THE APPLICATION OF DERIVATIVE MISCONDUCT IN THE WORKPLACE: A CRITICAL ANALYSIS OF

National Union of Metalworkers of South Africa obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited 2019 (5) SA 354 (CC)

1 Introduction

In modern South African law, employees have several fundamental rights, the right to strike being one of those rights. This right is enshrined in the Constitution of the Republic of South Africa, 1996 (the Constitution) and also in the Labour Relations Act 66 of 1995 (the LRA); both statutes provide that every employee has the right to strike (s 64(1) of the LRA and s 23(2)(*c*) of the Constitution). However, for a strike to be protected as legal strike action, at least 48 hours' notice of the commencement of the strike must be given, in writing, to the employer (s 64(1)(*b*) of the LRA). If employees misconduct themselves – for example, engage in acts of violence during a protected strike – the employer is entitled to dismiss those employees on the grounds of misconduct (Schedule 8, item 7 of the Code of Good Practice under the LRA). However, if the employer is unable to identify the responsible employees (the perpetrators), the question is whether the employer can request other employees to identify the perpetrators. If the answer to this is yes, the next question is whether the employer can dismiss these employees if the employees do not want to identify the "perpetrators".

To answer these questions, employers have relied on the principle of "derivative misconduct" to discipline employees during strike action where employees responsible for misconduct cannot be identified and other employees fail, when requested, to come forward and assist the employer to identify those responsible. Derivative misconduct is a principle that is neither defined nor appears in any labour legislation. It has been developed by the courts and used by employers as a concept to require an employee to come forward and give information about other employees who have misconducted themselves during protest action. Since derivative misconduct is not defined in labour legislation, a consideration of the judgments that have considered the scope and application of this principle on a particular set of facts demonstrates the difficulties of its application. Before the Constitutional Court judgment in *NUMSA obo Khanyile Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd* (2019 (5) SA 354 (CC)), several judgments attempting to develop or clarify the concept either found derivative misconduct did not exist on the particular facts or just expressed

obiter views on the issue. This led to varying decisions on the application of derivative misconduct. The Constitutional Court has now finally sought to articulate and grapple with this concept.

2 The facts

This was an application for leave to appeal against a decision of the Labour Appeal Court (LAC) in which Sutherland JA dismissed NUMSA's appeal and confirmed the order of the Labour Court. On 22 August 2012, 204 employees, who were also members of NUMSA, embarked on a protected strike. During the strike, violence erupted, leading to intimidation and property damage. An interdict to stop this violence was sought and granted but the violence continued to escalate. Over several weeks, the violence allegedly included setting alight the homes of a manager and a foreman, damaging several vehicles belonging to staff and visitors, stone-throwing, various forms of physical violence, throwing a petrol bomb, blockading workplace entrances, theft of a camera used to record the violence, scrawling death threats on a billboard and violation of agreed picketing rules. Dunlop and two associated companies (Dunlop) thereafter sought to identify the individuals who took part in the violence, but this was unsuccessful. This was done on three different days as follows:

- On 22 August 2012, a letter was sent to the union. The letter described the acts of violence and demanded that the identities of the culprits be given to management. The letter made it clear that the culprits would be disciplined. Moreover, it declared that failure to provide the relevant information would lead to a collective hearing at which all employees were at risk of dismissal.
- On 29 August 2012, a further letter to the attorney of the strikers described more acts of violence, including, notably, arson, death threats, and theft of the camera. Again, the strikers were called upon to identify the actual culprits, preparatory to a formal inquiry.
- On 12 September 2012, a further list of violent acts was given to the union. The letter drew attention to contempt of the court order. The union's intervention was requested.

Just over a month later, on 26 September 2022, Dunlop dismissed the employees, listing some as culprits and others as being party to "derivative misconduct". NUMSA challenged the fairness of the dismissal while Dunlop relied on actual misconduct, derivative misconduct, and common purpose as the basis of dismissal.

3 The Commission for Conciliation, Mediation and Arbitration (CCMA)

The arbitrator placed dismissed employees into three categories, namely:

a) employees who were positively identified as committing violence;

b) employees who were identified as present when violence took place but who did not physically participate in violence; and

c) employees who were not positively identified as being present when violence was being committed (see *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd* 2018 (6) SA 240 (LAC) 4 for these categories).

Having so categorised the employees, the arbitrator found that employees under category a) were fairly dismissed; employees under category b) were fairly dismissed on the grounds of "derivative action"; and employees under category c) were unfairly dismissed and therefore reinstated (*NUMSA obo Khanyile Nganezi v Dunlop Mixing and Technical Services* CC *supra* 16).

The employer was unhappy with the conclusion concerning the third category of employees and brought a review application to the Labour Court.

4 Labour Court decision (*Dunlop Mixing & Technical Services (Pty) Ltd v National Union of Metalworkers of SA obo Khanyile* (2016) 37 *ILJ* 2065 (LC))

In the Labour Court (LC), the application by Dunlop sought to review and set aside a portion of the award handed down by the arbitrator in the arbitration proceedings. In essence, Dunlop disputed the arbitrator's conclusion that it had not discharged its onus of proving derivative misconduct on the employees – who were not specifically identified as having been present during the "direct misconduct" (par 21). Dunlop claimed that it was illogical and unreasonable for the arbitrator to hold that those third-category employees were entitled to decide not to testify because there was no evidence against them (par 24). As a result, Dunlop argued, the decision of the arbitrator could not have been reasonably reached on the evidence and other material placed before him (par 25). In support of these claims, Dunlop argued that the employees – despite not being identified – were guilty of derivative misconduct and therefore fairly dismissed as it could be inferred that they were present during the acts of misconduct (par 22). Dunlop submitted several arguments, including that the evidence adduced was sufficient to create an inference in respect of the respondent employees, whether or not they had been identified, that required them to explain. It argued further that failure or refusal to come forward was a breach of the trust relationship, and that the evidence established that at all relevant times NUMSA and the employees were well aware of Dunlop's attitude towards the failure of employees to come forward and identify the perpetrators, as well as of its intention to rely upon derivative misconduct arising from that failure (par 62).

The issue to be determined by the court, therefore, was whether the inference could be drawn that the employees (including category c)) – all of whom were on strike at the time – were present during the acts of violence. In this case, the court concluded that a reasonable and plausible inference could be drawn that category c) employees were present during the strike and accordingly during the misconduct (par 76). The court further held that if they were not present or had no information regarding the perpetrators, they

would have said so, bearing in mind the opportunities afforded to them to respond (par 76). The court further held that the employees' failure to come forward and give evidence was a breach of trust (par 60). In reaching this decision, Gush J held:

> "[T]he evidence clearly established that the dismissed employees (the applicants before the arbitration) were members of the first respondent and were all on strike. The applicants on numerous occasions during the strike communicated to [NUMSA] that they sought particulars of those directly involved in the principal misconduct from the employees and they regarded the failure by the striking employees to assist as a breach of the trust relationship constituting derivative misconduct … The employees were given an opportunity to explain, either to identify the perpetrators of the direct misconduct or to exonerate themselves both prior to their dismissal and at the arbitration. The employees eschewed such opportunities. The only evidence adduced by or on behalf of [NUMSA] and the employees relating to who was present was confined simply to denying any direct misconduct. It was never suggested by the employees that they were not present during the direct misconduct that took place during the strike." (par 65 and 69)

Accordingly, the court reviewed the decision of the arbitrator and found that the dismissal of employees was both procedurally and substantively fair. After the decision of the Labour Court, NUMSA took the matter to the Labour Appeal Court.

5 Labour Appeal Court decision (*NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd* 2018 (6) SA 240 (LAC))

The Labour Appeal Court (LAC) held that the central controversy in this matter was the meaning and scope of "derivative misconduct" and the question of whether the third category of employees was culpable of its prescripts (par 6). The court was split and it issued a majority and minority judgment. The majority judgment upheld the decision of the LC.

5 1 Majority judgment

Although the majority judgment found that the appeal must be dismissed, the judges differed on the reasons for the dismissal of the appeal. Commencing with Sutherland JA, the court started by holding that "'derivative misconduct' cannot be thought of as more than a label, a term of art to capture a rather complex idea [but] its genesis is an example of a breach of the employee's duty of good faith" (par 21). The court accepted, however, that the appropriate approach in the case of derivative misconduct is that the employer bears the onus of proving, on a balance of probabilities, that the employee knew or must have known about the principal misconduct (par 29). In this case, the court held that once it could be inferred from the evidence that the employees were probably present during the violence, the onus to satisfy that the employees "knew or must have known" who perpetrated violence was established (par 29).

Turning to the facts of the case, the court commenced by interpreting the reasoning of the arbitrator and that of Gush J in the LC. In this regard, the court found that the arbitrator adopted too narrow an approach when it treated the presence and identification of each employee as a *sine qua non* to be implicated based on derivative misconduct (par 32). On an interpretation of the facts, the court found that it was not disputed that all dismissed employees were on strike and therefore the inference could be drawn that it was improbable that every employee could not have acquired actual knowledge of the misconduct perpetrated, more especially because the misconduct was so spectacular (par 34). In reaching this decision, Sutherland JA reasoned:

> "[T]he very act of striking, being a collective activity in which worker solidarity is a critical dimension, it may be asked how likely would it be that strikers would absent themselves from the demonstrations of resolve and solidarity which are the very fibre of strike culture. On this aspect, the employees chose to be silent." (par 34)

Accordingly, there was nothing in the evidence to contradict the inference that, on the probabilities, each employee was present for at least some of the time, and equally probable that they were each present most of the time, even if it was not every day (par 34). The court, therefore, agreed with the LC's decision and held that the arbitrator erred in not assessing the evidence for inferences from which, on the probabilities, the employees were shown to have been present during the perpetration of violence: the evidence supported an inference of their presence during the violence; the LC was correct to conclude that the award ought to be set aside; and the employees breached their duty of good faith towards their employer by failing to disclose the identity of the culprits (par 42). In agreeing with the LC, Sutherland J summarised his reasoning (par 39) as follows:

- "39.1 Proof of the presence of the appellant employees during violence has been proved on a balance of probabilities. The Labour Court was correct to find that the arbitrator acted unreasonably in failing to conclude that the appellants were present at any of the scenes of misconduct and had actual knowledge of the misconduct and of the identity of any of the perpetrators thereof.
- 39.2 It had been implicit in the employer's case that the appellants were present and had such knowledge. The absence of direct evidence to that effect seems to have persuaded the arbitrator to arrive at his impugned conclusion. The arbitrator did not give consideration to the fact that such presence and knowledge were capable of proof by means of indirect evidence, or by inference, and, accordingly, did not determine whether those facts had indeed been proved by inference.
- 39.3 Circumstantial evidence relating to the appellants' presence at the scenes of misconduct and their knowledge of the misconduct and/or any of its perpetrators was placed before the arbitrator. Since it constituted an important component of the evidential material in the arbitration, it was incumbent upon the arbitrator to consider whether to draw the required inferences by complying with well-established rules of logic. The failure to do so was not reasonable.
- 39.4 The inference sought to be drawn in this case was whether the appellants were present at any of the scenes, or incidents of misconduct, but more crucially, whether each of them had actual knowledge of any of the misconduct, or of any of the perpetrators thereof. All of the appellants

were on strike with the other workers. The inferences that each of the appellants was present at some or all of the incidents where the misconduct occurred, and that they had actual knowledge of such misconduct and/or of the perpetrator(s) thereof, are consistent with the proven facts and are the only plausible inferences that can be drawn.

- 39.5 There was enough evidence, although not conclusive, that called for an explanation. The false evidence tendered through the witnesses called by the Union, and the failure by the appellants to give evidence themselves in those circumstances, are factors that could justifiably be placed in the balance against them.
- 39.6 A reasonable arbitrator would not have found otherwise."

The appeal was accordingly dismissed.

Concurring with Sutherland J, Coppin JA gave his reasoning in support of the decision to dismiss the appeal. As a point of departure, Coppin JA took the view that the appeal was capable of being decided on the basis that the arbitrator had unreasonably concluded that it had not been proved by Dunlop that the employees were present at any of the scenes of misconduct, had actual knowledge of the misconduct and/or any of the perpetrators thereof, and had deliberately withheld the information (par 47). The court considered the arbitrator's failure to draw the inference – on the circumstantial evidence that employees had been present at the scene of misconduct and their knowledge of the misconduct thereof – as unreasonable (par 49). It was held that such inference constituted an important component of the evidential material in the arbitration, and the arbitrator needed to consider such inference (par 49). On the question of derivative misconduct, the court took the view that the dismissed employees had a duty to speak and failure to disclose the required information was deliberate and culpable (par 54).

In addition, the court dealt in detail with the principle of derivative misconduct and its meaning for the duty to speak and the right to remain silent. The court took the view that requiring an employee to speak, even if the employee had no actual knowledge of the principal misconduct, overlooks or discards certain fundamental rights of employees, including the right to be deemed innocent of any wrongdoing (par 67). According to Coppin JA, completely denying an employee the right to silence and the privilege against self-incrimination seems to be inconsistent with the ethos of the LRA (par 67). Furthermore, the court held that disciplinary codes generally provide, consistent with the (generally) adversarial nature of disciplinary proceedings, that the employer bears the onus to prove the misconduct alleged; therefore, deviating from this is unfair (par 67).

5 2 Minority judgment

The minority judgment was given by Savage AJA and started by dealing with the duty to disclose information. In this regard, the court contextualised the societal challenges and complexities of labour relations in the workplace. The court appreciated the complexity of society and the suffering caused by racial discrimination stemming from inequality. The court, therefore, warned that developing labour jurisprudence

> "to include an expansive duty upon on employee to act in good faith or with trust and confidence towards his or her employer, with a duty to 'rat' on fellow employees must therefore be a careful process, one which ensures that there is appropriate regard to the context and tensions inherent in the contractual relationship between the employer and employee, the position of the employee and the circumstances and conditions under which employees work and live." (par 101)

Savage AJA took the view that appropriate regard must be had to the position of both employer and employee, especially to the risks that may arise when an employee speaks out in naming perpetrators or for purposes of exoneration, and to the dangers that may arise in doing so (par 102). Savage AJA held:

> "While a harsh view may be taken of an employee's passivity and silence when the employer's best interests could be advanced by disclosure, in determining the fairness of a dismissal, account must be taken of all relevant factors, which includes the risk of mortal or other serious danger to the employee." (par 104)

Savage AJA went further to deal with circumstantial evidence and questioned whether the arbitrator had not concluded reasonably that it had not been proved by Dunlop that the employees were present at any of the scenes of misconduct, or that they had actual knowledge of the misconduct and/or any of the perpetrators thereof and thus were under a duty to disclose the information sought by the employer. The judge was not persuaded that the arbitrator had adopted a narrow approach as maintained by Sutherland JA in the main judgment (par 109). Instead, she took the view that the decision of the arbitrator was reasonable. Savage AJA held the following:

> "[T]he fact that the employees did not exonerate themselves, by either disclosing any knowledge to the employer, or raising a defence such as intimidation, or the fear of reprisals and absence of any effective protections against same, does not lead me to a different conclusion; nor does it, to my mind, allow a finding in the circumstances that the employees can as a result be inferred to be culpable. The dishonesty of the union witnesses did not, however, to my mind, allow an inference to be drawn that all employees charged with misconduct as a result of their silence held actual knowledge of misconduct and were consequently culpable by virtue of such silence. If this were so, it raises the obvious question: what of those employees who were on strike but chose not to be on the picket line and knew nothing of the misconduct committed; or those employees who were on the picket line but did not witness strike misconduct? I am not persuaded that there was an obligation on those employees to testify individually to exonerate themselves, whether at the disciplinary hearing or the arbitration hearing, in the manner suggested by the employer, given the burden which rested on the employer to prove the existence of the misconduct alleged and the fairness of their dismissals." (par 112 and 115)

Accordingly, the minority judgment held the decision of the arbitrator to have been in line with the ambit of reasonableness required. NUMSA, still not happy with the outcome, brought the matter to the Constitutional Court (CC).

6 Constitutional Court decision (*NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd* 2019 (5) SA 354 (CC))

The unanimous judgment by Froneman J (with Mogoeng CJ, Cameron J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Nicholls AJ and Theron J concurring) dismissed the decision of the LAC. In dismissing the LAC decision, the court considered the historical understanding of the concept of "derivative misconduct" and whether an inference could be drawn that third-category employees were present at any of the scenes of misconduct. The court commenced by engaging on the issue of whether the Constitutional Court had jurisdiction to hear the appeal by NUMSA, and found that it did have jurisdiction to hear the appeal. In reaching this decision, the court interpreted section 23(1) of the Constitution and found that it guarantees the right to fair labour practices and the right to strike. Since employees had embarked on a protected strike, the court found that the concept of "derivative misconduct" had a direct impact on this protected right. Accordingly, the court concluded that it had jurisdiction to hear the matter and that it was in the interests of justice to grant leave to appeal (par 11).

Having concluded that it had jurisdiction to hear the matter, the court had to deal with the arguments raised by Dunlop and NUMSA. It became clear that the court had to deal with the circumstantial evidence and its role in the dismissal of third-category employees. In support of the LAC majority judgment, Dunlop argued that

> "inferential reasoning would have led the arbitrator to finding that the third category of employees were also present at some or all instances where violence occurred. With that established, the duty of good faith underlying the employment relationship necessitated the disclosure of the identities of others or personal exoneration, neither of which was forthcoming. These failures were sufficient to prove derivative misconduct." (par 25)

In disputing the correctness of the LAC majority judgment, NUMSA argued:

> "[E]ven if an inference of presence at the scenes of violence could be drawn, no derivative misconduct was established. Dunlop's reciprocal duty of good faith required, at the very least, that employees' safety should have been guaranteed before expecting them to come forward and disclose information or exonerate themselves. This was not done." (par 26)

To deal with these arguments, the court dealt in detail with the "derivative misconduct" principle and its application to South African labour law jurisprudence. In this regard, the court commenced by dealing with the link between primary misconduct and derivative misconduct. The court held that a derivative duty on employees to disclose information about the actual presence and participation of their co-employees in collective misconduct is a double-edged sword, aimed at dismissing employees (par 44). The court further held that it would be wrong to use the duty to disclose as an easier means to dismiss, rather than dismissing for actual individual participation in violent misconduct itself; to do so may result in the imposition of a harsher sanction on employees who did not take part in the actual primary

misconduct (par 45). It was further held that the failure, by an employer, to appreciate that there are many ways in which an employee may participate in and associate with the primary misconduct carries the risk of using derivative misconduct as an easier means to effect dismissal (par 48).

The court went further to deal with the duty of good faith, stressing the point that there must be a reciprocal duty between employee and employer. The court held that the contractual duty of good faith as a legal precept does not, as a matter of law, imply the imposition of a unilateral fiduciary obligation on employees to disclose known information of misconduct of their co-employees to their employers, because the legal contractual obligation of good faith is a contested one and must, at the very least, be of a reciprocal nature (par 62 and 63). According to the court, "a sound account of what the contractual duty of good faith requires within a reciprocal relationship between employer and employee is essential for identifying the basis of the misconduct" (par 69). Therefore, "in fair labour practice, 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" (par 75). In applying this principle to the facts, Froneman J held that Dunlop's reciprocal duty of good faith required, at the very least, that employees' safety should have been guaranteed before expecting them to come forward and disclose information or exonerate themselves, but this was not sufficiently done (par 78).

The court went further to deal with the duty to disclose and its impact on the right to strike. In this regard, the court commenced by holding that "the fact that a protected strike turned violent does not mean that the right to strike is no longer implicated in the analysis, or that the setting of the strike no longer constitutes relevant circumstances within which to assess the reciprocal duties of good faith" (par 70). Therefore, to impose a duty to disclose on employees would undermine the collective bargaining power of the employee 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 (par 71). It was therefore held by the court that a balance should be struck between the interests of employer and employee. On the one hand, the impact of violence on the employer's business and its trust of the employee after the strike points to a rationale for the concept of indirect misconduct; on the other hand, the intimidation of innocent, non-striking, or non-picketing employees makes safe disclosure a prerequisite for the possibility of this kind of misconduct (par 74). According to Froneman J, to find the right balance, a reciprocal duty of good faith should not, as a matter of law, be taken to imply the obligation of a unilateral fiduciary duty of disclosure on employees (par 75). Froneman J held that caution must be taken not to use derivative misconduct as a means to easier dismissal rather than initially investigating the participation of individual employees in the primary misconduct (par 75).

Furthermore, regarding the LAC's finding that the arbitrator had failed to consider circumstantial evidence and had drawn inferences about the dismissed employees' presence in violent actions, the court found this finding to be incorrect. The court held that based on the evidence given, it

was not good enough to draw the inference that some employees were probably present when the acts of violence were committed (par 81). Accordingly, the appeal was dismissed.

7 Comments

The principle of derivative misconduct stems from the idea that a failure to notify the employer of misconduct by other employees during a protest action is in itself an act of misconduct. Simply put, derivative misconduct is misconduct that is derived from the misconduct of another during protest action. When dealing with the principle of derivative misconduct, its purpose must be meticulously applied. On interpreting whether the derivative principle applies to the given facts, one must balance the interests of both employer and employee. This is because its application has an impact on the employer-employee relationship. For the purposes of this paper, it is imperative to deal with derivative misconduct as dealt with by the Constitutional Court.

7 1 History and development of derivative misconduct

The Constitutional Court commenced by looking at the concept's origins. The concept was introduced in an *obiter* statement in the early 1990s when Nugent J in *Food & Allied Workers Union v Amalgamated Beverage Industries Limited* ((1994) 15 *ILJ* 1057 (LAC) 1063) held that, in the field of industrial relations, policy considerations may, in certain circumstances, require more of an employee than to be silent where his failure to assist the employer in an investigation may justify disciplinary action. However,at the time it was introduced, Nugent J did not mention this principle by name (*NUMSA obo Nganezi v Dunlop Mixing and Technical Services* (CC) *supra* 32). The concept surfaced again four years later in *Chauke v Lee Service Centre t/a Leeson Motors* ((1998) 19 *ILJ* 1441 (LAC)) and this is where the concept was given its name. Cameron JA developed the concept by stating:

> "[T]his 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." (par 33)

Although the court developed the concept of derivative misconduct, the court continued to hold that it was not necessary to decide the question of derivative misconduct based on the facts before the court (*Chauke v Lee Service Centre t/a Leeson Motors supra* 36).

In 2015, the test for misconduct was then developed in *Western Refinery Ltd v Hlebela* ((2015) 36 *ILJ* 2280 (LAC)), where the court provided factors that may assist in determining whether a dismissal for derivative misconduct was justified. The factors included, *inter alia*: the undisclosed knowledge – established by inferences from the evidence adduced – must be actual, not imputed or constructive knowledge of the wrongdoing; the non-disclosure

must be deliberate, therefore contravening the duty of good faith; the non-disclosure would be related, in part, to the degree of seriousness of the wrongdoing; the duty to disclose does not depend on the rank of the employee although higher rank might be material to the degree of blameworthiness; the duty of good faith does not depend on a specific request for relevant information – mere actual knowledge by an employee triggers a duty to disclose (par 10, 11, 12, 13 and 14). In associating the concept of derivative misconduct with the duty of good faith, Sutherland JA held that derivative misconduct lies within the principles of the duty of good faith to "rat" on the responsible employees, not on culpable participation (par 15).

Having looked at the development and origins of derivative misconduct, the Constitutional Court had to interpret the duty to disclose and derivative misconduct in the context of strike action. The court interpreted derivative misconduct as a double-edged sword. It is submitted that the court was correct to view derivative misconduct as a double-edged sword, and as one that works in favour of the employer. This is because, in instances where violence erupts during a protected strike, the employer can, either way, dismiss employees. If the employee complies with the duty to disclose the identity of responsible employees, the employee escapes dismissal but their co-employees (responsible employees) are implicated in the primary misconduct. If the employee does not comply with the duty to disclose, they are dismissed, and unidentified perpetrators are not. This puts an employee in a difficult position: either the employee saves their job but runs a risk of later being confronted by the responsible employees, or the employee does not disclose the information and gets "fired". Furthermore, the court correctly found that immediate recourse to derivative misconduct may result in the imposition of a harsher sanction on an employee who was not a party to the primary misconduct (par 45). Therefore, it is imperative to understand that it may be wrong to use the duty to disclose as an easier means to dismiss an employee who did not participate in the primary misconduct. This is because there may be several ways for an employee, directly or indirectly, to participate or associate themselves with the primary misconduct; a failure to appreciate this carries the risk that an easier means, such as derivative misconduct, may be sought to effect a dismissal, without thoroughly investigating the primary misconduct (par 48). This principle, expounded by the court, curbs the misuse of derivative misconduct as an easier means to effect dismissals.

7 2 The obligations of the duty of good faith

In the LAC, the minority judgment by Savage AJA provided that developing the duty to "rat" on fellow employees must be a careful process (*NUMSA obo Nganezi v Dunlop Mixing and Technical Services* (LAC) *supra* 101). According to that judgment, the process of disclosure should ensure that due regard is given to the context and tensions inherent in the contractual relationship between employer and employee, the position of the employee and the circumstances and conditions under which employees work and live (*NUMSA obo Nganezi v Dunlop Mixing and Technical Services* (LAC) *supra*

101). Savage AJA held this after considering the inequality that exists in South African society. The Constitutional Court concurred with this idea and reasoned further. According to the court, the duty of good faith requires a reciprocal duty for both employer and employee. The court held that in the context of a violent strike, the duty of good faith requires a recognition of the impact of the violence on both employer and employee (*NUMSA obo Nganezi v Dunlop Mixing and Technical Services* (CC) *supra* 67). Froneman J held that, in the context of strike action, the imposition of a duty to disclose has the impact of undermining 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 (*NUMSA obo Nganezi v Dunlop Mixing and Technical Services* (CC) *supra* 71). On this premise, Froneman J held that a reciprocal duty of good faith requires, at the very least, that employees' safety be guaranteed before expecting them to come forward to disclose information or exonerate themselves (*NUMSA obo Nganezi v Dunlop Mixing and Technical Services* (CC) *supra* 76).

Guaranteeing employees' safety before expecting them to come forward to disclose information or exonerate themselves may be positive or negative – depending on the perspective from which one approaches the situation. From an employee's perspective, the guarantee of safety is positive. When one deals with a duty imposed on an employee to speak out, one must not forget the risks that may arise after an employee has spoken out. The risk of mortal or other serious danger to the employee, after disclosing the identity of responsible employees, cannot be ruled out. Once an employee has "snitched" on other employees, those employees may want revenge, especially if they are dismissed. Therefore, for an employee to disclose information to the employer, the employee must enjoy some sort of protection from the employer. However, on the negative side of the guarantee, the court did not specify what type of safety the employer needs to provide. It is not clear how far the employer should go in guaranteeing the safety of an employee. Does the guarantee extend outside the workplace, or is it confined within the workplace? If it is confined within the workplace, the employee may view the guarantee to be insufficient, as serious danger or mortality may occur outside the workplace.

From the employer's perspective, the principle of guarantee, as laid down by the court, is likely to be viewed mostly negatively. As has been said above, it is not clear how far the employer should go in guaranteeing the safety of an employee. The question that may always be asked by the employer is: what guarantee is required before it can be said that the guarantee is sufficient? If a guarantee is confined to the workplace, the employer may find this achievable. However, if the guarantee is to be extended outside the workplace, this may be difficult for an employer. The employer may argue that it is unreasonable to be expected to guarantee the safety of an employee outside the workplace. Nevertheless, while it may be difficult for the employer to guarantee safety outside the workplace, serious danger or mortality is likely to occur outside the workplace.

7 3 Inference to be drawn

Froneman J assessed and interpreted the evidence as follows:

> "The evidence showed that there were more than 150 employees involved in the strike and that on the first day about 100 were present when violence occurred. That was the high-water mark in the numbers of those present at violent occurrences. At least three possible inferences could be drawn in relation to presence at any one of the incidents of violence: (a) none of the applicants were present; (b) all of the applicants were present; or (c) some of the applicants were present. The more probable inference of these is the third, namely that some of them were present. But that is not good enough. One still does not know who they were. To dismiss all in the absence of individual identification would not be justified. So, the inferential reasoning fails at the first step. And even if it passed the first step, drawing the other necessary inferences would simply become progressively more difficult." (par 81 and 82)

Here, the court interpreted the number of employees present during violence as important in deciding whether the inference can be drawn. On an interpretation of the judgment and the evidence before the court, more than 30 per cent of employees were not present on the first day of the violence that erupted. This number led the court to hold that drawing an inference that linked all employees to derivative misconduct was not justified. It can therefore be argued that the more employees are not present during the violent strike, the more likely it is that one cannot draw the inference that employees were present during the violent protest.

8 Conclusion

This case note has sought to answer the question of whether an employee has a duty to identify responsible employees during a violent strike, and whether the employer is entitled to dismiss an employee for failure to disclose such information. In doing so, the case note has dealt with the principle of "derivative misconduct" as developed by the common law. The critical analysis of the Constitutional Court judgment in *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited* (*supra*) was at the heart of the discussion about derivative misconduct. According to this judgment, the derivative-misconduct principle can be employed by the employer in dismissing the employee. However, the court developed a new principle – the existence of an important reciprocal duty of good faith for both employer and employee – when it comes to derivative misconduct. While an employee must disclose information that can be crucial to discipline violent protestors, the employer has a duty to guarantee an employee's safety before expecting them to come forward and disclose information or exonerate themselves. The reciprocal duty serves to protect the employee and further guarantees the employee's safety prior to disclosing any information about who committed the alleged primary misconduct of the violent strike. The case note, however, shared some difficulties that may arise with the guarantee to be given by the employer.

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