JUDICIAL SCRUTINY OF DERIVATIVE MISCONDUCT IN SOUTH AFRICAN EMPLOYMENT LAW: A CAREFUL APPROACH TO THE DUTY TO SPEAK

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SUMMARY

The concept of derivative misconduct has in the past come to the aid of employers in disciplining employees who are reticent about disclosing information that would support the prosecution of an offence. Though dismissal based on derivative misconduct 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. In applying the concept of derivative misconduct, South African labour courts have placed too much emphasis on the unilateral duty of good faith owed by the employee to the employer rather than the reciprocal nature of the duty and the true realities of South African industrial relations. The ground-breaking judgment of the Constitutional Court in *National Union of Metalworkers of South Africa (NUMSA) obo Nganezi v*

Dunlop Mixing and Technical Services (Pty) Limited (2019) 40 ILJ 1957 (CC) crafted significant principles in relation to the application of derivative misconduct within the context of collective bargaining. This article seeks a critical unpacking of the legal quagmire, which has not been fully addressed by the Constitutional Court, and to provide a way forward that may be adopted by employers to promote a spirit of fairness in the employment relationship.

1 INTRODUCTION

For almost two decades, South African labour dispute resolution forums have struggled to craft important details in respect of the application of derivative misconduct and the duty of good faith. Accordingly, South African labour courts have placed too much emphasis on the unilateral duty of good faith[1] owed by the employee to the employer and too little on the reciprocal nature of the duty and the true realities of South African industrial relations. Consequently, South African labour courts have missed an opportunity to reflect on the ramifications of the unilateral approach, which does not uphold the principle that the employment relationship is based on fairness as a cornerstone. In her dissenting judgment Savage AJA emphasised the realities of the workplace environment, stating that imposing an expansive duty upon an employee to act in good faith towards his or her employer, with a duty to "rat" on fellow employees, must therefore be a careful process, one that ensures an appropriate regard to the context and tensions inherent in the workplace.[2]

The ground-breaking judgment of the Constitutional Court in the *NUMSA* case[3] crafted significant principles in relation to the application of derivative misconduct within the context of collective bargaining. In this regard, the Constitutional Court probed the impact of disclosure within the context of industrial action, stating that the imposition of a unilateral duty to disclose would undermine the collective bargaining power of workers by requiring positive action in the interests of the employer without any concomitant obligation on the part of the employer to give something reciprocally similar to the workers in the form of guarantees for their safety and protection before, when, and after they disclose.[4]

Despite the Constitutional Court pronouncement on the reciprocal nature of the duty of good faith within the context of industrial action, the court did not provide significant details of what would constitute a sufficient guarantee of safety to an employee. The court also failed to state whether the duty of

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1 In the case of *Western Platinum Refinery Ltd v Hlebela* (2015) ILJ 2280 (LAC) par 8, the court held no new category of dismissal had been created by the judgments in *ABI, Chauke, and RSA Geological Services*; rather the judgments elucidate the principle that an employee who is bound implicitly by a duty of good faith towards the employer breaches that duty by remaining silent about knowledge possessed by the employee regarding the business interests of the employer being improperly undermined.

2 *National Union of Metalworkers of South Africa (NUMSA) obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd* (2018) 39 ILJ 2226 (LAC) par 101.

3 *National Union of Metalworkers of South Africa (NUMSA) obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited* (2019) 40 ILJ 1957 (CC).

4 *NUMSA v Dunlop* (CC) *supra* par 73.

good faith imposes an absolute duty upon employees to make a disclosure or speak either against their fellow employees or implicate themselves if they have been directly involved in the commission of misconduct. This article seeks a critical unpacking of the legal quagmire, which has not been fully addressed by the Consitutional Court, and to provide a way forward that may be adopted by employers to promote a spirit of fairness in the employment relationship. In so doing, this article first provides a comprehensive overview of the origins, meaning and judicial development of derivative misconduct as a concept. Secondly, this article provides an analysis of the all-encompassing duty of mutual trust and confidence and how the Constitutional Court in *Dunlop* scrutinised the application of the duty of good faith. Lastly, this article provides a way towards fairness.

2 THE ORIGINS, MEANING AND JUDICIAL DEVELOPMENT OF DERIVATIVE MISCONDUCT

The concept of derivative misconduct was suggested, without being decided on, in the case of *Food & Allied Workers Union v Amalgamated Beverage Industries Ltd (FAWU v ABI)*.[5] The origins of the concept lie in an *obiter dictum* (non-binding statement) by Nugent J:

> "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."[6]

However, the genesis of derivative misconduct in South African labour jurisprudence can be attributed to the *Chauke* case.[7] Cameron JA, in a unanimous Labour Appeal Court judgment, defined derivative misconduct as occuring when there has been a proved act of misconduct necessitating disciplinary action, but the management is unable to pinpoint the perpetrator or perpetrators.[8]

The notion of derivative misconduct was also considered, without being decided on, by Grogan J in the case of *RSA Geological Services.*[9] In this

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5 (1994) 15 ILJ 1057 (LAC).

6 *FAWU v ABI supra* 1063.

7 *Chauke v Lee Service Centre t/a Leeson Motors* (1998) 19 ILJ 1441 (LAC).

8 *Chauke v Lee Service Centre supra* par 33.

9 *RSA Geological Services v Grogan NO* (2008) 29 ILJ 406 (LC). In this case, the dismissed respondent employees were laboratory assistants who processed and analysed samples of kimberlite in the applicant employer's laboratories to determine if the samples were diamondiferous. These tests reflected the quantity of diamond in the samples and were distributed to the employer's clients to enable them to invest resources appropriately. The tests required meticulous execution for accuracy. Any diamonds discovered were registered and stored and the remnants of the samples were retained as discarding the remnants would have resulted in a distortion of the results and subsequently any reports to clients. In April 2002, a secret informer advised management that kimberlite was being discarded down boreholes. It was common cause that the kimberlite came from the samples that had been discarded. The amount of discarded sample was in excess of 400 kilograms. The employees were interviewed and urged to cooperate with the investigation to identify the perpetrators of the misconduct. The employer supplied the employees with an anonymous

case, the court held that a two-stage enquiry should be followed when considering the evidence and inferences to be drawn as follows:[10]

- The first stage is to determine whether the facts, and inferences drawn from the facts, constitute *prima facie* proof that all of the employees had participated in the misconduct and had been aware of it.
- The second stage of the enquiry is to assess whether the employees had effectively rebutted these facts and inferences or whether the employer had succeeded in elevating its *prima facie* proof to conclusive evidence sufficient to discharge its onus of proving the fairness of the dismissal on a balance of probabilities.

The court articulated the following prerequisites for the application of the concept of derivative misconduct. It would have to be shown:[11]

1. first, that the employee knew or could have acquired knowledge of the wrongdoing;
2. secondly, that the employee failed without justification to disclose that knowledge to the employer, or to take reasonable steps to help the employer acquire that knowledge.

Pillay J found the employees guilty of the primary misconduct on the basis of overwhelming evidence presented by the employer and which demanded an answer from employees.[12] A compelling explanation would have been that discarding samples was serious misconduct; anyone who was involved would not have let others know about it.[13]

As a result, in the case of *Hlebela*,[14] the doctrine of derivative misconduct was reconsidered and developed in detail by the Labour Appeal Court. Sutherland J laid down the self-evident dimensions of the concept of derivative misconduct as follows:

a) The undisclosed knowledge that the employee is alleged to have must be actual knowledge (which may be established by inferences) and not imputed or constructive knowledge. Actual ignorance of facts, arising from incompetence or negligence, does not fall within the scope of derivative misconduct.
b) The employee must deliberately fail to disclose the knowledge.
c) The duty to disclose is not affected by the seriousness of the primary misconduct, and the duty to disclose applies equally to serious and less serious forms of misconduct.
d) Whether dismissal is an appropriate sanction may be determined by the seriousness of the primary misconduct, as well as the effect of the non-disclosure by an employee in the position of the charged employee on the ability of the employer to protect itself against the primary

number to call to provide information. However, the employees collectively refused to assist the employer as they denied knowing anything of the misconduct.

10 *RSA Geological Services v Grogan NO supra* par 22 and 23.

11 *RSA Geological Services v Grogan NO supra* par 29.

12 *RSA Geological Services v Grogan NO supra* par 32–33.

13 *Ibid*.

14 *Western Platinum Refinery Ltd v Hlebela supra* par 4–8.

misconduct; that is, these factors may serve as mitigating or aggravating factors rather than in the determination of guilt of the derivative misconduct.

e) The employee's rank is irrelevant in determining culpability in respect of the derivative misconduct, but may serve as a mitigating or aggravating factor, depending on the role fulfilled by the employee in respect of security or adherence to procedures.

f) Mere (actual) knowledge of the primary misconduct triggers the employee's duty to disclose, and the duty is not dependent on a request by the employer. Where a request is made by the employer, this may aggravate the culpability for non-disclosure.

g) An employee charged with derivative misconduct must be a witness to the primary misconduct and must not be a perpetrator thereof.

h) Worker solidarity is not a defence to the charge of derivative misconduct.

i) The view that a breach of the duty of good faith would occur where an employee could have acquired knowledge of the primary misconduct is too wide. An employee would be guilty of misconduct based on negligence rather than derivative misconduct in circumstances where the employee is negligently ignorant of circumstances of which they ought to have been aware. Negligent ignorance of such knowledge does not fall within the scope of derivative misconduct.

j) Where non-disclosure is capable of justification, this is not a defence to the charge of derivative misconduct. It may provide mitigation of culpability only.

k) Derivative misconduct may be an appropriate charge where those employees who have knowledge of the primary misconduct can be distinguished from the perpetrators.

A period of three years lapsed after *Hlebela*, and before the next chapter on derivative misconduct was deliberated upon by Kathree-Setiloane AJA in the *PRASA* case.[15] Kathree-Setiloane AJA reiterated the test to be applied on a derivative misconduct charge as follows:

> "The employer (PRASA) had to prove on a balance of probabilities that the employee committed the misconduct. This would require the employer to prove the following main elements of derivative misconduct, namely, the employee knew or must have known about the primary misconduct, but elected, without justification, not to disclose what he or she knew."[16]

The AJA further stressed that it was not sufficient that the employees may possibly have known about the primary misconduct.[17] Accordingly, the employer must prove on a balance of probabilities that each and every employee was in possession of information, or ought reasonably to have possessed information, that could have assisted the employer in its investigation. Consequently, without *prima facie* evidence that any of the

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15 *National Transport Movement v Passenger Rail Agency of SA Ltd* (2018) 39 ILJ 560 (LAC).

16 *National Transport Movement v Passenger Rail Agency of SA Ltd supra* par 31.

17 *Ibid*.

employees did have information about the principal misconduct, one cannot conclude that the employees' failure to cooperate necessarily meant that they either did have, or must have had, something to hide.[18]

3 THE ALL-ENCOMPASSING DUTY OF MUTUAL TRUST AND CONFIDENCE

According to Louw,[19] South African courts recognise the existence of an implied term of trust and confidence in the employment contract just as do a number of other common-law jurisdictions. Accordingly, the UK's House of Lords formulated the content of this duty as imposing an obligation that an employer would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.[20] In respect of the nature of the duty of good faith, Lord Denning MR reiterated that it is the duty of the employer to be good and considerate to his servants.[21] Sometimes it is formulated as an implied term not to do anything likely to destroy the relationship of confidence between them.[22] Bosch[23] is of the opinion that the implied duty of mutual trust and confidence would be breached if the employer behaved in an uncaring and abusive manner.

Cohen expressed the operation of the duty of mutual trust and confidence as follows:

> "In terms of this obligation contracting parties are required to have regard to the interests of the other party without subjugating their own, in recognition of the fact that the continued and harmonious relationship between employer and employee is imperative for the successful fulfilment of the employment contract. The implied obligation of mutual trust and confidence thus ensures that the employer's interests in deriving the maximum benefit from his or her business are equitably balanced against the interests of the employee in being treated fairly."[24]

The court in the case of *Fijen*[25] recognised the application of the implied term of trust and confidence to employment contracts, and emphasised that the relationship between employer and employee is one of trust and confidence and that any inconsistent conduct entitles the innocent party to cancel the agreement.[26] The court further drew an analogy with English law, stating that in every contract of employment the employer has a duty not, without reasonable and probable cause, to conduct itself in a manner likely

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18 *Ibid*.

19 Louw "The Common Law Is … Not What It Used to Be: Revisiting Recognition of a Constitutionally Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment" (Part 2) 2018 21 *PER* 12.

20 *Malik v Bank of Credit and Commerce International SA* (1997) 1 ICR 606 par 35.

21 *Woods v W M Car Services (Peterborough) Ltd* (1982) 1 ICR 695–9.

22 *Ibid*.

23 Bosch "The Implied Term of Trust and Confidence in South African Labour Law" 2006 27 *ILJ* 28.

24 Cohen "The Relational Contract of Employment" 2012 *Acta Juridica* 94–95.

25 *Council for Scientific & Industrial Research (CSIR) v Fijen* (1996) 17 ILJ 18 (A).

26 *CSIR v Fijen supra* 20B–D.

to destroy or seriously damage the relationship of confidence and trust between the parties.[27] Following the *Fijen* decision, it is evident that South African courts endorsed the application of the implied term of trust and confidence to employment contracts.[28]

According to Bosch,[29] the implied term is part of the moral code of the employer, representing a normative standard of right and wrong against which the conduct of the employer is to be assessed. Consequently, the implied term has resulted in a restriction of the scope of an employer's express powers under the contract of employment.[30] Chamberlain[31] presented how the implied term operates in practice by providing the following case law examples of breaches of the employer's moral code:

- criticism of an employee's performance that is unjustified and abusive;
- unilaterally and persistently trying to vary an employee's terms and conditions;
- undermining the authority of a supervisor by severely reprimanding her in front of the employees;
- failing to investigate complaints of sexual harassment;
- deceiving employees and tarnishing their reputations by operating a business in a dishonest and corrupt manner;
- disclosing in a reference to a prospective employer a number of complaints against the employee that were not brought to her attention; and
- failing to offer a contractual benefit to an employee that was offered to others.

By implication, the rationale for the all-encompassing duty of mutual trust and confidence in respect of derivative misconduct was suggested without being decided in the *Chauke*[32] case. The court suggested that the relationship between employer and employee is essentially one of trust and confidence; even at common law, conduct clearly inconsistent with that essence warranted termination of employment.[33] Failure to assist an employer in bringing the guilty to book violates this duty and may itself justify dismissal.[34] Accordingly, the effect of this approach targets not only perpetrators of the original misconduct but includes innocent employees who through their silence make themselves guilty of a derivative violation of trust

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27 *Ibid*.

28 *Jooste v Transnet Ltd t/a South African Airways* (1995) 16 ILJ 629 (LAC); *South African Revenue Services v Commission for Conciliation Mediation and Arbitration* (2014) 35 ILJ 656 (LAC).

29 Bosch 2006 *ILJ* 31.

30 Brodie "Mutual Trust and Confidence After Johnson v Unisys" 2002 *Edinburgh L Rev* 258.

31 Chamberlain "The Development and Scope of the Implied Term of Trust and Confidence" (19 January 2019) https://app.croneri.co.uk/feature-articles/implied-term-trust-and-confidence (accessed 2022-04-26) 5.

32 *Chauke v Lee Service Centre supra.*

33 *Chauke v Lee Service Centre supra* par 31.

34 *Ibid.*

and confidence.[35] Grogan submits that trust forms the foundation of the relationship between employer and employee, and derivative misconduct is founded on this notion.[36] In *Hlebela*,[37] the court expressed similar views, stating:

> "Uncontroversially, and on general principle, a breach of the duty of good faith can justify a dismissal. Non-disclosure of knowledge relevant to misconduct committed by fellow employees is an instance of a breach of the duty of good faith."[38]

One may argue that the *Chauke* and *Hlebela* cases failed to appreciate the reciprocal obligation imposed by the duty of good faith. The Constitutional Court in the *Dunlop*[39] case decided correctly when it held:

> "In the context of a strike, the imposition of a unilateral duty to disclose would undermine the collective bargaining of workers by requiring positive action in the interests of the employer without any concomitant obligation on the part of the employer to give something reciprocally similar to the workers in the form of guarantees for their safety and protection before, when and after they disclose."[40]

Notwithstanding the supposition that an employee's failure to assist an employer in bringing the guilty to book violates the duty of mutual trust and confidence and can justify dismissal, South African courts have also imported an implied duty of fair dealing into the common-law employment contract of employment, which is consonant with section 23 of the Constitution of the Republic of South Africa, 1996. In the *Murray* case,[41] the Supreme Court of Appeal expressed the view that to promote the spirit, purport and objects of the Bill of Rights, the common law of employment must be held at all times to impose on all employers a duty of fair dealing with their employees, including employees not covered by the Labour Relations Act (LRA).[42] Louw accordingly argues that the constitutional development of the common law to imply a duty of fair dealing to cases where the LRA does not apply serves to concretise and expand the notion of the importation of fairness into the common law.[43]

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35 *Chauke v Lee Service Centre supra* par 33.

36 Grogan "Derivative Misconduct" 2004 20 *Employment Law Journal* 15.

37 *Western Platinum Refinery Ltd v Hlebela supra.*

38 *Western Platinum Refinery Ltd v Hlebela supra* par 8.

39 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited* 2019 (8) BCLR 966 (CC).

40 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 73.

41 *Murray v Minister of Defence* 2009 (3) SA 130 (SCA).

42 66 of 1995; *Murray v Minister of Defence supra* par 5–6.

43 Louw 2018 *PER* 18.

4 THE DUTY OF GOOD FAITH THROUGH THE JUDICIAL LENS: *DUNLOP* CASE

In 2019, the Constitutional Court in the *Dunlop*[44] case delivered a unanimous landmark judgment on the concept of derivative misconduct.

The Constitutional Court was called upon to determine the reasonableness of the arbitrator's decision that the dismissal of the third category of employees had been substantively unfair. In determining whether or not Dunlop had proved that the employees were guilty of derivative misconduct, the Constitutional Court extensively examined the true nature and scope of the duty of good faith.[45]

In arriving at his decision, Froneman J drew a distinction between a fiduciary duty and the duty of good faith.[46] Froneman J observed that the *Chauke* decision[47] suggested that the rationale for the extension beyond the actual primary misconduct was that;

> "the relationship between employer and employee is in its essentials one of trust and confidence" and non-disclosure could amount to a "derivative violation of trust and confidence."[48]

The justice expressed the view that the violation of the "trust and confidence" referred to in *Chauke* can be interpreted as a breach of the duty of good faith towards the employer that, "uncontroversially and on general principle, can justify a dismissal for non-disclosure of knowledge relevant to misconduct by fellow employees".[49] The court noted that a duty to disclose must flow from the reciprocal duty of good faith that the employee and employer owe one another. The justice made reference to a seminal article by Idensohn in which he sharply criticises the conflation of fiduciary duties with a duty of good faith in our case law:

> "Much of this confusion is due to loose use of imprecise and ambiguous terminology. Terms such as 'good faith', 'trust', 'confidence', 'faithfulness', and 'loyalty' are used interchangeably in descriptions of employee duties without any recognition or acknowledgment that they have functionally different meanings in different contexts, and that those meanings have changed over time. Both fiduciary duties and duties of good faith, for example, require 'loyalty'. For the purposes of fiduciary duties, 'loyalty' has the specific meaning of acting solely and exclusively in the interests of another. In relation to duties of good faith on the other hand, 'loyalty' generally has a narrower, less exacting meaning that merely requires the incumbent to have regard to or take the interests of another into account."[50]

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44 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra*.

45 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 49–76.

46 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 49–69.

47 *Chauke v Lee Service Centre supra*.

48 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 49.

49 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 51.

50 Idensohn "The Nature and Scope of Employees' Fiduciary Duties" (2012) 33 ILJ 1539 1550, cited in *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 53.

Froneman J held that a fiduciary duty applies to those persons who have access to, or power in relation to, the affairs of a beneficiary, and that such duties must be exercised for the sole purpose of promoting the beneficiary's interests.[51] Because of the high level of trust and responsibility imposed on an individual with a fiduciary duty, this duty is unilateral.[52]

Froneman J concluded that our law does not imply fiduciary duties into all employment relationships.[53] However, the duty generally arising in an employment relationship is a reciprocal contractual duty of good faith, which itself does not impose an obligation on any employee to disclose information about misconduct of their fellow employees to their employer.[54]

In relation to the submissions by Dunlop that doing away with derivative misconduct in the form that would warrant dismissal goes against the entire march of the court's contractual jurisprudence, which has been towards the greater incursion of the values of morality, good faith and *ubuntu*[55] into the contractual relationship.[56] The Constitutional Court dismissed Dunlop's submission, holding that the principles of *ubuntu* ought to be infused into the employment contract as the employment relationship is an unequal and hierarchical relationship, in which the employer has unfair power over its subordinated employee.[57] In addition, the court highlighted that if the *ubuntu* analogy were to be appropriately applied, it would be in relation not to the subordinated employee but to the employer.[58]

Froneman J also interrogated the impact of the duty to disclose within the context of a strike.[59] The Constitutional Court observed that the fact that a protected strike turned violent does not mean that the right to strike is no longer implicated in the analysis.[60] The right to strike is underpinned by the power play between employer and employees, and employees only have the power to strike if there is solidarity among the employees.[61]

Froneman J expressed the following view:

> "In the context of a strike, the imposition of a unilateral duty to disclose would undermine the collective bargaining power of workers by requiring positive action in the interests of the employer without any concomitant obligation on the part of the employer to give something reciprocally similar to the workers in the form of guarantees for their safety and protection before, when and after they disclose."[62]

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51 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 55.
52 *Ibid*.
53 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 62.
54 *Ibid*.
55 A Nguni Bantu term meaning humanity.
56 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 65.
57 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 66.
58 *Ibid*.
59 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 70–76.
60 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 70.
61 *Ibid*.
62 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 73.

The Constitutional Court concluded that a correct balance must be adopted in fair labour practices, taking into account the interests of both employer and employee in the context of a violent strike.[63] In the quest to strike the correct balance between employer and employee, Froneman J stressed:

> "The reciprocal duty of good faith should not, as a matter of law, be taken to imply the imposition of a unilateral fiduciary duty of disclosure on employees. In determining whether, as a matter of fact, a unilateral fiduciary duty to disclose information on the misconduct of co-employees forms part of the contractual employment relationship, caution must be taken not to use this form of indirect and separate misconduct as a means to easier dismissal rather than initially investigating the participation of individual employees in the primary misconduct. A failure to appreciate that there are many ways, direct and indirect, for employees to participate in and associate with the primary misconduct, increases this risk. Evidence, direct or circumstantial, that individual employees in some form associated themselves with the violence before it commenced, or even after it ended, may be sufficient to establish complicity in the misconduct. Presence at the scene will not necessarily be required. Even prior or subsequent knowledge of the violence and the necessary intention in relation to association with the misconduct will still be sufficient."[64]

In conclusion, Froneman J underlined that the duty to disclose on the basis of good faith can never be unilateral, it must be accompanied by a reciprocal, concomitant duty on the part of the employer to protect the employee's individual rights, including the fair labour practice right to effective collective bargaining.[65] In the context of a strike, Froneman J held:

> "An employer's reciprocal duty of good faith would require, at the very least, that employees' safety should be guaranteed before expecting them to come forward and disclose information or exonerate themselves."[66]

On this basis, the Constitutional Court upheld the decision of the arbitrator that the dismissal of the third category of employees had been unfair. The article next reflects on the Constitutional Court judgment on the application of the derivative misconduct concept in the workplace.

5 THE RIGHT TO REMAIN SILENT AND THE PRESUMPTION OF INNOCENCE IN PERIL

Regardless of strict workplace rules to secure and sustain an enterprise, employers find it particularly difficult to prove the participation of individuals in impugned conduct where misconduct is alleged to be collective.[67] Nonetheless, no one should be held accountable where no evidence can be adduced to substantiate a claim against individuals solely on the basis of being part of a group.[68] Achieving a fair dismissal for misconduct in

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63 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 74.

64 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 75.

65 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 76.

66 *Ibid*.

67 Maqutu "Collective Misconduct in the Workplace: Is 'Team Misconduct' 'Collective Guilt' in Disguise?" 2014 25(3) *Stell LR* 566.

68 *Ibid*.

circumstances where the primary misconduct has been committed by a group of employees poses evidential difficulties and has birthed the concept of collective misconduct.[69]

Accordingly, an employee bound by the duty of good faith to an employer breaches that duty by remaining silent about knowledge in the employee's possession regarding the business interests of the employer.[70] The duty of faith that an employee owes to an employer includes an obligation to come forward and either identify the perpetrators of misconduct to which that employee is a witness or to provide answers, which includes evidence in the employee's exoneration.[71] It is submitted that an employee's failure to give evidence, either to identify the perpetrators or exonerate himself, is also significant from an evidentiary perspective in that negative inferences can be drawn from such a silence and may justify dismissal.

In an *obiter dictum*, Nugent J held:

> "In the field of industrial relations, it may be that policy considerations require more of an employee than that he merely remained passive in circumstances like the present, and that his failure to assist in an investigation of this sort may in itself justify disciplinary action."[72]

In the *Chauke* case, Cameron JA stated:

> "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 derivative violation of trust and confidence."[73]

However, it is submitted that the presumption of innocence and the right to remain silent is encroached if it cannot protect vulnerable employees from the risk of dismissal where an employee does not identify perpetrators of misconduct or exonerate themself in the face of collective misconduct charges.

Even though an inference from the employee's silence is permissible,[74] it is clear that misconduct created by an employee's failure to identify perpetrators or to exonerate themself unavoidably makes the employee's silence a factor to be taken into account in determining whether or not the employer has established a *prima facie* case.

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69 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 31.

70 *Dunlop Mixing and Technical Services (Pty) Limited v National Union of Metal Workers Union SA obo Nganezi* (2016) 27 *ILJ* 2065 (LC) par 4.

71 Poppesqou "The Sounds of Silence: Evolution of the Concept of Derivative Misconduct and the Role of Inferences" (2018) 39 *ILJ* 49.

72 *FAWU v ABI supra* par 1063.

73 *Chauke v Lee Service Centre supra* par 33.

74 In *R v Lepage* 1995(1) SCR 654, the court observed that "while it is permissible to conclude from the failure to testify that there is no unspoken, innocent explanation about which the trier of fact must speculate it is not permissible to use silence to strengthen a case that otherwise falls short of proving guilt beyond a reasonable doubt. If the totality of the evidence leads to guilt beyond a reasonable doubt, the accused's silence simply fails to provide any basis to conclude otherwise."

In the case *R v Noble,*[75] the court unequivocally observed as follows:

> "The use of silence to help establish guilt beyond a reasonable doubt is contrary to rationale behind the right to silence. Just as a person's words should not be conscripted and used against him or her by the State, it is equally inimical to the dignity of the accused to use his or her silence to assist in grounding a belief beyond a reasonable doubt. To use silence in this manner is to treat it as communicative evidence of guilt … The failure to testify tends to place the accused in the same position as if he has testified and admitted his guilt."[76]

Similarly, in cases of derivative misconduct, it is submitted that the employer, with its greater resources to investigate workplace misconduct, must not be permitted to use the employee's failure to identify perpetrators, or to exonerate themself, as a weapon against employees to build its own case. If the employer is permitted to establish a *prima facie* case using the employee's failure to exonerate themself, not only does it undermine the presumption of innocence but also creates a reverse onus of proof, which is contrary to the provisions of the Labour Relations Act.[77]

Furthermore, it is submitted that the main concern arising from allowing derivative misconduct dismissal is the failure to identify the principles determining the scope and contents of the presumption of innocence and the right to remain silent and its potential to significantly dilute these constitutionally protected rights. In the *Noble* case, the court stressed the importance of these two constitutionally protected rights.[78]

6 CRAFTING A WAY TOWARDS FAIRNESS

By implication, the duty to speak or disclose information relating to misconduct may be qualified to safeguard employees' interests. Accordingly, one may argue that there are two circumstances in which employees may be required to speak or disclose information in cases of derivative misconduct. First, an employee may be required speak against fellow colleagues, and secondly, an employee may be required to speak and incriminate themself if they were directly involved in the commission of the offence.

In the first category, the notion that there is a general duty to inform the employer of acts of misconduct committed by fellow colleagues remains unsupported in South African as well as English jurisprudence from which our law is derived. In terms of English law, Lord Justice Green in the *Swain* case, stated:

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75 (1997) 146 DLR 385.

76 *R v Noble supra* par 21.

77 66 of 1995. Items 7 and 4 of Schedule 8 (Code of Good Practice: Dismissal) sets out the substantive and procedural requirements for pre-dismissal. The employer bears the evidential burden on a balance of probabilities to prove that an employee is guilty of misconduct.

78 In *R v Noble supra* par 75, the court stressed that the right to silence is an essential right as it guards against the affront to dignity and privacy inherent in a practice that enables the prosecution to force an accused person to supply evidence.

> "I am unable to accept the proposition that there is a general duty to speak. Whether there is such a duty or not must depend on the circumstances of each particular case."[79]

The *Swain* judgment was endorsed by MacFarlane JA in *International Woodworkers of America v Sooke Forest Products Limited* when the court stated:

> "I think the learned judge refrained rightly from any decision as to the general existence or nature of the duty, if any, upon employees to disclose to the employer information regarding improper conduct of other employees. The existence of and the nature of such duty must depend upon the circumstances of the individual case."[80]

In terms of South African jurisprudence, neither the *FAWU*[81] nor the *Chauke*[82] cases uphold the proposition that there is a general duty to speak against acts of misconduct committed by fellow employees. In the *FAWU* case, Nugent JA stressed that in the field of industrial relations, it may be that policy considerations require more of an employee than that they merely remain passive and that their failure to assist in an investigation of this sort may in itself justify disciplinary action.[83]

Conversely, Cameron JA in the *Chauke* case stated that an employee may be under a duty to assist management in bringing the guilty to book, and where an employee has or may reasonably be supposed to have information concerning the guilty, their failure to come forward with the information may in itself amount to misconduct.[84]

In the first circumstance, it is safe to submit that, in safeguarding both the employer's and employee's interest, a balanced and fair approach must be adopted, taking into account, *inter alia*, the particular facts and circumstances of each case, the reciprocal duty of good faith and fair dealings in the employer and employee relationship, and the historical and socio-economic context.

The reciprocal duty of good faith was endorsed by Froneman J in the *Dunlop* case, where the justice remarked that an employer's reciprocal duty of good faith would require, at the very least, that employees' safety should be guaranteed before expecting them to come forward and disclose information or exonerate themselves.[85] Therefore, it may be argued that, to alleviate the potential consequences of being an *impimpi* (snitch), an employer may be required to offer guaranteed effective protection before, during and after disclosure of information by employees.

In this light, it is recommended that employers should consider adopting a workplace disclosure policy to deal with the potential consequences of

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79 (1936) 3 All ER 261, citing *Bell v Lever Brothers Limited* (1932) AC 161.
80 *1968 Carswell EC* 289 par 7.
81 *FAWU v ABI supra* par 1063.
82 *Chauke v Lee Service Centre supra*.
83 *FAWU v ABI supra* par 1063.
84 *Chauke v Lee Service Centre supra* par 31 and 33.
85 *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited supra* par 76.

disclosing information against fellow employees. Accordingly, it is submitted that a workplace disclosure policy may be a useful mechanism to manage any potential ramification either before, during, or after disclosure of information against a fellow employee, while also regulating effective protection of employees.

In this regard, a workplace disclosure policy may ensure that any wrongdoing disclosed regarding any form of misconduct is dealt with effectively, confidentially, and anonymously by the employer. In terms of such a policy, employees may be encouraged to report any form of suspected unethical, illegal, corrupt, fraudulent, or undesirable conduct committed during the course and scope of employment as the employer is then obliged to provide guaranteed protective measures to such employees in relation to such conduct without fear of victimisation or reprisal.

A workplace disclosure policy may therefore remain the prerogative of the employer to ensure that employees who disclose information are treated in a fair manner and do not suffer any occupational detriment, and that confidentiality is preserved in respect of all matters raised under this policy. Consequently, an employee or employees who make a disclosure of information to the employer will be guaranteed protection from any form of occupational detriment, including termination of employment, discrimination, harassment, bullying, or intimidation and victimisation.

By adopting such a workplace disclosure policy, the employer would endeavour to take reasonable steps to protect an employee or employees from any form of occupational detriment by taking necessary action where such conduct is identified. As such and if warranted, the policy may dictate that the employer allow an employee to perform duties from another workplace, or change to another department, in order to protect the employee from any risk of occupational detriment.

Lastly, a workplace disclosure policy may also provide that in cases where an employee or employees who disclosed information have suffered any form of occupational detriment as a result of the employer's failure or negligence to take reasonable precautionary and preventative measures, either before, during, or after disclosure of information, the employee or employees may claim compensation or recover civil damages.

In the second category of duty to speak, it is submitted that employees may be permitted to exercise the right to remain silent and to a presumption of innocence in order to eliminate the risk of an employee's tendering self-incriminating evidence during a disciplinary hearing. In that regard, in the absence of rules determining the scope and extent of questioning by the employer, protection similar to that enjoyed by an accused person invoking the right to remain silent in a criminal matter would not be out of proportion in labour matters.[86]

In the context of criminal law, the importance of the right to remain silent and the presumption of innocence is of paramount importance and it

[86] *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd* (2018) ILJ 2226 (LAC) par 68.

remains a cornerstone in South Africa's constitutional democracy. In addition, the right to remain silent guarantees protection against self-incrimination and unfair deprivation of freedom and liberty, whereas the presumption of innocence ensures that the State must prove the accused's guilt beyond a reasonable doubt. Consequently, an employee cannot be expected to assist an employer to establish a *prima facie* case against them or prove their innocence because statutorily the onus of proof rests with the employer.

7 CONCLUSION

For the past two decades, it is evident that South African labour dispute resolution forums have grappled with finding a fair approach to be adopted in relation to the duty to speak in cases of derivative misconduct. The unilateral approach to the duty to speak failed to take cognisance of fairness as a cornerstone in the employment relationship. Contrary to the unilateral approach, the reciprocal approach adopted by the Constitutional Court in *Dunlop* can be applauded not only for taking cognisance of the realities of the workplace environment but also for ensuring that its judgment was consonant with the right to fair labour practices. In addition, the researchers have identified two categories within the duty to speak – that is, a duty to speak against fellow employees, and duty to incriminate oneself. In the first category, it was suggested that a balanced and fair approach may be adopted. In the second category, it was suggested that employees may be permitted to exercise the right to remain silent and to a presumption of innocence in order to eliminate the risk of an employee's tendering self-incriminating evidence during a disciplinary hearing. However, it remains to be seen whether South African courts will decide on important details of the right to remain silent and presumption of innocence, which are implicated by a finding of derivative misconduct.