TITLE

STOPPING THIEVES AT WORK: SOME REFLECTIONS ON ENTRAPMENT AND DERIVATIVE MISCONDUCT

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DECLARATION

I declare that the 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 execution, and that all material contained herein has been duly acknowledged.

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STOPPING THIEVIES AT WORK: SOME REFLECTIONS ON ENTRAPMENT AND DERIVATIVE MISCONDUCT

1. Introduction

Theft, particularly employee theft, is a pervasive problem.[1] In the retail industry,[2] 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, especially in the retail sector, it is difficult if not impossible to apprehend and prove a case against a dishonest employee. Ira M. Shepard and Robert Duston in their *BNA Special Report* accurately capture the nature of internal crime:[3]

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

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[1] 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.

[2] 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).

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

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*[4] the majority of the court stated that:

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

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,[6] 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.

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

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

[5] *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); *Malekane/Shoprite Checkers* [2002] 9 BALR 945 (CCMA); *SACCAWU obo Nhlapo & others/Shoprite Checkers* [2003] 3 BALR 347 (CCMA); *Nsele/Snip Trading (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).

[6] See generally, *Moalilodi v East Rand Gold & Uranium Co Ltd* (1988) 9 *ILJ* 597 (IC); *Olkers v Mowbiso Knitwear (Pty) Ltd* (1988) 9 *ILJ* 857 (IC); *Nyalungu v PP Webb Construction* (1990) 11 *ILJ* 819 (IC); *Randberg 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.

offending employee nor are the employees disposed or willing to co-operate with the employer in tracking down the perpetrator(s). Is the employer in such a situation expected to hold individual enquiry so as to ascertain the extent to which each employee contributed to the act complained of or to be able to pin down the real perpetrators of the acts or should management dismiss them *en masse*, including innocent employees? 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"?

The study explores two aspects of workplace misconduct, namely entrapment and derivative misconduct.

The purpose is to isolate some of the difficult and interesting questions which have been raised in recent times concerning the substantive and procedural fairness of dismissal of employees for internal theft. In the first instance, the study will delve into the all-encompassing duty of mutual trust and confidence upon which the employer-employee relationship is founded. The net effect of internal theft is irretrievable breakdown of the requisite trust between the employer and employee.

In the second place, the requirements of the fair procedure in relation to dismissal of employees for internal theft are examined. Foremost amongst strategies for combating employee theft is entrapment. Trapping system raises important questions about the importation of criminal law doctrines[7] and methods of securing conviction into the employment context in general.

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[7] For Criminal law on common purpose: *S v Mgedezi* 1989 (1) SA 687 (A); *S v Memani* 1990 (2) *SACR* 4 (TkA); *S v Sefatsa & others* 1988 (1) SA 868 (A); *S v Singo* 1993 (1) *SACR* 226 (A); *S v Gaseb* 2001 (1) *SACR* 438 (NmS); *S v Thebus & others* 2003 (10) BCLR 1100 (CC). See further Sibanda, O 'There is nothing wrong with the doctrine of common purpose: *Thebus & another v the State CCT* 36/02 2004 (1) *Turf Law Review* 34. Hutchinson, W. 'The entrapment of employees: *Cape Town City Council vs. SAMWU*' (2000) 10(5) *CLL* 45, criticizes the strict approach adopted by the court in applying the principles of criminal law to the employment context. He argues that such approach would be wrong, further that criminal law should not be easily imported into labour law.

In the third place, workplace entrapment raises complex evidential questions of constitutional nature[8] concerning the admissibility of illegally obtained evidence to prove the facts of employee misconduct. In turn, this raises the question of the interpretation of fundamental rights provisions designed to protect the individual's right to his/her privacy. The other aspect of constitutionality raises entrenchment of the fundamental right to fair labour practice in the South African Constitution.[9]

Finally, there is the difficult problem of fair employment practice concerning dismissal of innocent employees. In effect, the question is: what can an employer do if it learns of serious misconduct which could only have been committed by one or more of a specific group of employees, but the actual culprits cannot be pinpointed or the other workers are unwilling to co-operate with the employer in identifying the perpetrators? In what circumstances will it be permissible to dismiss a group of workers, which incontestably includes perpetrators and innocent workers who had refused to divulge information that could lead to the detection of the culprits? Particular attention is paid to the emerging case law on derivative misconduct. An attempt is made to demonstrate how the concept of "collective" guilt hitherto condemned by the Industrial Court as being "wholly foreign to our system and

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

[9] See s 27, Constitution of the Republic of South Africa Act 200 of 1993 (interim Constitution); s 23, Constitution of the Republic of South Africa Act 108 of 1996 (the final Constitution). In the *In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) at para 7, the Constitutional Court remarked in relation to s23 in general: "The primary development of this law will, in all probability, take place in labour courts in the light of labour legislation. That legislation will always be subject to constitutional scrutiny to ensure that the rights of workers and employers as entrenched in NT23 are honoured." See too *NEHAWU v University of Cape Town*2003 (3) SA 1 (CC); paras33-35; *NUMSA v Bader Bop (Pty) Ltd* at para 13; *Fedlife Assurance Ltd v Wolfaardt* (2001) 21 *ILJ* 2407 (SCA); 2002 (1) SA 49 (SCA) at para 23; *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau & others* (2003) 24 *ILJ* 1721 (LC) at 1726D-C.

repugnant to the requirements of natural justice"[10] has now surfaced under the guise of derivative misconduct.

2. The duty of mutual trust and confidence[11]

An analysis of misconduct in labour law begins with a student defining the nature of individual employment relationship. An understanding of common law principles governing employment is crucial. Despite legislative inroads into employment, the principles governing individual employment relationship are derived from common law.[12]

The duty of cooperation derives from a single important case *Secretary of State for Employment v Aslef*.[13] 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 possibly be 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

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

[11] 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.

[12] See generally, Kahn-Freud, O, 'Blackstone' neglected child: The contract of employment' (1977) 3 *Law Quarterly Review* 508; Cairns J, 'Blackstone, Kahn-Freud and the contract of employment' (1989) 105 *Law Quarterly Review* 300; Brassey M, 'The nature of employment' (1990) 11 *ILJ* 889; Davis, DM 'Refusing to step beyond the confines of contract: The jurisprudence of Adv Erasmus SC' (1985) 6 *ILJ* 425; Pouche, MA 'Common Law Contract of Employment' in *A Practical Guide to Labour Law* 5th ed (2003) 16 para 2.6.6.

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

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'.

The implied term of trust and confidence is increasingly emerging as an important consideration in contracts of employment.[14] While the implied term of trust and confidence imposes obligation on both employers and employees, its most significant consequence lies in its application to employers.[15] Described as the corollary of the employee's duty to co-operate and to demonstrate fidelity and good faith,[16] it requires, in the words of Lord Steyn in *Malik v Bank of Credit & Commerce International (In liquidation)*[17] that an employer not, 'without reasonable and proper cause, conduct itself in a

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[14] Brodie, D 'The heart of the matter: Mutual trust and confidence' (1996) 25 *ILJ* (UK) 121; 'Beyond exchange: The new contract of employment' (1998) 27 *ILJ* (UK) 79; 'Fair deal at work' (1999) *Oxford Journal of Legal Studies* 83; 'Mutual trust and the values of the employment contract' (2001) 30 *ILJ* (UK) 84; 'Legal coherence and the employment revolution' (2001) 11 *Law Quarterly Review* 604; 'Book Review of "*The Personal Contract of Employment*" by M.R. Freedland' (2004) 33 *ILJ* (UK) 87;

[15] Primarily under the impulse of finding a breach of contract for constructive dismissal have emphasised the mirror-image obligation of the employer to co-operate with the employee and not to make his task in any way more difficult. Thus a breach has been identified when employers have criticized manager in front of subordinates: *Associated Tyre Specialists (Eastern) Ltd v Waterhouse* [1977] ICR 218; [1976] IRLR 386, use of foul language *Palmanor v Cedron* [1978] ICR 1008; [1978] IRLR 303; *R&C X-Press Freight v Munro* (1998) 19 *ILJ* 540 (LAC); made groundless accusations of theft: *Robinson v Crompton Parkinson Ltd* [1978] ICR 401, [1978] IRLR 61 and failed to show proper respect for a senior employee: *Garner v Grange Furnishings Ltd* [1977] IRLR 206.

[16] Creighton, B & Stewart, A *Labour Law: An Introduction* 3rd ed (2000) 9.48.

[17] [1998] AC 30 at 45.

manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.'

The Appellate Division affirmed the importance of trust and confidence in the employment relstionship in the following:[18]

> '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 summarised by Hiemstra J quoting with approval the following passage from *Rob v Green* (1895) 2 QB 1:[19]

> '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.'

On the issue of implied obligation of good faith and fair dealing in employment Justice McLachlin stated that:[20]

> 'The contract under consideration here is not a simple commercial exchange in the marketplace of goods and services. A contract of employment is typically of longer term and more personal in nature than most contracts, and involves greater mutual dependence and trust, with a correspondingly greater opportunity for harm or abuse. It is logical to imply that parties to such a contract would, if they turned their minds to the issue, mutually agree that they would take reasonable steps to protect each other from such harm, or at least would not deliberately and maliciously avail themselves of an opportunity to cause it.

Its purpose is to strike a balance "between an employer's interests in managing his business as he sees fit and the employee's interests in not being

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[18] *Council for Scientific & Industrial Research v Fijen* (1996) 17 *ILJ* 18 (A) at 26D-E.
[19] *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).
[20] *Wallace v United Grain Growers Ltd* 152 DLR (4th ed) 1 at para 139.

unfairly and improperly exploited".[21] For instance, in *Media 24 Ltd & another v Grobler*,[22] the Supreme Court of Appeal was satisfied that the appellant 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 her 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.

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.[23] 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

[21] *Malik v Bank of Credit & Commerce International SA (In Liquidation)* [1998] AC 30 at 46.

[22] (2005) 26 *ILJ* 1007 (SCA). See also 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.

[23] *Central News Agency (Pty) Ltd v Commercial Catering & Allied Workers Union another* (1991) 12 ILJ 516 (IC) at 344F-G, De Klerk J said the following: "In my view, it is axiomatic 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 substratum of the relationship between them. A breach of this duty goes to the root of the contract of employment and of the relationship between employer and employee." See also *Premier Medical & Industrial Equipment (Pty) Ltd v Winkler & another* 1971 (3) SA 866 (W) at 867H, *Ndlovu v Supercare Cleaning (Pty) Ltd* 1995 6 *BLLR* 87 (IC) at 94C.

confidence in an employee who has shown disloyalty and infidelity towards his employer.[24]

Daewoo Heavy Industries (SA) Pty Ltd v Banks & others[25] 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's 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 *bonos mores* to allow him to claim commission on those transactions.

There are many situations in which an employee can be expected to know and understanding that conduct contrary to the interests of his or her employer is unacceptable without the need to be specifically told. For example, in *Banking Insurance & Assurance Workers Union & another v Mutual & Federal Insurance Co Ltd*[26] Waglay J 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:[27]

> '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 faith 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

[24] 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 counter productive to his commercial activities or the public interest, he would be entitled to terminate the relationship.'

[25] (2004) 25 *ILJ* 1391 (T). *See also Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 177 and 179; *Steiner & others v Palmer-Pilgrim* 1982 (4) SA 204 (C) at 210A-B; *Union Government (Minister of Defence) v Chappell* 1918 CPD 462; *Ganes & another v Telecom Namibia Ltd* 2004 (3) SA 458 (SCA); (2004) 25 *ILJ* 995 (SCA) at paras 25 and 26. See also Mischke, C 'Acting in good faith: Courts focus on employee's fiduciary duty to the employer' (2004) 13 (4) *CLL* 31.

[26] (2002) 23 *ILJ* 1037 (LC).

[27] *Banking Insurance & Assurance Workers Union & another v Mutual & Federal Insurance Co Ltd supra* at 1040D-F.

cannot escape disciplinary measures being taken against him if he commits a misconduct simply because the misconduct is 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*[28] 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 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 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.

Again in *Tibbett & Bitten (SA) (Pty) Ltd v Marks & others*[29] the Labour Court affirmed that there was a standard form of ethical behaviour and the employee who was a senior employee, did not need to be reminded that personal purchases with the company's credit card were wrong. The fact that the misconduct was not specifically described in the code was of no consequence in this matter and on these facts. The court found that the employee's conduct was unethical, albeit not fraudulent, and that dismissal was appropriate. The arbitrator had misdirected herself in finding that the dismissal was substantively unfair.

[28] (2005) 26 *ILJ* 1129 (BC).
[29] (2005) 26 *ILJ* 940 (LC). See also *Masoka and Consolidated Wire Industries* (2005) 26 *ILJ* 965 (BCA).

Barends and SAPS[30] involved a police officer charged with two counts of theft and dismissed, although the missing goods and monies which were the subject of the charges were later found, or were handed in by the employee. The arbitrator found on the facts that the officer had acted dishonestly in his dealings with the goods, and that it was not necessary to find him guilty of theft to assess the seriousness of his breach of contract with his employer. The trust relationship had been broken and dismissal was appropriate. The arbitrator also considered the fiduciary duties of police officers, employed to prevent crime and to disclose suspected misconduct by fellow employees. Failure to make such disclosures could itself amount to misconduct.

2.1 Promoting the employer's business

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. An example of such a conflict of interest is an employee operating a business, which competes with the employer.[31] In the case of *Prinsloo v Harmony Furnishers (Pty) Ltd De Klerk*[32] 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

[30] (2005) 26 *ILJ* 1543 (BCA).

[31] See eg. *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; *Ivonore v Canadian Imperial Bank of Commerce* (1983) 3 C.C.E.L. 26.

[32] (1992) 13 *ILJ* 1593 (IC).

of his employer. He should not involve himself in an undertaking that is in competition with his employer.'[33]

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 in *Hirshowitz and Pick 'n Pay*[34] 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.

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

Employees frequently misrepresent their qualification, experience or previous remuneration in their applications for employment or in the course of a pre-employment interview. Heather Schooling[35] 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 coming to the attention of the employer subsequent to the 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.'

[33] *Prinsloo v Harmony Furnishers (Pty) Ltd De Klerk supra* at 1596D.
[34] (2005) 26 *ILJ* 161 (CCMA).
[35] 'Misrepresentation and an employee's failure to disclose 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.[36] In *TAWU obo Louw/Volkswagen (Pty) Ltd*[37] 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".[38]

Evans v Protech[39] 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.

2.3 Failure to disclose material facts

[36] See eg: *Asuret v Eskom Pension & Provident Fund* [1996] 7 BLLR 838 (IC); *Ndlovu v Transnet t/a Portnet* (1997) 7 BLLR 887 (IC).
[37] (2003) 4 BALR 493 (CCMA).
[38] *TAWU obo Louw/Volkswagen (Pty) Ltd supra* at para 23.
[39] (2002) 7 BALR 704 (CCMA). See too *Hoch v Mustek Electronics (Pty) Ltd* (1999) 20 *ILJ* 365 (LC).

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."[40]

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."[41] He further states that:[42]

> '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 as 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*,[43] the employee applied for a position as a bookkeeper, knowing that he would work with money in the debtor's department, and had failed to disclose his previous convictions for armed robbery and theft. The arbitrator held that:

> '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.'

The employer must ensure, however, that such cases are treated consistently.[44] A warning in this regard was sounded in *NUMSA obo Engelbrecht*

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[40] *Wille's Principles of South African Law* 7th ed, 336. See also Milner, MA 'Fraudulent non-disclosure' (1967) 74 *SALJ* 177.

[41] *Workplace Law* 6th ed, 137 footnote 5.

[42] Ibid.

[43] [1999] 3 BALR 353 (IMSSA).

[44] See generally, *NUM & others v Amcoal Collieries & Industrial Operations* [2000] 8 BLLR 869 (LAC); *Impala Platinum Ltd v NUM* [2000] 8 BALR 955 (IMSSA); *FAWU obo Tlati and Coca-Cola Bottling (East London)* (2002) 23 *ILJ* 1485 (CCMA); *United Transport & Allied Union obo Brandt and Metrorail (2)* (2002) 23 *ILJ* 2344 (BCA); See also Grogan, J. 'Parity revived: When prior warnings do not apply' (2000) 16(2) *EL* 17; Le Roux, P.A.K. 'Consistency of disciplinary

v Delta Motor Corporation,[45] 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.

In *Hoch v Mustek Electronics (Pty) Ltd*,[46] the company discovered some years after the applicant's appointment that she did not possess 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 placed a 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.

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action: *NUM & another v AMCOAL Colliery t/a Arnot Colliery & another*' (2000) 8 BLLR 869 (LC)' (2000) 10 *CLL* 28 and 'Individual Labour Law' in Cheadle *et al Current Labour Law 2000* Ch. 1 at 9-13.

[45] [1998] 5 BALR 573 (CCMA).

[46] [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.

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.[47]

The preceding discussion has revealed that one of the incidents of contract of employment is that the employer is subject to certain implied duties. The most central term is indisputably the implied term of mutual trust and confidence, which from the perspective of the obligations imposed upon the employer, has been expressed as a duty upon the employer not, without reasonable and proper cause, to act in such way as would be calculated or likely to destroy or seriously damage the relationship of trust and confidence existing between the employer and its employees.

The implied duty of mutual trust and confidence is increasingly emerging as an overarching consideration in contracts of employment. On the other side, the corollary of the employee's implied duty of mutual trust and confidence is for the employee to co-operate and to demonstrate loyalty and good faith in his or her relation towards the employer. If anything, the recent trends in case law demonstrate that in the field of labour relations a premium is placed on honesty because conduct involving moral turpitude by employees irretrievably destroys the trust upon which the employer-employee relationship is predicated. This trust, which the employer places in the employee, is basic to and forms the substratum of the relationship between them. A breach of this duty goes to the root of the contract of employment and of the relationship between employer and employee. The next section considers entrapment in employment context.

[47] *Spijkerman v ABSA Bank Ltd* (1997) 3 BLLR 287 (IC).

3. Entrapment and Labour Law

In their efforts to address massive financial losses due to employee theft, employers have resorted to myriad strategies[48] – some have been successful and others have failed. Foremost amongst strategies for combating employee theft is entrapment and to a large extent application of the concept of derivate misconduct. The *leit motif* behind the use trapping system in employment is most cogently summed up by Grogan as follows:

> 'As employers struggle to contain ever rising levels of shrinkage, many are resorting to employing "undercover agents" to tempt workers to expose dishonest inclinations. These "agents" pose as receivers of stolen goods, and arrange illicit transactions. When the employees succumb to temptation, they are caught red handed and dismissed. Courts throughout the world have recognised that entrapment is morally dubious, but effective: effective because it secures the arrest and conviction of criminals who might otherwise not be caught; dubious because it can result in the conviction of those who might never have gone wrong had they not been tempted.'[49]

Similarly, Hutchison has put the matter extremely well:

> 'The primary purpose of a trap in the employment sphere is not to obtain a criminal conviction but to reduce theft in the workplace. A too strict an approach towards such evidence would fail to take into account the legitimate interests of employers (who will usually not have the resource of the State at their disposal) in combating what appears to be an increasing rate of dishonesty (and often at a more organised level than petty pilfering) in the workplace. The employment relationship is clearly more intimate than that between the State and the individual.'[50]

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[48] Employers have shifted their emphasis from pre-employment screening to tougher internal controls, ranging from tightened security to the use of undercover surveillance. On polygraph test: *Mahlangu v CIM Deltak, Gallant v CIM Deltak* (1986) 7 *ILJ* 346 (IC); *Mncube v Cash Paymaster Services (Pty) Ltd* [1997] 5 BLLR 639 (CCMA); *Hamise v Rainbow Farms (Pty) Ltd* (WE1728); *Sosibo & others v Ceramic Tile Market* (2001) 22 *ILJ* 811 (CCMA); *NUMSA obo Nqukwe & others/Lonwold Implement & Farm Equipment (Life)* [2003] 8 BALR 909 (CCMA); *SACCAWU obo Chauke/Mass Discounters* [2004] 6 BALR 767 (CCMA); *Hoosen and Sparkport Pharmacy* (2004) 25 *ILJ* 618 (CCMA). Christianson, M ' 'Truth, lies and polygraphs' (1998) 8(1) *CLL* 1 and 'Polygraph testing in South African workplaces: "Shield and sword" in the dishonesty detection versus compromising privacy debate' (2000) 21 *ILJ* 16; Johnson, J. 'E-spy vs the right to privacy: Workplace monitoring and technology surveillance' (2000) 11 *De Rebus* 54; Tredoux, C. & Pooley, S. 'Polygraph based testing of deception and truthfulness: an evaluation and commentary' (2001) 22 *ILJ* 819; Collier, D. 'Truth or dare: what lies beneath the polygraph test?' (2001) *De Rebus* 24.

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

[50] The entrapment of employees: *Cape Town City Council vs. SAMWU'* (2000) 10(5) *CLL* 45, 48.

Given that entrapment evidence is, in principle, admissible, what happens when a dismissed employee challenges the substantive fairness of his or her dismissal because of the way in which the undercover operation was carried out? Three major questions arise when methods used to adduce evidence are improper or unfair:

1. Is an employer entitled to entrap an employee for the purposes of obtaining evidence to show that the employee is guilty of misconduct?
2. Should consideration be given as to whether correct procedures for undercover operations as set out in section 252A of the CPA may not have been followed, and if so, what effect does that have upon the value and/or admissibility of the evidence?
3. If undercover operations breach employee's constitutional rights, does the employer's legitimate interest in reducing shrinkage override any prejudice suffered by the offending employee?

Bulbulia DP answered the first question in the affirmative in *Lawrence v I Kuper & Co (Pty) Ltd*,[51] where the employer had hired a security guard to lure the applicant into doing business with him during the applicant's working hours. In motivating its decision, the court laid down the following principles:

(i) In *S v Malinga* 1963 (1) SA 692 (A), Holmes JA defined a trap as a person who, with a view to securing the conviction of another, proposes certain criminal conduct to him, and himself ostensibly takes part therein. In other words, he creates the occasion for someone else to commit the offence.

(ii) The general rule observed by the courts is that the evidence of traps (as well as that of spies, informers and private agents) should be treated with caution because they are paid to procure such evidence.

(iii) In *S v Chesane* 1975 (3) SA 172 (T) McEwan J pointed out that: "persons used as traps may have a motive in giving evidence which may outweigh their regard for truth", and that "such may include the earning of a monetary reward".

(iv) In the popular view it is regarded as somewhat unfair, if not unethical, to catch out someone by means of a trap and the *modus operandi* involving a trap is generally looked upon with disapprobation.

(v) Many others believe that it should be used only as a measure of last resort in order to deal with elusive criminals who cannot otherwise be brought to book.

[51] (1994) 5(9) SALLR (IC), [1994] 7 BLLR 85 (IC).

(vi) Leaving aside traps use in criminal cases, it would appear that the employer may sometimes be faced with a situation in the workplace when it becomes necessary for him to employ the services of a private investigator in order to obtain concrete evidence against an employee who is suspected of being involved in some improper conduct such as accepting bribes, or passing on trade secrets to competitors, or of dealing in dagga or other harmful drugs with fellow employees.

(vii) There is no reason why an employee may not be placed under surveillance in such circumstances.

(viii) The information or evidence so obtained should then be used to confront the employee and should form the basis for giving him a warning or even a final written warning.

(ix) Should the employer however decide to hold a disciplinary inquiry, then the cogency of the investigator's evidence, the seriousness of the offence or contravention, the interests of the company, and the work record of the employee should determine, *inter alia*, whether he or she should be summarily dismissed or be given a lesser penalty.

3.1 Cable thieves

Helping out with some cable needed to run electricity to a container used as a day care facility for children in Khayelitsha township proved to be the downfall of two electricity department employees of Cape Town City Council. Unfortunately, for the employees the female wearing provocative clothing who had persistently begged them to sell her a cable was part of the crew of undercover agents. A disciplinary hearing convened and the employees were charged with breach of trust and dismissed. In *Cape Town City Council v SA Municipal Workers Union and others*,[52] the council had engaged the services of private investigators to trap dishonest employees. This was part of the council's action of stemming out the scourge of cable theft.

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

[52] (2000) 21 *ILJ* 2409 (LC).

use of the trapping system is inherently unfair or not in the context of an employment relationship.

After a thorough enquiry into the pertinent law and academic thinking, Acting Judge Stelzner found that evidence of the entrapment was not admissible in the circumstances that prevailed in that case. He was at pains, however, to state that he would be 'reluctant if not unlikely to hold that a system of trapping (obviously properly constrained) may never be fair in employment context'.[53] The judge goes on to say that law enforcement and the pursuit of justice would be impeded if the evidence obtained in a trapping situation were excluded provided the use of entrapment is properly scrutinised and constrained.

Stelzner AJ pointedly put the central issue as follows:[54]

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

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

> 'I am of the view that guidelines and parameters not less rigid or strict than those set out in s 252A of the CPA should be applied in the context of the employment relationship. This is assuming, of course, that entrapment /use of the trap system should be allowed at all in the employment content.'[55]

Counsel for the employees further argued that the trapping in the workplace should be deemed impermissible. Put differently, an employer who instructs a person to act as buyer of stolen goods comes to court with

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[53] *Cape Town City Council v SA Municipal Workers Union and others* at 2434F.
[54] *Cape Town City Council v SA Municipal Workers Union and others* at 2426 J-2427A.
[55] *Cape Town City Council v SA Municipal Workers Union and others* at 2433B.

unclean hands.[56] Employers should not therefore be allowed to defend themselves against an unfair dismissal action with evidence obtained by the unlawful conduct of its own agents. In assessing the fairness of an employer's decision to terminate, should the court take into account the fact that the employer's hands are not completely clean? This is so because the offending employees were lured into committing misconduct.

Although the argument may seem compelling, for Grogan it misses one essential point:[57]

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

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

The court described the two employees as 'innocent', but were lured into committing an offence by the conduct of the investigators, and

[56] The clean hands doctrine traditionally emanates from equity. Equity law principles were developed based on the predominant 'fairness' characteristic of equity such as 'equity will not suffer a wrong to be without a remedy' or 'he who comes to equity must come with clean hands'. See also Chafee, Z 'Coming into equity with clean hands' (1947) 47 *Michigan LR 877*; Payne, J '"Clean hands" in derivative action' (2002) *Cambridge LJ* 76; Kahn, E *Contract and Mercantile Law Through Cases* (1988) at 44 para. 206.

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

prejudiced by the use of the trapping method used in the case. The court then concluded that the evidence was obtained in an improper, or at the very last unfair manner. The court went further to say admitting evidence in the present case would be detrimental to the interest of justice in the context of an employment relationship, and unfair to the employees.

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

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

> 'Firstly, trapping as such will not necessarily be held to be unfair. Had there been independent evidence to link the employee with other proven thefts, the case would probably have had a different outcome. Trapping is permissible when its object is to identify a thief. If the trappers had been less zealous in their efforts to involve the employees, the Court would probably have taken a different view. In other words, a successful trap should not form the sole evidence link against the trapped employee, but should be supported, even if circumstantially, by other evidence linking the employees concerned to dishonest practices other than their dealings with the trapper...the requirements of the Criminal Procedure Act are merely yardsticks for assessing an employer's actions in particular cases. So dishonest employees should not regard the judgment as an indication that they will never be dismissed if they dispose of their employer's property for personal gain to an undercover operative.'[58]

3.2 Gold smugglers

[58] 'To catch a thief: Entrapment in the workplace' (2001) 17(1) *EL* 8, at 10.

It will be recalled that trapping system has it roots in the advent of South Africa's diamond and mining industry at the turn of nineteenth century. The prevalence of smuggling around South African mines continues to this day.[59] The case of *NUM obo Mkhawani & 3 others*[60] provides a good illustration. Three employees were dismissed for dealing with gold concentrate. An undercover stint was set to trap the three employee suspected of smuggling. The traps were conducted under the supervision of the Director of Public Prosecutions.

In considering whether the evidence adduced as a result of undercover surveillance was admissible, Commissioner Talane remarked:

> 'In the present case the facts fall far short of raising a defence of entrapment because the police did no more than create an opportunity for the accused to commit the misconduct. For instance, Malemela was driven by his own greed to make extra money...There is no evidence that the employees were enticed or persuaded to commit the misconduct. ...Before the trap was set up there was a suspicion already that Malemela is trading with gold...'[61]

The commissioner found that the conduct of the police did not go beyond the requirements set out in section 252A (1) of the CPA. Further that the employer in setting up the trap with the assistance of the police, acted within the statutory parameters laid down in section 252A, therefore the evidence obtained was admissible.

It was held that in stealing their employer's property, the dismissed employees breached a rule of conduct at the workplace. The rule was reasonable as its purpose was to protect the employer's commercial integrity and that the employees were reasonably expected to have known the rule. Further that the employer was entitled to introduce such a rule and to impose a penalty to employees who breached it. The destruction of trust in an employment relationship rendered the continuation of the employment

[59] See e.g. *Free State Business Services v NUM obo Bolale* [1999] 12 BALR 1453 (IMSSA) (employee dismissed for participating in a scheme to steal gold concentrate).
[60] Unreported award NP 506-0, 03/10/2001.
[61] *NUM obo Mkhawani & 3 others* at 10.

untenable. Accordingly the dismissals of the employees met the requirement of substantive fairness.

3.3 Stock losses

After discovering stock losses that brought it to the brink of financial collapse, the employer in *Lowveld Implement Farm Equipment (Life)*[62] 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 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[63] 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

[62] *NUMSA obo Ngukwe & others/Lowveld Implement Farm Equipment (Life)* [2003] 8 BALR 909 (CCMA).
[63] (2004) 25 *ILJ* 1128 (BCA).

Mbuli and colleague's involvement in stealing the company's products. A trap was then set on the two employees; they were dismissed shortly after being found guilty at a disciplinary hearing for selling company products outside the corporation. The employer arranged with a third party to pose as a buyer for the corporation, and to approach Mbuli with a view of cheaply purchasing the company's products.

On the procedural fairness and the use of entrapment techniques, the arbitrator found the statutory guidelines contained in s252A of the CPA were instructive. Loveday outlined a summary of factors to be considered in dealing with the issue of entrapment in the employment context:[64]

- 'the nature of the offence-taking into account the prevalence of the offence and the seriousness of the offence;
- the availability of other techniques for the detection, investigation or uncovering of the commission of the offence, or the prevention thereof;
- whether an average person in the position of the accused would be induced to commit the offence;
- the degree of persistence and number of attempts made before the accused succumbed and committed the offence;
- the type of inducement used including the degree of deceit, trickery, misrepresentation or reward;
- the timing of the conduct-whether the trapper instigated the offence or became involved in an existing unlawful activity;
- whether the conduct involved the exploitation of human characteristics such as emotions, sympathy or friendship or an exploitation of the accused's personal, professional or economic circumstances;
- whether the trapper or agent has exploited a particular vulnerability of the accused's such as a mental handicap or a substance addiction;
- the proportionality between the involvement of the agent as compared to that of the accused;
- any threats implied or expressed against the accused;
- whether before the trap was set there existed any suspicion based upon reasonable grounds that the accused had committed a similar offence;
- whether the agent acted in good faith or bad faith.'

[64] *Mbuli and Spartan Wiremakers CC* at 1133J-1134A-D.

Loveday eloquently justified the use of entrapment as a means of identifying dishonest employees and deterring others as follows: [65]

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

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

The applicant employee had indeed removed and gave the three rolls of wire without authorization to the buyer. Thus, contravening one of the most fundamental rules of the workplace by stealing from his employer for personal gain, in the process damaging 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[66] 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

[65] *Mbuli and Spartan Wiremakers CC supra* at 1341-J.
[66] Unreported decision [MP 1215-01].

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.

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

Also noteworthy is *SACWU obo Cleophas/SmithKline*[67] 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

[67] [1999] 8 BALR 957 (CCMA).

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 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.

The case of *Phadu & others/Department of Health: Free State*[68] involved dismissal of employees as a result of an undercover operation for selling without authority for their own gain, medical supplies belonging to the company to a trappee. The employer employed undercover 'agents' after experiencing increasing stock losses over a long period. At a disciplinary hearing Sekoto an accused employee denied that he sold depot stock to anyone and said he did not know why he was dismissed. On the other hand his fellow perpetrator, Mpho contended that the undercover agents lured him into selling stock. The agents testified that they did not force the applicants to sell the stock to them.

[68] [2004] 2 BALR 167 (PHWSBC).

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

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

In *NUMSA obo Abraham/Guestro Wheels*[69] 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.

[69] [2004] 4 BALR 530 (CCMA).

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 top level than the interest of the employee.

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

The most recent addition to this growing body of case law is *Caji & Africa Personnel Services (Pty) Ltd.*[70]The factual aspects were an employee was dismissed as a result of a trap. At the disciplinary hearing Caji pleaded guilty to theft and the selling of a client's property without authorization. The key was whether the evidence obtained by the private investigator was properly obtained in a fair and just manner.

It was argued on behalf of Caji that the evidence should not be admissible in that it was obtained as a result of a trap and that the investigator had induced the applicant to take part in a criminal act in which he himself

[70] (2005) 26 *ILJ* 150 (CCMA). Dealing with the admissibility of video recordings was a case of *Moloko v Commissioner Diale and others* (2004) 25 *ILJ* 1067 (LC) where it was held that if a party wished to place relevance on a video recording used in a tribunal, it had to be authenticated.

partook. The employee was never suspected of being involved in theft or selling of company property. Further that, the applicant could have been disciplined on the basis of the information allegedly given to the investigator by the employees from the neighbouring business. In opposition, the company asserted that the employee was merely presented with an opportunity to commit the offence/misconduct, as most people are presented with on daily basis during the ordinary course of life.

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

Reference was made to the *Cape Town City Council* case and to section 252A of the CPA. The commissioner commented that a strict approach should specially be followed where it appears that the investigator had a vested interest (payment) in the outcome of the investigation.[71]

On the facts, the commissioner found that the company failed to bring evidence indicating that the applicant was not induced into committing the offence/misconduct. The collapse employment relationship, the

[71] *Caji & Africa Personnel Services (Pty) Ltd* at 159B.

commissioner concluded made reinstatement[72] not a viable option. The employer was ordered to compensate the employee.

The Canadian case of *Regina v Bonnar*[73] stands as an important companion to our jurisprudence. In the wake of shrinkage problem, the employer engaged a private detective to conduct an investigation. The private investigator 'in a workman's clothes' presented himself to Bonnar as an independent contractor who wanted to buy locks. The two parties met at the employer's storeroom. The respondent showed him the locks, but the detective indicated that he was not satisfied with the price. The respondent then reduced the price with no authority and sold 15 locks worth $100.00 for $10.00. The two parties had another arrangement according to which the investigator had to collect paint that he wanted to buy, from the respondent. The paint was worth $15.00 per gallon, but the respondent again reduced the price and sold it at $5.00 per gallon. In both instances the respondent after being given the money was seen putting the money in his own pocket.

Evidence given by the general manager of company; all cash transactions were to be made with the cashier. The trial Judge dismissed the charges against the employee. The trial Judge held that "there is clear evidence that there was implanted in the mind of the accused by Mike O'Brien's actions and words the inducement to commit the offence in order to provide grounds for the prosecution of the accused". It is clear from the above lines that the trial Judge supported the view that entrapment can be raised as a defence. The court held that:

> '...O'Brien did not actively instigate the commission of the offence by the accused. In other words, and as I said earlier, the accused was not induced to commit the offence. He was given an opportunity and a reason to steal the articles and seized such opportunity because of his predisposition to do so. It

[72] For an excellent exposition on reinstatement see Okpaluba, C 'Reinstatement in Contemporary South African law of unfair dismissal: the statutory guidelines' (1999) 116 *SALJ* (Part IV) 815.
[73] 30 C.C.C. (2nd) at 55.

was never suggested to him that he steal the articles. He did so on his own initiative because he had a "ready market" in Mr. O'Brien.'[74]

On the issue of entrapment raised as a defence, the court said that entrapment can be raised as a defence if it was clear that the accused did not have a prior intention or predisposition to commit the crime he is charged with. According to the court the 'agent provocateur' must go beyond providing ordinary solicitation in order for entrapment to be raised as a defence. The court in the present case found that the detective did not induce the accused to commit an offence where he had no previous intent to do so, but merely gave him the opportunity to commit the offence, which he was already predisposed to; in that case the accused could not raise entrapment as a defence.

The appeal was therefore allowed; the acquittal of the accused was set aside and a verdict of guilty entered against the accused on the two charges against him.

3.4 Honesty test cases

Four Metrorail cases firmly establish the right of an employer to secure its financial integrity by subjecting employees to a 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*,[75] 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

[74] *Regina v Bomar supra* at 69.
[75] (2000) 23 *ILJ* 1641 (BCA).

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

As to the troublesome issue of determining the appropriate sanction,[76] 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.[77] Accordingly the company decision to terminate the employee's services was substantively fair.

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[76] *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.

[77] 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

The grievant in *SATAWU obo Sithole/Metrorail*[78] 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 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[79] concerned the dismissal of an access controller for dishonesty and theft as a result of an "honesty test" that

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.

[78] [2000] 8 BALR 984 (IMSSA).

[79] (2001) 22 *ILJ* 2372 (ARB).

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 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.'[80]

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 'honesty test' was to be conducted as part

[80] *SATAWU on behalf of Radebe v Metrorail Wits* at 2377J-2378A.

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*[81] 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 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.'[82]

Therefore the employer cannot be expected to retain the services of a dishonest employee. A sanction of dismissal could not be disturbed.

4 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

[81] (2001) 22 *ILJ* 2379 (ARB).
[82] *SATAWU on behalf of Sefara v Metrorail Services Pretoria* at 2385C.

employer and employee. Derivative misconduct is founded on this notion. There is no general obligation on employees to share information about their colleagues with their employers, but at the very least employees must inform on their colleagues when they know that those colleagues are stealing from their employer, or that they have been guilty of some other misconduct which warrants disciplinary action.[83]

The concept of derivative misconduct first passed judicial scrutiny in *FAWU & others v Amalgamated Beverage Industries*.[84] 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

[83] See Grogan, J 'Derivative misconduct: The offence of not informing' (2004) 20(3) *EL* 15.
[84] [1994] 12 BLLR 25 (LAC).

complicity, and that no case had been made out which called for reply. Nugent J (as he then was) suggested that:[85]

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

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

In *Chauke & others v Lee Service Centre CC t/a Lesson Motors*[86] 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:[87]

> '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?

[85] *FAWU & others v Amalgamated Beverage Industries* at 1063B.
[86] (1998) 19 *ILJ* 1441 (LAC).
[87] *Chauke & others v Lee Service Centre CC t/a Lesson Motors* at paras 27-28.

> Two different kinds of justification may be advanced for such a dismissal. In Brassey & others *The New Labour Law* (1987) at 93-5. The situation is posed where one of only two workers is known to be planning major and irreversible 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:[88]

> 'It posits a justification on operational grounds, namely that action is necessary to save the life of the enterprise. That must be distinguished from second category, where the justification advanced is not operational. It is misconduct. And no innocent workers are involved: management's rationale is that it has sufficient grounds for inferring that the whole group is responsible for or involved in the misconduct.'

And further:[89]

> '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.

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[88] *Chauke & others v Lee Service Centre CC t/a Lesson Motors* at para 29.
[89] *Chauke & others v Lee Service Centre CC t/a Lesson Motors* at paras 31 and 33.

RSA Geological Services (a Division of De Beers Consolidated Mines Ltd) v Grogan & others[90] arose out of a dispute between the National Union of Mineworkers and De Beers over the dismissal of almost the entire staff of a mineral laboratory, fifteen in number, after a sample intended for analysis was found dumped down two boreholes in the laboratory grounds. The staff was interviewed and asked to disclose the identity of the culprits, and to undergo polygraph tests. None did so. However, after further grilling, a worker admitted to discarding the sample, and implicated two others. The rest of the staff 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

[90] [2008] 2 BLLR 184 (LC). See *NUM & others / RSA Geological Services, a Division of De Beers Consolidated Mines Ltd* [2004] 1 BALR 1 (P).

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".[91]

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 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[92]. 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[93].

[91] *RSA Geological Services (a Division of De Beers Consolidated Mines Ltd) v Grogan & others* at para 44.
[92] *RSA Geological Services (a Division of De Beers Consolidated Mines Ltd) v Grogan & others* at para 49.
[93] *RSA Geological Services (a Division of De Beers Consolidated Mines Ltd) v Grogan & others* at para 51.

4.1 Team misconduct /liability[94]

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

[94] 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.
[95] [1996] 4 BLLR 457 (IC). For discussion see Myburgh, A 'Worker courts: A democratic solution to shrinkage' (1996) *EL* 72.

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

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

It also found that the procedures followed by the Venturecom were fair. As to the allegation of substantive unfairness, the court found that the respondent had a clear rule regarding shrinkage and, that such rule was justified by its operational requirements. The concept of team control of shrinkage was to be evaluated in the light of the respondent's overall philosophy of participative management. The individual applicants had been

placed on final warning for not reducing the unacceptable level of stock losses, and were aware that they faced dismissal if they did not do so. In these circumstances, it was permissible for the respondent to hold the individual applicants liable as a group, notwithstanding the fact that the notion of collective guilt was generally repugnant to our law. Furthermore, the individual applicants, by choosing a group hearing, had elected to be judged as a group. The application was accordingly dismissed.

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

In *FEDCRAW v Snip Trading (Pty) Ltd,*[95] 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.

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

[95] [2001] 7 BALR 699 (P).

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.[97]

[97] *FEDCRAW v Snip Trading (Pty) Ltd* at paras 5-13.

On the question whether stock loss constitutes misconduct, the arbitrator held as follows:[98]

> '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".[99]

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

The arbitrator noted that, generally speaking, misconduct entails a breach of contract, though not all breaches of 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

[98] *FEDCRAW v Snip Trading (Pty) Ltd* at para 18.
[99] *FEDCRAW v Snip Trading (Pty) Ltd* at para 19.

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.[100]

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 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 descriptions. On the other side of the coin, a subordinate cannot be held responsible for the acts or omissions of a superior

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

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.[101] "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:[102]

> '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

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

has been held that it is fair to dismiss the entire staff of a branch or store where 'shrinkage' reaches unacceptable levels'.

However, the arbitrator cautioned that the concept of "team liability" cannot be used in all circumstances to justify collective punishment. If one member of a team fails to pull his or her weight or is guilty of theft and the lax or guilty member 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:[103]

> '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.'

4.2 Procedural fairness

It has been proved that it is difficult for employers to procure direct evidence against employees for stock loss. Most of the employers rely on their stock loss policies, which require the employees to explain the stock losses. Arbitrators view this approach as shifting the onus to the employees and as such contrary to the LRA.[104] For example, in *FEDCRAW obo Phindiwe v Snip Trading (Pty) Ltd*[105] the applicants were dismissed when stock losses at the store at which they worked exceeded the level tolerated by the respondent.

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

[104] Section 192 of the LRA provides:

'Onus in dismissal disputes

(1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.

(2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair

[105] [2002] 7 BALR 718 (CCMA).

The company held that, in terms of the employees' contracts of service they accepted liability for stock loss, and that they were dismissed in terms of a provision of the company disciplinary code which required employees to explain stock losses, failing which they could be dismissed.

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

In *FEDCRAW* v *Snip Trading (Pty) Ltd*, the issue of whether the company's stock loss procedure in effect reverses the onus that is placed on employers by the LRA 1995 to prove that dismissals are for a fair reason and in accordance with a fair procedure was considered. The arbitrator held as follows:[106]

> 'In cases of disciplinary action arising from stock loss, the company relies on the mere fact that the employees in question have failed to provide an acceptable explanation. While it is so that this approach places a burden on the employees, it is not a true case of reversal of the onus. In criminal and civil cases, the onus of proof rests on the State and the plaintiff, respectively. However, if an accused person or defendant raises a specific defence in rebuttal of a prima facie case made out by the State or the plaintiff, the burden of proving the facts necessary for the defence shifts to the

[106] *FEDCRAW* v *Snip Trading (Pty) Ltd* at para 46.

> accused...the same principle applies in the procedure followed by the company in cases involving stock loss. The company discharges a general onus if it proves that stock loss in the store has exceeded a particular level, and that procedures are in place which, if followed, would have reduced the loss. Once this is proved, a rebuttable presumption arises that the employees at the store have failed to comply with the rules. If the employees claim that they did follow the rules, or that they were unable to do so, or that they cannot be held individually accountable for the error that caused the loss, the burden then shifts to the employees to prove these claims".

In *RSA Geological Services (A Division of De Beers Consolidated Mines Ltd) v Grogan & others*, the court stated:[107]

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

It will be recalled that the Labour Appeal Court decided both *Amalgamated Beverage Industries* and *Leeson Motors*, by applying elementary rules of evidence to a civil case to determine the dispute on a balance of probabilities. The employers proved the principal misconduct and that some employees from a group incontestably participated in it. The employers had no direct evidence of which employees participated in lent it their support to, associated themselves with or knew about the misconduct. On the facts in *Amalgamated Beverage Industries*, Nugent J inferred that a group of some 100 employees were present when an assault took place on a casual worker employed during a strike, and that they either participated in or lent their support to it. On the factual scenario obtaining in *Leeson Motors*, Cameron JA drew the primary inference that a group of 20 employees all participated in a

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

campaign of sabotage. In all three cases, the employees refused to assist the respective employers with information to investigate the misconduct; they also refused to testify subsequently at their disciplinary enquiries; the evidence of the two witnesses who did testify in *Leeson Motors* was rejected. The Labour Appeal Court confirmed the dismissals in *Amalgamated Beverage Industries* and *Leeson Motors*. Pillay J in *RSA Geological Services (A Division of De Beers Consolidated Mines Ltd) v Grogan & others* upheld the arbitrator's findings in relation to 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.

4.3 Failure to testify

In civil cases a party's failure to give gainsaying testimony under oath or affirmation may have an adverse effect on his case. However, the effect of such a failure would depend upon all the circumstances of the case.[108] In *Galante v Dickson*,[109] Schreiner JA stated:

> '[I]t seems fair at all events to say that in an accident case where the defendant was himself the driver of the vehicle, the driving of which the plaintiff alleges was negligent and caused the accident, the court is entitled, in the absence of evidence from the defendant, to select out of two alternative explanations of the cause of the accident which are more or less equally open on the evidence, that one which favours the plaintiff as opposed to the defendant'.

It is a cardinal rule of logic when reasoning by inference that the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. The true facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.[110]

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[108] Schwikkard & Van der Merwe *Principle of Evidence* (2 ed) (2002) 510.
[109] 1950 2 SA 460 (A) at 465.
[110] *R v Blom* 1939 AD 188 at 202 -3

In *Amalgamated Beverage Industries Ltd*, a large group of workers had assaulted a 'scab' driver, leaving him severely injured. The company was unable to prove which of those present at the workplace at the time actually perpetrated the assault. All those who had clocked in and who were thus in the vicinity of the incident when it occurred were charged with assault. None came forward at the workplace hearing or in the Industrial Court to affirm their innocence or volunteer any evidence about the perpetrators. The court held that:[111]

> 'There was no direct evidence linking any of the appellants to any act in relation to the assault, and the respondent's case was based on inference alone. None of the appellants gave evidence, either in the court a quo or in the course of the disciplinary hearing. The attitude adopted by the appellants throughout was that it was for the respondent to establish their complicity, and that no case had been made out against any of them which called for a reply.
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> The extent to which a party's failure to give evidence may properly give rise to inference against him has received considerable attention from the courts. What emerges from the decided cases is that this failure to do so cannot by itself constitute proof of what is alleged against him. Nevertheless the evidence against him, though not conclusive, may be such that an explanation would be expected if one was available. In such cases his failure to provide an explanation may be placed in the balance against him...the inference which the respondent seeks to draw from the evidence is that all the appellants were present at the time the assault took place, and either actively participated in the assault or at least supported and encouraged the perpetrators. It is a cardinal rule of logic when reasoning by inference that the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. In my view all the evidence in the present case is consistent with that inference'.

The court went further and stated:

> 'In the present case however no alternative inferences have been advanced which have a foundation in the evidence. It was suggested in argument that one or more of the appellants may have been absent, or may have been unwittingly caught up in the events. This, however, is no more than speculation, as there is no evidence to suggest that this is what occurred. In my view this is pre-eminently a case in which, had one or more of the appellants had an innocent explanation, they would have tendered it, and in

[111] *FAWU & others v Amalgamated Beverage Industries* at 30-31.

my view their failure to do so must be weighed in the balance against them.'[112]

It was in this sense that the workers at Leeson Motors were damned by their silence. Judge Cameron summed up the evidence as follows:[113]

> 'The possibility that the damage was inflicted by a maverick individual with idiosyncratic grudge against management can in my view be excluded as overwhelmingly unlikely. If this had been the case, the workers' response would undoubtedly have been to volunteer indignant and alarmed assistance to management in the detection of the perpetrator. Given the physical circumstances, that they failed on repeated occasions to do so suggests, as the most likely inference, either that each worker was on one or more occasions individually involved in planning or inflicting the sabotage, or that each worker knew who was responsible, and deliberately chose to associate himself with him or them through silence. It must therefore be inferred, as a matter of probability, that each worker culpably participated in the campaign of sabotage.

However, when the employer in *FEDCRAW v Librapac CC*[114] sought to rely on the argument that it had dismissed its entire staff, not for theft, but because they had refused to identify the thieves, it received no sympathy from the CCMA commissioner who arbitrated the matter. He concluded:

> 'I reject the employer's contention that dishonesty arose from the fact that the employees refused to divulge the names of the employees who stole the globes. In my view, there is no legal duty to disclose the name of the perpetrator. It might be that there is a moral duty to do so. It would be different if the employee was a security guard or a senior employee such as a supervisor.'[115]

So, too, did the commissioner reject the employer's contention that the employees had been dismissed for a breakdown of the trust relationship.

5. SUMMARY AND CONCLUSION

It has been an important task for modern management decision-makers to combat shrinkage – a pervasive problem that infests all layers of the organisation. Argument that 'entrapment in the workplace abridges

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[112] *FAWU & others v Amalgamated Beverage Industries* at 32.
[113] *Chauke & others v Lee Service Centre CC t/a Leeson Motors* at paras 40.
[114] [1998] 1 BALR 4 (CCMA).
[115] *FEDCRAW v Librapac CC* at 7.

employee's fundamental rights, making the need for a Constitutional Court intervention attuned to protecting an employee's right to fair labour practices where the latter has been dismissed based on conscripted evidence obtained by use of undercover operations' are important contributions to the discussion. It is, however, suggested that an employer's distinctive legitimate interest to introduce measures to protect its commercial integrity and to expect compliance therewith will take precedence in the context of the employment relationship. If anything, the recent trends in case law emphasise an employer's prerogative to secure its financial integrity by subjecting employees to honest tests in order to rid itself of dishonest behaviour amongst its workforce, more so when the employer has been experiencing perpetual financial losses.

The *leit motif* behind the use of trapping system in employment is to arrest the ever escalating shrinkage, and by implication to save the enterprise. Unlike in the public sphere where the trapping is utilized to secure criminal conviction, the primary purpose of entrapment in the employment context is to reduce internal theft. The all encompassing implied duty of trust and good faith suggests that employees are expected to resist the inducement when it comes to illegally profiting at their employer's expense.

The overarching role of trust in the employment relationship is amplified by the notion of derivative misconduct. Although there is no general obligation on employees to share information about their colleagues with their employers, but at the very least employees must inform of their fellow employees when they know that they are stealing from their employers, or that they have been guilty of some wrongdoing which necessitates disciplinary action. This typically arises where misconduct warranting disciplinary action is proved but the employer is unable to pinpoint the wrongdoers and employees are unwilling to assist the employer in its quest to apprehend and discipline the culprits; if all avenues of

investigation have been exhausted, the employer may be entitled to dismiss a group of workers, including those employees who may not have participated in the primary misconduct. Failure of innocent employees to divulge information that could assist the employer in bringing the perpetrators to book make them guilty of derivative violation of trust and confidence, requisite in the employer-employee relationship. Another strand of justification is the inference of involvement, namely that the evidence justifies the inference that all the employees either participated in the primary misconduct or lent their tacit support to it.

The concept of derivative misconduct is problematic in that bears features of repugnant notion of common purpose and collective guilt discarded by the former Industrial Court[116]. It is easy to forget that the underlying purpose of labour is to serve as a countervailing force against the power of the employer.[117] In other words, 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.[118] The gravity, indeed, the ramifications of dismissal for employees cannot be overstated:

> 'It is unarguable that dismissal, whether fair or not is usually a devastating blow for an employee. Hurt to pride, dignity and self-esteem and economic dislocation are all readily foreseeable. Alternative employment may not be easy to find, and a damaged reputation may be a grave or even fatal hindrance. 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.'[119]

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[116] *NUM v Roodepoort Deep Ltd* (1987) 8 *ILJ* 156 (IC).

[117] See generally; Ewing, K. 'The death of labour law' (1989) 8 *Oxford Journal of Legal Studies* 293; Thompson, C. 'The changing nature of employment' (2003) 24 *ILJ* 1793; Kahn-Freund, O. *Labour and the Law* (1977) at 6; Davies, P. & Freedland, M. *Labour Legislation and Public Policy* (1993).

[118] *Netherburn Engineering Ceramic v Mudau & others supra* at 1725E.

[119] Maloka. TC 'Fairness of a dismissal at the behest of the third party: *Kroeger v Visual Marketing*' (2004) 1 *Turf Law Review* 108 at 109 (citations omitted). '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

The vulnerability of employees is underscored by the fact that dismissal has been aptly if colourfully called 'the labour relations equivalent of capital punishment'.[120] The foregoing considerations may well be most amplified at the point of termination induced by improperly and unconstitutionally obtained evidence.

It will be noted that in reaching its landmark decision in *Hoffman v South African Airways*[121] the Constitutional Court made it clear to employers that in appropriate circumstances it will intervene to protect the right of a person to work and earn a livelihood. In this regard it is instructive to quote a passage from the judgement, which says:

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large mass of the unemployed." Basson *et al*, *Essential Labour Law* (2002) Ch. 1 at 3, the authors say the following about employment: "...the fact remains that we need to work in order to survive. In its simplest form, we work because we need the money we earn by working, and using the money we earn, we support ourselves."

[120] *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 para. 70. See generally Landman, A. '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)' (1995) 5(6) *CLL* 51.Collins, H. *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 at 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, Bogaric, M. '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.'

[121] 2001 (1) SA 1 (CC).

'An order of instatement, which requires an employer to employ an employee, is a basic element of the appropriate relief in the case of a prospective employee who is denied employment for reasons declared impermissible by the Constitution. It strikes effectively at the source of unfair discrimination. *It is an expression of the general rule that where a wrong has been committed, the aggrieved person should as a general matter, and as far as possible, be placed in the same position the person would have been but for the wrong suffered.* In proscribing unfair discrimination, the Constitution not only seeks to prevent unfair discrimination, but also to eliminate the effects thereof. In the context of employment, the attainment of that objective rests not only upon the elimination of the discriminatory employment practice, but also requires that the person who suffered a wrong as a result of unlawful discrimination be, as far as possible, restored to the position in which he or she would have been but for the unfair discrimination.'[122]

In *Hoffman*, the employer had refused to employ the applicant, who had passed the employer's selection and screening processes as cabin attendant, when it discovered that he was HIV positive. Having held that the denial of employment on the ground that the applicant was living with HIV impaired his dignity under section 9 of the Constitution,[123] the next issue considered by the Court was that of appropriate relief. Ngcobo J concluded that instatement, that is, an order that Hoffman be appointed to the position which he was denied, was the appropriate and most practicable relief in the circumstances.

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[122] Per Ngcobo J in *Hoffman v South African Airways* 2001 (1) SA 1 (CC) at 24-25 paras [50-52] which was cited with approval by Pretorius A in *IMATU obo Xaneko/Makana Municipality* [2003] 1 BALR 4 (BC) at 9E-F where the employee was unfairly refused promotion and the disputed post no longer existed the remedy of "protective promotion" was ordered. See also *Walters v Transitional Local Government Council, Port Elizabeth* (2000) 21 *ILJ* 2723 (LC). *In X v Y Corp* [1999] 1 LRC 688 (Bombay HC) at 726 para [761], where the applicant was found to be medically fit for his normal job requirements and would not pose a threat to other workers due to his HIV positive status, the court ordered that the applicant's name be restored to the list of casual workers and be given work as and when available until such a time he would be considered for permanent employment. It was held that the medical test, which had shown him to be HIV positive, was unconstitutional and invalid. For further authorities and discussion see Okpaluba, C. 'Extraordinary remedies for breach of fundamental rights: Recent developments' (2002) 17 *SA Public Law* 98 esp.111-117.

[123] The trial judge had held in *Hoffman v South African Airways* 2002 (2) SA 628 (WLD) that no breach of the plaintiff's right to equality had occurred through the corporation's policy which was the result of a careful and thorough research and was consistent with international trends and that even if the corporation's policy constituted unfair discrimination, it was justified within the meaning of section 36 of the Constitution.

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