004] 2 BALR 167 (PHWSBC).

The arbitrator held further that employers need not comply in every respect with the requirements of the Criminal Procedure Act before and while conducting a trapping exercise, in particular, authorization need not be obtained from the office of the Director of Public Prosecutions. The trap had been properly authorized by senior official of the respondent; otherwise, it complied in all respects with the requirements of the law. The evidence obtained by the trap was accordingly admissible.

After discovering stock losses that brought it to the brink of financial collapse, *Lowveld Implement Farm Equipment (Life)*⁶³ introduced a number of control measures and eventually engaged the a private investigator. Seven employees, including the three applicants, were dismissed. The applicants contented that their dismissal was unfair because their guilt had not been proved, because the company had unfairly entrapped them, and because the sanction of dismissal was not permitted by the company's disciplinary code for the offences with which were charged.

The commissioner held that employers are entitled to use entrapment to identify dishonest employees, especially when the employers are suffering recurrent and serious loss. There was no evidence that the applicants had been pressurized into co-operating with the trappers. The commissioner noted further that the applicants had consented to polygraph tests, and had not challenged their results; the test results were accordingly accepted as corroborative evidence. The commissioner held further that the applicants were aware of the rule against theft and accepted the applicants' claim that the respondent was bound by its disciplinary code to give more than a final warning. Their dismissal was accordingly fair.

⁶³ *NUMSA obo Nqukwe & others/Lowveld Implement Farm Equipment (Life)* [2003] 8 BALR 909 (CCMA).

*Mbuli and Spartan Wiremakers CC*⁶⁴ provides another example of a resort to trapping system in response to severe stock losses. Mbuli, a machine operator and a colleague were suspected of being responsible for some of the stock disappearance. Two separate informers notified the corporation about Mbuli and colleague's involvement in stealing the company's products. A trap was then set on the two employees; they were dismissed shortly after being found guilty at a disciplinary hearing for selling company products outside the corporation. The employer arranged with a third party to pose as a buyer for the corporation, and to approach Mbuli with a view of cheaply purchasing the company's products.

On the procedural fairness and the use of entrapment techniques, the arbitrator found the statutory guidelines contained in s252A of the CPA were instructive. Loveday outlined a summary of factors to be considered in dealing with the issue of entrapment in the employment context.⁶⁵

- 'the nature of the offence-taking into account the prevalence of the offence and the seriousness of the offence;
- the availability of other techniques for the detection, investigation or uncovering of the commission of the offence, or the prevention thereof;
- whether an average person in the position of the accused would be induced to commit the offence;
- the degree of persistence and number of attempts made before the accused succumbed and committed the offence;
- the type of inducement used including the degree of deceit, trickery, misrepresentation or reward;
- the timing of the conduct-whether the trapper instigated the offence or became involved in an existing unlawful activity;

- whether the conduct involved the exploitation of human characteristics such as emotions, sympathy or friendship or an exploitation of the accused's personal, professional or economic circumstances;
- whether the trapper or agent has exploited a particular vulnerability of the accused's such as a mental handicap or a substance addiction;
- the proportionality between the involvement of the agent as compared to that of the accused;
- any threats implied or expressed against the accused;
- whether before the trap was set there existed any suspicion based upon reasonable grounds that the accused had committed a similar offence;
- whether the agent acted in good faith or bad faith.'

⁶⁴ (2004) 25 ILJ 1128 (BCA).

⁶⁵ *Mbuli and Spartan Wiremakers CC* at 1133J-1134A-D.

Loveday eloquently justified the use of entrapment as mean of identifying dishonest employees and deterring others as follows:⁶⁶

'In the current environment of massive losses incurred by business due to staff theft of company product, an employer should be entitled to use whatever lawful mechanisms are available to curb such theft. In exceptional cases these mechanisms may indeed include entrapment proved proper constrained are applied.'

The arbitrator found that the undercover buyer merely provided an opportunity for the accused employees to commit the offence and did not go beyond that. Far from being an innocent man who has been led astray by unfair inducement, the arbitrator found that Mbuli was a willing participant. Therefore found the evidence acquired as a result of a trap to be admissible and that it did not impact negatively on the fairness of the applicant's dismissal.

The applicant employee had indeed removed and gave the three rolls of wire without authorization to the buyer. Thus, contravening one of the most fundamental rules of the workplace by stealing from his employer for personal gain, in the process damaging that the trust relationship expected between employer and employee. However, the arbitrator found that the employer had been inconsistent in dismissing employees who were guilty of theft or gross dishonesty. The arbitrator concluded that in the circumstances the dismissal was an appropriate sanction.

The bare facts *Nchabeleng v Team Dynamix*⁶⁷ were that Rose Nchabeleng was found guilty of theft and gross dishonestly in that she unlawfully assisted or aided another person to remove CNA property. The employer relied on evidence from video footage, which was taken by investigators that were hired by CNA, who were tasked to investigate shortages in the store. The employee maintained that the investigator hired by CAN framed her. She denied seeing that he put the

⁶⁶ *Mbuli and Spartan Wiremakers CC* at 134I-J.

⁶⁷ Unreported decision [MP 1215-01].

book in his pants or that she assisted him in any manner to steal the company's goods.

Commissioner Zeeman found that no evidence was presented to show that prior to the trap being set, reasonable grounds existed for suspecting the applicant. The investigator had played on the emotions of an honest employee by stating that he did not have enough money to buy the map book. She also found that the average person in her position would probably also have been induced to commit the misconduct as a fellow staff member who needs money. On the facts, the commissioner considered Nchabeleng's dismissal to be unfair.

Also noteworthy is *SACWU obo Cleophas/SmithKline*⁶⁸ where entrapment came under consideration. Cleophas was suspended pending a disciplinary inquiry and subsequently dismissed for theft. The company alleged that he had colluded with a security guard to remove company goods from the employer's premises in his car, and claimed that Cleophas had been introduced by a security guard to a fellow employees he could "work with". They planned to drive through the factory gate while the security guard pretended to search their vehicle. The security guard agreed that, in return for a portion of the stolen goods, he would turn a blind eye to any goods he might see. The security guard reported the matter to his supervisor who equipped him with a video camera. The security guard amassed a huge amount of stolen goods which were eventually returned to the company.

Cleophas denied that he had been involved in theft and claimed that unfair methods had been used to entrap him. He also pleaded that his dismissal was unfair because it had, in fact, occurred when the company had purportedly suspended him, and that other employees who had been caught stealing had not been permitted to resign.

⁶⁸ [1999] 8 BALR 957 (CCMA).

The commissioner noted that entrapment occurs when a person is tempted to by another to commit a wrong he would not otherwise have committed. The security guard had merely suggested that he would not report Cleophas if he saw him with stolen. This did not amount to entrapment. On his own version, Cleophas had been predisposed to wrongdoing. In any event, he had not complained of having been entrapped when he was first alerted that he was under suspicion or after he was suspended. Even if Cleophas had not himself removed goods from the premises, the employer was justified in dismissing him because he had actively colluded with other employees who had been permitted to resign was irrelevant as there was no evidence that the company had acted arbitrarily in his case. An employer may be able to justify such inconsistency or differentiated action. Generally, the grounds such as the employee's disciplinary record, the seriousness of the transgression, or changed circumstances, which made it necessary to take a different view, way justify inconsistent enforcement of the rule.⁶⁹ The dismissal was upheld.

The case of *Phadu & Others/Department of Health: Free State*⁷⁰ involved dismissal of employees as a result of the undercover operation for selling without authority for their own gain, medical supplies belonging to the company to a trappee. The employer employed undercover 'agents' after experiencing increasing stock losses over a long period. At a disciplinary hearing Sekoto an accused employee denied that he sold deport stock to anyone and said he did not know why he was dismissed. Other hand his fellow perpetrator, Mpho contended that the undercover agents lured him into selling stock. The agents testified that they did not force the applicants to sell the stock to them.

⁶⁹ See *NUM & others v Amcoal Collieries & Industrial Operations* [2000] 8 BLLR 869 (LAC); *Impala Platinum Ltd v NUM* [2000] 8 BALR 955 (IMSSA); *FAWU obo Thati and Coca-Cola Bottling (East London)* (2002) 23 ILJ 1485 (CCMA); *United Transport & Allied Union obo Brandt and Metrorail (2)* (2002) 23 ILJ 2344 (BCA); See also Grogan, J. 'Parity revived: When prior warnings do not apply' (2000) 16(2) *EL* 17; Le Roux, P.A.K. 'Consistency of disciplinary action: *NUM & another v AMCOAL Colliery t/a Arnot Colliery & another*' (2000) 8 BLLR 869 (LC)' (2000) 10 *CLL* 28 and 'Individual Labour Law' in Cheadle *et al Current Labour Law 2000* Ch. 1 at 9-13.

⁷⁰ [2004] 2 BALR 167 (PHWSBC).

The issue to be decided by the arbitrator was whether the dismissals of the applicants were fair and whether the agents conducted a fair trap or not. In assessing the evidence of both the agents and the applicants concluded that the evidence given by the agents was consistent and appropriate. The arbitrator described the employees' evidence as "self-exculpatory nonsense" as the both contradicted each other. The arbitrator accepted that the respondent did experienced severe stock losses and resorted to other measures in order to catch the thieves before resorting to the undercover operation.

On the question of entrapment being fair or not, the arbitrator found that the operation was properly authorized by the relevant authorities, also that there was no need to ask permission from the Director of Public Prosecutions as required by section 252A. According to the Arbitrator some of the provisions provided for in s252A need not be literally applied in the employment context, but should be changed to suite the employment and that each case ought to be judge in its own facts. Further that, the agents conducts were in line with the s252A as they just offered an opportunity to commit the offence in question and that the evidence obtained by the operation be admissible. The dismissal for misconduct involving turpitude was substantively fair.

In *NUMSA obo Abraham/Guestro Wheels*⁷¹ the commissioner was called to determine the admissibility of evidence obtained by videotape during a trapping exercise and also whether the dismissal of the employee was substantively fair (procedural fairness was not in dispute). The applicant in this case was employed by the respondent as a dispatch clerk and was dismissed after he had written false invoices for the sale of rims, which belonged to the respondent, to an undercover agent and receiving money from the agent in return.

The applicant contended that the agent's evidence should not be admissible as it was obtained by means of a trap. Videotape evidence was tendered prove acts

⁷¹ [2004] 4 BALR 530 (CCMA).

of misconduct. The commissioner had to determine whether such evidence should be accepted or not. On the issue of privacy which was alleged to have been infringed by the fact that the evidence was obtained by a videotape. The commissioner weighed the interest of both the employee's right to privacy and the employer's property and economic interest. And concluded that no confidential or personal information of the employee was recorded and that no privacy was infringed and found the employer's interest to be on a top level than the interest of the employee.

The commissioner found that the videotape was admissible because the applicant was not lured into committing the offence, but was merely given an opportunity to do so. It was accepted that the employer was experiencing stock loss (rims) and had no alternative but to find out what was happening to the rims. The commissioner found that the conduct of the employee 'manifested dishonest intent'; as a consequence dismissal was a proper sanction in the circumstances.

The facts in *Caji & Africa Personnel Services (Pty) Ltd*⁷² were an employee was dismissed as a result of a trap. At disciplinary hearing Caji pleaded guilty to theft and the selling of a client's property without authorization. The key was whether the evidence obtained by the private investigator was properly obtained in a fair and just manner.

It was argued on behalf of Caji that the evidence should not be admissible in that it was obtained as a result of a trap and that the investigator had induced the applicant to take part in a criminal act in which he himself partook. The employee was never suspected of being involved in theft or selling of company property. Further that, the applicant could have been disciplined on the basis of the information allegedly given to the investigator by the employees from the

⁷² (2005) 26 ILJ 150 (CCMA). Dealing with the admissibility of video recordings was a case of *Moloko v Commissioner Diale and others* (2004) 25 ILJ 1067 (LC); where it was held that if a party wished to place relevance on a video recording used in a tribunal, it had to be authenticated.

neighbouring business. In opposition, the company asserted that the employee merely presented with an opportunity to commit the offence/misconduct, as most people are presented with on daily basis during the ordinary course of life.

The commissioner then scrutinized the evidence by both the investigator and applicant and found that their evidence contradicted each other. The investigator testified that the applicant called him several times to arrange the finalization of the deal, but according to the applicant the investigator was the one who persuaded him. As a result of the two conflicting versions, the onus shifted to the employer to present evidence, which will show that the applicant had not been induced or forced to take part in the commission of the misconduct. The commissioner was not convinced by the investigator's evidence and rejected it (as it was not properly obtained), also found the investigator to have had a vested interest in the outcome of the matter in that he sold for R5 000 the video tape containing the evidence which led to the applicant's dismissal and further demanded a R5 000 in order for him to testify at the arbitration.

Reference was made to the *Cape Town City Council* case and to section 252A of the CPA. The commissioner commented that a strict approach should specially be followed where it appears that the investigator had a vested interest (payment) in the outcome of the investigation.⁷³

On the facts, the commissioner found that the company failed to bring evidence indicating that the applicant was not induced into committing the offence/misconduct. The dismissal substantively unfair, procedurally fair in view of absence of irregularities in the process leading to termination. The collapse of the employment relationship, the commissioner concluded that reinstatement⁷⁴ was not a viable option. The employer was ordered to compensate the employee.

⁷³ *Caji & Africa Personnel Services (Pty) Ltd supra* at 159B.

⁷⁴ For an excellent exposition on reinstatement see Okpaluba, C 'Reinstatement in Contemporary South African law of unfair dismissal: the statutory guidelines' (1999) 116 *SALJ* (Part IV) 815.

6.3 Onus of proof

Section 192 of the LRA provides:

'Onus in dismissal disputes

- (1) in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.
- (2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair.'

The effect of this provision is that, if the 'existence' of the dismissal is in dispute, the employee bears the burden of placing facts before the court which warrant the conclusion that the termination of the employment relationship constituted a dismissal as defined in the LRA. Once the dismissal is proved, the employer is required to prove that the dismissal was both substantively and procedurally fair. By placing the onus on the employer to prove that dismissal was fair, the legislature has reversed the general principle that a person who claims a legal entitlement should prove the factual basis for that claim.⁷⁵

Proof that the dismissal was fair requires the employer to prove on a balance of probabilities that the employee in fact committed the misconduct, or was incapacitated to the degree alleged, as the case may be. The employer must also prove on balance of probabilities that it complied with the procedural requirements of the type of dismissal concerned.

The primary significance of the onus is that when the evidence on a point is evenly balanced or indecisive, the balance will tip against the party upon whom the onus rests. However, subject to the overall onus, the burden of proving particular points may shift to the party not bearing the onus, on the basis of the principle that 'he who alleges must prove'. So, for example, if an employee accused of theft pleads an alibi, the burden rests on the employee to prove that he or she was elsewhere at the time of the commission of the offence. If the

⁷⁵ Grogan, *J Workplace Law* 8 ed (2005) 270.

employee fails to discharge the evidentiary burden on a particular point, it may be that the employer will be held to have discharged its overall onus.⁷⁶

6.3.1 Rebuttable presumption

It has been proved that it is difficult for the employers to discharge direct evidence against employees for stock loss. Most of the employers rely on their stock loss policies which require the employees explain the stock losses. Arbitrators view this approach as shifting the onus to the employees and such is contrary to the LRA. For example, in *FEDCRAW obo Phindiwe v Snip Trading (Pty) Ltd*⁷⁷ the applicants were dismissed when stock losses at the store at which they worked exceeded the level tolerated by the respondent. The company held that, in terms of the employees' contracts of service they accepted liability for stock loss, and that they were dismissed in terms of a provision of the company disciplinary code which required employees to explain stock losses, failing which they could be dismissed.

The commissioner held that the respondent relied on a presumption that if a stock loss occurred, there was misconduct on the part of all employees. The respondent then placed the onus on employees to disprove that none was guilty of misconduct. The respondent also relied on the principle of collective responsibility. Justice requires that if an employer has reason to believe its employees are committing misconduct, it cannot dismiss them on mere suspicion; the employer must prove the misconduct on a balance of probabilities that the employees actually committed misconduct. While it might be difficult to prove individual involvement in acts leading to stock loss, it is not fair to hold all employees responsible, unless they are aware of the identity of the perpetrators. However, the onus of proving such knowledge rests on the employer. To reverse

⁷⁶ Grogan, J *Workplace Law*, 8 ed (2005) 120.

⁷⁷ [2002] 7 BALR 718 (CCMA).

the onus of proving misconduct by requiring employees to prove their innocence is contrary to the LRA.

In *FEDCRAW v Snip Trading (Pty) Ltd*, the issue of whether the company's stock loss procedure in effect reverses the onus that is placed on employers by the LRA 1995 to prove that dismissals are for a fair reason and in accordance with a fair procedure was considered. The arbitrator held as follows:⁷⁸

'In cases of disciplinary action arising from stock loss, the company relies on the mere fact that the employees in question have failed to provide an acceptable explanation. While it is so that this approach places a burden on the employees, it is not a true case of reversal of the onus. In criminal and civil cases, the onus of proof rests on the State and the plaintiff, respectively. However, if an accused person or defendant raises a specific defence in rebuttal of a prima facie case made out by the State or the plaintiff, the burden of proving the facts necessary for the defence shifts to the accused...the same principle applies in the procedure followed by the company in cases involving stock loss. The company discharges a general onus if it proves that stock loss in the store has exceeded a particular level, and that procedures are in place which, if followed, would have reduced the loss. Once this is proved, a rebuttable presumption arises that the employees at the store have failed to comply with the rules. If the employees claim that they did follow the rules, or that they were unable to do so, or that they cannot be held individually accountable for the error that caused the loss, the burden then shifts to the employees to prove these claims''.

In *RSA Geological Services (A Division of De Beers Consolidated Mines Ltd) v Grogan & others*, the court stated:⁷⁹

'The employer must prove on a balance of probabilities that the employees knew or must have known about the principal misconduct and elected without justification not to disclose what they knew. If the employer discharges this onus, then it may well, as in this case, also discharge the onus of justifying the dismissal on the principal misconduct of participating in, lending support to or associating themselves with the offence. In this case, all the employees were charged with participating in the principal misconduct. On the facts, the court must infer that all the employees participated in the principal misconduct in the absence of their evidence to the contrary...as the employees failed to discharge the burden of rebuttal, the court must find that they all probably knew about the scam and participated in it.'

⁷⁸ *FEDCRAW v Snip Trading (Pty) Ltd* at para 46.

⁷⁹ *RSA Geological Services (A Division of De Beers Consolidated Mines Ltd) v Grogan & others* at para 49.

It will be recalled that the Labour Appeal Court decided both *Amalgamated Beverage Industries* and *Leeson Motors*, by applying elementary rules of evidence to a civil case to determine the dispute on a balance of probabilities. In all three cases the employers proved that the principal misconduct and that some employees from a group incontestably participated in it. The employers had no direct evidence of which employees participated in, lent their support to, associated themselves with or knew about the misconduct. On the facts in *Amalgamated Beverage Industries*, Nugent J inferred that a group of some 100 employees were present when an assault took place on a casual worker employed during a strike, and that they either participated in or lent it their support to it. On the factual scenario obtaining in *Leeson Motors*, Cameron JA drew the primary inference that a group of 20 employees all participated in a campaign of sabotage. In all three cases, the employees refused to assist the respective employers with information to investigate the misconduct; they also refused to testify subsequently at their disciplinary enquiries; the evidence of the two witnesses who did testify in *Leeson Motors* was rejected. The Labour Appeal Court confirmed the dismissals in *Amalgamated Beverage Industries* and *Leeson Motors*. Pillay J in *RSA Geological Services (A Division of De Beers Consolidated Mines Ltd) v Grogan & others* upheld the arbitrator's findings in relation employees whose dismissals were found to be fair, but set aside his findings that the dismissal of some of the employees was substantively unfair.

6.3.2 Failure to testify

In civil cases a party's failure to give gainsaying testimony under oath or affirmation may have an adverse effect on his case. However, the effect of such

a failure would depend upon all the circumstances of the case.⁸⁰ In *Galante v Dickson*,⁸¹ Schreiner JA stated:

'[I]t 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'.

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. The true facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.⁸²

In *Amalgamated Beverage Industries Ltd*, 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 assault. None came forward at the workplace hearing or in the Industrial Court to affirm their innocence or volunteer any evidence about the perpetrators.

The court held that.⁸³

'There was no direct evidence linking any of the appellants to any act in relation to the assault, and the respondent's case based on inference alone. None of the appellants gave evidence, either in the court a quo or in the course of the disciplinary hearing. The attitude adopted by the appellants throughout was that it was for the respondent to establish their complicity, and that no case had been made out against any of them which called for a reply.

⁸⁰ Schwikkard & Van der Merwe *Principle of Evidence* (2 ed) (2002) 510.

⁸¹ 1950 2 SA 460 (A) at 465.

⁸² *R v Blom* 1939 AD 188 at 202-3

⁸³ *FAWU & others v Amalgamated Beverage Industries* at 30-31.

The extent to which a party's failure to give evidence may properly give rise to inference against him has received considerable attention from the courts. What emerges from the decided cases is that this 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 that 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 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 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. In my view all the evidence in the present case is consistent with that inference'.

The court went further and stated:

"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 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".⁸⁴

6.3.3 Standard of proof⁸⁵

For reasons that have never been fully explained, labour law has followed the civil courts in cases of dismissal for misconduct. This means that, when deciding whether an employee has committed misconduct, a presiding officer at a disciplinary hearing, and a judge or arbitrator who hears the matter later, need take the question of proof no further than to satisfy himself or herself that the employer's version is more probably true than that of the employee.

In *Potgietersrus Platinum Ltd v CCMA & others*⁸⁶ the Court accepted that, if the commissioner applied the criminal standard of proof rather than the civil, this

⁸⁴ *FAWU & others v Amalgamated Beverage Industries* at 32.

⁸⁵ Grogan, *J Dismissal* (2002) 91-93.

would lead to a conclusion that lacked “a rational objective basis”. A court testing the standard of proof applied by an arbitrator must wade deeply into the merits of the dispute and, in the truest sense, substitute its own decision for that of the arbitrator. For, as the Court did in *Potgietersrus Platinum*, it must not only find that the arbitrator had, in fact, applied the criminal test, but also whether, had he not done so, his finding could nevertheless be justified on the balance of probabilities. Gon AJ found that the arbitrator’s conclusion that the evidence was not strong enough to prove that the employees concerned were guilty was incorrect on the civil test, and set aside the award on that basis.

On the facts, this decision is undoubtedly correct. So, too, is the Court’s finding that, according to the weight of authorities, the test to be applied is the balance of probabilities. On that test, when the evidence permits more than one reasonable inference, one pointing to guilt and the other to innocence, the selected inference must “by the balancing of probabilities be the more natural, or plausible, conclusion” of the possible inferences.⁸⁷ In other words, the test allows a tribunal to select an inference even if there are others which, though plausible, are less plausible than that selected. Such a course is not permissible in criminal cases where a conclusion of guilt cannot be drawn if there are inferences, which, though less plausible, are nevertheless reasonably possible. The civil test requires a tribunal to weigh the alternatives and to select the most plausible.

The “balance of probabilities” was accepted as the proper test by the labour courts under the 1956 LRA, and has been applied without question under its successor. However, it may be asked whether this is, indeed, the test required under an Act which guarantees employees a right not to be unfairly dismissed, and which requires that all dismissals should be “for a fair reason”? Why should the principle that it is better to allow a guilty person to go free than to convict an

⁸⁶ (1999) 20 ILJ 2679 (LC).

⁸⁷ *AA Onderlinge Assuransie Assosiasie Bpk v De Beer Ltd* 1982 (2) SA 603 (A).

innocent person not apply also in the labour context? The arbitrator in *Potgietersrus Platinum Ltd* commented, "theft is theft". To be accused of theft by one's employer is no less serious, and probably more so, than to be accused of theft by the state. In most cases, a finding that an employee is guilty of theft has more serious consequences for him *qua* employee than it would have if he or she were to be prosecuted in a criminal court. When an employee is prosecuted by his employer for an offence involving dishonesty, he or she faces a penalty metaphorically equivalent to the death sentence. People who are prosecuted by the state for similar offences may face no more than a fine or a suspended sentence. Was the commissioner not, therefore, correct in requiring "clear and convincing evidence", even if he was wrong in concluding that in this case the evidence was not clear and convincing enough?

The courts have not explained why they have held that the civil test for evaluating evidence should apply in dismissal cases, rather than the more exacting criminal test. One imagines that the main reason is that labour law is a branch of the civil law. However, this does not seem a particularly compelling reason for accepting a less rigorous standard of proof in cases where employees face the possibility of dismissal. The main duty of an arbitrator is to ensure that employees are not dismissed except for valid reasons. The 1995 LRA places the onus of proving the validity of the reason on the employer. It says nothing about the degree of proof required to discharge that onus. By requiring employers to hold proper hearings to establish employees' guilt before dismissing them for misconduct, the labour courts have imposed their own standards on employers. The application of a more rigorous standard of proof by an arbitrator ought, therefore, not to be objectionable in principle.

The reason why the courts require a less rigorous standard of proof than those of the criminal courts must, therefore, be sought elsewhere. It is perhaps connected

with the peculiar nature of the regime they have been established to police. While it is important that employers should act fairly towards their employees, they also have a right to ensure that employees do not steal or commit other forms of misconduct calculated to destroy the trust relationship. That relationship is destroyed if there is evidence to show that, more probably than not, the employee has committed the misconduct. The state can afford to acquit accused persons who are possibly guilty, but not certainly so, in order to eliminate the risk of convicting innocent persons: employers cannot. Nor do employers generally have the capacity to perform the detective work the state is expected to complete before indicting a person on a criminal charge.

The truth is that the distinction between the civil and the criminal standards of proof is not absolute. The difference between the test that requires proof beyond reasonable doubt and that which requires proof of a fact on a balance of probabilities is one of degree. The civil test can be applied with varying degrees of rigour, the most rigorous of which will – in practical terms – be almost akin to the criminal test. An arbitrator charged with the heavy responsibility of deciding whether an employee has been unfairly dismissed surely cannot be criticized for requiring clear and convincing evidence that the employee committed the misconduct alleged. He can accordingly not be said to have committed a “jurisdictional misdirection” if, in a case involving the serious charge of theft, he weighs the alternative inferences strictly. By upholding the balance of probabilities test, the Courts are not suggesting that arbitrators be any less vigilant. Employers should not, therefore, regard the approval of the “balance of probabilities” test as an indication that the Courts will accept that a dismissal for misconduct is substantively fair on the basis of evidence that is unclear and unconvincing. This is why the weakest test of all – the so-called “reasonable suspicion” doctrine – has not found favour in the Labour Courts. At the end of the day, the main issue in such cases is whether the arbitrator, and ultimately a reviewing court, is satisfied on the evidence that the employee was, in fact, guilty

7. SPECIFIC CASES ON STOCK LOSS

Section 188 of the LRA provides:

'A dismissal that is not automatically unfair, is unfair if the employer fails to prove –

- (a) that the reason for the dismissal is a fair reason –
 - (i) related to the employee's conduct or capacity; or
 - (ii) based on the employer's operational requirements; and
- (b)...

If the reason for the dismissal cannot be brought under one of these headings, it is arbitrary and unjustifiable. Whether it thereby becomes 'automatically unfair' depends on the true reason for the dismissal and whether it can be classified as one of those listed in section 187. No dismissal can be for a valid reason unless it is related to the employee's conduct or capacity, or the employer's operational requirements.⁸⁸

7.1 Dismissal for misconduct

When dealing with dismissals for stock loss, the question that arises is whether stock loss constitutes misconduct? This question was fully canvassed in *FEDCRAW v Snip Trading (Pty) Ltd*, the arbitrator stated:⁸⁹

'stock loss, being a fact, cannot in itself constitute "misconduct". The term "stock loss" refers to situations in which stock has gone missing in circumstances that cannot be explained, and which results in loss to the employer...Can an employee be said to have committed misconduct solely because a stock loss has occurred at the store where he or she is employed? Each employee of the company is bound by a clause in his or her contract of employment in terms of which he or she expressly accepts "responsibility" and "personal accountability" for unacceptable stock losses, and accepts that stock losses exceeding 0,5 or 1 per cent "will be regarded as a serious breach of contract...which will be dealt with in terms of the provisions of the company's disciplinary code and procedure"

And further:⁹⁰

...[A] stock loss may indicate that the employees who are in control of the stock are administratively inept, or willfully negligent, or that the stock has been stolen, either by the employees or by third parties. In any of these cases, the stock loss

⁸⁸ Grogan, *J Workplace Law* 8 ed (2005) 118.

⁸⁹ *FEDCRAW v Snip Trading (Pty) Ltd* at paras 18-19.

⁹⁰ *FEDCRAW v Snip Trading (Pty) Ltd* at para 23.

may be a fair reason for disciplinary action, including dismissal, if the employees were in a position to prevent the loss. The company takes the view, not that the stock loss in itself constitutes misconduct, but that the misconduct lies in the inability of the employees concerned to satisfactorily account for the loss, which inability, so it contends, can be presumed to be an indication of intent or negligence’.

Schedule 8 Code of Good Practice: Dismissal, Item 7 provides:

‘any person who is determining whether a dismissal for misconduct is unfair should consider –

- (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the work-place; and
- (b) if a rule or standard was contravened, whether or not –
 - (i) the rule was a valid or reasonable rule or standard;
 - (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
 - (iii) the rule or standard has been consistently applied by the employer; and
 - (iv) dismissal with an appropriate sanction for the contravention of the rule or standard’

It has remained part of our law that it lies in the place within the province of the employer set the standard of conduct to be observed by its employees and determine the sanction with which non-compliance with the standard. The employers introduced policies and entered into collective agreement with organized labour to circumvent stock loss. Most of the collective agreement and policies hold the entire staff accountable for stock loss.

The facts in *SACTWU obo Lukas & others v Snip Trading (Pty) Ltd*⁹¹ were that the entire staff of one of the respondent’s store were dismissed when stock losses exceeded the level considered acceptable by the company. The commissioner noted that the applicants had all admitted that the respondent’s stock loss policy was part of their conditions of service, and that they faced dismissal if stock losses exceeded a certain level. They had all received warnings for earlier stock losses, and the trend had not been reversed.

⁹¹ [2002] 11 BALR 1177 (CCMA).

The applicant employees in *HOCAFAWU obo Malele & others v Rowmoer Investment 55 (Pty) Ltd*⁹² were dismissed when a stock take at the branch where they both worked established shrinkage in excess of 1.5% of monthly turnover. The employees claimed that they had reported incidents of theft to management, but nothing had been done. The commissioner noted that the employees had both signed contracts which provided, inter alia, that they would be responsible for controlling stock and that, if shrinkage reached a certain level, they would be dismissed if they could not give a satisfactory explanation. The employees had accordingly accepted joint responsibility for safeguarding stock. When stock losses reached nearly 2.5% of turnover in the month in question, the employees had breached the rule. The commissioner also rejected the employees' attempt to attribute the stock losses to theft by customers; if that were so, they had failed to exercise their duties with sufficient diligence.

In *DICHAWU obo Buthelezi & others v Express Stores (Pty) Ltd*⁹³, the individual applicants were dismissed for gross negligence after the respondent discovered significant stock losses. The respondent claimed that the applicants were collectively responsible. The applicants denied that they had failed to follow company procedures, as alleged, and attributed the loss to a computer malfunction. They also claimed that stock had been stolen by customers. The commissioner noted that the respondent had placed its stock in the care of its employees. It was their duty to ensure that stock was protected. The computer fault could not have resulted in a loss as large as the value of the stock that had gone missing. If customers had stolen stock, the applicants would still have been at fault, because it was their duty to ensure that shoplifters were apprehended.

The underlying principle in these cases is that the employer set standards to combat shrinkage and mostly that the stock losses should not exceed 2% of

⁹² [2008] 7 BALR 673 (CCMA).

⁹³ [2001] 7 BALR 747 (CCMA).

turnover. Furthermore it has shown that the judges and commissioners have accepted the 2% threshold as a fair standard.

7.2 Dismissal for poor performance

Code of Good Practice: Dismissal item 9 provides:

'Guidelines in cases of dismissal for poor work performance –

Any person determining whether a dismissal for poor performance is unfair should consider –

- (a) whether or not the employee failed to meet a performance standard; and
- (b) if the employee did not meet a required performance standard whether or not –
 - (i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;
 - (ii) the employee was given a fair opportunity to meet the required performance standard; and
 - (iii) dismissal was an appropriate sanction for not meeting the required performance standard'

Incapacity in its broadest sense exists when employees are unable to perform their work to a standard set by the employer, whether such incapacity arises from lack of skill or from physical or mental deficiency.

Whether employees were actually aware of a performance standard is a question of fact. However, the code accepts that dismissal for poor work performance may be justified if the employees should reasonably have been aware of the required performance standard. Relevant considerations include the manner in which the performance standard was conveyed to employees, the nature of the employee's work and position, and any specific warranties made by the employee regarding his or her experience, skill and qualifications. A performance standard can be conveyed to employees either by means of general directives or by ad hoc measures such as warnings and counseling if the employee's performance becomes deficient. The more warnings an employee has had, and the more

guidance that has been given, the less likely it will be that the employee will be able to deny the existence of the standard.⁹⁴

If employees display shortcomings in performing their duties, fairness requires that those employees should not only be informed that their performance is deficient, and in which respects, but also that the employees should be given an opportunity to improve. In this regard, in particular, the substantive and procedural aspects of dismissals for poor work performance begin to merge...the procedure for poor work performance requires that the employee should be counseled, monitored and offered assistance before the contract is terminated.⁹⁵

The employer can invoke this form of dismissal in stock loss dismissals. The employer in *Jacklens & others v Pep Stores*⁹⁶ after experiencing high stock losses at one of its stores introduced stringent stock control measures and training programme aimed at limiting losses to 2% of stock held. Employees were warned that if stock losses continued in excess of that figure, disciplinary action would be taken. After the store manager was dismissed, stock losses continued. The remaining staff were counseled and cautioned that they would be held individually and collectively responsible for further losses. In the course of these counseling sessions, employees were issued with warnings and final warnings. The employees' union was involved in attempts to curb further shrinkage. After a stock taking, the employees at the store were summoned to a disciplinary hearing and dismissed.

The commissioner noted that it was clear that the employees received training, counseling and were cautioned through the disciplinary code. It was also evident that the respondent did react on staff suggestions to minimize ineffective control. The commissioner dismissed the employees' application.

⁹⁴ Grogan, J *Dismissal Discrimination & Unfair Labour Practice*, (2ed) (2007) 412 – 413.

⁹⁵ Grogan, J *Dismissal Discrimination & Unfair Labour Practice*, (2ed) (2007) 412 – 413.

⁹⁶ [1999] 6 BALR 673 (CCMA).

In *SACCAWU obo Madika & others v Pep Store*,⁹⁷ the employees were dismissed when stock loss at the store exceeded the level tolerated by the respondent's shrinkage policy. The commissioner noted that the store had a continuous stock loss of higher than 2%, after the manager took the store over. The rule (shrinkage policy) was communicated to the personnel more than seven times in two hearing and counseling sessions. It was a valid rule and a rule was well communicated to the store. In retail store a premium is placed on the efficient operation of business where employers are entitled to expect satisfactory conduct in work performance from employees. Employers therefore have detailed procedures to counter stock losses. Should the application of these procedures fail to stem the losses suffered in a particular store, this could if all fails lead to the dismissal of all, or at least some, of the employees in the store. The basis for the dismissal will be the operational requirement of the business or perhaps the poor work performance of the employees, on the basis that they have been trained to perform their work in such a way as to prevent these losses and they failed to do so. A fair opportunity was given to the employees to meet the standard of less than 2% over more than two years. Appropriate evaluation, training, guidance and counseling was given to the employees. Even in terms of the disciplinary code an extra final warning was issued, where according to the disciplinary code in the employment guide, the employee should have been dismissed. The employees were are of the standard and the rule and failed to abide by it.

As indicated by the code, the first requirement is prove that the standard exists, and that it is reasonable. The existence of the standard may be proved by a contractual provision, by practice, or by reference to industry norms

In *SACCAWU obo Mdiya & others v Pep Stores (Pty) Ltd*⁹⁸ concerned staff at a branch of Pep store who were dismissed for poor work performance emanating

⁹⁷ [2002] 6 BALR 657 (CCMA)

⁹⁸ [2003] 10 BALR 1172 (CCMA).

from escalating stock loss. They claimed their manager was responsible for the loss, and claimed that the respondent had failed to counsel them in accordance with its procedure. The respondent contended that the applicants had been counseled, and that at the time of their dismissal they were all on final warnings for shrinkage. The commissioner held that:⁹⁹

'[T]he company has complied with the code of good practice in so far as the applicants were aware of the standard required of them and should have been aware of the repercussions of failing to meet the required standard. The company had made out a case that the standard was not met and investigated the causes of the stock loss. Action plans and training was carried out to help curb the losses. The applicants had not improved in spite of a long period of time in which to do so.'

7.3 Dismissal for operational requirements

Section 213 of LRA defines 'operational requirement' as requirements based on the economic, technological, structural or similar needs of an employer.

The 'economic needs' of a business is a very broad concept. Essentially, it covers all those needs that relate to the economic well-being of the enterprise. One of the most common economic reasons for dismissal is financial difficulties experienced by a business due to, for example, a downturn in the economy or a decrease in the demand of its products. 'Technological needs' refers to the introduction of new technology, such as more advanced machinery, mechanization or computerization that leads to the redundancy of employees.

'Structural needs' as a reason for dismissal of employees refers to posts becoming redundant following a restructuring of the enterprise.

'Similar needs' is an extremely broad concept that must be determined with regard to the circumstances of a case. The following categories of 'similar reasons' can be distinguished:

- Special operational needs of the business
- The employee's actions or presence affect the business negatively
- The employee's conduct has lead to a breakdown of the trust relationship

⁹⁹ *SACCAWU obo Mdiya & others v Pep Stores (Pty) Ltd* at 1181.

- The enterprise's business requirements are such that the changes must be made to the employee's terms and conditions of employment¹⁰⁰

Operational requirements have been accepted by courts operating under the 1956 LRA as justifying dismissal when the employer is unable to prove an allegation of misconduct, but where the circumstances are such that the employer is able to demonstrate that the relationship of trust and confidence has been compromised.¹⁰¹ In *EAWTUSA & another v The Production Casting Co (Pty) Ltd*¹⁰² the Industrial Court ruled:¹⁰³

'As far as misconduct is concerned I believe that if the employer is of the bona fide view that as a result of the employee's conduct which has come to his attention and which he has investigated to such an extent that it would exclude any grounds that he (the employer) acted arbitrarily, the relationship between him and the employee has become intolerable and for commercial or public interest reasons, he will be entitled to dismiss the employee.... If an employer for instance mistrusts an employee for reasons which he must obviously justify (not according to any particular standard of proof), and he can show that such mistrust, as a result of certain conduct on the part of the employee, is counter-productive to his commercial activities or to the public interest (where appropriate), he would be entitled to terminate the relationship.'

The court found that the basis for the suspicion was too weak to permit the application of this doctrine.

The principle underlying these cases seems to be that, in exceptional circumstances, where an employer is faced with proven theft but cannot identify the culprits, 'operational requirements' can be invoked to justify dismissal. This is a departure from the requirement that the employee may be dismissed for misconduct only if it is proved on a balance of probabilities that the employee actually committed the offence. However, it must be accepted that there are situations in which losses occasioned by theft could conceivably threaten the viability of a business. When theft is occurring and the employer has done

¹⁰⁰ Basson *et al Essential Labour Law Individual Labour Law* Vol 1 LLP Cape Town (2002) 225-

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¹⁰¹ *Chauke & others v Lee Service Centre CC t/a Lesson Motors* at paras 27-28.

¹⁰² (1988) 9 ILJ 702 (IC).

¹⁰³ *EAWTUSA & another v The Production Casting Co (Pty) Ltd* at 708H-J.

everything in its power to identify the actual culprits without success, there is no reason in principle why the employer should not be able to invoke operational reasons as a justification for terminating the services of a group of employees whose duties, if properly performed, would prevent theft.¹⁰⁴

On the issue of delicate balance between fairness to employees on the hand, and operational requirements of the employer in employment context, the Labour Court in *De Beers Consolidated Mines Ltd v CCMA & others*¹⁰⁵ stated that:

'Dismissal is not an expression of moral outrage; much less is it an act of vengeance, it is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise'.¹⁰⁶

Code of Good Practice: Dismissal based on Operational Requirements, item 2, provides: 'Dismissals for operational requirements have been categorized as 'no fault' dismissals. In other words, it is not the employee who is responsible for the termination of employment...'

In cases of stock loss, employees are responsible for the loss; the only problem is that the employer cannot prove the misconduct and such misconduct affects the sustainability of the enterprise. As highlighted above, the employer can only invoke operational requirements in cases wherein he cannot prove the commission of theft.¹⁰⁷

8. CONCLUSION

¹⁰⁴ Grogan, *J Dismissal Discrimination & Unfair Labour Practice*, (2ed) (2007) 517-18.

¹⁰⁵ [2000] 9 BLLR 995 (LAC).

¹⁰⁶ *De Beers Consolidated Mines Ltd v CCMA & others* at para 22.

¹⁰⁷ See *SACCAWU & others v Pep Store* (1998) 19 ILJ 1226 (LC) at para 42 'The reason for this was that they were suffering stock losses which, were due to unexplained causes, but which would include the inability of the custodians of the goods to protect them from loss. That is a sufficient reason to close a store for operational requirement'.

From the above discussion, what remains after this thorny issue of stock loss has boiled down, is two interests that one of the employer plagued by stock loss and that of the employees who honestly innocent but caught in the wide net of dismissals under the notion of “collective responsibility”. Collective responsibility has proved to inconsistent with the rules of natural justice and that left the employers in dilemma until the new concepts like “derivative misconduct” and “team misconduct” were developed into our law by the courts.

The writer is inclined to agree with the conclusion of arbitrator in *FEDCRAW v Snip Trading* that as in many sporting endeavours, productive and commercial activities often depend for their success, not on the uncoordinated actions of individuals, but on team effort. In such circumstances, when a group of workers is dismissed, the justification is that each culpably failed to ensure that the team met its obligation. Blame cannot be attributed among members of the group, as it can in cases where it is known that some of the individuals in the group are innocent. However, there is an important ride: the concept of “team liability” cannot be invoked used in all circumstances to justify collective punishment. If one member of a team fails to pull his or her weight, the accomplishment of the entire team may be jeopardized. When the “guilty” member is identifiable, he or she can be removed – either for misconduct or for incapacity – and replaced. Where the guilty or deficient member of a group can be identified, it would clearly be unfair to punish the entire team. However, the problem arises when it is not possible to identify a guilty or deficient member. There two possibilities in a competitive world. The first is to replace the entire team and the second to replace the captain... in situations of “team misconduct” it is...permissible to act against the entire team if each member has a role to play in attaining the performance standard set for the team. If that standard is not reached, each member must be given an opportunity to explain the team’s failure; the person to who the explanations are given must be objectively satisfied that the team’s failure cannot be blamed on any particular member of that team.

There are situations that contribute to stock loss and such should be taken into cognizance when assessing or adjudicating over a matter that involves stock loss; thus security measures, size of the store vis-à-vis the staff, etc. In one typically example, the employers should also take a blame in the manner in which they display their products to the public and in most cases it causes theft by the customers.

The acceptance of the notion of “team misconduct and derivative misconduct” has at least relieved the employers who were plagued with shrinkage and failed to dismiss the employees in a fair manner as envisaged by the LRA. In the right of the employer to set standards and the consequence of the failure to attain the standards has come as the great assistance to the most of the employers.

For employees it has proved to very difficult to proof or explain stock loss. Be that as it may employees enter in contract and accept the conditions of employment that clearly indicates that the employees will be held collectively accountable if stock loss reaches certain level.

These are two competing interests; employers’ interests prevail over that of employees in that the employers are in business of making a profit. Furthermore, the sustainability of the enterprise depends on economic climate and the relationship between the employer and employees.

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