CURRENT ISSUES CONCERNING THE DUTY OF MUTUAL TRUST AND CONFIDENCE IN SOUTH AFRICAN LABOUR LAW

By

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DECLARATION

I declare that the mini-dissertation hereby submitted to the University of Limpopo, for the degree of Masters of Law in Labour Law has not previously been submitted by me for a degree at this or any other university; that it is my work in design and in execution, and that all material contained herein has been duly acknowledged.

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Raligilia, K.H (Mr) **Date**

[redacted]

DEDICATIONS

This research paper is dedicated to the memory of my late mother Mmbulaheni Josephine Raligilia who was my greatest source of inspiration. It is also dedicated to my brother Ndivhadzo Christopher Mukwevho for his sacrifice and also in ensuring that I am completing this research paper with ease.

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ABSTRACT

In *Joseph v University of Limpopo & Others* (JA14/09) [2011] ZALC 8 (13 May 2011) the Labour Appeal Court affirmed that there was unfairness in the process adopted by the employer in failing to renew the employee's fixed term contract. This research paper examines the Labour Appeal Court's reasoning in this case, with particular focus on the development of an implied term that each party to an employment contract owes the other a mutual duty of trust and confidence, and general reasonable behaviour. This paper further argues that mutual trust and confidence in the employment context protects the legitimate expectations of employees by serving as a bulwark against illegitimate conduct or acts of on the part of the employer designed or likely calculated to destroy the employer-employee relationship, thereby ensuring fuller protection of an employee's constitutional rights. *Joseph v University of Limpopo & others* is of great significance. It indicates that the employer's ability to rely successfully upon its prerogative not to renew fixed term contract where an employee has legitimate expectation of renewal may be contingent on its having acted in a manner consonant with mutual trust and confidence.

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CHAPTER ONE

THE NATURE OF EMPLOYMENT RELATION:

THE COMMON LAW CONTRACT OF EMPLOYMENT REVISITED

An analysis of misconduct in labour law begins with a student defining the nature of the individual employment relationship. An understanding of common law principles governing employment is crucial. Despite legislative inroads into employment relationship, the principles governing the individual employment relationship are derived from common law. Without doubt, the contract of employment constitutes the foundation upon the employment relationship is predicated.[1]

The common law[2] treats the contract of employment as a species of the contract of letting and hiring.[3] More particularly, it is treated as a contract of letting, by an employee, of his labour potential to the employer.[4]

Judges[5] and scholars[6] on labour law have found it extremely difficult to define a contract of employment. This is understandable as that which needs to be defined in

[1] See Grogan, J *Riekert's Basic Employment Law* 2 ed (1993) 2-3 where he states"[t]he common law contract of employment remains the basis of the employment relationship in the sense that the legal relationship between the employer and the employee is created by it." See also Kahn-Freund, O 'Blackstone's neglected child: The contract of employment' (1977) *LQR* 503, 525. Contra, however, Jordaan, B 'The law of contract' in *Bennet et al* (eds) *Labour Law* (1991) 73, 88 where he states that "[at] some stage in the history of its development the contract of employment probably reflected reality with a reasonable measure of accuracy. It no longer does so and its continued survival can only be explained in terms of its being 'a figment of the legal mind."

[2] See Rycroft, A & Jordaan, B *A Guide to South African Labour Law* 2 ed (1992) 21-25 and 33-34 and *Smit v Workmen's Compensation Commissioner* 1979 (1) 51 (A) at 56D-61H, as well as the sources therein referred to for historical overview of the contract of employment.

[3] Also known as the *locatio conductio* contracts. See Rycroft, A & Jordaan, B *A Guide to South African Labour Law* 2 ed (1992) 324 and *Smit v Workmen's Compensation Commissioner* 1979 (1) 51 (A) at 61A.

[4] Also known as the *locatio conductio operarum*. *Smit v Workmen's Compensation Commissioner* 1979 (1) 51 (A) at 61A-B.

legal terms is a social relationship. Brassey[7] explains the complex nature of the employment relationship and the problems experience in determining the existence of such a relationship as follows:

> "Employment is a complex and multifaceted social relationship; its forms are protean, and its existence must be viewed by a process whose application goes unremarked in most other branches of the law, the process of assessing all the relevant facts."

The following definition by Jordaan[8] is in accordance with the views held by most South African writers[9] on what constitutes a contract of employment:

> "[a] contract of employment ... [s] an agreement in terms of which one party (the employee) agrees to make his personal services available to the other party (the employer) under the latter's supervision and authority in return for remuneration."

Subordination as an Element of the Contract of Employment

Today,[10] most writers[11] as well as the courts[12] accept that subordination by the employee to the employer must be one of the elements of the contract of

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[5] See Brassey, M 'The nature of employment' (1990) 11 *ILJ* 889, 893 and the cases therein referred to.

[6] See Brassey, M 'The nature of employment' (1990) 11 *ILJ* 889, 89.43 and the writers therein referred to.

[7] See Brassey, M 'The nature of employment' (1990) 11 *ILJ* 889, 920.

[8] In Du Plessis *et al Practical Guide to Labour Law* 2 ed (1996), 7.

[9] In the Roman law, remuneration was considered an essential element (*Smit v Workmen's Compensation Commissioner* 1979 (1) 51 (A) at 65F although it appear that this was not the case in Rom Dutch Law (see the *Smit* case at 60G-61). See also Norman-Scoble, C *Law of Master and Servant in South Africa* (1956) 2 who regards remuneration as an essential element of the contract of employment. Contra, however, Mureinik, E "The contract of service: An easy test for hard cases" (1980) 97 *SALJ* 246, 249 note 16 where he states that remuneration itself is not essential element of the contract of service. He states that the explicit statutory mention of the requirement of remuneration in the definitions of "employer" and "employee" in s 1 of the Industrial Conciliation Act 28 of 1956 may be taken as implicit authority of its absence at common-law. (Note the definition of "employee in s 213 of the LRA also stipulates remuneration as requirement. See also *Rodrigues & others v Alves & others* 1978 (4) SA (A) at 841D-E.

[10] There appears to be some debate as to whether or not subordination constituted an element of the common law contract of employment. Some writes are of the view that this was not the case and that it was an element adopted from the English law. (Strydom, EML *The Employer Prerogative from a Labour law Perspective* LLD Thesis UNISA 1997, 46)

employment. Davies and Freedland[13] explain the fact that subordination is an element of the contract in the following terms:

> "But the relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power In its inception it is an act of submission, in its operation is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as "the contract of employment"."

Although there appears to be the general consensus that subordination constitutes an essential element of the contract of employment, the reason or reasons for these have been subject of debate

Some writers[14] argue that the element of subordination is a remnant of the status relationship which existed between the master and servant. The relationship was fixed by law and based on the status of the parties in society. One of the attributes of this relationship was that the status of the master carried with it the right to command and discipline the servant.[15] It has been pointed out that[16]

> "Viewed in the grossest terms, the employment relationship is one of conflict. The employer attempts to maximize worker productivity and firm profitability, and the workers attempt to restrict their labour output and increase their wages. However much they struggle, to some extent all workers must obey the directions of their

[11] Rycroft, A & Jordaan, B *A Guide to South African Labour Law* 2 ed (1992) 35 and 60-63; Brassey, M 'The nature of employment' (1990) 11 *ILJ* 889, 902, Lord Wedderburn *The Worker and The Law* 3 ed (1986) 5; Mureinik, E "The contract of service: An easy test for hard cases" (1980) 97 *SALJ* 246, 263 and 266.*Ongevallekommisaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4) SA 446 (A) at 455G-H and *Colonial Mutual Society Life Assurance Ltd v* MacDonald 1931 AD 412 at 432-435.
[12] See generally *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 *ILJ* 673 (LAC) at 681J-682A and 683E-F; *Smit v Workmen's Compensation Commissioner* 1979 (1) 51 (A) at 60-61;
[13] *Kahn-Freund's Labour Law and The Law* 3 ed (1983) 18.
[14] Lord Wedderburn *The Worker and The Law* 3 ed (1986) 111 where he states that, "[t]he judges carried over the earlier concept of service, built from the fourteenth century upon the status and legal imagery of pre-industrial society with agricultural and domestic labourers featuring prominently, ... giving to the masters powers to demand obedience that derive from earlier relationships".
[15] Selznick, P *Law, Society, and Industrial Justice* (1980) explains that (at 214) as follows: "He [i.e. the master] could issue order on any matter touching the conduct of the enterprise to be obeyed."
[16] Austin, R 'Employer abuse, worker resistance, and the tort of intentional infliction of emotional distress' (1998) 41 *Stanford LR* 1, 36-37.

employers in order to keep their jobs. Economic coercion necessitates the employment relationship and furnishes the most basic and pervasive sort of worker control."

Selznick[17] argues that the contract of employment which developed in the first quarter of the nineteenth century was a specific type of contract which, by the end of the century, protected and enhanced the decision-making powers of the employer. He refers to this contract as the prerogative contract.[18] According to him, the prerogative contract relied on two assumptions, namely that the parties entered into the contract voluntarily[19] and that the ownership of property by the employer automatically gave it the decision-making power over the employee.

Both these assumptions may be criticised. Although a person is not forced by an employer to accept a job offer, social and economic considerations do play an important role in his decision to accept. Furthermore, property rights afford the employer rights over its business premises and machinery – not over the people employed by it.

Collins[20] states that the source of subordination element is twofold. It is firstly based on the market power of the employer. Collins argues that no equality of bargaining power in the labour market exists between the employer and employee. The second source of the subordination element suggested by Collins is the bureaucratic organisation of an enterprise.[21] He[22] argues that when the employee joins an enterprise, he joins a bureaucratic organisation where he finds himself in a

[17] Selznick, P *Law, Society, and Industrial Justice* (1980) 130-137.
[18] Selznick, P *Law, Society, and Industrial Justice* (1980) 135, "The main economic significance of the contract at will was the contribution it made to easy layoff of employees in response to business fluctuations. But it also strengthened managerial authority. By the end of the nineteenth century the employment contract had become very special sort of contract in large part a legal device for guaranteeing to management the unilateral power to make rules and exercise discretion. For this reason we call it the prerogative contract".
[19] Selznick, P *Law, Society, and Industrial Justice* (1980) 135.
[20] Collins, H 'Market power, bureaucratic power and the contract of employment' (1986) 15 *ILJ* (UK) 1.
[21] Collins, H 'Market power, bureaucratic power and the contract of employment' (1986) 15 *ILJ* (UK) 1.
[22] Collins, H 'Market power, bureaucratic power and the contract of employment' (1986) 15 *ILJ* (UK) 1-2.

relationship of subordination with those above him in the system of ranks.[23] However, it is suggested that the second ground advanced by Collins may be rejected. The bureaucratic organisation of the enterprise is not the reason for the employee's subordination. It is merely a structure devised by the employer to exercise maximum authority over its employees.

Pauw[24] argues that subordination became an essential element of a contract of employment as a result of the role which vicarious liability plays in labour law. When liability by an employer for torts committed by its employee developed in England, it seemed unjust to hold the employer liable for torts committed by an employee at a time when the employer had no control over him. According to Pau, subordination as an element of the contract of employment was adopted by the South African law from English law.

Brassey[25] criticises Pauw's explanation for subordination as an element of the contract of employment. He states that it is possible for one-party to have sufficient control over another for purposes of vicarious liability without an employment relationship existing between the parties.[26] He also argues that subordination was an essential element of the contract of employment in both Roman and Roman-Dutch law, and that it is accordingly unnecessary to turn to English law in this regard.[27]

Jordaan suggests that the subordination element has its origin in both the status relationship that existed between the master and his servant[28] and legislation such

[23] Collins, H 'Market power, bureaucratic power and the contract of employment' (1986) 15 *ILJ* (UK) 1-2, states that, "[t]his bureaucratic aspect of subordination arises from the organisation structure rather than from any initial inequality of bargaining power in the market for it persists even when the employee, either individually or collectively, enjoys strong leverage".
[24] Pauw, P 'Aspect of contract of service' (1979) *MB* 138.
[25] Brassey, M 'The nature of employment' (1990) 11 *ILJ* 889, 892.
[26] Brassey, M 'The nature of employment' (1990) 11 *ILJ* 889, 992 and 903 and see the cases referred to by him in notes 12-18 of his article.
[27] Brassey, M 'The nature of employment' (1990) 11 *ILJ* 889, 889-899.
[28] Rycroft, A & Jordaan, B *A Guide to South African Labour Law* 2 ed (1992) 62.

as the Master and Servant laws, introduced to confirm and ensure the employee's subordination to his employer.[29]

All the aforementioned writers search for the reason for subordination as an essential element of the contract outside the parameters of the contract. It is submitted that status, the unequal bargaining relationship between the parties and the economic superiority of the employer, constitute nothing more than reasons for an employee's preparedness to conclude a contract in terms of which he will be subordinate to the employer. Also, legislation is not the originating source of the subordination element. Although some of the Master and Servants Acts[30] subscribed to the subordination element by, for example, branding an employee's refusal to adhere to the employer's demands as criminal offences, these statutes did nothing more than promote subordination in that they served as an incentive for the employee to be subordinate to the employer.

It is submitted that the reason why subordination constitutes an element of the contract of employment is to be found in the contract itself.[31] More particularly, it is to be found in that which the employee "hires out" to the employer, namely his labour potential. Labour potential is not separable from the employee and, as a rational being; he has full control over it. In order to ensure that the employee applies his labour potential in accordance with their agreement, it is imperative that the employee is subordinate to the employer.[32] If subordination is not an element of the contract of employment, an employer will have no legal basis to demand that the

[29] Rycroft, A & Jordaan, B *A Guide to South African Labour Law* 2 ed (1992) 62-63.

[30] See, for example, the Natal Master and Servant Ordinance of 1850. In terms of this ordinance, it was a criminal offence for a servant to refuse or neglect to perform his stipulated duty or to perform work in a negligent or improper fashion.

[31] Edwards, R *Contested Terrain: The Transformation of the Workplace in the Twentieth* Century (1979) 12 where he states that, "... unlike the other commodities involved in the production, labour power is always embodied in people, who have their own interests and need and who retain their power to resist being treated like a commodity."

[32] See also *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 *ILJ* 673 (LAC) at 682E where the court stated "Nevertheless, once it is accepted, as I think it must be, that what is essential to the relationship of employment is that one person's capacity to work has been placed at the disposal of another, it seems to me most unlikely that this will be found to have occurred in practice without the recipient at the same time having assumed some measure of control over the manner in which that capacity is to be developed, for that is the very thing for which he contracted..."

employee applies his labour potential for the purpose the employer intended it to be applied.

Lawfulness v Fairness

It is important to distinguish between the lawful termination of an employment contract and the fair termination of an employment contract.

If the termination is in accordance with the contract, the termination is lawful. If it is not in accordance with the contract, this will be a breach of the contract and thus renders such termination unlawful.

The common law does not concern itself with the reason for the termination of the employment contract, as long as the contractual and statutory provisions relating to notice have been complied with, the requirements of the common law are satisfied and the termination is regarded as lawful.[33]

The concept of fairness originates from the LRA and the terms thereof,[34] a dismissal must be fair. The dismissal must comply with certain substantive and procedural requirements. Even though a dismissal is lawful, it does not necessarily follow that such a dismissal is fair.

Regarding the contract of employment, what will follow is a discussion, with reference to case law development in South African labour regarding the requirement of fairness, as referred to above.

[33] Davis, DM 'Refusing to step beyond the confines of contract: The jurisprudence of Adv Erasmus SC' (1985) 6 *ILJ* 425; Fouche, MA 'Common Law Contract of Employment' in *A Practical Guide to Labour Law* 5th ed (2003) 16 para 2.6.6.
[34] Sidumo

Boxer Superstore Stores Mthatha v Mbenya

This matter concerned an appeal from the High Court dismissing an objection to the High Court jurisdiction. The employer terminated the employment of an employee who applied to the High Court for an order, inter alia, that the hearing preceding her dismissal be set aside and its outcome declared unlawful and be set aside, a declaratory order that her dismissal was unlawful and of no force, reinstatement and back pay. The employer raised a point of law contending that the High Court lacked jurisdiction in the matter as it fell within the exclusive competence of the Labour Court.

On appeal, the court held that the exclusive jurisdiction of the LC has been carefully circumscribed over the years.

The court held that despite section 157(1), the following is now well established:

(i) Section 157 does not purport to confer exclusive jurisdiction on the Labour Court generally in regard to matters concerning the relationship between employer and employee,[35] and since the LRA affords the LC no general jurisdiction in employment matter, the jurisdiction of the High Court is not ousted by section 157(1) simply because a dispute is one that falls within the overall sphere of employment relations.[36]

(ii) The LRA's remedies against conduct that may constitute an unfair labour practice are not exhaustive of remedies that might be available to employees in the course of the employment relationship – particular conduct may not only constituted an unfair labour practice (against which the LRA gives a specific remedy), but may give rise to other rights of action: provided the employee's claim as formulated does not purport to be one that falls within the exclusive jurisdiction of the LC, the High Court has

[35] *Fedlife Assurance Ltd v Wolfaardt supra.*
[36] *Fredericks v MEC Education & Training, Eastern Cape* supra.

jurisdiction even if the claim could also have been formulated as an unfair labour practice.[37]

(iii) An employee may therefore sue on the High Court for a dismissal that constitutes a breach of contract which gives rise to a claim of damages.[38]

The court held that the question in this case pushes the boundary further as to whether an employee may sue in the High Court for relief on the basis that the disciplinary proceedings and dismissal were "unlawful", without alleging any loss apart from salary? The court held that the answer to this question is yes.

The court referred to the matter of *Old Mutual Life Assurance Co SA Ltd v Gumbi*[39] in respect of which the court held that the common law contract of employment developed in accordance with the Constitution to include a right to a pre-dismissal hearing. Contractual claims are cognizable in the High Court. The fact that they also be cognizable in the Labour Court through that court's unfair labour practice jurisdiction does not detract from the High Court's jurisdiction.

Old Mutual Life Assurance Co SA Ltd v Gumbi

This matter concerned Old Mutual, the employer, who dismissed the respondent, the employee, following a disciplinary hearing in respect of which the employee was found guilty of misconduct and dismissal was recommended as an appropriate sanction. The respondent instituted an application in the Transkei High Court challenging the dismissal on the basis that the enquiry was held in his absence and as a result he was denied a hearing before a decision to dismiss was taken. Miller J dismissed the application on the ground that the employee "wilfully and wrongfully excluded himself from the disciplinary hearing" because he failed to return to it after

[37] *United National Public Servants Association of SA v Digomo No* (2005) 26 *ILJ* 2957 (SCA).
[38] *Fedlife Assurance Ltd v Wolfaardt supra*.
[39] (200& 8 BLLR 699 (SCA).

a short adjournment. The employee appealed to a full court and the majority reversed the decision of the court of first instance and held that the employee's absence from the disciplinary hearing was neither wilful nor voluntary and that the medical certificate handed to the disciplinary tribunal by the representative of the employee could not be rejected when its authenticity and correctness had not been disputed at the hearing. In a dissenting judgement Somyalo JP, the learned judge found that the employee's absence from the hearing was wilful and voluntary. The present appeal is with special leave of this court.

The crisp issue in the appeal was whether the termination of the employee's employment by the employer was procedurally fair. The sole focus of the appeal was the employee's right to a pre-dismissal hearing at common law.

The court held that employees' entitlement to a pre-dismissal hearing is well recognised in South African law.[40] Such a right having its source *inter alia*, the common law. The court held that it is clear that co-ordinate rights are now protected by common law: to the extent necessary, as developed under the constitutional imperative[41] to harmonise the common law into the bill of rights which itself includes the right to fair labour practices in section 23(1).

[40] The requirement that an employer must observe a fair procedure for the dismissal of an employee to be fair in South African law of unfair dismissal was developed by the old Industrial Court albeit expressed in the language of the common law principles of natural justice. Even in the absence of an enabling legislation, the Court incorporated the ILO Convention 158 and Recommendation 166 of 1982 on Termination of Employment at the Initiative of the Employer in its development of the South African law of unfair dismissal in the exercise of its unfair labour practice jurisdiction under the LRA 1956. For the most robust and extensive consideration of the application of the rules of natural justice in the law of unfair dismissal by the Industrial Court under the previous labour regime see the judgment of Bulbilia AM in *Mahlangu v CIM Deltak, Gallant v CIM Deltak* (1986) 7 *ILJ* 346 (IC). For some of the many articles and texts on the subject, see Cameron, E 'The right to a hearing before dismissal - part I' (1986) 7 *ILJ* 183; same author, 'The right to a hearing before dismissal: Problems and puzzles' (1988) 9 *ILJ* 147; Olivier, M in Brassey et al, *The New Labour Law* (1987) 407; Olivier, M 'The dismissal of executive employees' (1988) 9 *ILJ* 519; Rautenbach, NF 'Remedying procedural unfairness: An employer's dilemma' (1990) 11 *ILJ* 466; Campanella, J 'Procedural fairness and the dismissal of senior employees on the ground of misconduct' (1992) 13 *ILJ* 14; Rycroft, A & Jordaan, B *A Guide to South African Labour Law* (2ed) 203; Le Roux, PAK & A Van Niekerk, A *The South African Law of Unfair Dismissal* (1994) Ch 9.

[41] S39(2) of the Constitution.

In recognizing a right to a hearing the court held that South African law is consistent with international law in respect of pre-dismissal hearings as set out in article seven of the ILO Convention on termination of employment. The convention recognised that the right is not absolute in that there are certain circumstances where they may not apply.

The court held further that by extending requirements of the *audi alteram partem* rule to employment relationship, South African law promotes justice and fairness in the workplace and promotes the objectives of the LRA. In this context, the court held that fairness must benefit both the employer and the employee. The court held that the process of determining the actual content of fairness, the court referred with approval to *NUMSA v Vetsak Cooperative Ltd* where it was stated as follows:

> "Fairness comprehends that regard must be had not only to the position and interest of the worker, but also those of the employer, in order to make a balance and equitable assessment. In judging fairness, a court applies a moral or value judgement to establish facts and circumstances ... and doing so it must have due and proper regard to the objectives sought to be achieved by the Act. In my view, it would be unwise and undesirable to lay down or attempt to lay down any universally applicable test for deciding what is fair."

The concept of fairness pervades every facet of labour law.[42] The fundamental inquiry in a dismissal case under the 1995 LRA is whether the dismissal was fair. In labour law fairness and fairness alone is the yardstick[43] - and especially in dismissal law - the courts are charged with the duty of ensuring that employers and employees act fairly towards each other.[44] Like reasonableness,[45] fairness is incapable of

[42] For a systematic discussion see C Okpaluba, 'The opportunity to state case in the law of unfair dismissal in Swaziland in the light of the developments in South Africa and the United Kingdom' 11 (1999) *The African Journal of International and Comparative Law* 392.

[43] Per Conradie JA *BMW (SA) (Pty) Ltd v Van der Walt* (2000) 21 *ILJ* 113 (LAC) at 117I.

[44] Grogan, J 'Double jeopardy: Are duplicated disciplinary inquiries allowed?' (2000) 16(1) *EL* 15, 18. See also *NUMSA v Vetsak Co-operative Ltd & Others* [1996] 6 BLLR 697 (A).

[45] For a sustained account see C Okpaluba 'Employee's misconduct, employer's reasonableness and the law of unfair dismissal in Swaziland' (1999) 32 *CILSA* 386, 393-394 esp. note 56 where the author

precise definition. However, it has been pointed out that fairness does not exist in vacuum, but is part of the legal system.[46] Thus the Labour Appeal Court in *Woolworths (Pty) Ltd v Whitehead*[47] Wills JA, stated that:

> "Fairness is an elastic and organic concept. It is impossible to define with exact precision. It has to take into account of the norms and values of our society as well as its realities. Fairness, particularly in the context of the LRA, requires an evaluation that is multidimensional. One must look at it not only from the perspective of prospective employees but also from employers and the interests of society as a whole. Policy considerations play a role. There may be features in the nature of the issue which call for restraint by a court in coming to a conclusion that a particular act of discrimination is unfair.

Steyn JA in *Botswana Railways Corporation v Setsogo & 198 Others*[48] articulated the concept of fairness in the following terms:

> "… the area of resolution of industrial disputes is a minefield, in which fairness, objectivity and manifest independence are prerequisites for confidence and acceptance of decision – more specifically as these impact upon motive, volatile – indeed explosive issues. Great care must therefore be taken to ensure that its composition and the procedures through which its deliberations are conducted, the

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notes that 'although the courts in South Africa rejected the reasonable employer test in evaluating the sufficiency of the reason for dismissal, they have held that the employer must consider whether dismissal is the 'appropriate sanction' and in doing so, they have applied all those same factors which an employer ought to consider under the reasonable employer test. However, recent developments seem to suggest that the reasonable employer test is gradually finding its way back into South Africa's labour adjudication where the issue is whether dismissal is the appropriate penalty in the circumstances.' See too Johan Myburgh SC & Andre van Niekerk, 'Dismissal as a penalty of misconduct: The reasonable employer and other approaches' (2000) 21 *ILJ* 2145; Tamara Cohen, 'The "reasonable employer" test – Creeping in Through the Back Door? (2003) 15(2) *SAMLJ* 192. But see *Toyota SA Motors (Pty) Ltd v Radebe & Others* (2000) 21 *ILJ* 340 (LAC) where it was held that the reasonable employer test is not part of our law; *Rustenburg Platinum v CCMA* 2002 4 BLLR 387 (LC) where it was held that whether dismissal is an appropriate sanction in the circumstances is not to be decided according to the 'reasonable employer test. Grogan, J 'Death of reasonable employer: the seismology of review' (2000) 16(2) *EL* 4.

[46] Per Zondo JP *BMW (SA) (Pty) Ltd v Van der Walt supra* at 124H.

[47] *Woolworths (Pty) Ltd v Whitehead* (2000) 21 *ILJ* 571 (LAC) at 599H-I.

[48] (unreported) Civil Appeal No. 51/95.

objectivity, representativeness and impartiality of the Court are beyond legitimate question." [49]

Fairness, rather than correctness is the mandated test.[50] The general considerations of fairness may also justify, in appropriate cases, a departure from other principles generally regarded as sacrosanct in labour law.[51]

The right to pre-dismissal hearing imposes on employers an obligation to afford employees an opportunity of being heard before their employment is terminated by means of dismissal. However, should employees fail to take the opportunity offered, in a case where he or she ought to have, the employer's decision to dismiss cannot be challenged on the basis of procedural fairness.

In applying the above principles to the present matter, the crucial question was whether the absence of the employee from the hearing, in the circumstances of the case, were justified; or whether fairness to both parties demands that his dismissal be set aside or not?

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[49] *Botswana Railways Corporation v Setsogo & 198 others supra* at 100.

[50] Per Davis AJA in *BMD Knitting Mills (Pty) Ltd v SACTWU* [2001] 7 BLLR 705 (LAC) at 710E-H.

[51] See the remarks of Conradie JA in *SA Commercial Catering & Allied Workers Union & Others v Irvin & Johnson Ltd* (1999) 20 *ILJ* 2302 (LAC) at 2313C-J saying "In my view too great emphasis is quite frequently sought to placed on the 'principle' of disciplinary consistency, also called the 'parity principle'. There is really no separate 'principle' involved. Consistency is simply an element of disciplinary fairness. Even then I dare say that it might not be so unfair as to undo the outcome of other disciplinary enquiries. If, for example, one member of a group of employees who committed a serious offence against the employer is, for improper motives, not dismissed, it would not, in my view, necessarily mean that the other miscreants should escape. Fairness is a value judgement. It might or might not in the circumstances be fair to reinstate the other offenders. The point is that consistency is not a rule unto itself". 'Whether or not a second disciplinary enquiry may be opened against an employee would, I consider, depend on whether it is, in all circumstances, fair to do so.' per Conradie JA in *BMW (SA) (Pty) Ltd v Van der Walt supra* at 117G para. 12. On consistency and progressive discipline, see following: *Reckitt & Colman (SA) (Pty) Ltd v Chemical Workers Industrial Union* (1991) 12 *ILJ* 806 (LAC); *NUMSA & Others v Free State Consolidated Gold Mine (Operations) Ltd* (1995) 16 *ILJ* 1371 (A); *SACTWU & Others v Novel Spinners (Pty) Ltd* (1999) 11 BLLR 1157 (LC); *NUM & Another v AMCOAL Colliery t/a Arnot Colliery & Another* (2000) 8 BLLR 869 (LAC); *Impala Platinum Ltd v NUM* [2000] 8 BALR 955 (IMSSA); *Monate v Anglo-Platinum – Rustenburg Platinum* [2002] 1 BALR 48 (CCMA); *SAFRAWU obo Pienaar v Rainbow Farms* [2002] 2 BALR 215 (CCMA); *Ntshinka v Telkom SA (Pty) Ltd* [2002] 7 BALR 2749 (CCMA); *NUMSA v Delta Motor Corporation* [2002] 9 BLLR 817 (LAC); *NEHAWU obo Billet v PE Technikon* [2003] 6 BALR 712 (CCMA). See also J Grogan 'Just Desserts: The limits of the parity principle' (1999) 15(3) *EL* 14, 'Parity Revived: When prior warning do not apply' (2000) 16(2) *EL* 17.

In determining this issue, the court referred to the facts of the case and held that when all the above facts are viewed objectively, it cannot be said that the employer acted procedurally unfairly in continuing with the disciplinary hearing in the employee's absence which culminated in his dismissal. For the purposes of brevity a detailed analysis of the court's assessment of the facts will not be undertaken in this note.

***Murray v Minister of Defence*[52]**

In this matter the appellant (employee) was employed by the respondent (employer) being the Navy since 1984. The employee was the officer in charge of the Simonstown Military Police Station. His superiors in Simonstown lodged appraisals that lauded his commitments, dedication, and managerial abilities, with attended performance bonuses.

The employee came into acrimonious conflict with members of his unit whose accusations led to a series of investigations and court marshals. None of the allegations culminated in any serious adverse finding.

The navy removed the employee from his post in Simonstown and declined to reinstate him. After two years in a supernumerary position at the Naval Staff College in Muizenburg, and despite the navy offering a senior staff officer's position in Pretoria, the employee resigned.

[52] (2008) 6 BLLR 513 (SCA).

The High Court found that the employment relationship had not broken down irretrievably, that in weighing each individual complaint advanced, the court held that none of them rendered employee's position intolerable, or caused him to resign.

The only matter before the SCA was whether the plaintiff was entitled to damages for constructive dismissal. The applicable legal framework was agreed in that there was no directly applicable statute. This was due to the LRA excluding members of the SA National Defence Force[53]. The parties agreed that the employee could rely directly on section 23(1) of the Constitution which provided for the right to dignity which the court held is closely associated with the right to fair labour practices.

The impact of these rights in this case could be best understood through the constitutional development of the common law contract of employment. The contract of employment always imposes mutual obligations of confidence and trust between the employer and employee that it was developed as it must be to promote the spirit, purport and objects of the bill of rights, that the common law contract of employment must be held to impose on all employers a duty for fair dealing at all times with employees, even those the LRA does not cover.

The court held that this case involved the particular application of that duty where the employee terminates the contract of service formally; the employee is not dismissed but rather considered to have resigned. However, the court held that the form in which termination of service was clad cannot deprive the employee of his cause of action. This is the position under the LRA; the position under the common law as constitutionally developed can be no different. The reasons were that the LRA recognizes the right not to be unfairly dismissed[54] and furthermore that a dismissal

[53] S 2 of the LRA.
[54] S 185 of the LRA.

includes the termination with or without notice by an employee because the employer made continued employment intolerable for the employee.[55]

This provision made statutorily explicit what the jurisprudence of the Industrial Court and the Labour Appeal Court had already achieved under the unfair labour practices dispensation.[56] In employment law, constructive dismissal represents a victory for substance over form.

The LRA expressly codified unfair employer-instigated resignation as a dismissal. However the court confirmed that this does not apply in this case. It also noted that the constitutional guarantee of unfair labour practices continues to cover a non-LRA employee who resigns because of unbearable conduct by an employer, and to offer protection through the constitutionally developed common law. All contracts are subject to constitutional scrutiny, which includes employment contracts outside the LRA. Whether an employer dismisses such an employee in violation of the right to fair labour practices, or unfairly precipitates a resignation, is a matter of form, not constitutional substance.

That substance, as was pointed out before the LRA, is that the law and Constitution impose a continuing obligation of fairness towards the employee on the employer when he makes decisions affect the employees' in his work. The obligation has both a formal-procedural and substantive dimension, it is now encapsulated in the constitutional right to fair treatment in the workplace. However, a detailed discussion of constructive dismissal will take place at a later stage.

[55] S 186(e) of the LRA.

[56] In Pretoria Society for the Care of the Retarded v Loots [1997] 6 BLLR 721 (LAC), the Court referred to Jooste v Transnet Ltr t/a SA Airways (1995) 16 ILJ 629 (LAC), stating that the first test was whether, when resigning, the was no other motive for the resignation –in other words, the employee would have continued the employment relationship indefinitely had it not been for the employer's unacceptable conduct.

However, of more direct relevance, it is important to note that the appellant in this matter as a member of the SANDF fell outside the ambit of the LRA. Despite this being the case, the court held that the appellant could rely on section 23(1) of the Bill of Rights and furthermore held that the common law contract of employment must be held to impose on all employers a duty of fair dealing and at all times with their employees, even those employees outside which the LRA does not cover.

In addition, the appellant employee proceeded by way of civil action in the High Court on the basis of constructive dismissal. Such a constructive dismissal being breach of the appellant employee's contract of employment and the implied duty on the employer to conduct itself fairly at all times with their employees as aforesaid. It is worthwhile to note that although the appellant employee proceeded by way of civil action, the SCA drew heavily on the LRA as well as the position prior thereto with particular reference to what jurisprudence of the Industrial Court and the old Labour Appeal Court had achieved under the unfair labour practice dispensation.

In essence, it is submitted that even though the appellant employee proceeded by way of civil action, the concept of "fairness" was clearly applicable to the case and, accordingly it is submitted that this blurs even further the distinction between "lawfulness" and "fairness".

CHAPTER TWO

THE EMPLOYEE'S DUTY OF MUTUAL TRUST AND CONFIDENCE

INTRODUCTION

In the employment sphere, misconduct is an all-embracing term. It includes any act arising from the conduct of the employee other than incompetence or incapacity which has a negative effect on the business of the employer or employment discipline at the undertaking or outside the workplace.[57] Unlike poor work performance and incapacity, misconduct relates to the employee's negative conduct or misbehaviour. Employment misconduct consists of transgressions of some established and definite rule of action, a forbidden act, an unlawful behaviour sometimes willful in character, in fact, any improper performance or failure to act in the face of an affirmative duty to act[58] on the part of the employee at the workplace or outside it in so far as it affects the business of the employer.[59] An attempt to catalogue the various categories of misconduct remains as elusive as ever,[60] but the most commonly known species of employment misconduct[61] are traceable to offending employee's violation of his/her over-arching duty of mutual trust and confidence owed to the employer. In other words, they relate

[57] *SACTWU v HC Lee Co. (Pty) Ltd* (1997) 18 *ILJ* 1120 (CCMA); *Saaiman & another v De Beers Consolidated Mines (Finsch Mine)* (1995) 16 *ILJ* 1551 (IC). On non-work related misconduct generally, see Le Roux & Van Niekerk, *The South African Law of Unfair Dismissal* (1994) Ch. 11.

[58] See also *Black's Law Dictionary* (6ed) 999.

[59] Cf in *SA Scooter & Transport Allied Workers Union & others v Karras t/a Floraline* (1999) 20 *ILJ* 2437 (LC) at 2449 para 39 where it was held that although unruly and rowdy conduct could conceivably justify a decision to dismiss if it takes place on the employer's premises but not as in the present case where the singing, toyi-toying and whistle blowing took place outside the premises of the employer.

[60] *Per* MacCardie J in *Re Ruebel Bronze & Metal Co. Ltd* [1919] 1 KB 315; *Baster London & County Printing Works* [1899] 1 QB 901 at 904 per Channel J; *Clouston & Co. Ltd v Corry* [1906] AC 122 at 129 per Lord James. Cf that commendable effort by Avin, A who, in his book on *Employee's Misconduct* (1968), had provided a comprehensive list of the various types of employees' misconduct in the common law world. On a similar attempt to identify specific acts of misconduct in the South African labour environment see Le Roux & Van Niekerk, *South African Law of Unfair Dismissal* (1994) Ch. 8.

[61] It is not misconduct for an employee to have reported to the police rumours of assassination plot against union officials during a strike in so far as the report was reasonable, not malicious and had not adversely affected the employment relationship - *Suncrush Ltd v Nkosi* (1998) 19 *ILJ* 788 (LAC).

to:- breach of trust and confidentiality;[62] dishonest behaviour of various shades - fraud, theft and unauthorised possession of employer's property;[63] use of abusive language;[64] violent and threatening behaviour;[65] fighting, drunkenness and disorderly behaviour;[66] sabotage of employer's business or property;[67] insubordination[68] and disobedience of lawful and reasonable orders;[69] unauthorised absence from duty;[70] and sleeping on duty,[71] are but some aspects of misconduct. Sometimes, negligence on the part of the employee ranks as misconduct when it is aggravated by the conduct of the employee such as when it constitutes a reckless or wanton act. In other occasions, it is an aspect of poor work performance when it represents lack of due care in performing one's duties,[72] for instance, failure to meet the requirements of the employer's code.[73] Otherwise, carelessness does not equate to misconduct.[74] What follows is an

[62] *Council for Science & Industrial Research v Fijen* (1996) 17 *ILJ* 18 (A) 26D-E; *Sappi Novoboard v JH Bolleurs* (1998) 19 *ILJ* 784 (LAC); *Khoza v Gypsum Industries Ltd* [1997] 7 BLLR 857 (LAC); *Edgars Stores Ltd v Ogle* [1998] 9 BLLR 891 (LAC); *Nel v Ndaba & .others* (1999) 20 *ILJ* 2666 (LC); *Woolworths (Pty) Ltd v CCMA*, Case No: JA 62/98 of 24/06/99 (LAC); *Standard Bank of South Africa v CCMA* (1998) 19 *ILJ* 903 (LC); *Tucker v Electra Personnel Consultants* [1999] 5 BALR 598 (CCMA); *SACWU obo Cleophas v Smith Kline* [1999] 8 BALR 957 (CCMA).

[63] *Edgars Stores Ltd v Ogle* [1998] 9 BLLR 891 (LAC); *Nedcor Bank Ltd v Jappie* [1998] BLLR 1002 (LAC); *Standard Bank of SA v CCMA & Ors* [1998] 6 BLLR 622 (LC); *Toyota SA Manufacturing (Pty) Ltd v Radebe & Ors* [1998] 10 BLLR 1082 (LC); *Metcash Trading Ltd t/a Metro Cash & Carry v Fobb & another* (1998) 19 *ILJ* 1576 (LC); *Komane v Fedsure Life* [1998] 2 BLLR 215 (CCMA); *SAMWU obo Peni v City of Tygerberg* [1998] 11 BALR 1475 (CCMA); *SACCAWU obo Moqolomo v Southern Cross Industries* [1998] 11BALR 1447 (CCMA).

[64] *R & C X-Press v Munro* (1998) 19 *ILJ* 540 (LAC); *AWUSA obo Ncube v Northern Crime Security CC* (1999) 20 *ILJ* 1954 (CCMA); *TGWU obo Molatane v Megabus & Coach* [1999] 10 BALR 1279 (IMSSA).

[65] *AWUSA obo Ncube v Northern Crime Security CC* (1999) 20 *ILJ* 1954 (CCMA).

[66] *County Fair Foods (Pty) Ltd v CCMA & Ors* (1999) 20 *ILJ* 1701 (LAC); *Tanker Services (Pty) Ltd v Magudulela* [1997] 12 BLLR 1552 (LAC); *NUM v Kloof Gold Mining Co. Ltd* (1986) 7 *ILJ* 375 (IC); *NUMSA obo Walsh v Delta Motor Corporation* [1998] BALR 710 (CCMA); *SACCAWU obo Ntonga & another v A1 Fisheries* [1999] 8 BALR 943 (CCMA).

[67] *Chauke & others v Lee Service Centre CC t/a Leeson Motors* (1998) 19 *ILJ* 1441 (LAC).

[68] *Air Products (Pty) Ltd v CWIU & another* [1998] 1 BLLR 1 (LAC); *Johannes v Polyoak (Pty) Ltd* [1998] 1 BLLR 18 (LAC); *PPWAWU obo Fortuin v Macrall Timbers (Pty) Ltd* (1999) 20 *ILJ* 1139 (CCMA).

[69] It was held in *Ellerines Holdings v CCMA & Ors* [1999] 9 BLLR 917 (LC) that it was not a defence to an allegation of fraud for an employee to plead that he committed the unlawful act on the instruction of a superior officer since an employee is not under an obligation to obey illegal instructions. Similarly, the Industrial Court held in *Ntsibande v Union Carriage & Wagon Co. (Pty) Ltd* (1993) 14 *ILJ* 1566 (IC) that the instruction given to the employee of 32 years service to deliver goods to an area he was not familiar with was unreasonable and he was entitled to disobey it.

[70] *NUM obo Boqo v Anglogold Ltd* [1998] BALR 1642 (IMSSA); *Amcoal Witbank v NUM obo Mamphoke* [1999] 8 BALR 965 (IMSSA); *East Rand Gold & Uranium Co. Ltd v NUM* [1998] 6 BLLR 781 (CCMA); *Seabelo v Belgravia Hotel* [1997] 6 BLLR 829 (CCMA).

[71] On this see *Boardman Brothers (Natal) (Pty) Ltd* (1998) 19 *ILJ* 517 (SCA).

[72] *Delta Motors v Theunissen* (unreported) PA 9/98 of 99/08/12 (LAC).

[73] *Webber v Fattis & Monis* (1999) 20 *ILJ* 1150 (CCMA). Mistake, however gross it may be, does not constitute a misconduct - *Hyper-chemicals International (Pty) Ltd v Maybaker Agrichem International (Pty) Ltd* 1992 (1) SA 89 (W) at 100 *per* Preiss J.

[74] *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 176 *per* Solomon JA.

examination of selected species of employee misconduct touching on breach of mutual trust and confidence. The purpose is to illustrate the application of the core obligation of mutual trust and confidence in relation to the regulation of the employee's conduct from inception and during subsistence of the employment relationship.

The legacy of *Secretary of State for Employment v Aslef*[75]

The duty of cooperation derives from a single important case *Secretary of State for Employment v Aslef*. The issue here was whether a work to rule by employees of British Rail constituted a breach of contract. The work to rule operated here involved minute observance of the British Rail rule book with the intention of throwing the entire railway system into chaos. The men insisted that they could not be possibly breaking their contracts merely by observing their strict terms. Lord Denning, however, identified a breach 'if the employee, with others take steps wilfully to disrupt the undertaking, to produce chaos so that it will not run as it should, then each one who is a party to those steps is guilty of a breach of contract'. He gave 'a homely instance' of what he had in mind as a breach:

> 'Suppose I employ a man to drive me to the station. I know there is sufficient time, so that I do not tell him to hurry. He drives me at a slower speed than he need, with the deliberate object of making me lose the train, and I do lose it. He may say that he has performed the letter of the contract; he has driven me to the station; but he has wilfully made me lose the train, and that is a breach of contract beyond all doubt.'

However, Lord Denning disapproved of the term suggested by Donaldson P at first instance that the employee should actively assist the employer to operate his organisation. It was going too far to suggest 'a duty to behave fairly to his employer and do a fair day's work'.

[75][1972] 2QB 455; [1972] ICR 19; [1972] 2 All ER 949, 13 KIR 1.

Every employee owes a duty of good faith and trust to his employer, which involves an obligation not to work against his employer's interests. This duty is automatically a consequence of any employment, and exists even if it does not expressly form part of the employment contract. It is not even regarded as an implied term of the contract, but an integral part of that contract. The Appellate Division affirmed the importance of trust and confidence in the employment contract in the following:[76]

> 'It is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitle the 'innocent party' to cancel the agreement … It does seem to me that, in our law, it is not necessary to work the concept of an implied term. The duties referred to simply flow from *naturalia contractus*.'

The governing principles are succinctly summarized by Hiemstra J quoting with approval the following passage from *Rob v Green* (1895) 2 QB 1:[77]

> 'I have a very decided opinion that, in absence of any stipulation to the contrary, there is involved in every contract of service an implied obligation, call it by what name you will, on the servant that he shall perform his duty, especially in these essential respects, namely that he shall honestly and faithfully serve his master, that he shall not abuse his confidence in matters appertaining to his service, and that he shall, by all reasonable means in his power, protect his master's interest in respect of matters confined to him in the course of his service.'

Perhaps, one of the most concise authoritative statements of which is generally encompassed by the duty of fidelity and good faith is to be found in *Blyth Chemicals v Bushnell*.[78] In that case Dixon and McTiernan JJ said:[79]

> 'Conduct which in respect of important matter is incompatible with the fulfilment of an employee's duty, or involves an opposition, or conflict between his interest and his

[76] *Council for Scientific & Industrial Research v Fijen* (1996) 17 *ILJ* 18 (A) at 26D-E.
[77] *Premier Medical & Industrial Equipment (Pty) v Winkler & another* 1971 (3) SA 866 (W) at 867H.See further *Sappi Novoboard (Pty) Ltd v Bolleurs* (1998) 19 *ILJ* 784 (LAC) at 786F-787D; *Penta Publications (Pty) Ltd v Schoombee & others* (2000) 21 *ILJ* 1833 (LC).
[78] (1933) 49 CLR 66. See also *Robb v Green* [1895] 2 QB 315 at 317.
[79] *Blyth Chemicals v Bushnell* (1933) 49 CLR 66 at 81-82.

duty to his employer, or impedes the faithful performance of his obligations, or is destructive of the necessary confidence between employer and employee, is a ground of dismissal… But the conduct of the employee must itself involve incompatibility, conflict, or impediment, or be destructive of confidence. An actual repugnance between his acts and his relationship must be found. It is not enough that ground for uneasiness as to future conduct arises.'

Misrepresentation and the employee's failure to disclose relevant information to a prospective employer

Although the general principle is that there is no duty on a prospective employee to disclose prejudicial information from his past to the future employer, however such duty may arise where the non-disclosure of information amounts to fraud.[80] Employees frequently misrepresent their qualification, experience or previous remuneration in their applications for employment or in the course of pre-employment interview. Heather Schooling[81] writing on pre-employment misrepresentation observes:

'Although it is possible that the situation could be dealt with in terms of the principles applicable to incapacity (if, for example, the employee has misrepresented that he has an accounting qualification, and the fact that does render him incapable of performing his job to the required standards), the majority of these case are deal with as species of misconduct. Our courts generally accept that it is appropriate for an employer to enquire about an employee's employment history and conduct prior to taking up, and acknowledge that such facts often have a bearing on why an employer employs such a person in its organisation. In the event of material information come to the attention of the employer subsequent conclusion of the contract of employment, either because the employee has misrepresented himself or failed to disclose such information, the employer may convene a disciplinary inquiry on this basis.'

[80]Grogan, J, *Workplace Law* 3ed, 25.
[81]'Misrepresentation and an employee's failure to disclosure information to a prospective employer' (2002) 13(1*) CLL* 5 at 5.

The fact that the employee has performed satisfactorily with the current employer prior to the discovery of pre-employment misrepresentation will not bar his employer from instituting disciplinary action.[82] In *TAWU obo Louw/Volkswagen (Pty) Ltd*[83] the commissioner found that even though there is no employment relationship in existence at the time when the employee makes the misrepresentation, the employer was entitled to dismiss him. In the present case the employee had substantially overstated the salary he earned in his employment and was appointed in a more senior position by his employer as a consequence. The arbitrating commissioner upheld his dismissal pursuant to a disciplinary inquiry on the basis that his misrepresentation during his interview and the continued lies regarding his earnings during the course of his employment "had clearly rendered the trust relationship intolerable".[84]

Evans v Protech[85] concerned an employee who named a particular referee and claimed in her curriculum vitae to have worked for the referee as a qualified hairdresser. One month after the conclusion of the employment contract, the employer checked her references and learnt that she had in fact only been employed as an apprentice hairdresser and moreover had not worked with her referee during the period of employment there at all. The commissioner accepted that the dismissal of the employee was substantively fair, and observed that, although the employer had failed to check on the employee's credentials before deciding to employ her, this alone did not detract from the fact that it was expected of an employee to act truthfully when applying for a position.

As regards an applicant's suitability for employment, it is for the employer to ask the questions rather than for the applicant to volunteer information which may harm his prospects – unless his silence amounts to fraud. If the question is asked and a deliberately false answer given then bad faith is established. But dismissal may still

[82] See e.g.*: Auret v Eskom Pension & Provident Fund* [1996] 7 BLLR 838 (IC); *Ndlovu v Transnet t/a Portnet* (1997) 7 BLR 887 (IC).
[83](2003) 4 BALR 493 (CCMA).
[84]*TAWU obo Louw/Volkswagen (Pty) Ltd supra* at para 23.
[85](2002) 7 BALR 704 (CCMA).

not be justified if the matter is trivial or the employee's merits proved by subsequent good service.

Failure to disclose material facts

The employer's recourse to dismissal is less certain where the employee has not actively misled the employer with his misrepresentations, but has simply failed to bring certain facts to the employer's attention. As a general rule, a prospective employee is not obliged to disclose potentially prejudicial information to his employer. In terms of the normal contractual principles of the common law, such a duty will only arise "where there is a special relationship between the parties and the one party knows of the other's ignorance of material facts."[86]

Grogan notes that "an employee is obliged to disclose prior misconduct … only if such misconduct has a bearing on the relationship to be forged with the new employer."[87] He further states that:[88]

> 'Such a duty may arise where the non-disclosure amounts to fraud. In the present context, non-disclosure will be deemed fraudulent where the past misconduct would render the prospective employee totally unfit for the employment offered.'

This will invariably depend on factors such the nature of the position held by the employee and the nature of the misconduct committed by the employee. In *SACCAWU obo Waterson v JDG Trading (Pty) Ltd*,[89] the employee applied for a position as a bookkeeper, knowing that he would work with money in the debtor's

[86] *Wille's Principles of South African Law* 7th ed, 336. See also Milner, MA 'Fraudulent non-disclosure' (1967) 74 *SALJ* 177.
[87] *Workplace Law* 6th ed, 137 footnote 5.
[88] Ibid.
[89] [1999] 3 BALR 353 (IMSSA). See too *Oracle Corporation SA (Pty) Ltd v CCMA & Others* [89](2005) 10 BLLR 982 (LC); *Van Schalkwyk v Edgars* [2009] 4 BLLR 424 (CCMA).

department, and had failed to disclose his previous convictions for armed robbery and theft. The arbitrator held that:[90]

> 'Considering his work environment and the degree of trust necessary, I am of the opinion that his non-disclosure of that information amounted to fraud. He must have known that that information would render him unsuitable for the position and, by means of omission, failed to disclose a material fact.'

In *Hoch v Mustek Electronics (Pty) Ltd*,[91] the company discovered some years after the applicant's appointment that she did not possess the qualifications she claimed to have when she was employed. Ms Hoch was dismissed after a disciplinary inquiry and appeal for misrepresenting her qualifications. The company conceded that the diplomas in question were not indispensable to the adequate performance of Ms Hoch's work, but contended that, had it been known that she had misrepresented her qualifications, she would not have been appointed because the company places premium on honesty.

The Labour Court found that Ms Hoch did not possess formal qualifications in either accounting or teaching, as she had claimed, but had merely completed a secretarial course in which one of the subjects had been "accounting". Since she had persisted with her claim that she possessed the diplomas – once during the course of her employment and, again, in her disciplinary and appeal hearing – it could not be said that she had merely made an error of judgement. Even though Ms Hoch was an employee of long standing and the disputed qualifications were not directly relevant to her work, the company justifiably considered her dishonesty to be serious enough to have irreparably damaged the trust relationship. The court held that an employer has a prerogative to set standards of conduct for its employees and to decide the proper sanction if that standard is transgressed. The application was dismissed.

[90] *SACCAWU obo Waterson v JDG Trading (Pty* at 359.
[91] [1999] 12 BLLR 1389 (LC). An employee who exaggerated her work experience as an electrician in order to obtain employment was held by the arbitrator in *Luwaca and GMT South Africa* (2004) 25 *ILJ* 1540 (BCA) to be guilty of fraudulent misrepresentation, which justified dismissal.

In *Baptista/SAPS*[92] the arbitrator upheld the dismissal of the employee for submitting a fraudulent educational certificate in support of an application for promotion. The arbitrator held that, even if the applicant had not been party to producing the false certificate, he should have known that it did not reflect the truth. Such conduct was inappropriate for a police officer. The dismissal was upheld.

It should be noted that there is as yet no case law to indicate when the employee's failure to disclose information of a personal nature, for example, his ill-health or financial status, may constitute material disclosure, which may justify dismissal. Indeed, our courts have held, for example, that an employee's insolvency through no fault of his own does not justify termination of his employment as credit manager on operational grounds.[93]

In *Mashava v Cuzen & Woods Attorneys*[94] the Labour Court was unsympathetic to an employer's attempt to rely on the claim that the reason for the dismissal was not the employee's pregnancy, but the employer into offering her a position as candidate attorney without disclosing the fact that she was pregnant. The employer claimed that the trust required to offer her a position had been undermined. The court relied on English case law and held that deceit could provide a ground for dismissal in instances when the underlying reason was the employees' pregnancy. The court stated that it understood the attitude of an employer when confronted with the situation where an employee had denied pregnancy to a member of staff and had failed to take her employer into her confidence. Nevertheless, this had to be measured against the right to privacy. Although a duty to inform the employer of her pregnancy may arise at a later stage (for example, in order to comply with the provisions of the BCEA), there is no immediate obligation on an employee to inform her employer that she is, or may be, pregnant. This applies even if the employee is employed on a probationary basis. The court found that the alleged deceit was no

[92] [2004] 8 BALR 942 (SSSBC).
[93] *Spijkerman v ABSA Bank Ltd* (1997) 3 BLLR 287 (IC).
[94] (2000) 21 *ILJ* 402 (LC).

deceit at all, and that real reason for her dismissal was the employee's pregnancy, or at least a reason related thereto.[95]

The employer must ensure, however, that such cases are treated consistently.[96] A warning in this regard was sounded in *NUMSA obo Engelbrecht v Delta Motor Corporation*,[97]where an employee who was dismissed for failing to disclose previous act of dishonesty in his job application form was reinstated by the arbitration commissioner, on the basis that the employer had previously condoned such misconduct by another employee.

Disclosure of confidential information

An employee may not use or divulge, for personal benefit, confidential information obtained as a result of the employment. In *Pelunsky & Co v Theron*,[98]Theron, a clerk was employed by a certain livestock agent. While still in its service he copied a list of his employer's customers, as well as the telegraphic code used by his employer while communicating with its clients. He then resigned from the job and set up his own business as a livestock agent and used the list and code to further his own business. The court held that there had been a breach of good faith on the part of Theron and that his former employer was entitled to damages. A very similar principle was formulated in *Cooler Ventilation Co Ltd (SA) Ltd v Liebenberg & another*,[99] where the court had the following to say:

[95] S 187(1)(e) of the LRA. *Woolworths (Pty) Ltd v Whitehead* (2000) 21 *ILJ* 571 (LAC); *Wardlaw Supreme Moulding Pty Ltd* (2004) 25 *ILJ* 1094 (LC); *Lukie v Rural Alliance CC t/a Rural Development Specialist* (2004) 25 *ILI* 1445 (LC). See generally Van Jaarsveld M, the dismissal of pregnant employees (2005) 24 (1) *LLN* 2.
Smit, N & Oliver, M 'Discrimination based on pregnancy in Employment 'law' (2002) *TSAR* 783
[96] Le Roux, PAK 'Individual Labour Law' in Cheadle *et al Current Labour Law 2000*, chapter 1, 9-13.
[97][1998] 5 BALR 573 (CCMA).
[98]1913 WLD 34.
[99]1967 (1) SA 686 (W) at 691.

> 'It seems to me than an employer is entitled to be protected from unfair competition, as it is called in American law, brought by confidential information of his business to a rival by an employee or ex-employee.'

What transpires from the above case law is that employees may not make use of information gained in the course of their employment in a manner inconsistent with their duty to further the employer's interests. However, employees may use general knowledge and skills acquired during employment with a particular employer once they leave its employment, even if their new employers benefit from such knowledge and skills.

Conflicts of interests

A conflict of interests, while not generally criminal in nature, is nevertheless the sort of untrustworthy conduct to be discussed under the rubric of "dishonesty". An employee who has placed himself in a position in which his or her personal interests directly conflict with the interests of the employer is often subject to dismissal.[100] An example of such a conflict of interest is an employee operating a business, which competes with the employer.[101] In the case of *Prinsloo v Harmony Furnishers (Pty) Ltd De Klerk*[102] SM stated:

> 'At common law an employee is under an obligation to enhance the business interests of his employer and to avoid a conflict of personal interests and those of his

[100] In *Benjamin/Sea Harvest Corporation Ltd* [1998] 12 BALR 1565 (CCMA) the commissioner upheld the principle that senior employees must devote their full attention and energy to their work, and be on call even after hours. The employee had purchase a cafe in another town, and after that had been warned by the employer that he must concentrate on his work or face dismissal. It was held that his private business had affected his availability to an extent that justified dismissal.

[101] See e.g. *Christiaan Benjamin van Staden v ABSA Bank Beperk* (1993) 4(4) SALLR 1 (IC); *Lubbers v Santech Engineering (A Division of Scaw Metals)* [1994] 10 BLLR 124 (IC); *FAWU obo Maleke v SA Breweries* [1998] 10 BALR 1330 (AMSSA); *SALSTAFF obo Van Niekerk v SA Airways* [1999] 2 BALR 218 (IMSSA); *NASECGWU obo Visser v De Beers Consolidated Mines (Farm Division)* [2000] 4 BALR 379 (CCMA); *HOSPERSA obo Swanepoel v SA Post Office* [2003] 1 BALR 43 (CCMA); *Devine v SA Breweries* [2003] 2 BALR 130 (CCMA); *Miller v Rand Water* [2003] 7 BALR 817 (CCMA). Canada *Duguay v Maritime Welding & Rentals Ltd* (1998) 28 C.C.E.L. 126, 100 N.B.R (2d) 212, 252 A.P.R. 212 (Q.B.); *Jewitt v Prism Resources* (1980) 110 DLR (3d) 713 (B.C.S.C.); *Alschul v Tom Davis Management Ltd* (1985) 6 C.C.E.L. 180; *Ivanore v Canadian Imperial Bank of Commerce* (1983) 3 C.C.EL. 26;

[102] (1992) 13 *ILJ* 1593 (IC).

employer. He should not involve himself in an undertaking that is in competition with his employer.'[103]

It is also trite that an employee may not enter into an arrangement which creates a conflict between his or her own interests and those of the employer. The commissioner *Hirshowitz and Pick 'n Pay*[104] found that where an employee had guaranteed funds to a franchise of his employer to enable franchisee to meet the terms of the franchise, but had no financial interest in the running or success of the franchise business, he had not breached the trust relationship, nor created a conflict of interest with his employer which would merit his dismissal.

A corollary to the duty of faith to avoid conflicts of interests is the corresponding obligation that an employee may not compete with the employer. Employee may not work for another if the other's business interests are in conflict with those of the principal employer.[105] Nor may employees enter into arrangements, which create a conflict between their own interests and those of their employers. The mechanic who occasionally repairs a friend's car after hours at home will probably not be seen as competing with his employer. On the other hand, if that mechanic actively solicits work from the employer's clients, and agrees to service their cars after hours for his own account, he will be guilty of a breach of contract. But in the absence of a contrary provision in the contract there is nothing to preclude employees from holding two compatible jobs, provided the second is not conducted during the working hours they are obliged to devote to the first job.[106]

Taking a job outside working hours is not itself a breach of the implied duty of fidelity, even where that job involves working for a competitor. The general rule at common

[103]*Prinsloo v Harmony Furnishers (Pty) Ltd De Klerk supra* at 1596D.
[104](2005) 26 *ILJ* 161 (CCMA).
[105]*Ketteringham v Cape Town City Council* 1933 CPD 316; *Harrismith Building Society v Taylor* 1938 OD 36.
[106]*Gerry Bouwer (Pty) Ltd v Preller* 1940 TPD 130; *Jefferies v President Steyn Mine* (1994) 11 *ILJ* 1425 (IC); *Namesake (SA) Products (Pty) Ltd & another v Zaderer & others* (1999) 20 *ILJ* 549 (C).

law is that, in the absence of an express term, employees are free to do what they want during their off-duty hours provided that these activities do not interfere with or harm the employer's legitimate business interests.[107] In determining whether the damage to the employer is such as to breach the employee's implied obligation of fidelity, regard will be had to the type of work involved, the position of the employee within the employer's organisation, the employee's hours of work, and the risk and extent of potential commercial harm to the employer.

In *Nova Plastics Ltd v Foggart*,[108] an odd-job man, did spare-time work for a rival company which did not greatly affect his employer. The EAT thought the tribunal was entitled to conclude that he was not in breach of trust simply because he happened to work for a competitor in his spare time. The nature of F's work was such that it could not possibly amount to any serious aid to the rival as a competitor; His dismissal was therefore unfair. Similarly, in *EETPU v Parnham & another*,[109] Ms and Mrs P worked as kitchen assistants and cook at a trade union conference centre. Mrs P obtained a weekend job at a cafe and the couple were promptly dismissed for disloyalty. The EAT upheld a tribunal's finding that dismissal of the husband and wife was unfair. Mrs P's spare-time job had done nothing to harm the employer's interests. In addition, the employer had failed to warn them or give them a chance to explain, or even to provide an adequate grievance procedure.

Another example of impressible competition is where an employee, while employed by one employer, sells the products of another competing employer. It is clear, however, that there will always be borderline case where it will be difficult to decide whether the activity in question constitutes competition. A similar breach of the employee's duty to act in good faith will take place if an employee who is about to resign from an employer's employment, solicits the employer is customers and persuades them to place orders with the new business or if the employee is about to start. A further breach of duty will occur if such an employee still employed by an

[107] *Hivac Ltd v Park Royal Scientific Instruments Ltd 1964* 1 Ch 169.
[108] 1983 IRLR 146.
[109] EAT 378/78.

employer persuades certain of the fellow employees to resign as well and to join his or her new business as employees.[110] Similarly, employees who secretly compete with the employer's business for their own account breach their fiduciary duty.[111]

In *Rafanti/Jordaan Attorneys*[112] a conveyancing secretary in a legal practice was dismissed after she decided to obtain training with a local estate agency. The respondent claimed that her association with the estate agency conflicted with her duties as employee because knowledge obtained in her position with the respondent could place the estate agency at an unfair advantage over other estate agencies. The commissioner accepted that involvement of a key member of the respondent's staff in the activities of an estate agency could jeopardise the respondent's business. The applicant had defied the respondent's instruction to end her association with the estate agency. She had therefore justifiably been dismissed for refusing to obey instructions and acting to the prejudice of the respondent. The application was dismissed.

Where an employee seeks to obtain other employment or to set up in competition, and thereby breaks the mutual confidence and trust between him and his employer, this could be sufficient to justify dismissal. For example, in *Tucker/Etcetera Personnel Consultants*[113] the employee who worked for a personnel consultant, made copies of the contents of several of the employer's files for use when she started her own personnel consultancy. She had made it known that she intended o "take the employer's clients with her". The commissioner found that the employee's conduct was calculated to undermine the high degree of trustworthiness required of a person in the employee's position. Her dismissal was upheld.

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[110] *Jeffrey v Persetel (Pty) Ltd* (1996) 17 *ILJ* 388 (IC); *Forwarding African Transport Service CC t/a FATS v Manica Africa (Pty) Ltd & others* (2005) 26 *ILJ* 734(D);

[111] *Premier Medical & Industrial v Winkler & another* 1971 (3) SA 866 (W); *Ebert & Co v Edy* (1893) 8 EDC 32. In Solidarity obo Van Heerden/Ford Motor Company of SA (Manufacturing) (Pty) Ltd [2005] 4 BALR 395 (P), the dismissal of a senior manager for not disclosing his interests in business other than that of his employer was held to be an unduly harsh penalty because the applicant employee had not consciously sought to deceive his employer. The arbitrator also found that the policy regarding disclosure had not been applied consistently. The applicant was retrospectively reinstated.

[112] [2003] 4 BALR 462 (CCMA).

[113] [1999] 5 BALR 598 (CCMA).

But dismissal will not invariably be justified in case where an employee seeks to obtain alternative employment. For instance, in *Harris and Russell Ltd v Slingsby*[114] an employee was dismissed for seeking to obtain employment with another employer during a period in which he had given notice of termination. An English Employment Appeals Tribunal found this insufficient grounds for dismissal and hence unfair because there were no grounds for supposing that the employee's actions involved a breach of confidence.

There are different views on whether an employee who invites or persuades other employees to join him or her in a competing business is in breach of the implied duty of fidelity. In *Marshall v Industrial Systems and Control Ltd*,[115] for instance, the EAT held that M drafted a business plan with another senior manager and together they had approached a third senior employee and invited him to join them. The EAT held that M had breached the duty of fidelity and that his subsequent summary dismissal was fair. By contrast, in *Tithebarn Ltd v Hubbard*,[116] a senior trainer, told P, another employee, that he intended to join him. The EAT held that T's actions did not amount to a breach of his implied duty of fidelity and that his dismissal was therefore unfair. H had merely carried out preparatory acts and had simply invited P to work for him in due course.

Of course, if the employee had tendered for the future business of the employer's customers in competition with the employer that would be both a breach of the implied contractual duty to give faithful service and could be basis of dismissal for misconduct.

[114] [1973] 3 All ER 31.
[115] 1992 IRLR 294, EAT.
[116] EAT 532/89.

Conduct incompatible with trust relationship

There are many situations in which an employee can be expected to know and understand that conduct contrary to the interests of his or her employer is unacceptable without the need to be specifically told. For example, a married professor's dismissal for seducing a female student was upheld in *Orr v University of Tasmania*.**[117]** In *Banking Insurance Assurance Workers Union & another v Mutual & Federal Insurance Co Ltd*[118] Waglay J (as he then was) affirmed the right of an employer to discipline and dismiss a shop steward for making a false submission in defence of a fellow employee at an internal hearing. His Lordship stated:[119]

> 'An employee must in relation to his duties act fairly and faithfully. When an employee take on the role of representing a fellow employee, must act in good and honestly. While the law will protect him in so far as he fulfils his role as a representative of a fellow employee in disciplinary matter, he cannot escape disciplinary measures being taken against him if he commits misconduct simply because the misconduct committed while performing duties that he was entitled to perform.
>
> Representing a fellow employee does not licence the representative to be untruthful or dishonest. If the representative is simply advised of the state of affairs or represented were untrue, no blame can be apportioned to the representative. This so because he, like a lawyer defending his client, carried out his instructions.'

And in *Chemical Energy Paper Printing Wood & Allied Workers obo Two Members and Leader Packaging*[120] the bargaining council arbitrator found that, although employees are entitled to present evidence on behalf of their colleagues at disciplinary and/or arbitration hearings, they bear the responsibility of presenting truthful testimony. Where employees lie whether under oath or otherwise in any of these tribunals, an employer is entitled to take disciplinary steps against the errant

[117] (1957).
[118](2002) 23 *ILJ* 1037 (LC).
[119]*Banking Insurance Assurance Workers Union & another v Mutual & Federal Insurance Co Ltd supra* at 1040D-F.
[120](2005) 26 *ILJ* 1129 (BC).

employees. The employees had presented false evidence under oath at the arbitration. The arbitration held that the sanction of final written warning imposed on the employees by the company for their dishonest acts was eminently fair in the circumstances and should not be disturbed. By contrast in *Concorde Plastics (Pty) Ltd v NUMSA & others*,[121] the court held that the dismissal of the employees concerned was unfair because they had merely agreed to testify against the employer in a defamation action by the employer against a union official. The court held that the employees had given evidence in good faith. It is submitted that the finding would clearly have been different had the employees perjured themselves.

Under rubric of conduct incompatible with trust relationship, conduct which brings the employer's name into disrepute may warrant disciplinary action. It is trite that employees are bound to uphold their employer's good name and reputation. The scope and effect of conduct which tarnishes the employer's image and causes reputational damage is shown in more detail by cases such as *Buthelezi v ABI*.[122] The decision of the court in *Buthelezi* dealt with the fairness of a dismissal based on the alleged incapacity of an employee. During the course of the dispute between the employer and employee, the employee made certain remarks to the press. The issue arose during trial and the court expressed the view that the conduct of the employee in this regard would have affected the employee's right to reinstatement. It is at least arguable that the following excerpt would also be applicable to a test for dismissal:[123]

> 'Much was made, during the hearing, of an article in the City Press newspaper concerning the applicant's dismissal. Had the applicant been entitled to reinstatement or re-employment this evidence would have been material. Both the tone and appearance of the article, which goes out of its way to soil the respondent's public image, indicates an active and willing participation by the applicant (despite her denial of this evidence). Hence I would have been persuaded by it that, by participating in it, the applicant had made continued employment intolerable and denied her reinstatement or re-employment. While employees have a right to freely express their grievances against their employers in the press, they do so at the risk

[121] [1998] 2 BLLR 107 (LAC).
[122] (1999) 20 *ILJ* 2316 (LC).
[123] *Buthelezi v ABI* at para 29.

of forfeiting their right to reinstatement or re-employment because high profile muddling – particularly where an employer's business depends on a positive public image makes a continued employment relationship intolerable.'

In *Bamford & others (Pty) Ltd v NUMSA* the arbitrator held that the case graphically illustrated how employees may jeopardize a business by using computers irresponsibly. The employees concerned had transmitted and stored thousands of offensive e-mails. The employees' misconduct was also aggravated by their appearance on radio and TV, where they misrepresented the nature of their misconduct and the offending material.

The applicant employee in *CWU obo Ramokoatsi/Telkom SA*[124] was dismissed for storing and transmitting offensive material on the employer's computer system. He claimed that his dismissal was unfair because he had done nothing wrong, and because the respondent had not dismissed other employees who also misused the computer system. The commissioner rejected both points. Telkom had a clear policy on the use of office computers, of which the employee was well aware. In previous cases where the employees had not been dismissed, they had confessed to their offences and had shown remorse. The employee in this case had attempted to blame a colleague, and had shown no remorse. His dismissal was upheld.

During a discussion with her subordinates, the applicant in *Mahas/Smiths Manufacturing*[125] remarked during a meeting with subordinates: "*'n Boer maak* 'n plan, but an Indian is born with a plan." Thereafter, the applicant engaged in a discussion of race classification. Some of the workers took exception, and complained to the respondent that the applicant had made racist comments. She

[124] [2006] 8 BALR 819 (CCMA). In Sylvester/Neil Muller Construction [2002] 1 BALR 113 (CCMA) the applicant was dismissed for forwarding a risqué SMS message to female colleague's cell phone. The commissioner held that the isolated action did not amount to sexual harassment, and was not as serious as the recipient claimed because she and the applicant had frequently exchanged ribald jokes. The applicant was awarded compensation. See also *NUMSA obo Mthombeni/Barloworld Equipment* [2006] 8 BALR 790 (MEIBC); *Masinga & another/Kraft Food SA* [2006] 10 BALR 1036 (CCMA).

[125] [2006] 7 BALR 660 (MIBCO)

was summoned to a disciplinary inquiry and dismissed. The commissioner found that the applicant's innocuous remark had been distorted during the subsequent discussion, which had been initiated by one of the complainant workers. It was clear that the applicant had not intended to cause affront. The commissioner also rejected the respondent's claim that the employment relationship had been destroyed; had the respondent properly investigated the matter instead of dismissing the applicant and then informing the workers that she was guilty of race discrimination, the problem could have been resolved. The applicant was retrospectively reinstated.

Off-duty misconduct

It is settled law that an employer has no right to discipline an employee for after-hours conduct unless it can be demonstrated that it has some interest in the conduct of the employee.[126] It follows therefore that the private lives of employees is of no concern to the employer outside working hours. However, a rigid division between the private and working lives of employees is not always realistic; employers have an interest in how their employees behave outside their working lives if that behaviour affects their work performance.[127]

Cases decided on this issue indicate that actions performed outside the workplace are *prima facie* considered not work-related, and accordingly beyond the reach of the employer's disciplinary power.[128] The onus rests on the employer to establish that it

[126] P A K Le Roux & Andre van Niekerk *South African Law of Unfair Dismissal* (1994) at 184.

[127] *Erasmus v Norkee* [2003] 10 BALR 1132 (CCMA).

[128] *NUM & Another v East Rand Gold & Uranium Co Ltd* (1986) 7 *ILJ* 739 (IC) - assault on company bus after working hours; *Van Zyl v Duvha Opencast Services (Edms) Bpk* (1988) 9 *ILJ* 905 (IC) - assault by one employee on another after hours; *Scaw Metals v Vermeulen* (1993) 14 *ILJ* 672 (LAC) - threat uttered outside the workplace; *Hoechst (Pty) Ltd v Chemical Workers Industrial Union & Another* (1993) 14 *ILJ* 1449 (LAC); *Saaiman & Another v De Beers Consolidated Mines (Finsch Mine)* (1995) 16 *ILJ* 1551 (IC) - miners convicted under Explosives Act 26 of 1956 for privately manufacturing explosives; *SA Clothing & Textile Workers Union H C Lee Co (Pty) Ltd* (1997) 18 *ILJ* 1120 (CCMA) - drunken fighting at a company Christmas party was held to be work-related misconduct because the company had paid the bill and had been obliged to ensure the safety of its staff. *Foschini Group (Pty) Ltd v CCMA & Others* (2001) 22 *ILJ* 1642 (LC) - employee dismissed for stabbing an employee from a nearby store. *NEHAWU obo Barnes v Department of Foreign Affairs*

has sufficient and legitimate interest in an employee's conduct outside the workplace or after working hours to justify disciplinary action against the employee. This onus will be discharged only if the court is satisfied that there is some nexus between the employee's conduct and the employer's legitimate interest. Grogan[129] correctly points out that while connection is enough in itself the employer is still required to prove that the employee committed the offence and that dismissal was an appropriate sanction. Indeed, where misconduct is committed outside the workplace and after working hours, the employer carries a formidable onus.

The types of criminal offence that most commonly affect the employment relationship are those involving sexual conduct, violence or dishonesty. The factors that persuade tribunal that there is an adverse connection between conduct and employment will obviously vary from case to case. A tribunal will pay attention to all the circumstances in each dismissal claim – including the employee's length of service, status, relations with fellow workers, influence over vulnerable groups and even the employee's effect on the business subsequent to a charge or conviction. In *Lloyds Bank plc v Bardin*[130] a part-time cleaner was dismissed after she pleaded guilty to three charges of obtaining money by deception. The EAT decided that the issue was not whether the employee was actually a security risk but whether the bank acted reasonably in all the circumstances in treating her as one. On this basis, the EAT found an adequate link between the offence and the employee's type of work to warrant dismissal.

[2001] 6 BALR 539 (P); *SACCAWU obo Matsau v Goldfields Parkers (Pty) Ltd t/a OK* In *Smith v Kamploops and District Elizabeth Fry Society* (1996) 136 DLR (4th) at 654, the British Columbia Court of Appeal held that "[a]n employee's conduct outside the workplace which is likely to be prejudicial to the business of the employer can constitute grounds of summary dismissal.' In *Tellier v Bank of Montreal* (1987) 17 CCEL1 (Ont. Dist. Ct), one of the key events constituting sexual harassment occurred at a cocktail party held by a company doing business with the bank. See also *Simpson v Consumers' Association of Canada* 209 DLR (4th) (Ont. C.A). The ratio for the extension of rules outside the workplace is clear: misconduct by an off-duty employee can impact negatively on the interpersonal relations at the workplace, wherever it might have occurred.

[129] Grogan, J *Dismissal*, (2002), 173.

[130] EAT 38/89.

The nature of the employee's job was considered crucial by the EAT in *Moore v C and A Modes*.[131] In that case, the claimant, a section leader in one of the employer's stores, was dismissed after 20 years' service for shoplifting at another store. The dismissal was held to be fair. On appeal, the EAT commented:[132]

> 'It seems to us to be quite unreal to expect any employer in the retail trade not to dismiss someone who has, for 20 years, been a trusted employee, who is reasonably believed to have been stealing just down the road although not from the employers themselves, because nobody should be more alive than such an employee to the damage which is caused by what is commonly called shoplifting.'

In *Saal/De Beers Consolidated Ltd*[133] the commissioner upheld the dismissal of an employee who had assaulted a woman off the workplace and outside working hours. The employee had allegedly attempted to rape and had assaulted a domestic worker at a mine village. Although the commissioner found that a charge of attempted rape had not been proved, the employee had admitted to striking the woman. That the complainant had laid a criminal charge against the employee did not after the respondent's right to act against him in his capacity as an employee. The test for the fairness of a dismissal for misconduct committed outside the workplace was whether the employment relationship and the business of the employer had been affected. The respondent clearly had an interest the well-being of people residing in the mine village. The applicant's dismissal was upheld.

Although the road rage incident took place outside the workplace, in *Kroeger v Visual Marketing*[134] its prejudicial impact on the business of the employer was palpable. The proceedings in the Labour Court arose out of the applicant employee's dismissal for operational reasons, in consequence of pressure brought on management by the employees and their trade union. Kroeger was employed by the

[131] 1981 IRLR 71, EAT.
[132] *Moore v C and A Modes* at para 23
[133] [2000] 2 BALR 171 (CCMA0.
[134] (2003) 24 *ILJ* 1979 (LC).

respondent company, as a factory manager from 1999 until his forced departure in 2001. In the aftermath of a widely reported racially motivated road rage incident[135] in which Kroeger shot and killed a black man, the majority of the company's hourly paid (black) employees demanded that the offending employee be dismissed. The reason behind the petition was that the targeted employee had previously threatened to kill the black staff and called them "kaffirs". They feared for their lives. In order to deal with the matter, the respondent's management suspended Kroeger on full pay, explaining to him that this was for his own personal safety. Following exhaustive negotiations and correspondence with the workers' representatives, the workforce refused to withdraw their petition that the employee not be allowed to return to work. At a meeting between management and the employee and his representatives the employee insisted that he be allowed to return to work. The employees once again refused to withdraw their demand. The deadlock could not be broken; eventually the company dismissed the employee for operational reasons.

It is also relevant to note the Supreme Court of Canada's decision in *Ross v School District No. 15*.[136] There David Attis, a Jewish parent complained in 1988 that Malcolm Ross an elementary school teacher, publicly made racist and discriminatory comments about Jewish people during his off-duty time, and this created a "poisoned environment" in the school district, negatively affecting the Jewish children and other minority students. David Attis brought a compliant before the provincial human rights tribunal, contending that his daughter's right to an education without discrimination on the basis of race or religion was compromised by Ross' presence in the classroom. His daughter was not a student of Ross; she did not even attend his school. However, Attis' daughter submitted evidence that she was afraid to attend sporting events and other interschool activities at Ross' school, since she had been told by other students that it was the school with "the teacher who hated Jews." There was also evidence of many anti-Semitic incidents among students throughout the district. In his free time, Ross was active anti-Semite who published numerous writings and appeared on local television attacking Jews and denying the existence

[135] On criminal liability for road rage killing see *S v Eadie* (1) 2001 (1) SACR 172 (C); 2002 (1) SACR 663 (SCA). See also Ronald Louw '*S v Eadie*: The end of the road for the defence of provocation/' (2003) 16(2) *South African Journal of Criminal Justice* 201.

[136] [1996] 1 S.C.R. 826. For a useful discussion see Janine Benedet 'Pornography as sexual harassment in Canada' in *Directions in Sexual Harassment Law* (2004) Catherine C. MacKinnon & Reva B Siegel (eds), 417 at 428-434

of the Holocaust. Ross had never expressed these views at school or in the classroom. Nonetheless, his activities were well known in the community and among his students.

The tribunal ruled that Ross' continued employment in the classroom crated a discriminatory learning environment for Jewish students in the district to remove Ross from the classroom. If a non-teaching position for which he was qualified became available within eighteen months, he was to be awarded that position. If, however, at the end of this period no such position had materialized, he was to be dismissed. The tribunal also ordered the school board to terminate Ross immediately it he published, sold, or distributed any of his previous writings or any new writings that mentioned a Jewish or Zionist conspiracy, or attacked the followers of the Jewish religion.

Ross sought judicial review of the board's order as contrary to his right to freedom of religion and freedom of expression under the Charter. The New Brunswick Court of Queen's Bench upheld the portions of the order removing Ross from the classroom. However, the court held that the portion of the order restricting Ross' writings after he had been removed from the classroom was unconstitutional. On further appeal to the New Brunswick Court of Appeal, the court held, by a two-to-one majority, that the entire order was unconstitutional.

The New Brunswick Human Rights Commission appealed this decision to the Supreme Court of Canada. The court unanimously held that the parts of the Board's order removing Ross from the classroom were not contrary to the Charter. Justice La Forest, for the court, held that it was reasonable for the tribunal to conclude that Ross' activities outside the classroom created a discriminatory learning environment. There was evidence that Ross' activities outside the classroom created a discriminatory learning environment. There was evidence that Ross' activities poisoned the educational environment and created a setting in which Jewish students were forced to confront racist sentiment. Students testified to numerous

incidents of taunting and intimidation of Jewish students and displays of anti-Semitic imagery. It was reasonable for the tribunal to draw an inference between the notoriety of Ross's off-duty conduct and the actions of the students. The district's passivity in the face of this environment amounted to discrimination.

Justice La Forest then turned to the Charter claims. He noted that the scope of the constitutional protection for expression was very broad. It was clear that Ross' writing and statements constituted "expression," so long as it is not communicated in a physically violent manner. The court had, in previous cases, found that the hate propaganda was covered by section 2(b). The next step of the test was to consider whether the purpose or effect of the government action was to restrict the individual's freedom of expression. It was clear that the tribunal's order, while intended to remedy discrimination, had the purpose of preventing Ross from publicly espousing his views. Therefore, section 2(b) was infringed.

Under Canadian constitutional law, however, this does end the inquiry. The court must go on to consider whether the infringement is nonetheless justified as a reasonable limit under section 1 of the Charter, which "guarantees the rights and freedoms set out in it subject to only such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The Supreme Court of Canada has developed a complex test for determining whether an infringement of a right or freedom is nonetheless "saved" by the operation of section 1 of the Charter. Justice La Forest noted that the application of section 1 test was essentially a balancing test exercise; the justification for the abridgement of Ross' rights had to be considered in its social context. He agreed with the human rights commission that three contexts were relevant: the educational context, the employment, and the anti-Semitism context. The importance of the province's commitment to eradicating discrimination in the public school system was relevant to the constitutional analysis. In addition, it was significant that the educational services in question involved young children. Education awakens

children to the values a society hopes to foster and to nurture. Young children are especially vulnerable to the messages conveyed by teachers, and less likely to distinguish between in-class and out-of-class statements. In the employment context, the province as employer had a duty to ensure that the fulfilment of public functions was undertaken in a manner that did not undermine public trust and confidence.

Finally, Justice La Forest considered the anti-Semitism context. He referred to the submission of the human rights commission in its brief that it was simply not feasible to consider the constitutional values of freedom of expression and freedom of religion, where they are relied upon to shield anti-Semitic conduct, without contemplating the centrality of that ideology to the death and destruction caused by the Holocaust. Justice La Forest noted:

> 'In assessing this submission, it is helpful to refer to *R v Edwards Books and Art Limited*, [1986] 2 S.C.R where Dickson C.J. stated that the Courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons."
>
> This direction is especially applicable in this appeal. The order rendered by the board was made to remedy the discrimination it found to be manifest within the public school system of New Brunswick that targeted Jews, and historical disadvantaged group that has endured persecution on the largest scale. The respondent must not be permitted to use the Charter as an instrument to "roll back" advances made by Jewish persons against discrimination.'[137]

Justice La Forest noted that hate propaganda was not close to the core values of freedom of expression, which includes the search for political, artistic, and scientific truth; the protection of individual autonomy and self-development; and the promotion of public participation in the democratic process. Where the expression in question was not close to these values, the court could apply a lower standard of justification

[137] [1996] 1S.C.R. 826 at 875.

under section 1. Justice La Forest characterised Ross' expression in the following terms:

> 'Such expression silences the views of those in the target group and thereby hinders the free exchange of ideas feeding our search for political truth. Ours is a free society built upon a foundation of diversity of views, it is also a society that seeks to accommodate this diversity to the greatest extent possible, such accommodation reflects an adherence to the principle of equality, valuing all divergent views equally in recognizing the contribution that a wide range of beliefs may make in the search for truth. However, to give protection to views that attack and condemn the views, beliefs and practices of others is to undermine the principle that all views deserve equal protection and muzzles the voice of truth.'[138]

Expression that incited contempt for Jewish people hindered the ability of that group to develop a sense of self-identity and belonging. It effectively undermined democratic values by impending meaningful participation in social and political decision-making by Jews.

His lordship held that the portions of the order that required the district to remove Ross from the classroom and assign him to a non-teaching position within eighteen months, or terminates him after that point, was reasonable limit in Ross' expressive right. The order was carefully tailored to accommodate its specific objective of remedying the discriminatory situation in the school district. Any punitive effect was merely incidental.

The applicant in *Visser/Woolworths*[139] was dismissed after she was arrested for stealing in a store belonging to one of the respondent's competitors. The commissioner held that, while an employee may be dismissed for misconduct committed off the employer's premises and outside working hours, the mere fact that an employee is arrested does not constitute a fair reason for dismissal. The

[138] {1996] 1 S.C.R 826 at 877-878.
[139] [2005] 11 BALR 1216 (CCMA).

respondent had made no attempt to establish whether the applicant was indeed guilty of theft. Moreover, it had taken no action against another employee who had been arrested on a charge of drunken driving which for purposes of the charge against the applicant constituted inconsistent treatment. The applicant received compensation equivalent of eight months' salary.

In *NUMSA obo Biliman/Coatek*[140] the respondent did not appear for "incitement". The charge arose from a notice published by the applicant, which stated: "To those who are eating bread and butter with blood underneath – their time is limited. No more white dominance." The shop steward claimed in a default hearing that the notice merely advertised the march and explained its purpose. The arbitrator held that in the absence of evidence from the respondent to indicate the unlawful conduct the applicant had allegedly incited, she could not assess whether the applicant was guilty of incitement. However, the applicant was not reinstated, as he wished; he was awarded limited compensation because he had acted irresponsibly by publishing an inflammatory notice with racist undertones. On the other hand in *NUMSA obo Yako/Maxiprest*[141] was upset when he found the company change room locked, and accused a manager of doing so to keep black workers separate from others. When protested, he caused a commotion, and accused his supervisor in the presence of clients of racism, and also used other colourful language. The arbitrator rejected the employee's claim that he had neither sworn at his supervisor nor accused him of racism, and upheld the dismissal.

It is respectfully submitted that there is absolute no place in contemporary labour relations for the use of racial epithets, demeaning conduct or disrespect between races. The firmest hand is required in this regard. In the instant matter the applicant had predilection for the use of the word 'kaffir'. The fact that the person did not intend

[140] [2005] 6 BALR 646 (MEIBC).
[141] [2006] 9 BALR 885 (MEIBC).

to offend, as the applicant contended that he used the word in jest, is irrelevant. In this regard the Revelas JA in *Kroeger* made apt observation: [142]

> ... the applicant was insensitive to the feeling aroused by the word. A strong response to hearing the word 'kaffir', the applicant regarded as an overreaction. Taking action in favour of those who feel offended by the word, he deemed a sign of weakness.

An example of a situation where the uttering of racial epithet 'kaffir' to denigrate a black employee attracted strong and meaningful rebuke is *Crown Chickens (Pty) Ltd t/a Richards Poultry v Kapp & Others.*[143] The court summarized its conclusion about racism in the workplace stating:

> 'The attitude of those who refer to, or call, Africans "kaffirs" is an attitude that should have no place in any workplace in this country and should be rejected with absolute contempt by all those in our country - black and white - who are committed to the values of human dignity, equality and freedom that now form the foundation of our society. In this regard courts must play their proper role and play it with conviction that must flow from the correctness of the values of human dignity, equality and freedom that they must promote and protect. The courts must deal with such matters in a manner that will "give expression to the legitimate feelings of outrage" and revulsion that reasonable members of our society - black and white - should have when acts of racism are perpetrated.' [144]

In the subsequent chapter the focus of the discussion will be troublesome issue of employee dishonesty as cause and ground for discipline and dismissal for breach implied term of mutual trust and confidence.

[142] *Kroeger supra* at 1983G-H.

[143] (2002) 22 *ILJ* 863 (LAC); [2002] 6 BLLR 493 (LAC).

[144] *Kroeger supra* at para 37.

CHAPTER THREE

DISHONESTY AND DERIVATIVE MISCONDUCT

INTRODUCTION

In the field of labour relations a premium is placed on honesty because conduct involving moral turpitude by employees damages the trust relationship on which the contract is founded.[145]Dishonest conduct in the course of employment will, absent significant and mitigating circumstances, provide a fair reason for dismissal. What justifies the dismissal is the loss of trust and confidence in an employee who has shown disloyalty and infidelity towards his employer.[146]

Theft, particularly employee theft, is a pervasive problem.[147] In the retail industry,[148] shrinkage or stock loss remains a thorny issue for most employers. The problem of protecting goods against theft is compounded by the fact that in many cases,

[145]In Standard *Bank of SA Ltd v CCMA* (1998) 19 *ILJ* 903 (LC) at para 37 the court said the following stated that:"it is one of the fundamentals of the employment relationship that the employer should be able to place trust in the employee. A breach of this trust in the form of conduct involving dishonesty is one that goes to the heart of the relation and is destructive on it. The existence of the duty upon an employee to act with good faith towards his/her employer and to serve honestly and faithfully is one of long standing in the common law." See also *Premier Medical & Industrial Equipment (Pty) Ltd v Winkler & another* 1971 (3) SA 866 (W) at 867H, *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 *ILJ* 573 (LAC); *Ndlovu v Supercare Cleaning (Pty) Ltd* 1995 6 *BLLR* 87 (IC) at 94C.

[146] See for examples *Williams v Gilbeys Distillers & Vinters (Pty) Ltd* (1993) LCD 327 (IC) where the court stated: 'If an employer for instance mistrust an employee for reasons which he must obviously justify … and he can show such mistrust, as a result of certain conduct of the employee, is counterproductive to his commercial activities or the public interest, he would be entitled to terminate the relationship.'

[147] See generally Note, 'Theft, unauthorised possession and related issues' (1988) 1(9) *Labour Law Briefs* 59; Myburgh, A. 'Worker courts: a democratic solution to shrinkage' (1996) 12 *EL* 72, Landman, A 'Team misconduct: The final solution to shrinkage?' (2001) 17(5) *EL* 3.

[148] See generally *SACTWU obo Baatjies & others/Pep Stores* [2004] 3 BALR 377 (CCMA); *FEDCRAW v Snip Trading* (2001) 22 *ILJ* 1945 (ARB); *SACCAWU & others v Cashbuild Ltd* [1996] 4 BLLR 457 (IC); *DICHAWU obo Qwabe & others v Pep Stores* [2000] 2 BALR 130 (CCMA); *Pep Stores/ Namibia (Pty) Ltd v Iyambo & others* (2001) 22 *ILJ* 1995 (HCN); *SAGAWU obo Ndumdum v Snip Trading* [2003] 2 BALR 211 (CCMA); *SAGAWU obo Mdiya v Pep Stores (Pty) Ltd* [2003] 10 BALR 1172 (CCMA); *Kwinda v Snip Trading (Pty) Ltd* [2003] 11 BALR 1268 (CCMA).

especially in the retail sector, it is difficult if not impossible to apprehend and prove a case against a dishonest employee. The nature of the dilemma which confronts modern management decision-making process in disciplinary matters manifests itself where acts of misconduct are perpetrated but the employer is not in a position to pinpoint the offending employee nor are the employees disposed or willing to co-operate with the employer in tracking down the perpetrator(s). Can the employer, for instance, use undercover agents to identify the wrongdoer(s) amongst its workforce in a situation where there is a "massive and systematic theft"?

This chapter explores two aspects of pervasive from employee breach of implied obligation of trust and good faith, internal theft (shrinkage or stock) and derivative misconduct.

Shrinkage

It is incontestable that combating internal theft remains an overarching objective of all retail employers. For example, in the matter of *Metro Cash & Carry Ltd v Tshehla*[149] 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.'[150]

[149] (1996) 17 *ILJ* 1126 (LAC); [1997] 1 BLLR 35 (LAC).

[150] *Metro Cash & Carry Ltd v Tshehla* 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 offences involving misappropriation of company property, do not themselves necessarily have dishonestly 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); *Nsele/Snip Tradin*g *(Pty) Ltd* 8 BALR 887 (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 major problem which these types of cases present are the following: the subtle nature of the theft, the proof of the offence, the admissibility of evidence obtained through undercover operations, the appropriate penalty for dishonesty, the relationship between criminal prosecutions and company hearings,[151] and the prevention of shrinkage by trapping methods and dismissal of innocent employees for refusing to divulge information that could lead to the detection of colleagues' misdemeanors.

After discovering stock losses that brought it to the brink of financial collapse, the employer in *Lowveld Implement Farm Equipment (Life)*[152] introduced a number of control measures and eventually engaged a private investigator. Seven employees, including the three applicants, were dismissed. The applicants contended 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 they 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

[151] See generally, *Moahlodi v East Rand Gold & Uranium Co Ltd* (1988) 9 *ILJ* 597 (IC); *Olkers v Monviso Knitwear (Pty) Ltd* (1988) 9 *ILJ* 857 (IC); *Nyalungu v PP Webb Construction* (1990) 11 *ILJ* 819 (IC); *Randburg Town Council v National Union of Public Service Workers & others* (1993) 4(12) SALLR 7 (LAC); *PSA obo Van Rooyen v SAPS* [2000] 6 BALR 733 (IMSSA); *Fourie v Amatola Water Board* (2001) 22 *ILJ* 694 (LC); *Mohlala v Citibank & others* (2003) 24 *ILJ* 417 (LC); Commonwealth cases: *Russell v Wanganui City College* [1998] 3 ERNZ 1076; *Russell v Wanganui City College* [1999] 1 ERNZ 654; *A v B* [1999] 1 ERNZ 613; *Sotheran v Ansett New Zealand* [1999] 1 ERNZ 548. Du Toit, D. 'Crime or misconduct: 'damned of you, damned if you don't' (2003) 12(2) *Labour Law News and CCMA Reports* 2; Grogan, J. 'Workplace crime – must employers leave it to the police?' (2001) 17(5) *EL* 14; Whitfield, N. 'Employment law and police investigations' (2002) 2 *Employment Law Bulletin* 28.

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

applicants' claim that the respondent was bound by its disciplinary code to give more than a final warning. Their dismissal was accordingly fair.

Mbuli and Spartan Wiremakers CC[153] 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.

The applicant employee 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 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.

Nchabeleng v Team Dynamix[154] is another variation of the theme. The bare facts 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 CNA framed her. She denied seeing that he put the book in his pants or that she assisted him in any manner to steal the company's goods.

[153] (2004) 25 *ILJ* 1128 (BCA).
[154] Unreported decision [MP 1215-01].

Commissioner 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*[155] 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 employee 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 been permitted to resign.

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

[155] [1999] 8 BALR 957 (CCMA).

stolen goods. 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, may justify inconsistent enforcement of the rule. The dismissal was upheld.

In *NUMSA obo Abraham/Guestro Wheels*[156] 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 to prove acts 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 higher level than the interest of the employee.

[156] [2004] 4 BALR 530 (CCMA).

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.

Honesty test cases

Four Metrorail cases firmly establish the right of an employer to secure its financial integrity by subjecting employees to an honesty test in order to rid itself of dishonest behaviour amongst its workforce, more so where the employer had been experiencing perpetual financial losses. In *Metrorail and SA Transport & Allied Workers Union on behalf of Magagula*,[157] for instance, a ticket officer with 20 years service and a clean record was dismissed for theft and dishonesty after failing to issue tickets to "two commuters" (undercover investigators conducting an 'honesty test') who had given him "marked money". During arbitration the union contended that Magagula had been unlawfully trapped, thus rendering subsequent disciplinary action and dismissal inherently unfair. Metrorail's contention was that the employee's conduct of walking away showed that he had something to hide and that the misconduct was of a 'subtle' nature that cannot be easily detected' and therefore the action taken by it must be drastic to deter other employees.

The arbitrator found that the trap was justified by Metrorail's operational requirements. Metrorail harboured suspicion that ticket officers were defrauding the company by taking money belonging to the company to their own private pockets, without issuing tickets. The arbitrator referred with approval to the *Cape Town City Council* case and to a note by Grogan *Sibergramme 10/2000* on the issue and

[157] (2000) 23 *ILJ* 1641 (BCA).

requirements to be met when conducting the trapping system. She was satisfied that the investigators in the case conducted a fair trap.

As to the troublesome issue of determining the appropriate sanction,[158] Steadman considered the employee's long service and impeccable record coupled with the company did not suffer any loss as a result of the employee's conduct. However the arbitrator was of the view that, the employee's conduct which amounted to theft and dishonesty was a serious form of misconduct which strikes the heart of the employer-employee trust relationship. The employer relied on the integrity of the employee to act faithfully in relation to money paid by commuters and account appropriately for such monies.[159] Accordingly the company decision to terminate the employee's services was substantively fair.

The grievant in *SATAWU obo Sithole/Metrorail*[160] was dismissed for allegedly receiving money from commuters without issuing tickets. The employer uncovered the alleged misconduct during an entrapment exercise forming part of a series of "honesty tests", conducted by the company, in which security officers acted as commuters. Mr Sithole claimed he had taken money from one of these "commuters" without issuing a ticket because the ticket office was busy and a queue was beginning to form. He said that it was common practice to do so when this

[158] *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 *ILJ* 2405 (CC); *Engen Petroleum Ltd v CCMA& others* (2007) 28 *ILJ* 1507 (LAC). See Okpaluba, C 'Employee's misconduct, employer's reasonableness and the law of unfair dismissal in Swaziland' (1999) 32 *CILSA* 386, 393-394; Myburgh SC & Van Niekerk, 'Dismissal as a penalty of misconduct: The reasonable employer and other approaches' (2000) 21 *ILJ* 2145; Cohen, T. 'the "reasonable employer" test – Creeping in through the back door? (2003) 15 (2) *SAMLJ* 192. Garbers, C. 'The demise of the "reasonable employer" test: *Toyota South Africa Motors (Pty) Ltd* v *Radebe and others* (Labour Appeal Court, Case No DA2/99 – unreported).' (2000) 9 *CLL* 19.

[159] For example, the applicant employee in *Autopax/SATAWU obo Lefefa* [2003] 1 BALR 12 (AMSSA) was dismissed after 27 years' service for retaining a large sum of money received for the sale of tickets. He claimed that a manager (since resigned) had authorised him to repay the money by stop order, and that he had intended to do so. The arbitrator noted that the employee had admitted that he had handed over the ticket books only when requested to do so by the company. That he had obtained permission from the manager to keep the money was no excuse. The applicant had breached his duty to act in good faith. His dismissal was upheld. *SATAWU v Cape Metrorail* [2000] 9 BALR 11 (IMSSA) – employee retaining cash surplus to make good future shortfalls in takings. The arbitrator concluded that the employee dismissal was selective and unfair because though conduct dishonest, such practice was common among the employees.

[160] [2000] 8 BALR 984 (IMSSA).

happened. The company claimed that Sithole had been given a “marked” coin that had not been handed to the ticket office after Sithole received it.

The arbitrator held that the plea of “entrapment” holds only when an accused person was tempted into wrongdoing by the person engaged in the exercise. The South African courts have held that entrapment may be raised as a plea in mitigation. While employers may seek to protect their economic interests by using traps, the employer’s need must in each case be balanced against other principles of fairness. If an entrapment exercise is to be accepted, the employer must establish that the exercise is not improper. The trapping exercise *in casu* was justifiable. However, Sithole had been dismissed because he failed to hand over a marked coin to the ticket office. His claim that he had handed over another coin of similar value was not improbable. The dismissal was accordingly unfair. Sithole was reinstated without loss of benefits.

SATAWU obo Radebe v Metrorail Wits[161] concerned the dismissal of an access controller for dishonesty and theft as a result of an “honesty test” that was conducted by private investigators. Despite being aware that ‘honesty test’ was to be conducted in their area, like Magagula, Radebe pocketed “marked coins” used by investigators as a train fare. It was argued on behalf of Radebe that he had an outstanding disciplinary record and had a lengthy service with the company. The undercover methods employed by the company were assailed on the basis that ”one cannot indulge someone into committing misconduct and if that person capitulates then continue charging him for such misconduct”. Seen from the union perspective, the ‘honesty test’ was encouraging dishonesty than eliminating it.

In justifying its decision to dismiss, the employer asserted that Radebe’s misconduct entails a breach of trust and confidence, resulting in irreversible breakdown of the employment relationship. It was of no relevance that the value of money involved

[161] (2001) 22 *ILJ* 2372 (ARB).

was negligible, what mattered was that the company can no longer trust the employee. It had placed a high degree of loyalty, as Radebe was a custodian of the company's revenue.

In considering the issue of entrapment in the labour law context, the arbitrator concluded that it can be utilized in labour law provided proper measures are followed. The arbitrator put the matter as follows:

> 'If person x is charged and found guilty of dishonesty, it is by far different if the person was trapped (induced) to act dishonestly and then found guilty. The blameworthiness in the first instance cannot be the same compared to the latter in as much as I hold the view that [an] employer, given the economic era we find ourselves in, should act in its best interest and should protect its commercial and economic integrity. It would be fair to accept that an employer may embark on such exercises to rid its self of dishonest behavior and such related elements amongst its ranks. This must, however, be balanced against principles of fairness and should not be improper or criminal.'[162]

In the case at bar, the company's use of the trapping system was appropriate because it was encountering continuous financial losses. The workforce had been informed that an 'honesty test' was to be conducted as part of the company strategies of stemming out financial haemorrhage. The value of the money misappropriated makes no difference as the collapsed trust relationship between the employer and employee had made continued employment intolerable. Radebe's dismissal was therefore fair.

Similarly, in *SATAWU obo Sefara v Metrorail Services Pretoria*[163] a ticket officer was dismissed after being found guilty of theft and failure to issue a ticket. Sefara had pocketed coins marked by the investigators conducting undercover operation on the trains. Transnet's Bargaining Council Disciplinary code, regarded theft as a serious

[162] *SATAWU on behalf of Radebe v Metrorail Wits* at 2377J-2378A.
[163] (2001) 22 *ILJ* 2379 (ARB).

offence/misconduct. The code provided that 'if an employee is found guilty of theft/fraud, 'they will lose their jobs'

After weighing up the competing interests of the parties, the arbitrator concluded that '…ticket officers are in positions of trust where they deal with the primary source of metrorail's income. The company must be able to rely on the honesty and integrity of employees handling the company's money.'[164]

It is submitted that an employer cannot be expected to retain the services of a dishonest employee. A sanction of dismissal could not be disturbed.

Derivative Misconduct

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 this 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 the employer about 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.[165]

[164] *SATAWU on behalf of Sefara v Metrorail Services Pretoria* at 2385C.
[165] See Grogan, J 'Derivative misconduct: The offence of not informing' (2004) 20(3) *EL* 15.

The concept of derivative misconduct first passed judicial scrutiny in *FAWU & others v Amalgamated Beverage Industries*.[166] The facts in *Amalgamated Beverage Industries (ABI)* were that on the day upon which the workers had agreed to return to work after an 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 the 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 chosen 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 based 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:[167]

> '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.

[166] [1994] 12 BLLR 25 (LAC).
[167] *FAWU & others v Amalgamated Beverage Industries* at 1063B.

In *Chauke & others v Lee Service Centre CC t/a Lesson Motors*[168] the Labour Appeal Court clarified the concept of 'derivative misconduct'. The facts were that the appellant employees who worked in a 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. Cameron JA (as he then was) held as follows:[169]

> '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:[170]

> '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,

[168] (1998) 19 *ILJ* 1441 (LAC).
[169] *Chauke & others v Lee Service Centre CC t/a Lesson Motors* at paras 27-28.
[170] *Chauke & others v Lee Service Centre CC t/a Lesson Motors* at para 29.

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:[171]

'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 essentially 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.

RSA Geological Services (a Division of De Beers Consolidated Mines Ltd) v Grogan & others[172] 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

[171] *Chauke & others v Lee Service Centre CC t/a Lesson Motors* at paras 31 and 33.
[172] [2008] 2 BLLR 184 (LC). See *NUM & others / RSA Geological Services, a Division of De Beers Consolidated Mines Ltd* [2004] 1 BALR 1 (P).

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 were 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 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".[173]

The court also accepted that the dismissal of the five employees who the arbitrator had found were implicated in the dumping had been fair because the probabilities

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

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 not 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 so[174]. 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 dismissals[175].

4.1 Team misconduct liability[176]

In their quest to combat stock loss/shrinkage, some 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*[177] 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

[174] *RSA Geological Services (a Division of De Beers Consolidated Mines Ltd) v Grogan & others* at para 49.
[175] *RSA Geological Services (a Division of De Beers Consolidated Mines Ltd) v Grogan & others* at para 51.
[176] See Landman, A 'Team misconduct: The final solution to shrinkage?' (2001) 7(5) 17(5) 3 *EL* 3; Le Roux, P.A.K. 'Discipline and group misconduct' (1993) 2(11) *CLL* 119; Le Roux & Van Niekerk, *The South African Law of Unfair Dismissal* (1994) Ch. 10.
[177] [1996] 4 BLLR 457 (IC). For discussion see Myburgh, A 'Worker courts: A democratic solution to shrinkage' (1996) *EL* 72.

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.

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.

In *FEDCRAW v Snip Trading (Pty) Ltd,*[178] is a leading decision on application of the notion' team misconduct' as a ground of justification for dismissing employees for failure to control shrinkage. There the arbitrator was required to determine decide three issues, formulated as follows in the arbitration agreement. Firstly, whether stock loss constitutes misconduct. Secondly, whether employees other than managers should be held accountable for a general stock loss at a store; and thirdly, 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.

[178] [2001] 7 BALR 699 (P).

The facts in *FEDCRAW v Snip Trading (Pty) Ltd* were that 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 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 henceforth 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 threats of strikes and litigation, the matter was referred to private arbitration in terms of the Arbitration Act 42 of 1965.[179]

On the question whether stock loss constitutes misconduct, the arbitrator held as follows:[180]

> '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".[181]

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.

[179] *FEDCRAW v Snip Trading (Pty) Ltd* at paras 5-13.
[180] *FEDCRAW v Snip Trading (Pty) Ltd* at para 18.
[181] *FEDCRAW v Snip Trading (Pty) Ltd* at para 19.

The arbitrator noted that, generally speaking, misconduct entails a breach of contract, though not all breaches of contract 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), distinguishes between dismissals related to the conduct of employees, those relating to employees' capacity and work performance, and those related to the operational requirements of the employer. In terms of the 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.[182]

In respect of the 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 the 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 accountable' (i.e. 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

[182] *FEDCRAW v Snip Trading (Pty) Ltd* at paras 20–23.

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.

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 a member of the staff could not point to theft or some other cause or to loss not attributable to their own negligence or 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 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 members 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 misconduct", 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 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.[183] "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:[184]

> 'As in many sports, productive and commercial activities 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'.

[183] *FEDCRAW v Snip Trading (Pty) Ltd* at paras 32 and 34.
[184] *FEDCRAW v Snip Trading (Pty) Ltd* at para 33.

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 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 (captains) to be dismissed for stock losses. The arbitrator said:[185]

> '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.'

It is goes without saying to the relationship between 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 the employee, is basic to and forms the bedrock of the relationship between them. A breach of this duty goes to the root of the contract of employment and of the relationship between employer and employee. That the thing stolen is of comparatively little value is not relevant; the correct test is whether or not the employee's misconduct has had the effect that the continuation of the employer-employee relationship has been rendered intolerable. The point has been made that:[186]

> "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

[185] *FEDCRAW v Snip Trading (Pty) Ltd* at para 36.

[186] *De Beers Consolidated Mines Ltd v CCMA & others* (2000) 21 *ILJ* 1051 (LAC) at 1058.see also the remarks of Grogan, J *Dismissal* (2002) 99, where he illustrated the point that: "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 no 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."

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."

CHAPTER FOUR

DISMISSAL OF MANAGERIAL EMPLOYEES FOR BREACH OF FIDUCIARY DUTY AND INCOMPATIBILITY

INTRODUCTION

Termination of the employment of senior, and especially managerial and executive employees, including directors of companies[187] and municipal managers,[188] presents a number of interesting problems. The broad issue of the applicability of the Labour Relations Act, 1995, as well as procedural and substantive fairness has been dealt with in some detail by the courts and arbitrators. Senior or managerial employee whose knowledge and experience qualify him or her to judge for himself or herself whether he or she was meeting the standards sets by the employer.[189] The second

[187] Directors of companies find themselves in a different position. The terms "director" occurs in the old Companies Act, 1973, and s 220 specifically allows a company "notwithstanding anything … in any agreement between it and any director, by resolution …" to "remove a director before the expiration of his period of office". If person is simply a director, he may be removed in terms of the Companies Act, but if he is also an employee, the proper equity requirements relating to termination of employment must be met. This principles was clearly illustrated in *Brown v Oak Industries (SA) (Pty) Ltd* (1987) 8 *ILJ* 510 (IC), where the Industrial Court remarked: "It appears to the court that the mere fact that a person is also a director should not exclude him from the ambit of the Act. It must depend on the *de facto* position of the director. Many … will be appointed by shareholders in general meeting and they will not be subject to day to day control by anyone. The Act would therefore not apply to them.
On the other hand, there are directors who are primarily employees, subject to the authority and control of more senior directors or managers. This is particularly likely to happen … in a group set up, where the directors of subsidiary companies are employees subject to the day to day control of group managing director or some other senior director or manager. These directors, being employee, should have available to the them protection of the Act." See also *Whitcutt v Computer Diagnostics & Engineering (Pty) Ltd* (1987) 8 *ILJ* 356 (AD); *Turnbull and Amazwi Power Products (Pty) Ltd* (2006) 27 *ILJ* 237 (BCA). For discussion see: Larkin MP 'Distinctions and differences: A company lawyer looks at executive dismissal' (1986) 7 *ILJ* 248; Note 'Not on top, but outside: executive dismissals and the court' (1986) 2 *EL* 67; Olivier MP 'The dismissal of executive employees' (1988) 9 *ILJ* 519; Note 'Dismissal executive and managerial employees' (1988) 2 *LLB s* 1

[188] See for instance, *Mgoqi v City of Cape Town & another, In re: City of Cape Town v Mgoqi & another* [2006] 9 BLLR 873 (C); *Mafihla v Govan Mbeki Municipality* (2005) 25 *ILJ* 257 (LC); *Mbatha v Ehlanzeni District Municipality & others* (2008) 19 *ILJ* 1029 (LC); *Dladla v Council of Mbombela Local Municipality & another* (1) (2008) 29 *ILJ* 1893 (LC).

[189] In *McBain/Afrox Ltd obo J McEvoy* [1999] 12 BALR 1386 (CCMA) the, a senior sales representative, joined a number of his friends at a local pub one Friday afternoon, and was found there by his branch manager. He was dismissed after a disciplinary hearing for consuming alcohol during working hours. The applicant contended that he had left the office early because by that time he had already worked a full day, and that he regularly worked longer hours than was required to work. The employer contended thatits sales representative did not work flexitime, and that the

and distinct aspect relates to employees whose jobs required of them a degree of professional expertise of an extremely high standard and the likely consequences of the slightest deviation from that high benchmark which is so grave, that a lapse in judgement is sufficient to warrant dismissal. In this, the nature and scope of the implied term of trust and confidence in relation to managerial employees, with particular emphasis on breach of fiduciary obligations as well as incompatibility is discussed.

Senior Managerial or Executive Employees

One of the incidents of corporate directorship is that the director is subject to certain fiduciary obligations.[190] The most central is undoubtedly the implied terms of loyalty and good faith, which form the perspective of the fiduciary obligations imposed upon directors, individually or collectively, the obligation to exercise their powers in good faith and in the best interest of the company.[191] One only need to refer to the oft-

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applicant was already on a final warning for abuse of sick leave. The commissioner held that, although the previous manager of the branch where the applicant worked had a relatively tolerant approach to the consumption of alcohol during working hours, the present branch manager had a different view, of which the applicant had been aware. There had been no agreement concerning working flexitime. Furthermore, the applicant had not been honest about the time he had knocked off on the day in question. The employer had a clear rule prohibiting its employees from consuming alcohol while on duty. This was a reasonable rule. There was accordingly no basis for interference with the sanction of dismissal. The application was dismissed.

[190] There is no magic in the term "fiduciary duty" the existence such a duty and its nature and extent are questions of fact to be adduced from a thorough consideration of the substance of the relationship and any relevant circumstances which affect the operation of that relationship. The *sui generis* basis of these obligations is widely recognised and has been confirmed by the Supreme Court of Canada in *Guerin v Canada* [1984] 2 SCR 335; 13 DLR (4th) 321 at 341 where Dickson J (as he then was) said:

> "It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary category."

See too *Frame v Smith* [1987] 2 SCR 99 at 98-99; *Du Plessis NO v Phelps* 1995 (4) SA 165 (C) at 171A-B; *Phillips v Fieldstone Africa (Pty) Ltd & another* 2004 (3) SA 465 (SCA) at para 27. See also Havenga, M 'Corporate opportunities: A South African update (Part 1)' 1996 (8) *SA Merc LJ* 40, 41.

[191] The "interests" in this context are only those of the company itself as a corporate entity and those of its members as such as a body. See e.g. *South African Fabrics Ltd v Millman* 1972 (4) SA 592 (AD) at 596; *Alexander v Automatic Telephone Co* [1990] 2 CH 56 (CA) at 67, 72; *Coronation Syndicate Ltd v Lilienfeld* 1903 TS 489 at 497; *Parke v Daily News Ltd* [1962] Ch 927 at 963; [1962] 2 All ER 929 at 948; *Gaiman v National Association for Mental Health* [1971] Ch 317 at 330; [1970] 2 All ER 362 at 367.

quoted passage of Laskin J (as he then was) in *Canadian Aero Services v O'Malley*[192] to understanding why fiduciary doctrine is so deeply entrenched:

> '[T]he general standards of loyalty, good faith and avoidance of a conflict of duty and self interest to which the conduct of a director or senior officer must conform, must be tested in each case by any factors which it would be reckless to attempt to enumerate exhaustively…Descending from the generality, the fiduciary relationship goes at least this far; a director or senior officer … is precluded from obtaining for himself either secretly or without approval of the company (which would have been properly manifested upon full disclosure of the facts), any property or business advantage either belonging to the company or for which it has been negotiating; and especially is this so where the director or officer is a participant in the negotiation on behalf of the company'.[193]

It was also pointed by Gibbs CJ in the High Court of Australia in *Hospital Products Ltd v United States Surgical Corporation*:[194]

> 'I doubt if it is fruitful to attempt to make a general statement of the circumstances in which a fiduciary relationship will be found to exist. Fiduciary relations are of different types, carrying different obligations ... and a test which might appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another purpose.'

In addition to this succinct passages, there is ample authority for the proposition that the all-encompassing fiduciary doctrine includes the director's duty to exercise care and skill,[195] duty to exercise independent discretion;[196] duty to act under available powers;[197] duty not to improperly compete with the company;[198] duty to account for

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[192] (1973) 40 DLR (3d) 371.
[193] *Canadian Aero Services v O'Malley* 390.
[194] (1984) 156 CLR 41 (HC) 69.
[195] See e.g. *Lindgreen & others v L & P Estates Co Ltd* [1968] 1 Al ER 917 (CA); *Winthrop Investments Ltd v Winns Ltd* 1975 2 NSWLR 666 (CA). See also McLennan, JS 'Director's duties and misapplication of company funds' (1982) S*ALJ* 349
[196] A director may not be a mere dummy or puppet. See *S v Shaban* 1965 (4) SA 646 (W) at 651-652; *Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 (4) SA 156 (W) at 163; *Scottish Co-operative Society Ltd v Meyer* [1959] AC 324 (HL) at 341-342' 363-368; [1958] 2 All ER 66 at 70-71; 85-86; *Novick v Comair Ltd* 1972 (2) SA 116 (W) at 130; *Selangor United Rubber Estates Ltd v Cradock (3*) [1968] 2 All ER 1073 (Ch) at 1095, 1123.
[197] See *Cullerne v The London & Suburban General Permanent Building Society* (1890) 25 QB 485 (CA) at 488, 490; *Sparks & Young Ltd v John Hoatson* (1906) 27 NLR 634 at 642; *In re Exchange*

secret profits;[199] duty to avoid conflict of interests and duty;[200] as well as duty to disclose interest in a contract with the company.[201]

Case Law

The hallmarks of a fiduciary obligation are trust and loyalty. The law on fiduciary duty is tied to its core objective of regulating deliberate abuse of trust and loyalty. This objective is reflected in the oft quoted comments of Southin J. (as she then was) in *Giradet v. Crease & Co*[202] where she noted that "… an allegation of breach of fiduciary duty carries with it the stench of dishonesty – if not deceit, then of constructive fraud."

Certain relationships are presumptively or inherently fiduciary. Examples of these include the classic relationships of trustee-beneficiary, attorney-client, and principal-agent. Other relationships are held to be fiduciary because of the specific circumstances and characteristics of those particular relationships. ("*ad hoc* relationships"). An employment relationship is not presumptively fiduciary. It is not a *per se* fiduciary relationship. Therefore, a careful examination of the circumstances and characteristics of the employee's employment relationship is required to

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Banking Co; Flitcroft's Case (1882) 21 Ch 519 (CA) at 533-534; 535; *In re Sharpe* [1892] 1 Ch 154 (CA) at 165-166; *In re Kingston Cotton Mill Co (2)* [1896] 2 Ch 279 (CA); *In re Duomatic Ltd* [1996] 2 Ch 365 at 374-375; [1969] 1 All ER 161 at 169; *Jacobson v Liquidator M Bulkin & Co Ltd 1976* (3) SA 781 (T) at 790-791.

[198] See *Bell v Lever Brothers Ltd* [1932] AC 161 (HL) at 195; *Robinson v Randfontein Estates Gold Mining Co* 1921 AD 168 at 216; *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) at 198; *Rectifier & Communication Systems (Pty) Ltd v Harrison* 1981 (2) SA 283 (C) at 286-287. For discussion: Havenga, M 'Directors in competition with their companies' 2004 (16) *SA Merc LJ* 275.

[199] See *Parker v McKenna* (1874) LR 10 Ch App 96 at 118; *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 3 at 33-34; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134 (HL) at 153; [1942] 1 Al ER 378 at 391-392; *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch 339 (CA)at 158; 395. See further, Prentice, D 'Corporate opportunity – Windfall profits' (1979) 42 *Modern LR* 215;

[200] See *Robinson v Randfontein Estates Gold Mining Co* 1921 AD 168 at 177-179; *Boardman v Phipps* [1967] 2 AC 46 (HL) at 123-124; [1966] 3 All ER 721 at 756; *Aberdeen Rail Co v Blaikie Bros* (1854) 1 Macq 461 at 473, (1854) 2 Eq Rep 1281 (HL) at 1286; *Bray v Ford* [1886] AC 44 (HL) at 51. For excellent discussion: Blackman, MS 'Duties of directors and officers: Ratification or condonation of director's breach of duty and prior consent and release' in *LAWSA First Reissue* Vol 4(2) Part 2.

[201] S 234 of the Companies Act 61 1973.

[202] 1987 CanLII 160 (BC SC),(1987), 11 B.C.L.R. (2d) 361 (S.C.) at 362.

determine if it constitutes an *ad hoc* relationship that gives rise to a fiduciary obligation.

Daewoo Heavy Industries (SA) Pty Ltd v Banks & others[203] concerned an employer's High Court action against an employee for damages resulting from a breach of the employee's duty of trust towards his employer. The court considered the extent of an employee fiduciary duty in terms of his contract of employment at common law, and restated the duties and responsibilities. Thus, a senior manager was held to be under such a fiduciary duty although he was not the managing director. Where he had made fraudulent deals in the course of his employment the court held it would be contra *boni mores* to allow him to claim commission on those transactions.

In 2003 *Phillips v Fieldstone Africa (Pty) Ltd & another*[204] was decided. In issue was appellant director's liability to account to his employer for secret profits made out of corporate opportunity arising out of empowerment transaction. The essence of the judgement is expressed in the following instructive comments by Heher JA which, in my respectful view, apply the authorities correctly:[205]

> 'The duties of the appellant which were inherent in his relationship with the respondents included the promotion of the respondents' interests and the disclosure to them of such information as came to his knowledge which might reasonably be thought to have a bearing on their business.
>
> That the appellant breached his duty is manifest. He failed to inform the respondents of the offer to him or its terms; he took it for himself without their consent. In both respects he succumbed to a potential conflict of interest between his duty and his self-interest.

[203](2004) *25 ILJ* 1391 (T).
[204] 2003 SA (SCA).
[205] *Phillips v Fieldstone Africa (Pty) Ltd & another* 2004 (3) SA 465 (SCA) at paras 38-40. See also *Ganes & another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at para 16.

> It is irrelevant … that the opportunity "properly belonged to the company" unless this means no more than that it was an opportunity which arouse in the context of the appellant's fiduciary duty to the respondents and of which he was required to inform them.'

The facts in this matter can be summarised as follows: Phillips had been employed by the respondents, an American-based group of companies, Fieldstone Private Capital Group. The respondents sued the appellant after he had resigned, when they discovered that he had used his position within the company to obtain shares in an empowerment company which the respondents were doing business. It contended that the appellant had acted in breach of his duty of loyalty to the respondents by not accounting to them for the shares.

When the issue of availability of equity stake in the empowerment company, was raised the respondents advised Phillips that he could acquire shares in his personal capacity since he was a corporate fiduciary.[206] His response was that the empowerment company was prepared to issue shares for purposes of raising capital to selected black empowerment individuals. After survey of comparative authorities and legal principles, the court held that the director had appropriated an opportunity belonging to the company as he stood in a fiduciary relationship to the respondents when the opportunity became available to him. Consequently the delinquent corporate fiduciary was deemed to have acquired the shares on behalf of the respondents and in terms of his fiduciary, was obliged to account to them in respect thereof.

The recent Supreme Court of Appeal authority brings an important dimension to the issue fiduciary obligations, in that it found a labour broker owed fiduciary. In *Volvo (Southern Africa) (Pty) Ltd v Yssel,*[207] the facts were briefly as follows. When it commenced operations in 2000 Volvo (Southern Africa) (the appellant) was looking for

[206] *Phillips v Fieldstone Africa (Pty) Ltd & another* 2004 (3) SA 465 (SCA), at para 11.
[207] 2009 4 All 497 (SCA). See Idensohn, K 'Towards a theoretical framework of fiduciary principles: *Volvo (Southern Africa) (Pty) Ltd v Yssel* 2009 4 All 497 (SCA)' (2010) 24 *Speculum Juris* 142.

a manager for its information technology division. A personnel placement agent introduced it to Yssel (the respondent) and Volvo decided to appoint him to the position. Yssel did not want to enter into direct employment with Volvo. He preferred instead to be employed by a labour broker with which he was then associated – Highveld Personnel (Pty) Ltd – which would assign him to provide his services to Volvo. Volvo reluctantly accepted that arrangement and for the next five years or Yssel worked for Volvo on that basis. Volvo had no direct dealings with Highveld and entered into all these contractual arrangements through Yssel. Material terms of the contracts included a description of the services to be provided by Yssel to Volvo (which contained no express reference to liaising with labour brokers for the purpose of negotiating or concluding contracts for the provision of labour to Volvo) and a number of provisions confirming that Yssel was not an employee of Volvo.

This arrangement remained in place for several years. By 2004 there were six other people working in the IT division who were similarly employed by labour brokers that has assigned their services to Volvo. In mid-2004 Yssel approached Volvo's human resources manager and informed her that some the personnel in the IT division were unhappy with their current labour brokers and that he could arrange for them to transfer to Highveld at no extra cost to Volvo. He made the same suggestion to the IT personnel, pointing out that their remuneration could be structured more favourably if they moved to Highveld at no extra cost to Volvo. Both Volvo and the individuals agreed to the proposal and Yssel made the necessary arrangements. These were subsequently recorded in a written agreement between Volvo and Highveld which provided for Highveld to supply the services of the personnel to Volvo in return for a monthly fee. Over a period of approximately nine months Yssel accompanied each of the IT personnel to Highveld's offices where they signed a "conformation of assignment". They all gave evidence that they were given to understand that from the amounts that Volvo paid for their services, Highveld would retain a fixed charge of about R425 per month plus administration fee of 3% of their earnings. None of them was aware of the amount that Highveld was charging for their services.

Volvo again had no direct contact with Highveld in making these arrangements and acted at all times through Yssel as a “facilitator” or “intermediary”. Once the arrangements were in place, Highveld sent the monthly invoices to Yssel who presented them to Volvo for payment. Unbeknownst to both Volvo and the personnel concerned. Yssel had agreed with Highveld that Highveld would pay him a “commission” for arranging for personnel to transfer to Highveld and that this commission would not be mentioned to either Volvo or the personnel. The amounts involved were substantial. In most cases Yssel received about 40% of the monies that Volvo paid to Highveld for the services of the personnel. Investigations by an internal auditor at Volvo revealed that from August 2004 to January 2006 Volvo had paid R1 976 900 to Highveld for the services of the personnel (excluding that of Yssel). Of this, the personnel received R 1 087 650, Highveld deducted its own commission of R114 143 and the balance of R775 107 had been paid to Yssel.

Once the payments to Yssel were discovered, Volvo sued Yssel in the High Court for payment of the R775 107 on the basis that it was secret profit that Yssel had earned in breach of a fiduciary duty that he owed Volvo to act in its interests and not in his own. Yssel argued that, because he was not an employee of Volvo and had no other contractual relationship with Volvo; he did not stand in a fiduciary duty.

The crisp issues for determination were thus whether Yssel did owe any fiduciary duty to Volvo to act only in its interests and, if so, whether he had earned the undisclosed commission payments from Highveld in breach of that duty

Nugent JA held that it was the nature of the Yssel’s position, rather than any contractual relationship with Volvo that defined what Volvo could expect of him. He had not been brought to Volvo “so as to provide him with an opportunity to hawk his own wares” but in the interests of Volvo. That his functions did not include recruiting, employing or acquiring staff was, in the view of the court, irrelevant. What was material was that he in fact engaged in those activities and, when doing so, he did act as a stranger conducting his own affairs but as an incident of his function as

manager of the division that Volvo was induced to "relax the care and vigilance it would and should have ordinarily exercised in dealing with a stranger". Yssel was also aware that Volvo's arrangement with Highveld and that the manager was relying solely on what Yssel had told her. The fact that he found it necessary to keep his commission secret made it abundantly clear that he was aware that she believed that he was arranging matters as part of his ordinary managerial duties and not on his own account. In short, he knew that she did not consider herself to be dealing at arm's length with an independent party but with a manager of a Volvo division. Indeed, it was only because Yssel was IT manager and that the arrangements came about at all.

The court accordingly concluded that Volvo had justifiably relied on Yssel to act in its interests. This placed Yssel in a position of trust and under a duty not to allow his own interests to prevail over those of Volvo. He had breached that duty and was thus liable to disgorge his secret commissions plus interests.

The problem of departing entrepreneurial employees

The question whether fiduciary obligations survive resignation is a troublesome one.[208] It is settled that the fiduciary duties of a director arise only once the appointment of the director takes effect.[209] There is also authority[210] to the effect that provided that the director does nothing contrary to his employer's interest whilst in the employment he may with impunity entertain the idea of resignation so that he may exploit some commercial opportunity, and after he has resigned he may proceed to acquire the opportunity for himself.

[208] Welling, B 'Former corporate managers, fiduciary obligations, and the public policy in favour of competition' (1990) 31 *Cahiers de Droit* 1095.
[209] Thus a prospective director or 'director-elect does not occupy a fiduciary position: Havenga, M 'Corporate opportunities: A South African update (Part 2)' 1996 (8) *SA Merc LJ* 233; Larkin, M 'The fiduciary duties of the company director' (1979) *SACLJ* E-1 at E-2; Van Dorsten, JL *Rights, Powers and duties of Directors* (1992) 180.
[210] *Island Export Finance Ltd v Umunna & another* [1986] BCLC 460; *Sali v SPC Ltd & another* [1991] ACLC 1511.

Manitoba Ltd v Palmer[211] concerned a corporate officer who had resigned together with several employees and joined a competitor. The plaintiff who was the successor of Mayer Limited sued defendant for breach of fiduciary duty in that the defendant diverted a corporate opportunity away from the plaintiff by enticing the plaintiff's customers to deal with plaintiff's competitor and plaintiff's employees to join the competitor.

Of cardinal importance was for the court to determine whether no restraint of trade agreements had been entered into with the employee and whether the employee owe any fiduciary duty to the company as is in the case of a director. It is this fiduciary duty which will limit how he could compete with the company after resignation. The court had to strike a balance between the need of a company to impose fiduciary duty upon its managerial employee against the need of the individual to earn a living and to be in productive employment. The court concluded that Palmer was in a fiduciary relationship with the plaintiff and this fiduciary duty continued and survived defendant's resignation.

In *Christie (WJ) & Co v Greer & Sussex Realty & Insurance Agency Ltd*,[212] the Manitoba Court of Appeal considered a situation similar to a case at bar. Greer was a high-ranking management employee as well as a director, officer and minority shareholder of the claimant insurance agency and real estate management company. He was found to occupy a fiduciary position which imposed a duty on him not to solicit business directly from the customers of his former employer after leaving the company. Huband K delivering the judgement of the court, made the following observations:[213]

> 'There is nothing to prevent an ordinary employee from terminating his employment, and normally that employee is free to compete with his former employer. The right to compete freely may be constrained by contract … *But it is different for a director/officer/key management person who occupies a fiduciary position. Upon his resignation and*

[211] (1985) 7 CPR (3d) 477 (BC). See also *Roper v Murdock & others* (1987) 39 DLR (4th) 684 (BCSC).
[212] 121 DLR 472.
[213] *Christie (WJ) & Co v Greer & Sussex Realty & Insurance Agency Ltd* at 477.

departure, that person is entitled to accept business from former client, but direct solicitation of that business is not permissible. Having accepted a position of trust, the individual is not entitled to allow his own self-interest to collide with fiduciary responsibilities. The direct solicitation of former clients traverses the boundary of acceptable conduct. The defendant, Greer, and the co-defendant, Sussex, should have been content to allow news of Greer's departure and the establishment of Sussex to reach the clientele of W.J. Christie, without resort to direct approach.'

A similar approach was taken in *Metropolitan Commercial Carpet Centre Ltd v Donovan & Donovan (B) Interiors*.[214] There, the defendant Donovan, a shareholder and the general manager of the plaintiff company, resigned and then competed directly with his former employer. As a key employee of the plaintiff, the defendant was held to owe the plaintiff a fiduciary duty. Davison described the scope of the duty in these terms:[215]

'The extent of the fiduciary duty and the question as to whether there has been breach of such duty would differ with the factual situations in each individual case. If Donovan, by reason of his own qualifications and abilities attracts customer to his new business, such a result accrues from a personal asset of Donovan. On the other hand, if Donovan acquires a connection or a relationship with a customer of the plaintiff during the course of his employment with the plaintiff and, after resignation, he affirmatively approaches that customer with a view of enticing the customer to cease doing business with the plaintiff, that would pass over the boundary and constitute breach of a fiduciary duty.'

In *British Midland Tool Ltd v Midland International Tool Ltd & others* the court had to deal with issue of the scope of the obligation (if any) after the director's resignation, the extent to which a former director may compete with his company, and how far a such director may go in establishing up a competing business in contemplation of resignation of office. Hart J stated:[216]

'The situation was one, quite simply, where to the knowledge of three six members of the board of BMT, a determined attempt was being made by a potential competitor to

[214] (1989) 91 NSR (2d); 233 APR 99.

[215] *Metropolitan Commercial Carpet Centre Ltd v Donovan & Donovan (B) Interiors* at 103.
[216] *British Midland Tool Ltd v Midland International Tool Ltd & others* at para 90.

> poach the former company's workforce. The remaining three at best did nothing to discourage, and at worst actively promoted, the success of this process. In my judgement this was a plain breach of their duties as directors. Those duties required them to take active steps to thwart the process. Plainly their plan required the opposite. Active steps should have included alerting their fellow directors to what was going on. Their plan required, on the other hand, that their fellow directors be kept in the dark. This plan was formed, at the very least, by 13 March when Don Allen gave notice of retirement. At least from that date in my judgement the continuance in office of the remaining three without disclosing to their fellow directors what was afoot necessarily involved them in breach of their duties.'

In the instant case, the Tamworth 4 were executive directors of the company, charged and trusted by the owners with its management on a semi-autonomous basis and having the primary responsibility for relations between the company and its employees, the fact any one of them was himself involved in a breach of duty did not release him from his duty to report breaches by the others.[217] The decision demonstrates that the fundamental duty of directors to act in good faith and in the best interest of the company is unquestionable. Although the extent of the duty to inform depends on the circumstances of each, mere passive standing by without disclosure, in itself constitutes a breach of directors' fiduciary obligations.

The principle articulated in *British Midland Tool Ltd, Christie (WJ) & Co* and *Metropolitan Commercial Carpet Centre Ltd* represents a correct statement of the law. Direct solicitation of the former employer's clients by the departing or departed employee is not acceptable where the employee is a fiduciary of the employer. Having been vested with a high degree of trust and confidence, the indicia of a fiduciary relationship, a key employee is not then at liberty to betray the trust by soliciting the employer's client and employees for his own account or for someone else to his indirect benefit. To suggest otherwise would be to weaken the strong sense of duty and obligation which the term fiduciary connotes.

[217] *British Midland Tool Ltd v Midland International Tool Ltd & others* at para 91.

In *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd& others*[218] and *Sibex Construction (SA) (Pty) Ltd & another v Injectaseal CC*[219] our courts were confronted with the problem of departing entrepreneurial corporate fiduciaries capitalizing on business opportunities. In *Atlas Organic Fertilizers*, for instance, the departing managing director had, resigned his office while serving out his period of notice, taken steps to set up new a company under which he intended to do business. He also sabotaged Atlas Organic Fertilizers' chances of obtaining a long-term contract on raw materials and enticed certain employees of the plaintiff company to join his own company. The court held that the departing director had acted in violation of his fiduciary duties by diverting a contract belonging to the plaintiff company and inducing its employees to join his company.

Sibex Construction is also illustrative of the situation where a directors' departure is prompted by a decision to obtain for himself or his associate a business opportunity for which the company had been tendering. Like the corporate officers in *Canaero* and *Cooley*, in the instant case the offending officers were members of top management of the company, namely managing director and general manager. As senior officers of a working organisation they stood in fiduciary relationship with the company. While working for the company, the delinquents fiduciaries were heavily involved in tendering process as with the clients of the company. The directors later resigned and formed a company, Injectaseal, which submitted a lower tender to one of the clients of the plaintiff company.

The court considered the issue of fiduciary duty breach by the departing directors, and concluded that the courts should recognise and strictly enforce the 'strict ethic' in this area of the law to which Laskin J referred so that persons in positions of trust be less tempted to place themselves in a position where duty conflicts with interests'.[220]

[218] 1981 (2) SA 173 (T).
[219] 1988 (2) SA 54 (T).
[220] *Sibex Construction (SA) (Pty) Ltd & another v Injectaseal CC* 1988 (2) SA 54 (T).

The factual scenario in *Spieth & another v Nagel*[221] provides another variation of the theme. Here *Spieth* established a company (Lutro) the business of which was that of a supplier and installer of spray painting and plants for motor vehicles. The business acquired exclusive agency for the importation of certain products for distribution in Southern Africa. The business was run successfully as one-man concern by the applicant who was contemplating retirement in due course. Nagel was employed and became a director and shareholder. A series of incidents over a period of two years resulted in the respondent being suspended from his employment. The applicant contended that the respondent director had approached the distributor with the intention of having the distributorship awarded to him and that his solicitation of the distributorship amounted to breach of his fiduciary duty as a director. The applicants (Spieth and Lutro) sought an interdict to prevent the respondent director from usurping the business opportunity.

The court had no difficulty in concluding on the facts that the respondent had breached his fiduciary duties as a director and that the interdict sought by the applicant was appropriate in the circumstances. The significance of this decision is that it is the first South African case, which, in the context of a corporate opportunity, prevents a departing corporate officer from continuing to exploit such opportunity for himself after his resignation. In enunciating the principle that fiduciary duties survive any voluntary departure, Schwartzman J held:[222]

> ' … there is no reason in principle why in an appropriate case, a company should not while such duty survives, be protected by way of an interdict from an irreparable loss it may otherwise suffer if the director, following his resignation, is allowed to continue to exploit a commercial opportunity created in breach of his fiduciary duty.'

However, where a former director's resignation was not prompted by the need to exploit a commercial opportunity that the company has been actively pursuing, a breach of fiduciary duty will not arise. In one of the leading cases,[223] the court held that the former director's resignation was not part of any deliberate strategy or

[221] [1997] 3 All 316 (W). For commentary see Salant, J (1999) *De Rebus* 34.
[222] *Spieth & another v Nagel* [1997] 3 All 316 (W) at para 20.
[223] *Movie Camera Company (Pty) Ltd v Van Wyk* [2003] 2 All SA 291(C).

intention to set himself in competition with his former company. Thus on the facts the resignation was brought about by his unhappiness working for the plaintiff company and in particular their failure to deal with the period of his restraint and their refusal to hand him his shares.[224]

A similar line was taken in *Ont. Ltd v Tyrell*[225] wherein the former manager was allowed to compete for the plaintiff's customers. The court concluded that Tyrell was allowed to compete with plaintiff for customers as Tyrell's resignation was prompted by the plaintiff in circumstances amounting to constructive dismissal and Tyrell's resignation was not influenced by a desire to acquire for himself a business opportunity pursued by his employer.

The *Symington & others v Pretoria-Oos Privaat Hospital Bedryfs (Pty) Ltd*[226] case provides another example of a situation in which defaulting corporate fiduciary faced a claim for disgorgement of profits for receiving benefit from a sublease. Briefly stated, the relevant facts were that the respondent company was formed to operate a newly established private hospital. The appellant directors were shareholders in the company. The shareholders' agreement provided that Symington, the first appellant would utilise the premises for conducting a radiologist practice and a lease agreement was concluded to this effect. Another company (IA) was then nominated by Symington to be the lessee in his place and IA thereafter entered into a sublease with a partnership of radiologists. At the time the lease and sublease was concluded, the appellants were shareholders and directors of IA. Subsequently the shares in the respondent company were sold to Netcare. In terms of the sale agreement, all directors were obliged to resign. The appellants handed in their letter of resignation as directors of the respondent company to a representative of Netcare on the same day. The Registrar of Companies received notification of their resignation at a later date.

[224] *Movie Camera Company (Pty) Ltd v Van Wyk* footnote 64 *supra* at para 54.
[225] (1981) 127 DLR (3rd) 99 (Ont H.C.).
[226] [2005] 4 All SA 403 (SCA).

The respondent company's claim for damages was based on the proposition that the appellants, by permitting IA to enter into a sublease had deprived them of a corporate opportunity to let out the premises for a commercial rental. They also contended that by allowing IA to enter into the sublease, the appellants had breached their fiduciary duty as directors of the respondent. On appeal, the court held that since the respondent's claim for damages was pursuant to breach of fiduciary duty, it followed that the damages would only become due when the sublease constituting such breach was concluded, namely 8 November 1996. Since summons was only served in November 2000, then respondent's claim was incorrectly framed as one of disgorgement of profits as there was no evidence that the appellants had received any benefit from the sublease.

Senior Public Employees

The overarching fiduciary obligations apply with greater force even to senior public sector employees. The House of Lords accepted in *R v Secretary of State ex parte Council of Civil Service Unions*[227] that in the interests of national security an employee might be obliged to give up union membership or face dismissal. In the New Zealand case of *Deynzer v Campbell*[228] the position was explained as follows:

> A servant owes a duty of loyalty to his employer's interests and if he develops opinions or associations, whether political or otherwise, which do or might endanger the interests of his employer then he cannot complain if his employer take steps by way of dismissal or transfer to other work so as to abate the danger, [especially where] the department in which the plaintiff was employed is one in which the loyalty and discretion of its components cannot be in doubt.'

[227] [1885] AC 374
[228] (1950) N.Z.L.R. 790

The issue of irremediable breach of trust in the upper echelons of the public service came for consideration in *Masetlha v President of RSA & another*.[229] In the case at hand, President had first suspended and later terminated Masetlha's employment as head and Director-General of the National Intelligence Agency. The fallout between the appellant and the President and the Minister of Intelligence concerned the so-called the "Macozoma affair"[230] which broke into the public domain. In making the decision, the President asserted that the relationship of trust between him, as head of state and of the national executive, and the Head and D-G of the National Intelligence Agency, had disintegrated irreparably. The appellant spurned offer settlement to pay his full monthly salary, allowances and benefits for the unexpired period and other moneys that may be due at the expiry of a term of office. The appellant launched legal proceedings before the High Court and later the Constitutional Court seeking reinstatement to his previous position. The respondent opposed application.

While finding in favour of the appellant in so far as unlawful termination of his contract, Moseneke DCJ writing for the majority declined to re-instatement:[231]

> 'This is so because it would not be proper to foist upon the President a Director-General of an important intelligence agency he does not trust. Nor would the public interest be served by a head of an intelligence service who says that he has lost trust and respect for his principals, being President and the Minister.'

A complete trust between the President and the head of the NIA is essential. Otherwise, the security our country may be compromised. Trust is thereof fundamental to the relationship between the President and the head of NIA.

[229] 2008 (1) 566 (CC).
[230] *Masetlha v President of RSA & another* at paras 9-16.
[231] *Masetlha v President of RSA & another* at para 98.

Moseneke views were shared by Ngcobo J (as he then was) who commented thus:[232]

> 'Regrettably, on the record before us, the relationship between the President and the applicant has deteriorated at least since the "Macozoma affair" broke out. One need only have regard to the allegations and counter allegations made in the papers. The subjective views of the President on the state of the relationship between him and the applicant bear testimony to this. The applicant, while accepting that the relationship between him and the President has deteriorated nevertheless believes it may still be repaired. This implicit acknowledgement of the breakdown in the relationship by the applicant serves to confirm the state of the relationship. Viewed objectively therefore the relationship of trust between the applicant and the President, which is fundamental to the relationship between the head of the NIA and the President, has dropped to its lowest ebb. And in my view, it has broken irreparably. It is not necessary to consider who is responsible for this breakdown. It is sufficient to hold that, viewed objectively, the relationship has indeed broken down.'

Incompatibility

The most difficult category of substantive fairness to deal with is the category that involves managerial styles and clashes of personality. Occasionally a dismissal will be precipitated, or substantially contributed to, by a senior employee's incompatibility with other staff. Whilst the court has accepted incompatibility as ground for a fair dismissal[233] each case must be considered on its own merits.[234] It could be that an employee who behaves in a manner which is grossly insubordinate or insolent, giving rise to perceived incompatibility, may be justifiably charged with misconduct.

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[232] *Masetlha v President of RSA & another* at para 17.

[233] See generally Benjamin, P 'The Italian job: eccentric behaviour as grounds for dismissal' (1993) *EL* 105; Note 'Not on top, but outside: executive dismissals and the court' (1986) 2 *EL* 67;. Olivier, MP 'The dismissal of executive employees' (1988) 9 *ILJ* 519; Note 'Dismissal executive and managerial employees' (1988) 2 *Labour Law Briefs* 1.

[234] See generally, *Van Reenen v Rhodes University (*1989) 10 *ILJ* 926 IC); *Joslin v Olivetti Systems and Network Africa (Pty) Ltd* (1993) 27 (IC); *Visagie v Prestige Skoonmaakdienste (Edms) Bpk* (1995) 16 *ILJ* 421 (IC); *Hapwood v Spanjaard Ltd* [1996] 2 BLLR 187 (IC); *Davmark (Pty) Ltd and Dally* (1997) 1 CCMA 8.1.30; *Nathan and the Reclamation Group (Pty) Ltd* (2002) 23 *ILJ* 547 (CCMA); *Subrumuny and Amalgamated Beverages Ltd* (2000) 21 *ILJ* 2780 (ARB); *MWU Obo Calitz v Toyota SA* [2003] 3 BLLR 152 (CCMA).

Alternatively, in the manner of *Wright v St Mary's Hospital*,[235] the employee's incompatibility was regarded as a dismissal due to operational requirements. However, given narrow definition of dismissal due to operational requirements as contained in the Labour Relations Act it has become accepted that because of incompatibility, in the absence of elements of misconduct, arises out of the subjective relationship between the employee and others in the organization, it is best dealt with as form of incapacity.[236]

It will be recalled that *Council for Scientific & Industrial Research v Fijen*[237] the court remarked that the contract of employment contained an implied term that an employee shall not act in a manner as to cause disharmony and a breakdown in the employment relationship. Furthermore, at common law, it is accepted that an employee has a duty to act in good faith and to further the interest of the employer. A confrontational attitude on the part of employee as where, for instance, the employee is not interested in conciliation and where he perceives himself to have been wronged or slighted will be satisfied with nothing less than an unequivocal pronouncement by management that he, the employee, was right and the other party totally wrong, may well justify an employer's termination of the employee's on the grounds of incompatibility.[238]

[235](1992) 13 *ILJ* 987 (IC).

[236] See Le Roux, PAK & Van Niekerk, A *The South African Law of Unfair Dismissal,* (1994), 286-287. In Du Toit *et al Labour Relations Law: A Comprehensive Guide (*2000) at 376-377 the authors say 'While accepted as a valid ground for dismissal under the previous LRA in certain circumstances, it was not one of the three fundamental reasons for fair dismissal recognised by the ILO and opinions were divided on where it belonged. Rycroft and Jordaan treated incompatibility as a species of unsatisfactory work performance or incapacity whereas Le Roux and Van Niekerk, in the light of the decision in *Wright v St Mary's Hospital* classified it as a form of dismissal for operational purposes.

The new LRA made it vital to resolve the uncertainty. Unless incompatibility is brought under one of these two headings, it cannot be a valid ground for dismissal (s 188). But, since different rules apply to dismissal on the grounds of incapacity and dismissal for operational reasons, it is necessary to be clear under which heading it belongs. The LRA itself, unfortunately, is silent on the question.'

[237] (1996) 17 *ILJ* 18 (A).

[238] See *R Anderson v Toyota SA Motors (Pty) Ltd t/a Toyota SA Stamping Division* (1993) 4(4) *SALLR* 38 (IC).

When it is alleged that a manager does not "fit in" with the style of his new organization, or that his managerial style is not conducive to the well being of the company, the matter is more complex. Incompatibility often arises from the clash of personality differences. *Harvey on Industrial Relations & Employment Law*[239] cites the case of *Gorfin v Distressed*,[240] an example. The employee who described as a "determined and forceful lady", worked as a domestic servant a geriatric home and was dismissed after complaints had been received from other staff members, that she had dissension in the home. It was held by the Industrial Tribunal, as summarised by Harvey, that[241]

> "… before any dismissal arising from personality difference will be considered fair, the employer must show that not only is there a breakdown in the working relationship but it is irremediable. So every step short if dismissal should first be investigated in order to seek an improvement in the relationship: *Turner v Vestric Limited (*1981) IRLR."

In deciding whether a dismissal, arising from friction between employees, is fair or not, the potential injustice which the dismissed employee may suffer is an important. Harvey discusses this aspect as follows:[242]

> "… when seeking to determine whether or not the dismissal is fair in all circumstances, an industrial tribunal must consider whether the employer has taken into account the potential injustice suffered by the employee. This was the clear view of the Court of Appeal in the case of *Dobie v Burn International Security Services* (UK) Ltd (19984) ICR 812 CA, where a security officer at Liverpool Airport was dismissed at the behest of Merseyside County Council. The industrial tribunal in considering the fairness of the dismissal of the dismissal held that they had to consider solely the conduct of the employer and ignore the question of whether the employee had suffered any injustice. The EAT held that this was misdirection."

Olivier discusses some of the principles surrounding the incompatibility:[243]

[239] Vol I, Div II, Para 1046, Issue 102.
[240] (1973) IRLR 290.
[241] Cited in M.P Olivier 'The dismissal of executive employees' (1988) 9 *ILJ* 519; 522.
[242] Cited in M.P Olivier 'The dismissal of executive employees' (1988) 9 *ILJ* 519; 522.
[243] 'The dismissal of executive employees' (1988) 9 *ILJ* 519; 520.

'The reasons which are usually given for the dismissal of senior employees concern alleged incompatibility with the employer's business, alleged incompetence or alleged misconduct. On one occasion the Court found that the managing director's management style was incompatible with the employer's business and that the manager could not get along with a large section of staff. The incompetence of a senior employee to execute his assigned responsibility has also been raised before the court. Certain guidelines, however, have been laid down by the Court in cases of alleged incompatibility or incompetence. The employer should inform the employee with regard to the alleged deficiency and should help towards the remedying thereof. Furthermore, the employers should discuss the situation with the senior employee and endeavour, if possible, to find alternatives in order to avoid dismissal …"

De Kock SM explains the approach and the procedure which an employer should adopt as follows:[244]

"… What is required where there is incompatibility is that the employee must be advised what conduct allegedly causes the disharmony; who has been upset by the conduct; what remedial action is suggested to remove the incompatibility; that the employee be given a fair opportunity to consider the allegations and prepare his rely thereto, that he be given a proper opportunity of putting his version; and where it is found that he is responsible for the disharmony be must given a fair opportunity to remove the cause of disharmony."

The leading case is *Stevenson v Sterns Jewellers (Pty) Ltd*.[245] In this case the applicant was appointed as the managing director of the company. His managerial style was not acceptable to a broad front of employees, including the chairman of the company, a number of managers and the auditor.

As far as procedural fairness was concerned the applicant had had personal interviews with the chairman of the company. He had assumed duties on 1 September 1986, and on 13 September the chairman had confronted with complaints against his managerial style. Matters did not improve and on 23 September further complaints had been received from senior managers. Applicant's applied for reinstatement in terms of s 43 of the Labour Relations Act, 1956, inter

[244] *Wright v St Mary Hospital* at 1004H.
[245] (1986) 7 *ILJ* (IC).

alia, because he had not been given any warnings, and had not had the benefit of a hearing.

The court was of the opinion that:[246]

> "those employed in senior manager may be the nature of their job be fully aware of what is required of them and fully capable of judging for themselves whether they are achieving that requirement. In such circumstances, the need for warning and an opportunity for improvement is much less apparent".

This does not mean that the requirements of procedural fairness were not followed:

> "Applicant was confronted with allegations. He replied to them and gave his considered view. He replied to them and gave his considered view. Whether he was also warned or not, is in this case not decisive."

Again, it is clear that, although an opportunity must be given to a manager to explain his actions, formal enquiry in cases of clashes of style is not always necessary.

The case of *Larcombe v Natal Nylon Industries (Pty) Ltd*[247]was decided along similar lines, although in this case the employee was reinstated. Larcombe was accused of being incompatible with other members of the staff, although the managing director indicated that he was satisfied with Larcombe's work and that his positions was secure. The reinstatement order was granted primarily because the employee, who was a financial manager, was not given a proper hearing, coupled to the fact that he had been assured that his position was secure.

[246] *Stevenson v Sterns Jewellers (Pty) Ltd* at 324.
[247] (1986) 7 *ILJ* 326 (IC).

When considering the issue of compatibility within the employment relationship, it was held in *Erasmus v BB Bread Ltd*[248] that an employer may expect an employee to foster harmonious relationships within the workplace, and where disharmony is caused, the employer should address the matter, and if no improvement is shown, may dismiss the employee. In this case the managerial employee, who was a distribution manager told an employee that he should shower because he "stink", and that the black staff did not know how to use taps. These were but two in a number of incidents of a similar nature.

A new broom sweeps clean …

In *Lubke v Protective Packing (Pty) Ltd*[249] a new broom set about her task with so much diligence and gusto that it seemed to have caused annoyance to some subordinates. Her fault, it seemed lay, not in what she did, but rather in the manner in which she went about her work. The company's senior employees began to complain that she moved too quickly to change things and that she was bent on changing the "culture" of the company.

To recapitulate the facts surrounding the dismissal: Ms Lubke, a managing director of the respondent company for a relatively short period of 56 days was relieved of her position on grounds of incompatibility. Following her appointment, she set to work in nothing less than a vigorous manner, to redefine the internal functioning and operation of the company. Within a matter of days of her assuming her position, she had set to work in re-organising the factory as well as the administrative and sales staff. In this she succeeded because the financial reports of the company for June 1993 showed reasonable profit attributable to increased sales.

Although the company's management acknowledged that Ms Lubke possessed positive qualities that she had brought to bear on her position as managing director. The persons who were disgruntled with her style of work were certain senior

[248] (1987) 8 *ILJ* 537 (IC).
[249] (1994) 15 *ILJ* 422 (IC).

employees who complained that in introducing certain changes she had acted unilaterally and had not consulted with her personnel in the company's administrative and sales divisions. Bulbilia DP writing of the Industrial Court held that the senior personnel, who fall under the supervision of a new executive appointee, such as a new managing director, should learn to live with, and to adapt themselves to, changes and new work patterns, instead of crying foul-play simply because the bristles of the new broom happen to be hard and irksome. The court found that no fair or proper assessment can be made of a senior employee's alleged incompatibility until a sufficiently reasonable period of time had elapsed. In the present case, two months is far too short a period within which such incompatibility could be gauged. Consequently, the court ordered the applicant be reinstated.

In the matter of *Jardine v Tongaat Hulett Sugar Ltd*[250] the commissioner considered what an employer must do to establish that a dismissal was justified on the basis of incompatibility, and suggested a number of guidelines, based on decided cases and other authorities. These guidelines may be summarized as follows:

- whether the employee had caused disharmony in the workplace;
- whether the disharmony had an adverse or potentially adverse effect on the organization;[251]
- whether the employee was put on terms to correct the behaviour causing the disharmony and given a reasonable opportunity to make amends;[252]

[250] (2002) 23 *ILJ* 547 (CCMA).

[251] The applicant in Glass/Liberty Group Ltd *[2007] 12 BALR 1172 (CCMA), a senior manager was dismissed after she fell out* with colleagues in her department. Before the respondent had a chance to explore its proposal that the applicant had initially agreed, she filed a formal grievance against her superiors. The commissioner held that the applicant was the cause of the deterioration of interpersonal relations in the department, and that she had frustrated management's attempt to resolve the problem. Incompatibility must be dealt with under the guidelines for dismissal for incapacity – the employer must counsel the errant employee, who must be given a chance to meet the required standard of conduct. Failing that, the employee must be given the opportunity to state a case. The commissioner found that the respondent had complied with these guidelines, but that the employment relationship has been destroyed by the applicant's attitude and conduct. Her dismissal was accordingly procedurally and substantively unfair.

[252] In *McPherson/North West University – Mafikeng Campus* [2009] 9 BALR 920 (CCMA) the commissioner accepted that incompatibility is a valid ground for dismissal and that, procedurally, incompatibility should be handled as a case of incapacity. The applicant, then dean of faculty, was called to account at an "an incapacity/incompatibility inquiry" for running the faculty badly. He admitted that his management style was "inflexible". The commissioner found that the applicant had also spurned efforts to counsel and assist him. Given the seniority of his post, the applicant should have

- whether dismissal was the only reasonable way to deal with the matter.[253]

In *FOCSWU obo Ralawe/Anglican Church*[254] the applicant was dismissed after the relationship between herself and her superiors had deteriorated to the point where they could no longer work together. The commissioner found that, although an employee could be dismissed for incompatibility, she could not "fit in", and a reasonable opportunity to adapt. The employer had led no evidence to prove that the applicant had been guilty of dereliction of duty or other misconduct, or that she had been seriously and systematically counselled before her dismissal. That the applicant was on extend probation did not relieve the employer of its duty to comply with the requirements of natural justice. The employee was awarded compensation.

In *McDuling v MIF*[255] the commissioner upheld the dismissal of an employee who had impugned and defamed fellow employees and office bearers of the employer. Finding that the applicant was totally incompatible with his manager, the commissioner held that an employee could only be dismissed for this reason if it could be attributed to the employee. Since the applicant had been intent on sowing discord even though he had been placed on final warning for his conduct, his dismissal was justified.

A related aspect to incompatibility concerns a dismissal at the behest of third party.[256] The principles for determining the substantive fairness of a dismissal in

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made some effort to resolve difficulties with his colleagues and students. The dismissal was ruled both substantively and procedurally unfair.

[253] The applicant in *Wagenaar/Uniting Reformed Church in SA* [2005] 1 BALR 127 (CCMA) was relieved of his duties after the respondent church decided that the ties with his congregation should be "loosened". The commissioner held that the reason for the dismissal was essentially incompatibility between the minister and his congregants. The test for the fairness of such dismissal was whether the employer had attempted to resolve the differences and whether the disharmony created by the employee's presence can be cured only by terminating the employment relationship. The church had done everything that could reasonably be expected of it in the circumstances, and it was clear that the congregation would not be satisfied if the employee remained at his post. His dismissal was accordingly justified.

[254] [1999] 9 BALR 1022 (CCMA).

[255] [1998] 3 BALR 287 (CCMA).

[256] *Dismissal* (2002) 279-280, where Grogan neatly points out, that"...dismissals at the behest of third parties are more closely akin to classic dismissal for operational reasons than dismissal for incompatibility, because the tension arising from the employee's continued presence cannot be alleviated even if the employees concerned adapt their conduct. However, the two classes of dismissal may shade into each other because the employees' demand that offending employees be

response to a demand by a third party were expounded by Kroon JA in *Lebowa Platinum Mines Ltd v Hill*[257] as follows:

- the mere fact that a third party demands the dismissal of an employee does not render such dismissal fair;
- the demand for the employee's dismissal must have good and sufficient foundation;
- the threat of action by the third party if its demand was not met had to be real or serious;
- the harm that would be caused if the third party were to carry out its threat must be substantial; mere inconvenience is not enough to justify dismissal;
- the employer must make reasonable efforts to dissuade the party making the demand to abandon the demand;
- if the third party cannot be persuaded to drop the demand, the employer must investigate and consider the alternatives to dismissal; and
- in the process of considering alternatives, the employee must be consult the employee and make it clear to him or her that the rejection of the any possible will result in dismissal.[258]

The case of *Lebowa Platinum Mines* dealt with a situation in which a supervisor had called a black subordinate a "bobbejaan".[259] The supervisor received a final warning for this offence and was told not to do it again. The employees and their union were dissatisfied with the leniency of that sanction and demanded that the supervisor be fired. The employees threatened to embark upon industrial action if the offending employee was not dismissed. After exhaustive negotiations, the company decided to

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dismissed may be caused by the latter's unacceptable conduct. However, the distinguishing aspect of dismissal at the instance of third parties is that, had it not been for the pressure exerted by the third party, the employer would not have dismissed the employee. Such dismissals are effected because employers regard the cost of keeping offending employees on their payroll as outweighed by the actual or potential costs of the third parties' reaction if the employees are not dismissed.' See also Maloka, TC

[257] *Lebowa Platinum Mines Ltd (*1998) 19 *ILJ* 112 (LAC); [1998] 7 BLLR 666 (LAC). See also *Govender v Mondi Kraft-Richards Bay* (1999) 20 *ILJ* 2881 (LC) at 2887C-H; *Mnguni v Imperial Truck Systems (Pty) Ltd t/a Imperial Distributors (*2002) 23 *ILJ* 492 (LC) at para [19].

[258] *Lebowa Platinum Mines* at 671-3.

[259] Which means a 'baboon'.

terminate the services of Mr Hill for operational reasons. In light of uncompromising stance adopted by the workers, the union's unshakeable intention to implement the threat of industrial action in the form of a strike, the fact that the employee' safety could not be guaranteed, the court held that the employee, in unreasonably refusing the transfer, left the door open for his discharge.

The regional manager in *Lotter and SA Red Cross Society*[260] challenged the fairness of his dismissal for alleged incompatibility. After tracing the development of that legal concept as a ground for dismissal the commissioner summarized and applied a number of established guidelines for determining in what circumstances a dismissal for incompatibility would be justified. The commissioner also considered when dismissal at the behest of a third party would be justified, and found that in the circumstances before him the dismissal was substantively unfair.

In *Cronje v Toyota Manufacturing*[261] a managerial employee of the company was dismissed, inter alia, for distributing racist or inflammatory material (via e-mail and in hard copy), and for violating the company's internal Internet and e-mail use code. The commissioner very carefully considered the nature of the material at issue (a picture of a gorilla, with the president of Zimbabwe's head on it). It found the material to be crude, offensive, and racially stereotyping.[262] The context in which the material was distributed – in emerging democracy is South Africa, and in a factory with 3 500 black employees where a lot of crime and energy were spent on building good relationship between labour and management – was important.[263]

In another case,[264] a managerial employee was dismissed, *inter alia*, on the grounds of the use of company time and resources to view pornographic material and excessive use of internet (in the broader context of a complaint of sexual harassment). It found that the employee was guilty of viewing pornography during working hours, and, generally, of using the Internet for purposes other than company

[260] (2006) 27 *ILJ* 2486 (CCMA).
[261] (2001) 22 *ILJ* 735 (CCMA).
[262] *Cronje v Toyota manufacturing* (2001) 22 *ILJ* 735 (CCMA) at 745H-I.
[263] *Cronje v Toyota manufacturing* (2001) 22 *ILJ* 735 (CCMA) at 739-740 and 745-749
[264] *Smuts/Backup Storage Facilities & others* [2003] 2 BALR 219(CCMA).

business. Whilst there was no rule in place to prohibit this, the commissioner found that the employee (at senior level) should have known better and should not have engaged in this type of activity at the workplace. The absence of an explicit rule did not favour the employee.

After a drunken meeting of branch managers at a country resort, the applicant in *Rautenbach/Reylant Retail (Pty) Ltd*,[265] a regional manager, intimated to male colleagues in the bar that he had had sexual intercourse with one of the female branch managers, who at the time was recovering in one of the hotel rooms from a drinking bout. Rumours spread. The applicant could not recall the events in the room. The applicant was charged with sexually harassing the complainant, and dismissed. The complainant could not recall the events in the room. The applicant denied that he had molested the complainant, or that he had made remarks suggesting that he had had sexual intercourse with her. The commissioner found that, although the evidence did not prove that anything untoward had occurred in the room, the applicant had uttered inappropriate remarks at the bar. As the comments were not made in the presence of the complainant, the applicant's words did constitute sexual harassment. However, his words still constituted serious misconduct. While the applicant may have been under the influence of liquor at the time, and may also have subsequently apologised to the complainant, his conduct was sufficiently serious to warrant dismissal.

To sum the senior managerial employees have greater obligation to refrain from engaging conduct that is incompatible with implied term of trust and confidence. An employee also risks dismissal if he does not pass on to management any information he may have of material dishonesty among fellow employees, more particularly if he himself is in a responsible position. But does good faith require an employee to report his own shortcomings? The usual and more realistic is 'no', but there are exceptions because he did not tell his company of a conspiracy among fellow employees to set themselves up in competition – albeit he only knew of the conspiracy because he was a party to it, and was thus bound to incriminate himself.

[265] [2005] 8 BALR 890 (CCMA).

CHAPTER FIVE

THE EMPLOYER'S DUTY OF MUTUAL TRUST AND CONFIDENCE

INTRODUCTION

It is unarguable that dismissal, whether fair or not is usually a devastating blow for an employee.[266] Hurt to pride, dignity and self-esteem and economic dislocation are all readily foreseeable.[267] Alternative employment may not be easy to find, and a damaged reputation may be a grave or even fatal hindrance.[268] Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her identity, self-worth, and emotional well-being.[269]

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[266] In *Netherburn Engineering Ceramic v Mudau & others* (2003) 24 *ILJ* 1712 (LC) at 1725E Landman J stated: 'Dismissal relating to conduct hold serious social, financial and personal implications for employees and for employers. The concept of preserving job security is one of the paramount aims of the LRA. So protection against the invalid and unfair termination of an employment relationship has a special significance. Employers too have a real and legitimate interest in maintaining a workforce that is not prone to misconduct (eg theft of good and insubordination, inability to do the job, poor work performance).'

[267] Brodie, D 'A fair deal at work' (1999) 19 *Oxford Journal of Legal Studies* 83 at 85. *Wallace v United Grain Growers* 152 DLR (4th ed) 1 at 33 where Iacobucci J observed 'The point at which the employment relationship ruptures is the time when the employee is most vulnerable and hence, most in need of protection. In recognition of this need, the law ought to encourage conduct that minimizes the damage and dislocation (both economic and personal) that result from dismissal'. Lord Hoffman in *Johnson (AP) v Unisys Ltd* [2001] 2 WLR 1076 at par 35 made following observations '… a person's employment is usually one of the most important things in his or her life. It gives a livelihood but an occupation, an identity and a sense of self-esteem. The law has changed to recognize this social reality.' It is essential to remind ourselves just how central and significant the workplace is to the lives of employees. E.H Phelps Brown, *The Economics of Labour* 9 (1962) states 'Labour is the means by which we define ourselves, our ethics, morals, success, and failures. An individual labour provides the means to live in the society as productive participant.'' Rosabeth Moss Kanter, *Men and Women of the Corporation* (1993) at 3 says 'The most distinguished advocate and the most distinguished critic of modern capitalism were in agreement on one essential point: the job makes the person. Adam Smith and Karl Marx both recognized the extent to which people's attitudes and behaviour take shape out of their experience they have in their work'.

[268] *Stuart v Armour Guard Services* [1996] 1 NZLR 484 at 498.

[269] *Reference Re Public Service Employee Relations Act* [1987] 1 SCR 313 at 368, quoted with approval by the majority in *Wallace v United Growers supra* at 32-33.

The vulnerability of employees is underscored by the fact that dismissal has been aptly if colourfully called 'the labour relations equivalent of capital punishment'.[270] The foregoing considerations may well be most amplified at the point of termination induced by reprehensible conduct on the part of the employer.

The obligation of mutual trust and confidence cut both ways. Employer must not behave arbitrarily or unreasonably, or so as to destroy the necessary basis of mutual confidence.[271] The effect of the obligation requires a balance be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited.

The principal question which will be dealt in the course of this chapter is the extent of the obligation upon the employer not without reasonable and proper cause, to act in

[270] *BAWU v Edward Hotel* (1989) 10 *ILJ* 357 (IC) at 373G-H; *SA Polymer Holdings (Pty) Ltd t/a Mega-Pipe & Others* (1994) 15 *ILJ* 277 (LAC) at 281I; *Chemical Workers Industrial Union & Others v Algorax (Pty) Ltd* (2003) 24 *ILJ* 1917 (LAC) at 1940A para. 70. See generally Landman, AA 'Unfair dismissal: The new rules for capital punishment in the workplace (part one)' (1995) 5(5) *CLL* 41, 'Unfair dismissal: The new rules for capital punishment in the workplace (part two)' (1996) 5(6) *CLL 51*. Hugh Collins *Justice in Dismissal: The law on termination of employment* (1992) at 15 writes that dismissal means that '… the worker is excluded from the workplace which is likely to constitute a significant community in his or her life. It may be through this community, for instance, that the worker derives his or her social status and self-esteem. The workplace community may also provide the principal source of friendships and social engagements.' In their work A *Guide to South African Labour Law* (1992) at 230 Rycroft & Jordaan state that for the retrenched worker 'at a time of rising unemployment, the loss of a job frequently means "disappearance into the large mass of the unemployed"'. For example it has been pointed out in "Termination of employment by the employer: the debate on dismissal", *Termination of Employment Digest* (Geneva, ILO) 2000, 8:'that because of its economic and social implications, and in spite of regulation at the highest level, the termination of employment by the employer is one of the most sensitive issues in labour law today. Protection against dismissal is seen by most workers as crucial, since its absence can lead to dire economic consequences in most countries. See further, Mirko Bogaric 'New criminal sanctions – inflicting pain through the denial of employment and education' (2001) *Criminal Law Review* 184 at 193 'The "employment sanction" would consists of an order prohibiting the offender from engaging in employment (paid or unpaid) for a defined period. This punishment is likely to inflict more pain than a fine, since for most people the pain of this sanction would go beyond the consequential loss of income. Many people view their job as a defining aspect of their personhood. The employment sanction will block participation in one of the endeavours and projects, and this is likely to produce a significant level of unhappiness for the offenders.'

[271]See generally *Malik v BCCI* [1998] AC 20, 35; *Woods v WM Car Services (Peterborough) Ltd* 1981 IRLR 347at 350; *Lewis v Motorworld Garages Ltd* [1985] IRLR 465; *Loubser and PM Freight Forwarding* (1998) 7 CCMA 6.13.13; *Murray v Minister of Defence* [2008] 6 BLLR 513 (SCA).

such a way as would be calculated or likely to destroy or severely damage the relationship of trust and confidence existing between the employer and its employees. The objective of the chapter is to examine the role that mutual trust and confidence plays in protecting the legitimate expectations of employees by serving as a bulwark against illegitimate conduct on the part of the employer designed or likely calculated to destroy employment relationship. This will involve, *en passant*, an exposition of the content of the employer's duty to act in a manner consonant with mutual trust and confidence in exercising its prerogative during the subsistence of as well as the termination of the employer-employee relationship. The question is not whether an contractual duty not to destroy the mutual trust and confidence inherent in the employment relationship, but what kind of conduct will constitute breach of that obligation and what remedial consequences might be.

Good faith and Fair Dealings

The emerging obligation of 'mutual trust and confidence' plays a similar role in employment contract law to that played by the concept of good faith in performance in commercial contract law. Development of the employment law concept is well advanced in the United Kingdom, where it is possible to say that an employer's duty not to destroy mutual trust and confidence in the employment relationship can give rise to an obligation to treat employees even-handedly and fairly. The *Malik* duty of mutual trust and confidence has been inferentially adopted in South African jurisprudence.[272] An implied obligation of good faith and fair dealing in the context of dismissal has been described by Iacobucci J. as follows:[273]

> 'The obligation of good faith and fair dealing is incapable of precise definition. However, at minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest, and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.'

[272] Bosch, C 'The implied term of trust and confidence in South African labour law/ (2006) 27 *ILJ* 28.
[273] *Wallace supra* at para 98.

It is respectfully submitted that the better interpretation of the Wallace *dicta* is that it refers to the applicability of the duty of good faith and fair dealing in the manner of dismissal, not only at the instant of dismissal, but extending back into the employment relationship so that various events during the employment relationship can be considered in order to provide context for assessing the manner of dismissal.

Control on Discretion?

One the questions which remains to be answered in South African labour law is whether the mutual trust and confidence term can be called in aid of an employee who been the victim of an arbitrary or capricious exercise of an employer's discretion to award performance based remuneration According to Australian commentator:[274]

> 'It is typical for performance based remuneration schemes to reserve considerable discretion to the employer to determine bonuses and rewards. This is consistent with the open-textured, relational nature of many employment contracts. Unknown factors like future firm profitability discourage employers from making iron-clad commitments to certain levels of remuneration; however the desire to attract ambitious and talented staff encourages the employer to offer incentives for high performance. Hence, the terms of the contract reserve discretion for the employer to award performance bonuses. Mutual trust has been used as a tool to control such discretions ...'

Early intimations of this approach can be found in the English cases of *Clark v BET*[275] and *Clark v Nomura International plc*.[276] There an employer dismissed a senior manager on a fixed term contract some years early. The contract had provided for salary increment each year at the absolute discretion of the employer. When paying out the manager to end the contract term, the employer refused to make any allowance for pay increases over the term of the contract, claiming that awarding pay increases was entirely discretionary. The court decided, in favour of

[274] Riley, J (2006) 29(1) *University of South Wales LJ* 166, 181.
[275] [1997] IRLR 348
[276] [2000] IRLR 766

the employee's claim, that the employer was required to exercise its discretion to provide salary increases over the term of a fixed term contract in good faith. Consequently, the employee's payout was increased by the court's assessment of what a reasonable employer would have awarded by way of increases, if it were exercising its discretion in good faith. Likewise, in *Clark v Nomura International plc*, an employer who paid performance bonuses to its staff refused to pay a bonus to a particular high-flyer who was dismissed (for reasons unrelated to his performance) nine months into a financial year. The court held that a proper exercise of the employer's discretion to award bonuses would have seen the employee receive a pro-rata payment.

If South African labour law were to follow these English examples, the mutual trust and confidence obligation may perform a useful role as a restraint on the arbitrary exercise of contractual discretions in employment contracts. Employers who reserved to themselves discretions to determine important aspects of the relationship – such as a situation where an employee reasonably expected an employer to renew a fixed-term contract on the same terms but the employer renews it on different terms or refuses to renew it could be restrained from exercising those discretions in a capricious way for some ulterior motive. The cases of *Wood v Nestle (SA) (Pty) Ltd*,[277] *Mediterranean Woolen Mills (Pty) Ltd v SACTWU*,[278] *McInnes v Technikon Natal*,[279] *Yebe v University of KZN*,[280] *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood*,[281] *Fedlife Assurance Ltd v Wolfgaardt*,[282] *Buthelezi v Municipal Demarcation Board*[283] and *Joseph v University of Limpopo & others*[284] illustrate this point.

[277] (1996) 17 *ILJ* 184 (IC).
[278] (1998) 19 *ILJ* 366 (LAC).
[279] (2000) 21 *ILJ* 1138 (LC).
[280] (2007) 28 *ILJ* 490 (CCMA).
[281] (2009) 30 *ILJ* 407 (LC)
[282] (2001) 12 BLLR 1301 (SCA).
[283] (2005) 2 BLLR 115 (LAC).
[284] (JA14/09) [2011] ZALC 8 (13 May 2011).

Wood v Nestle (SA) (Pty) Ltd

The employee's reason for entering into a fixed-term contract was based on a special project, the employee assistance programme. The employer's personnel policy specified any continued extension of temporary contracts as an unfair labour practice, depriving temporary personnel of benefits allocated exclusively to permanent staff. Contrary to this policy, the employer had renewed Wood's fixed-term contract several times over a continued period of three years. The Industrial Court held that Wood had legitimate expectation that her status would change because she was indeed led to believe that she would be considered for indefinite employment. The court held that the employer's refusal to engage in an indefinite contract of employment constituted an unfair labour practice (in terms of the previous position under the LRA of 1956) and awarded her compensation as if she had been in indefinite employment.[285]

Mediterranean Woolen Mills (Pty) Ltd v SACTWU

The importance of this decision lies in the court's judgment on the effect of a clause which expressly stipulates that the employee fully understands that no reasonable expectation for the renewal of the fixed-term contract could arise from the nature of the contract. The cur held that despite wording to the contrary, a reasonable expectation could arise during employment if assurances, existing practices and the conduct of an employer led an employee to believe that there was hope for a renewal, whether on a temporary or an indefinite basis.

[285] "T]he weight to be attached to the practice probably increases in proportion to the number of successive contracts concluded by the parties". See Grogan, J *Workplace Law* 10th ed (2009)150.

McInnes v Technikon Natal

The applicant has been employed in terms of two successive fixed-term contracts until the renewal of a temporary post to one of indefinite duration. The applicant reasonably believed (had an expectation) that she would be appointed into the new position as she was the selection committee's preferred choice. However, the decision to appoint the applicant was overturned due the respondent's affirmative action policy. The court adopted a two-stage approach to establish whether the applicant's subjective expectation was reasonable, and establish that the applicant had a reasonable expectation of an indefinite appointment and that she was unfairly dismissed based on the employer's affirmative action policy.

Yebe v University of KZN

Yebe's fixed term contract was renewed 20 times over a period of approximately for and half years using 28 fixed-term employment contract, whilst the permanent post which could have filled remained vacant for five years.[286] The employee rendered the same service as two permanent employees on the same campus would have done during the extended period of time. During this period the employee successfully upgraded his skills though various courses at the University. The court held that this is clear example where the series of renewals created a reasonable expectation that the employment relationship would be renewed. Consequently the court found that the employer's failure to renew the employment relationship was an unfair dismissal.

[286] *Yebe v University of KZN* (2007) 28 *ILJ* 490 (CCMA) at 505.

Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood

The applicant in the Vorster case has been employed by the respondent in terms three two successive contracts, each of one month's duration. Her employment was extended for a further month. Ms Vorster claimed an unfair dismissal after having served "a three-month probation period". The respondent company denied the dismissal.

The court accepted that an expectation to renew the fixed term contract may exist, even if the contract expressly stipulated that the employee should not expected any renewals(s). While the thorny question whether an employee on a fixed term contract can rely on section 186(1)(b) when claiming dismissal based on the reasonable expectation of renewal, based on the promise that she would be considered for permanent employment after the three-month probation period. She therefore had been dismissed.

Fedlife Assurance Ltd v Wolfgaardt

This matter concerned the respondent employee (Wolfaardt) who was appointed on a fixed term contract for five years. After only two years, the appellant employer terminated the contract on the grounds that the respondent's position had become redundant.

The respondent elected to accept the appellant's repudiation and claimed damages in the High Court. The appellant filed a special plea claiming that the matter should have been referred to the Labour Court under the LRA, the High Court lacked jurisdiction. The respondent accepted to the special plea. In the majority judgement of the court; Nugent AJA held that the LRA created an elaborate and innovated legal framework for the regulation of the relationship between employers and employees.

In referring to the unfair labour practice created by the 1956 Labour Relations Act[287] (hereinafter referred to as the "the 1956 LRA") for which a statutory remedy for the commission of such an unfair labour practice was interpreted by the courts to include the unfair dismissal of an employee. The effect of that interpretation was to recognise the right not to be unfairly dismissed and such right is now expressly provided for in section 185 of the LRA.

In this matter the court confirmed that they were only concerned with the Labour Court's exclusive jurisdiction as reflected in section 157(1).

The court furthermore referred to the issues in this matter as being whether the respondent's action against the appellant is a matter that falls within the exclusive jurisdiction of the Labour Court and is thus excluded from the jurisdiction of the High Court and whether the respondent's claim is legally cognizable at all.

The appellant employer in the matter contended that Chapter VIII of the LRA codifies the rights and remedies that are available to all employees in our law arising from the termination of their employment. The Chapter is alleged to be comprehensive and exhaustive in so far as it provides for remedies upon dismissal. Accordingly, it was contended that the common law right to enforce a fixed term contract has been abolished by the LRA.

The clear purpose of the legislature when it introduced a remedy against unfair dismissal was to supplement the common law rights of an employee whose employment might lawfully be terminated at the will of the employer. It was furthermore to provide an additional right to an employee whose employment might be terminated lawfully but in circumstances that were nevertheless unfair.

[287] 28 of 1956.

An implied right not to be unfairly dismissed was imported into the common law employment relationship by section 27(1) of the Interim Constitution[288] even before the LRA was enacted by guaranteeing every person the right to fair labour practices.

Therefore the constitutional dispensation never deprived employees of their common law rights to enforce the terms of a fixed term contract of employment. However, the question whether the LRA simultaneously deprived employees of their pre-existing common law right to enforce such contracts, thus confining them to the remedies for "unlawful dismissal" provided by the LRA.

In considering whether the LRA did so, the court held that it must be borne in mind that it is presumed that the legislature did not intend to interfere with existing law, not to deprive parties of existing remedies for the wrong done to them.

The continued existence of the common law right of employees to be fully compensated for damages they can prove they suffered by reason of an unlawful premature termination by the employers of their fixed term contracts of employment is not in conflict with the spirit, purport and object of the Bill of Rights and it is appropriate to involve the presumption in the present case.

In addition the court held that there is a clear indication in the LRA that the legislature had no such intention. In support of this the court referred to section 186(b) which extends the meaning of dismissal. It was significant that the legislature did not include in this extended definition the premature termination of a fixed term contract not withstanding that such termination would be manifestly unfair. The court held that the reason for this is plainly that the common law right to enforce such term remained intact. The Legislature's intention behind section 186(b) was to bestow on

[288] Act 200 of 1993; see s 23(1) of Act 108 of 1995.

the employee a new remedy where there was a reasonable expectation on the part of the employee that such contract would be renewed.

The court considered that it would be “bereft of any rationality” for the legislature to deny an employee whose fixed term contract has been prematurely and unlawfully terminated for the benefit of either specific performance or damages and to confine that employee to the limited and arbitrary compensation yielded by the application of the formula in section 194 of the LRA. The court held that the absurdity extended if one considers that the employer can show a fair reason for the dismissal and that such dismissal was in accordance with a fair procedure; the employee would not receive any compensation.

In addition, the court referred to section 195 of the LRA which makes it clear that an order or award of compensation in consequence of an unfair dismissal is “in addition not a substitute for any other amount to which an employee is entitled in terms of any law, collective agreement or contract of employment”.

The question further is whether this falls within the exclusive jurisdiction of the Labour Court in terms of section 157(1), the court indicated that in the light of the restrictions pertaining to the relief afforded by the LRA it is impossible to infer that the legislature intended that the LRA should provide the employee with the full balance of the common law damages as well. Absent such an intention, section 195 contemplates that for such a balance an employee is free to proceed in civil courts. Section 77(3) of the Basic Conditions of Employment Act[289] conferred concurrent jurisdiction on the Labour Court. Section 157(1), accordingly, does not purport, to confer exclusive jurisdiction on the Labour Court generally in regard to matters concerning the relationship between employer and employee. Whether a particular dispute falls within the provisions of section 191 of the LRA depends on what is in dispute, and the fact that an unlawful dismissal may also be unfair is irrelevant to the

[289] 75 of 1997.

enquiry. A dispute falls within the terms of the section only if the “fairness” of the dismissal is the subject of the employee’s complaint. Where it is not, and the subject of the dispute is the lawfulness of the dismissal, then the fact that it might also be, probably is, unfair is quite coincidental for that is not what the employee’s complaint is all about.

Apart from the majority opinion, Froneman AJA (as he then was) also delivered a minority judgment. It is submitted that with reference to the cases discussed hereunder, such minority judgment will prove to be materially significant. Judge Froneman held that the issue in this case was narrow and particular and concerned the question whether the dispute resulting in the dismissal of an employee, following upon an unlawful repudiation of the employment contract by his employer, is a “dispute about the fairness of a dismissal” under section 191 of the LRA.

Judge Froneman expressed the opinion that this matter does seem to be a dispute about unfair dismissal as it seems unfair that one party to a bargain should be allowed to go back on his word by dismissing someone before the promised time for the termination of his contract employment arrives.

Judge Froneman held further that the right not to be unfairly dismissed is a particular concretised form of the constitutional right to fair labour practice which the LRA gives expression to. In dealing with the question to what extend the common law has been altered; the LRA does not purport to change the pre-constitutional common law by expressly mentioning each and every aspect of it that it wishes to change. It deals with specific issues and states expressly what the law now is in regard to these issues.

Accordingly, Judge Froneman held that the common law contract of employment must give some form of expression to the fundamental right not to be unfairly dismissed, once the common law contract of employment does give this expression,

the difficulty is namely; to conceive how an unlawful dismissal would not also be an unfair dismissal.[290] If such a dismissal is unfair any dispute about it falls square within section 191 of the LRA.

Once it is accepted that the dispute is about fairness of a dismissal, it follows the procedure in section 191 must be followed, which in one way or another ends up with the Labour Court or the Labour Appeal Court having the final say. Section 158(1)(a)(vi) provides for the Labour Court having competence to award damages and thus the present case is a matter to be determined by the Labour Court by virtue of the provisions of section 157(1); exclusively.

In addition, in dealing with the concurrent jurisdiction provided in section 77(3) of the BCEA, Judge Froneman held that the High Court does not need the BCEA to give it jurisdiction in a matter concerning a contract of employment. It has residual competence in any event although it may be attenuated by statutory provisions such as section 157(1) of the LRA. Thus, what section 77(3) does is to give the same residual concurrent competence to the Labour Court, something that court does not enjoy without specific authority.

Without stating the obvious, it is submitted that the difficulty seems to lie in the interpretation of the relevant provisions above.

Buthelezi v Municipal Demarcation Board

The applicant employee in *Buthelezi* was appointed on a fixed term contract for five years; however within the first year of his appointment, Buthelezi received a notice of retrenchment, which involved an instructional restructuring process. The consultation

[290] *NUMSA v Vetsak Co-operative Ltd* 1996 (4) SA 577(AD) at 592F-H.

process took place and the appellant was invited to apply for a different vacant post within the respondent's structure. The appellant was unsuccessful and was served with a notice of dismissal and he was required to vacate his office with immediate effect. A dispute arose about the fairness of the dismissal, the matter was referred to CCMA for conciliation and the Labour Court for adjudication, and the appellant sought reinstatement and compensation.

The Labour Court held that the dismissal was substantively unfair as a result of the appellant's dismissal during the currency of the fixed term contract; however, the dismissal in other respects was substantively fair with regard to reasons pertaining to the respondent's operational requirements.

The matter then proceeded to the Labour Appeal Court. The issue before the LAC was premature termination of the appellant's fixed term contract. Regarding the issue of substantive fairness the LAC held that the starting point would have to be to determine whether a valid fixed term contract had been concluded, which was confirmed. The question was whether the respondent was entitled to terminate the fixed term contract of employment prematurely?

From a common law perspective, a party to a fixed term contract has no right to terminate such a contract in absence of repudiation or a material breach of contract by the other party. There is no right to terminate such a contract, even on notice, unless the terms provide for such notice.

The court held that the rationale for this is clear:[291]

> "When parties agree that their contract will endure for a certain period as opposed to a contract for an indefinite period¸ they bind themselves to honour and perform their respective obligations in terms of that contract for the duration of the contract and

[291] *Buthelezi v Municipal Demarcation Board* at para 9.

> they plan, as they are entitled to in light of their agreement, their lives on the basis that the obligations of the contract will be performed for the duration of that contract in the absence of a material breach of the contract. Each party is entitled to expect that the other has carefully look into the future and has satisfied itself that it can meet its obligations for the entire term in the absence of any material breach. Accordingly, no party is entitled to later seek to escape its obligations in terms of the contract on the basis that its assessment of the future has been erroneously or had over looked certain things. Under the common law there is no right to terminate a fixed term contract of employment prematurely in the absence of material breach of such a contract by the other party.

Accordingly, the LAC concluded that the respondent *in casu* had no right to terminate the contract of employment for a fixed term. The LAC held that the premature termination of the fixed contract *in casu* was unfair and thus constituted an unfair dismissal.

The most important point to draw from *Buthelez*i is that parties to a fixed term contract should be held liable to such a contract for the duration of the term of the contract in the absence of any material breach of the terms of such contract could be unfair to an employer who wants to restructure his business before the expiry of the term of such contract. However, any unfairness is tempered by the fact that the employer is free not to enter into a fixed term contract but to conclude a contract for an indefinite period if such an employer thinks that there is a risk that he might have to dispense with the employee's services before the expiry of the term. If he chooses to enter into a fixed term contract, he takes the risk that he might have need to dismiss the employee mid-term but is prepared to take that risk. If he has elected to take such a risk, he cannot be heard to complain when the risk materialises. Conversely, the employee also takes a risk that during the term of the contract he could be offered a more lucrative job while he has an obligation to complete the contract term. Both parties make a choice and there is no unfairness in the exercise of that choice.

The above therefore confirms that the premature termination of a fixed term contract is unfair, as well as unlawful. It is also worthwhile to note that, although Buthelezi could have approached either the High Court or the Labour Court, on approaching the Labour and launching his claim under the LRA, he was awarded precisely the same amount he would have been awarded in a civil court namely; lost salary before acquiring another job.

Importantly the LAC never considered the employers claim that there were compelling operational requirements for dismissing Buthelezi, as a court is required to do under the LRA. The LAC merely decided the matter on principle; the dismissal was unfair because the employer prematurely terminated Buthelezi's fixed term contract. However the following questions remains unanswered as to how an employer who concludes a lengthy fixed term contract with an employee is suppose to predict that its operational requirements may alter during the course of the contract? In addition, even if there is a risk involved in concluding a fixed term contract, does it follow that an employer acts unfairly if its operational requirements happen to change due unforeseeable circumstances beyond its control? Apart from the right to dismiss for operational requirements when circumstances so require if an employer follows the procedural requirements of the LRA, how can an employer fulfil its obligations to select employees fairly if those on fixed contracts are absolutely secure? In the *Buthelezi* case, the matter was decided on principle, in some circumstances the premature retrenchment of an employee on a fixed term contract is unfair for that reason alone, but, it is submitted that it may be equally said that in appropriate circumstances an employer cannot to be said to have acted unfairly by terminating the services on an employee on a fixed term contract for compelling operational requirements, in accordance with a fair procedure.

Joseph v University of Limpopo & Others

The proceedings in the Labour Appeal Court arose out of appeal against the judgement of Labour Court in which the court a quo reviewed and set aside

arbitration award ordering the University of Limpopo to reinstate, the appellant to his position as a senior lecturer in the School of Languages and Communication. Prior to joining the respondent university in 1997 on a three year fixed term contract, Dr Joseph an expatriate from India had given professorship at University of KwaZulu-Natal just to pursue his passion at a "non-elitist" rural institution that catered for disadvantaged students. In order to comply with legislative requirement pertaining employment of non-South African citizen, upon the expiry of his three year term contract in 2000, the university advertised. The appellant applied for and was appointed to his position for a further fixed term period of three years.

During his tenure at the respondent institution, Dr Joseph developed two niche programmes, which used students' home language as a medium of instruction in the teaching of English, namely, Contemporary English Language Studies (CELS) and Multilingual Studies (MULST) These were unique programmes in the country and were to be offered in Applied English Studies. Despite these laudatory initiatives and approval having been obtained from the Quality Authority and the Council for Higher Education, bolstered by donor funding arranged by the appellant, there was resistance within certain quarters at the institution. For instance, the Head of Department blocked the implementation of the programmes. It was only after an appeal to the executive dean of the faculty that an internal memorandum prepared by the dean confirmed firstly; that the programme would be offered from the year 2003 and secondly that Dr Joseph would be the intellectual anchor in offering CELS and MUSLT modules. There was also another senior colleague in Theology Department who was opposed to the introduction of the relevant modules. In short, the antipathy towards the appellant from senior staff was to play crucial when the issue of his suitability for appointment to another fixed contract came for consideration by the interview.[292]

Towards end of his fixed term contract in 2003, the appellant became concerned at the delay in the advertising of the position and the impact it would have on the

[292] *Joseph* at para 40.

renewal of his contract. To this he addressed a memorandum to the Vice Chancellor requiring written clarification about his position. In response the university indicated that the position would later be advertised and it was required of him to apply of the position if he required to have contract extended. Further the Vice Chancellor addressed a letter to Department of Home Affairs motivating for the extension of the appellant work permit, stating that the latter's services were indispensable to the university.[293] Subsequently the respondent institution advertised the position that was occupied by the appellant and specifically called for someone involved in academic development. In other words, whoever filled the post had to have the necessary qualifications to deal with specialised programmes which the incumbent candidate, Dr Joseph had introduced. This was precisely was what Dr Joseph was doing.

During the ensuing period the appellant had applied to and was offered an appointment at the University of Witwatersrand. Acting on genuine belief and expectation that he would retained at the respondent institution, the appellant declined the appointment which that university had offered him. The appellant then applied for the position as advertised. It is noteworthy that two senior colleagues, namely the Head of Department and the same colleague from Theology whom Dr Joseph had major differences on the interview panel. The outcome of the interviews conducted subsequent to the advertisement was that the Dr Joseph was unsuccessful. Dr Joseph was placed as the second best candidate for the position. The outcome of the interview process was that the panel recommended another candidate be appointed despite the fact that she did not have requisite qualifications to implement and to teach the two niche programme. This was underscored by her resignation soon after taking up her appointment and the position of senior lecturer was again vacant. Nevertheless, the university refused to appoint the Dr Joseph to that position.

[293] *Joseph* at para 13. S 19(2) of the Immigration Act.

The Labour Appeal Court Judgment

Although the Jappie JA did not make reference to implied terms of mutual trust and confidence, a careful reading of the reasoning of the Labour Appeal Court in overturning the Labour Court reviewing arbitration reinstating the appellant shows that the court was cognizant of the extensive of obligation owed by employers towards employees, in particular an employer ought to be held to an obligation of good faith and fair dealing in the manner of exercise its discretionary power to appoint or not an employee to a fixed period of appoint as well as the manner of dismissal. While the obligation of good faith and fair dealing is incapable of precise definition, at a minimum in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engraining in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive. Jappie JA writing for majority made references to conduct on the part of respondent institution's senior management incompatible with the fulfillment with the of employer's duty of mutual trust and confidence owed to the appellant.

In relation to successful claim based on non-renewal of fixed terms, the employee bears on proving the existence of reasonable or legitimate expectation.[294] He or she does so by placing evidences before an arbitrator that there circumstances which justifies such an expectation. Such circumstances could be for instance, the previous regular renewals of his or her contract of employment,[295] provisions of the contract,

[294] *Dierks v University of SA* 1999 20 *ILJ* 1227 (LC) 1248E Oosthuizen AJ concluded that "an entitlement to permanent employment cannot be based simply on the reasonable expectation of s 186(b), ie an applicant cannot rely on an interpretation by implication or 'common sense'. It would require a specific statutory provision to that effect, particularly against the background outlined above". The ruling was upheld by *Auf der Heyde v University of Cape Town* 2000 21 *ILJ* 1758 (LC) and *SA Rugby (Pty) Ltd v CCMA* 27 *ILJ* 1041 (LC).

[295] In *Geldenhuys and University of Pretoria* 2008 29 *ILJ* 1772 (CCMA) Commissioner found the Labour Court divided on the issue of a dismissal – s 186(1)(b) where the claim is based on an expectation of indefinite employment after the lapse of a fixed-term relationship. As the LAC had not at the time taken a stance on this issue, the Commissioner preferred a wide interpretation on the matter as "there seems to be no reason or logic or law why an expectation of permanent employment should not provide a ground for a claim of dismissal under this provision".

the nature of the business and so forth. The aforesaid is not an exhaustive list. It case depends on the given circumstance and is a question of fact.

Counsel for the respondent had argued that the appellant could not have reasonably held the belied that there was no South Africa citizen with an equivalent qualification who fill the position. Therefore, the subjectively the appellant could have had a legitimate expectation of being appointed to the position as advertised. Further, it was contended that when the appellant forgo the position at the University of Witwatersrand he has stated “if there was even a small chance that I could be retained at UNIN, and now this chance though small, seems very possible”. Put differently, the respondent contended that this communicated reflected that the appellant’s state of mind. In his own words he had no guarantees.. Another point forward in support of the non-existence of legitimate expectation, it was argued that such an expectation must have been created by someone with sufficient authority for and acting on behalf of the university.

In giving short shrift to the respondent contention non-existence of legitimate expectation, the court noted that senior of officers of the respondent, namely Senior Manager HR Department as well as the Vice Chancellor both had motivated for the extension of the appellant’s current work because his services were important to the institution. Accordingly both officials ‘were persons of authority who could, through their conduct, create in the mind of the appellant that his employment contract would be renewed’.[296] Furthermore, considering that fact Dr Joseph was intellectual anchor in implementation of these niche programmes and the fact that the position required someone with expertise to implement and teach these two programmes, it is submitted that the appellant in circumstances it was reasonable for the appellant to expect that his contract with respondent would be renewed. At the time when the appellant applied to be re-appointed to his position the programmes were ongoing and were still being offered by the university.

[296] *Joseph* at para 36.

Another glaring example of breach of mutual trust and confidence is demonstrated respondent's handling of the interview process. It will be recalled the two senior colleagues who had displayed an outward personal antipathy towards the appellant were allowed to sit on the interview. In fact the chairperson of the interview testified that has he known of the two senior colleagues' animosity towards the Dr Joseph 'he would have objected to the manner in which the panel was constituted'.[297] Moreover, another member of the panel, indicated that he had gathered from the manner in which the two hostile colleagues raised certain issues with the appellant, that there was ill-feeling between them. In the light of the unfair interview process evidencing lack of fair dealing on the part of the respondent, it was inevitable that an injustice to the appellant would result. One must also note something of a paradox. The respondent had set a process in motion with the clear purpose of ensuring that the appellant contract would not be renewed despite respondent senior officials having motivated to the Home Affair Department that he was an asset to the institution. Notwithstanding that the preferred candidate resigned after taking appoint, and the position was now unoccupied, the respondent still refused to appoint the appellant despite him having initiated and secured funding for the niche programmes. It is respectfully submitted that the respondent conduct was calculated to ensure that the appellant contract was not extended. Seen in this context, dismissal of the appellant in terms of section 186(1)(b) was a foregone conclusion.

What about lessons from other commonwealth jurisdictions? A classic example is *Malik & Mahmud v Bank of Credit & Commerce* which arose from the collapse of the Bank of Credit & Commerce International (BCCI). Depositors lost their money and employees lost their jobs. Two employees have not been able to find employment in the wake of their dismissal by the liquidators of the BCCI. They approached the court claiming that their association with BCCI, which had allegedly run a dishonest and corrupt business placed them at a serious disadvantage in finding alternative employment. They therefore sought so-called 'stigma damages' for loss of reputation based on their employer's breach of implied terms of trust and confidence in running

[297] *Joseph* at para 40.

its business in a dishonest manner. The House of Lords was called on to determine whether such a claim was good in law.

The following salient points emerge from judgments of Lord Steyn and Lord Nicholls: The importance of the implied term of trust and confidence lies in its impact on the obligations of the employer. What is significant in determining whether the implied term has been breached is the impact of the employer's conduct on the employee. That impact is objectively assessed. It is not necessary therefore that the employer's conduct should have been directed at the employee. It is enough that conduct directed at third parties, as in the instant matter, is likely seriously to damage the trust and confidence between employer and employee. The employer's motive is not determinative or pertinent to judging employees' claims of breach of the implied term.[298] Proof of an actual, subjective loss of trust or confidence on the part of the employee is not necessary. Nor does it have to be shown that the employee was ever aware of the employer's conduct.[299] The remedy available to an employee is limited by the requirement that the employer must have acted without reasonable and proper cause and it conduct must have been likely to destroy or seriously damage trust and confidence. An employer will not be liable simply because it ran its business in an incompetent manner.

Mention must also be made of *BG Plc v O'Brien*[300] where an employee argued that the employer had breached the implied term of trust and confidence by excluding him from participation in an enhanced redundancy package which had been offered to all other employees. The packages had been offered as the company was winding

[298] *Malik* at para 35.
[299] Lord Steyn put it as follows: "There is nothing heterodox about allowing a claim for damages for a breach occurring during the contractual relationship where damage resulting from the breach only becomes manifest after the termination of the relationship. In truth the ignorance of an employee of a breach of the implied term is only relevant to the choice of remedies: obviously the employee cannot decide to terminate on a ground of which he is unaware. Moreover, if counsel's submission were right it would mean that an employer who successfully concealed dishonest and corrupt practices before termination of the relationship cannot in law commit a breach of the implied obligation whereas the dishonest and corrupt employer who is exposed during the relationship can be held liable in damages. That cannot be right.*' Malik at* para 35.
[300] [2001] IRLR 496.

down its operations over five years in order to retain and motivate staff during that period. The employer had not offered the enhanced package to O'Brien because it thought that he was not permanent member of staff. The EAT found that he was permanent employee and that his position did not really differ from any of the employees who had been offered the package. In its view the company's failure to offer O'Brien the same package was a breach of the company's implied term could not operate so as to create a positive obligation on the employer to offer O'Brien a new benefit that the employer has never been contractually obliged to provide.

The decision of the EAT was confirmed on appeal to the Court of Appeal in the following terms:[301]

> 'In this case, for good commercial reasons the appellants decided to offer their workforce (the relevant part of which was over 70 strong) a new contract on better terms. To single out an employee on capricious grounds and refuse to offer him the same terms as offered to the rest of the workforce is in my judgement a breach of the implied term of trust and confidence. There are few things which would be more likely to damage seriously (to put it no higher) the relationship of trust between an employer and employee than a capricious refusal, in the circumstances, to offer the same terms to a single employee.'

It is also relevant to note Supreme Court of Canada's decision in *Wallace v United Grain Growers* in which the court was asked to recognize that an employee could bring a claim for damages of an implied obligation of good faith in dismissing an employee. Iacobucci J delivered judgment for the majority of the court. He rejected the idea that the court should imply into the employment contract a term that the employer would not dismiss the employee except for cause or legitimate business reasons because the 'law has long recognised the mutual right of both employers and employees to terminate an employment contract at any time provided there are no express provisions to the contrary'.[302] Nonetheless, the majority went to hold that bad faith conduct in the manner of dismissal is unacceptable and is a factor that is

[301] [2001] IRLR 496.
[302] *Wallace* at para 79.
[302] *Wallace* at para 76.

properly compensated by an addition to what is reasonable notice period in a particular case.[303]

The basis for the *Wallace* principle was the finding of an implied obligation of good faith and fair dealing in the context of dismissal: Iacobucci described the obligation as follows:[304]

> 'The obligation of good faith and fair dealing is incapable of precise definition. However, at minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive.'

His lordship went on to cite following as examples of possible breaches of the obligation of mutual trust and confidence: An employer persisted in a wrongful accusation of a dismissed employee's involvement in theft and conveyed that information to prospective employers of the employee. An employee's post had been eliminated, but he was informed by senior executive in the organisation that it was likely that another position would be found for him and that would likely involve a transfer. But while the employee was being given those reassurances senior management was considering the termination of his employment. No position could be found for the employee and he was dismissed. The employee was not informed of the decision for over month despite the fact that the employer knew that he was in the process of selling his house in anticipation of the transfer. The employee was only informed of his dismissal after his house had been sold.

[303] *Wallace* at para 77.
[304] *Wallace* at para 98.

Observance of Policies

It can also be asserted with some certainty that the duty of mutual trust and confidence can assist in the construction of the contract of employment. For example, the employer's duty not to destroy mutual trust and confidence obliges an employer to honour any of its policies and procedures concerning treatment of employees which have been communicated to employees. The line South African authority is *Denel (Pty) Ltd v Vorster*,[305]*Denel (Pty) Ltd v Vorster* s involved an appeal which was confined to a claim for breach of contract. There was no dispute that the appellant (employer) had proper substantive grounds for summarily terminating the respondent's employment. The respondent's complaint was confined to the process that was adopted.

The procedures that had to be followed when disciplinary action was taken against an employee, and the identities of the persons who were authorised to take such disciplinary action, were circumscribed in the employer's disciplinary code. The terms of the disciplinary code were expressly incorporated in the conditions of employment of each employee with the result that they assumed contractual effect.

They did not follow the prescribed procedure in the disciplinary code.

Through the employer's disciplinary code as incorporated in the conditions of employment, the employer undertook to its employees that it would a specific route before it terminated their employer and it was not open to the employer unilaterally to substitute something else.

If the new constitutional dispensation did have the effect of introducing into the employment relationship a reciprocal duty to act fairly it does not follow that it deprives contractual terms of their effect. Such implied duties would operate to

[305] (2005) 4 BLLR 313 (SCA).

ameliorate the effect of unfair term in the contract, or even to supplement the contractual terms where necessary, but not to deprive a fair contract of its legal effect. The procedure in the disciplinary in the matter was held to be unfair one and the employee was entitled to insist that the employer abide by its contractual undertaking to apply it.

It is therefore submitted that in the light of the fundamental right to fair labour practices, there is an implied reciprocal duty fairness, however this duty of fairness does not displace contractual terms which are fair and accordingly a party is entitle to rely on such terms However, such a duty of fairness can very well play an important role as far as unfair terms of a contract are concerned, alternatively to supplement contractual terms.

On the other side of the commonwealth, the Federal Court of Australia in *Thomson v Orica Australia Ltd*[306] case found that an employer had breached its duty of mutual trust and confidence by flouting its own policy for return to work after maternity. Allsop J held that even if the policy was not incorporated into the employment contract, ignoring the policy signalled the employer's lack of regard for the employee and so constituted breach of mutual trust. Ms Thomson's remedy was to seek damages for wrongful dismissal. In similar vein in *Dare v Hurley*,[307] Driver FM held that an employer's best practice human resources procedures manual had been ignored when the employee was summarily dismissed. The procedures manual provided that employees should be given warnings if they failed to meet certain performance standards, which were also set out in the manual. Ms Dare's letter of appointment required that she agree to be bound by these procedures, and although the letter did not expressly commit the employer to do likewise, Driver FM held that the employment contract would be unworkable unless the obligation to observe the procedures manual was reciprocal. Driver FM noted that the employer had 'taken the trouble to become a quality endorsed business by Standards Australia'[308] and that its

[306] (2002) 116 IR 186.
[307] [2005] FMCA 844(12 August 2005).
[308] *Dare v Hurley* at para 112.

proprietor, Mr Hurley, 'place great store on following procedures.' Of particular importance, Driver FM held that it would be inconsistent with the mutual obligation of trust and confidence implied by law into all employment contracts if the employer were free to ignore the procedures that bound the employee.[309]

On the downside, it appears that in Australia, breach of duty of mutual trust and confidence will not give rise to an entitlement to claim damages for hurt feelings, distress or humiliation upon termination of employment in a harsh and rude manner. The principle in *Addis v Gramaphone Co Ltd*[310] that no damages flow from the manner of breach of a contract appears entrenched in Australian law.[311]

Overlap between the Duty of Mutual Trust and Confidence and the Duty of Care

Where more serious personal harm is caused by the employer egregious behaviour, employer's duty of care will prove more fruitful source of appropriate remedies for employees than mutual trust and confidence obligation.For instance, in *Media 24 Ltd & another v Grobler,*[312] the Supreme Court of Appeal was satisfied that the appellant

[309] *Dare v Hurley* at para 121.
[310] (1909) AC 488.
[311] See generally Godfrey, K 'Contract of employment: Renaissance of the implied term of trust and confidence' (2003) 77 *Australian LJ* 74; Lindsay 'The implied term of trust and confidence' (2001) 30 *ILJ* (UK) 1; Pollard, D 'Employer's duty of trust and confidence: Part 1' (1998) 9((6) *Australian Superannuation Bulletin* 49; Tolhurts, GJ & Carter, JW 'The new law on implied terms' Refining the New Law' (1997) 2 *Journal of Contract Law* 152; Gray, PRA 'Damages for wrongful dismissal: Is the gramophone record worn out?' in McCallum, R & Rondfeldt, P (ed) *Employment Security* (1995); McCarry, G 'Damages for breach of the employer's implied duty of trust and confidence' (1998) 26 *ABLR* 141; Swinton, JP 'Implied contractual terms: Further implications of *Hawkins v Clayton'* (1992) 5 *Journal of Contract Law* 121.
[312](2005) 26 *ILJ* 1007 (SCA). For close reading: Le Roux, R 'Sexual harassment in the workplace: Reflecting on *Grobler v Naspers'* (2004) 25 *ILJ* 1897; Whitcher, B 'Two roads to an employer's vicarious liability for sexual harassment*: S Grobler v Naspers Bpk en andere* and *Ntsabo v Real Security CC*' (2004) 25 *ILJ* 1907; Note 'The employer's liability for manager's sexual harassment of a subordinate' (2004) 13(4) *LLN* 4 and 'When is an employer liable for sexual harassment of one employee by another an for how much?' (2004) 13(2) *LLN* 2; Note 'Damages for sexual harassment: When employers are liable?' (2004) 20(4) *EL* 3; Grogan, J 'Vicarious harassment: Employers become reluctant insurers' (2004) 20(4) *EL* 3; Mischke, C 'Sexual harassment, credibility and dismissal' (2004) 13(9) *CLL* 88 and 'The employer's liability for sexual harassment: The High Court makes new law with

company was in breach of a legal duty to its employees to create and maintain a working environment in which, amongst other things, its employees were not sexually harassed by other employees in their working environment. The court noted that it is well settled that an employer owes a common law duty to its employees to take reasonable care for their safety. The court was of the view that this duty could not be confined to an obligation to take reasonable steps to protect employees from physical harm caused by what may be called physical hazards. It had also in appropriate circumstances to include a duty to protect them from psychological harm caused, for example, by sexual harassment by co-employees. In the present case a secretary employed by a subsidiary of the appellant claimed that her superior had sexually harassed him over a period of several months. She suffered post-traumatic stress disorder and was no longer fit to work. The High Court found the company, as employer of her superior, vicariously liable for his actions.

On the other hand, in the employer was confronted with intersection between duty of care and breach of mutual trust and confidence in *Insurance & Banking Staff Association obo Isaacs v Old Mutual Life Assurance Co*[313]The material facts were that when introducing members of the department to the manager of the internal audit department, the employee's superior, Z, referred to Ms Isaacs as 'our new slut in the department'. Ms Isaacs broke down crying and was very distressed. Although the offending superior subsequently apologized in writing and publicly and, after grievance proceedings, received a written warning, Ms Isaacs was not appeased, and wished not to have to report to him or to have to see him on a regular basis. The incident traumatized Ms Isaacs and triggered a severe depression. From 7 March to 31 May 199 she was off work and for part of the time admitted to hospital suffering from depression and anxiety.

The employee returned to work on 1 June 1999 but was still very emotional about seeing Z again and indicated that she could not work in the department with him. Z's

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important implications for employers' (2004) 14(1) *CLL* 5; Rycroft, A & Perumal D 'Compensating the sexually harassed employee' (2004) 25 *ILJ* 1153; Schooling, H 'Compensation for victims of sexual harassment' (2003)15(3) *CLL* 41.

[313] (2000) 5 LLD 584.

superior, L, tried to accommodate her by fashioning a new job description for her, and suggested that she go home and return when she felt better. She returned again on 7 June and was ready to work, but was still unhappy to be near Z. She asked the company's human resource manager if she could move to another department, and he agreed to look at alternatives. The following day the employee told L that she no longer wanted to work in the department and that she did not think L wanted to help her or cared for her. He advised her that it would not be possible for her to avoid Z altogether and that retrenchment was not an option.

The employee left work on 8 June and did not return. On 1 June the company send her a letter advising that unless she reported for work by 14 June she would be reported as having absconded. On 17 June she advised that she was regarded as having absconded, and her contract was terminated summarily.

After reviewing the foregoing evidence and the arguments of both sides the commissioner expressed the view that the company's behaviour was inappropriate. L knew that the employee was depressed and she had been hospitalised. He knew that she was not coping at work. Very few alternatives were given any serious consideration. The employee had approached the human resources manager on various occasions looking for alternatives to her dilemma. He knew that she had been off work for depression and should have thought to suggest Pay bridge (a disability benefit available to employees who had been on four weeks' continuous sick leave and who had been traumatized or involved in an accident) to her. This would have given her the opportunity to pull herself together whilst seeking other alternatives.

The commissioner observed that the employee had 15 years' loyal service with the company and was a good and valued employee. To simply follow standard abscondment procedures was not fair. The company was a very large organisation and alternatives must have been available. If the alternatives did not work out, the correct procedure in circumstances would have been to follow the disciplinary route for incapacity. The dismissal was found to have been substantively unfair.

Two particular judgments Australian have made impact on the development of the duty care in realm of employment. In *Patrick Stevedores (No 1) (Pty) Ltd v Vaughan*,[314] the NSW Court of Appeal affirmed a significant damages award to an employee who had suffered psychiatric illness after being left by his employers to the abuse of striking waterfront workers. The claim was framed as a breach of the employer's duty of care to the employee. In later judgment the High Court of Australia adopted different attitude in *Koehler v Cerebos (Australia) Ltd*.[315] In that case, the victim of a work related stress induced illness to recover damages, on the basis that she had agreed to undertake the excessive duties when she accepted employment. The court effectively allowed the employer to rely on a 'voluntary assumption of risk' argument.

Constructive dismissal

A constructive dismissal[316] situation provides a clearest illustration of conduct inconsistent mutual trust and confidence at the instance of an employer. The employee has the onus to prove that his resignation constitutes constructive dismissal by the employer party. In dealing with whether a resignation constitute constructive dismissal or not, the Labour Appeal Court in *Pretoria Society for the Care of the Retarded v Loot*s[317] state formulated the test as follows:[318]

> "The enquiry is whether the appellant [employer] without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and the employee. It is not necessary to show that the employer intended any repudiation of

[314] [2002] NSWCA 275.
[315] [2005] HCA 15.
[316] Section 186(1)(e) of the LRA reads as follows 'an employee terminated a contract of employment with or without notice because the employee made continued employment intolerable for the employee'

[317] (1997) 18 *ILJ* 981 (LAC).
[318] *Pretoria Society for the Care of the Retarded v Loot*s at 985A-C. at 984D-F.

the contract: - the court's function is to look at the employer's conduct as a whole and determine whether ... its effect, judged reasonably and sensibly is such that the employee cannot be expected to put up with it."

Furthermore:[319]

> "when an employee resigns or terminates the contract as a result of constructive dismissal such an employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil what is the employee's most important function, namely to work. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable working environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves that she has in fact resigned."

The conduct of the employer and the employee must be looked at as a whole and 'its cumulative impact assessed'. The adjudicator must determine whether the employer's conduct '... is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it ..."[320] The test for determining whether or not the employee was constructively dismissed is thus an objective one. '... The subjective apprehensions of an employee can therefore not be a final determinant of the issue. The conduct of the employer must be judged objectively'.[321]

The employee in *De Beer/Joshua Doore*,[322] a branch manager was told that he was to be promoted to regional manager in another town. After his wife resigned her

[319] *Pretoria Society for the Care of the Retarded v Loot*s at 984D-F.
[320] *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 *ILJ* 981 (LAC) at 985.
[321] *Smithkline Beecham (Pty) Ltd v CCMA & others* (2000) 21 *ILJ* 988 (LC) at para 38.The applicant in *Norris/Transpaco Flexibles (Pty) Ltd [*2003] 8 BALR 850 (BC) resigned after receiving letters from the respondent's newly appointed managing director raising concerns about the manner in which the applicant's department was run. The applicant said he felt that the letters were an attack on his personal integrity. The commissioner disagreed. He found that the letters raised genuine concerns. The applicant had failed to prove that conditions were so intolerable at work that he was unable to fulfil his duties. The application was dismissed. .
[322] [2003] 6 BALR 695 (CCMA).

employment, the employer informed him that it had changed its mind. The commissioner held that the employee could not reasonably be expected to endure the situation at the branch. Nor could he be blamed for not referring a formal grievance to a higher level, because his superiors had proved they were unsympathetic.

The applicant in *Gaelejwe/Department of Health*,[323] then CEO of Rustenburg Provincial Hospital, resigned after workers engaged in a prolonged and violent strike, claiming that he had been responsible for the death of a nurse and other acts of misconduct. After the strike, the applicant was transferred to another hospital, far from his home. The Commissioner accepted the employee's claim that the department's failure to support him during the strike had rendered the employment relationship intolerable. Furthermore, the unilateral decision to transfer him was grossly unfair. The applicant's resignation accordingly constituted a constructive dismissal. He was awarded compensation equal to a year's salary.

Horkulak v Cantor Fitzgerald[324] is provides another picture of the kind of employer conduct that amounts to breach of the implied term of trust and confidence. In this case the employee had been subjected to frequent outburst of foul and abusive expressions and swears words from his senior managing director, a man who employed a dictatorial style of management and was quick to criticise and dismiss employees, often without good reason. This caused the employee extreme stress and anxiety which resulted in his leaving his employment. The court found that the managing director had by his actions breached the implied term of trust and confidence and thereby repudiated the contract of employment. The repudiation was accepted by the employee who terminated the contract and brought a successful claim for damages for breach of contract.

[323] [2003] 10 BALR 1075 (CCMA).
[324] [2004] ICR 697.

Where an applicant worked in a robust environment and there are strict deadlines to meet and the employer has to bring in revenue in order to keep business going, it may be untenable for employee to complain about work environment being intolerable. There are cases to illustrate the point. For instance, in *Moyo and Standard Bank of SA Ltd*[325], the Commissioner found that the employee could have waited for the outcome of the two grievances and have attended the disciplinary hearing to clear his name. He chose to resign and had not been constructively dismissed. The background in the instant case was as follows: The applicant was employed for two years as an administrative manager by the respondent bank. During that time he raised a number of grievances against his employer, to which the employer responded, usually in the employee's favour. He was, however, dissatisfied in his position and felt himself to be constantly under threat and the subject of allegations. Later in 2003 he summoned to a meeting and suspended pending a disciplinary hearing into an allegation of fraud. He immediately handed in a letter of resignation, on the ground that continued employment had become intolerable. He also handed two further grievances on the same day. Before the CCMA he claimed to have been constructively dismissed.

In finding that the circumstances did not justify resignation, the Commissioned noted that: [326]

> 'He was a senior manager and in this position one is expected to deal with ambiguity, conflict in relationships, power struggles, office politics and demands for performance where if not delivered no payment is made. They do not constitute intolerable working conditions.'

This is in harmony with *Coetzer and The Citizen Newspaper*,[327] where the commissioner noted that the newspaper is a robust environment in which deadlines had to be met and revenue brought in. In the present case the applicant employee was a supplement coordinator. She claimed that her employer had made continued employment intolerable for her on the ground that she had been unfairly criticised, verbally abused by the respondent's service manger. The applicant had complained of the abrasive behaviour to her superiors of occasions, but no remedial steps had

[325] *Moyo and Standard Bank of SA Ltd* at 568B.
[326] (2005) 26 *ILJ* 563 (CCMA).
[327] (2003) 24 *ILJ* 622 (CCMA).

apparently been taken. The commissioner found that the employee did not exhaust all other remedies available to her and the resignation was not justified and was premature. Consequently, her claim for constructive dismissal failed.

CHAPTER SIX
SUMMARY AND CONCLUSIONS

It is submitted that in the employment, the *Malik* duty of mutual trust and confidence entitles an employee to a greater degree of protection from insult and outrage by an employer than if he or she were stranger. This approach is based partly on the rationale that, as opposed to most casual and temporary relationships, the workplace environment provides a captive victim and the opportunity for prolonged abuse.

Similarly in employment context, the coercive pressure upon an employee to accede to the unacceptable demands and insults of the employer is greatly intensified by the implied threat of job loss or job erosion in the event of non compliance.

It is submitted that *Malik* duty of mutual trust and confidence in the employment context protects the legitimate expectations of employees by serving as a bulwark against illegitimate conduct or acts of on the part of the employer designed or likely calculated to destroy the employer-employee relationship, thereby ensuring fuller protection of an employee's constitutional rights. The evolving jurisprudence in South Africa and elsewhere indicates that the employer's ability to rely successfully upon its prerogative is contingent on its having acted in a manner consonant with mutual trust and confidence.

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