CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 202/18

In the matter between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA OBO KHANYILE NGANEZI AND OTHERS	Applicant

and

DUNLOP MIXING AND TECHNICAL SERVICES (PTY) LIMITED	First Respondent
DUNLOP BELTING PRODUCTS (PTY) LIMITED	Second Respondent
DUNLOP INDUSTRIAL HOSE (PTY) LIMITED	Third Respondent
COMMISSIONER FOR CONCILIATION MEDIATION AND ARBITRATION	Fourth Respondent
COMMISSIONER ALMERO DEYNZEL N.O.	Fifth Respondent

and

CASUAL WORKERS ADVICE OFFICE	Amicus Curiae

Neutral citation:	*National Union of Metalworkers of South Africa obo Khanyile Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others* [2019] ZACC 25
Coram:	Mogoeng CJ, Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Nicholls AJ and Theron J
Judgment:	Froneman J (unanimous)
Heard on:	28 February 2019

Decided on: 28 June 2019

Summary: Labour Relations Act 66 of 1996 — unfair dismissal — derivative misconduct — violent strike

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ORDER

On appeal from the Labour Appeal Court:

1. Leave to appeal is granted.
2. The appeal succeeds and the orders in the Labour Court and Labour Appeal Court are set aside.
3. The order in the Labour Court is replaced with the following:

   "The application is dismissed."
4. There is no order as to costs.

JUDGMENT

FRONEMAN J (Mogoeng CJ, Cameron J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Nicholls AJ and Theron J concurring):

Introduction

[1] An employer may not dismiss an employee for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike.[1] On 22 August 2012, employees of the first to third respondents (Dunlop) embarked on a

[1] Section 67(1) and (4) of the Labour Relations Act 66 of 1995 (LRA).

protected strike. A little more than a month later, on 26 September 2012, Dunlop dismissed them all. How did this happen?

[2] The answer lies in an unfortunate fact of life still far too often encountered in our labour relations: violence. On the day the protected strike started, violence erupted. An interdict obtained to stop it did not help. The violence continued and escalated over the following month. Negotiations between Dunlop and the applicant, the National Union of Metalworkers Association (NUMSA), to stop the violence also came to nought. Violent strikes not only affect employers but also have a detrimental effect on employees who do not participate in the violence.

[3] An employer is not precluded from fairly dismissing an employee in terms of the LRA for a reason related to the employee's misconduct during a strike.[2] Dunlop's dismissal of the employees was based on their alleged misconduct during the strike.

[4] NUMSA challenged the fairness of the dismissal and the matter proceeded to arbitration.

[5] The arbitrator distinguished between three categories of employees: (a) those that were positively identified as committing violence; (b) those that were identified as present when violence took place but who did not physically participate;[3] and (c) those that were not positively and individually identified as being present when violence was being committed. He found no procedural unfairness in the entire dismissal process, and held that the dismissal of the first two categories of employees was substantively fair. The dismissal of the last category, however, was held to be substantively unfair and he ordered their reinstatement.

[2] Section 67(5) of the LRA. This may also be done for a reason based on the employer's operational requirements.

[3] The category (b) dismissals were not challenged by the union and were never in issue. This is significant. It may be that NUMSA and the employees themselves, and thus the arbitrator, accepted that category (b) employees, by their identified proximity to violence, associated themselves culpably with it. In this regard, see [46] below.

[6] Dunlop successfully took the award in respect of the third category of employees on review to the Labour Court where it was set aside.[4] NUMSA appealed to the Labour Appeal Court, but the appeal was dismissed by the majority in that Court.[5] NUMSA now seeks leave to appeal against that dismissal on behalf of the third category of employees, those not positively and individually identified as present during the violence (applicants).

Jurisdiction and leave to appeal

[7] Narrowly construed, this application involves an assessment of the "bounds of reasonableness"[6] of the arbitrator's finding of unfair dismissal in respect of the applicants. That may in itself raise a constitutional issue, but this Court will generally be slow to hear appeals from the Labour Appeal Court unless they raise important issues of principle.[7] A broader issue of principle does arise here.

[8] It lies in the proper conception of what has become known as "derivative misconduct" in our labour jurisprudence. Both the Labour Court and Labour Appeal Court made their assessment of the reasonableness of the arbitration award on the basis of derivative misconduct. Their articulation of what derivative misconduct entails was, however, not uniform and harmonious. Two members of the Labour Appeal Court – one concurring in the majority judgment, the other dissenting – distanced themselves from what they considered to be an extension of the doctrine in the Labour Court.[8]

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

[5] *NUMSA obo Nganezi v Dunlop Mixing and Technical Services (Pty) Ltd* [2018] ZALAC 19; 2018 (6) SA 240 (LAC) (Labour Appeal Court judgment).

[6] *Sidumo v Rustenburg Platinum Mines Ltd* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) (*Sidumo*) at para 109.

[7] *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU*) at paras 13-6 and 31.

[8] A member of the majority in the Labour Appeal Court, Coppin JA, expressed concern that the Labour Court judgment could be interpreted as replacing the test for derivative misconduct applied by the arbitrator with a "radical extension of the concept" (Labour Appeal Court judgment above n 5 at para 43). Coppin JA distanced himself from this in his separate judgment as part of the majority. The other member of the majority in the Labour Appeal Court, Sutherland JA, sought to confine himself to "the critical question whether the decision of an

[9] An assessment of the range of reasonableness of the arbitrator's award in relation to the alleged derivative misconduct depends on the meaning given to the nature and scope of derivative misconduct. The origin, development and findings of derivative misconduct in the Labour Courts show that authoritative agreement on its nature and content is not settled. This Court has not yet spoken on the issue, not least in the particularly fraught context of a protected strike that has turned violent.

[10] This question engages our jurisdiction through section 23(1) of the Constitution, which guarantees the right to fair labour practices. The right not to be unfairly dismissed is one of the most important manifestations of the constitutional right to fair labour practices.[9] Derivative misconduct also speaks to the nature and scope of common law duties of both the employee (the duty of good faith; the duty not to commit misconduct; and the duty to obey lawful and reasonable employment-related orders) and the employer (the general duty of fair dealing with employees).[10] The right to strike guaranteed in section 23(2)(c) is also implicated. This is because derivative misconduct in this case concerns the participation or presence of striking employees in a protected strike.

[11] This Court thus has jurisdiction to hear the matter and it is in the interests of justice to grant leave to appeal.

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arbitrator is one which a reasonable arbitrator could reach" (Labour Appeal Court judgment above n 5 at para 8) and his judgment returns to earlier articulations of derivative misconduct, including his own comprehensive account in *Western Platinum Refinery Ltd v Hlebela* [2015] ZALAC 20; (2015) 36 ILJ 2280 (LAC) (*Hlebela*). Savage AJA disagreed with the majority's finding that the arbitrator's decision fell outside the scope of reasonableness, but like Coppin JA, she took issue with the Labour Court's extension of derivative misconduct to include a duty to self-exonerate (Labour Appeal Court judgment above n 5 at para 114).

[9] *Sidumo* above n 6 at para 55; and *Fedlife Assurance v Wolfaardt* [2001] ZASCA 91; 2002 (2) All SA 295 (A) at para 14 (judgment of Nugent AJA) and para 4 (judgment of Froneman AJA).

[10] *Murray v Minister of Defence* [2008] ZASCA 44; 2009 (3) SA 130 (SCA).

Factual background

[12] The protected strike began on 22 August 2012. So did the violence. An interdict to stop the violence was sought and granted on the same day. The violence continued and escalated. It involved 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 on one occasion, blockading workplace entrances, theft of a camera used to record the violence, scrawling death threats on a billboard and violation of agreed picketing rules.

[13] Dunlop sought to enlist the help of NUMSA in identifying the individuals who took part in the violence, and to prevent the violence. This bore no fruit. Eventually, on 26 September 2012, the employees were dismissed, some listed as culprits of violence and other individuals on the basis of "derivative misconduct". Individuals who wished to appeal the decision were informed that a collective appeal would be held and that any of them who believed they should not have been dismissed for "derivative misconduct . . . should present evidence at the appeal hearing". Only one employee attended the hearing and she was reinstated on the strength of her evidence that she did not participate in the violence and did not know who the perpetrators were.

[14] The unfair dismissal dispute was referred to arbitration. Dunlop relied on actual misconduct, derivative misconduct and common purpose in its justification for the dismissals.

Litigation history

[15] The arbitrator found that the evidence of Dunlop's witnesses "proved on an overwhelming balance of probabilities that the acts of misconduct . . . did occur". Of particular relevance are his findings in respect of the situation in Induna Mills Road.

[16] He stated:

> "The situation that prevailed in Induna Mills Road during the course of the strike was highly relevant to the derivative misconduct issue. If any of the applicants were present in the group of strikers who . . . [committed the acts of violence] they would either have been perpetrators of principal misconduct *or be liable for derivative misconduct on the basis that they knew who the perpetrators of the misconduct were and failed to disclose that information to the respondent.* If such applicants had a defence one would have expected them to give evidence and explain what the defence was. Mr Grantham and Mr Duma testified but their evidence was rejected for reasons given hereunder.
>
> Regarding the misconduct that was committed by the group that gathered in Induna Mills Road the evidence did not prove on a balance of probabilities that strikers not identified as being involved, had knowledge of who the perpetrators were. Such misconduct only constituted a fair reason for dismissing those applicants who were proved to be actual perpetrators.
>
> There is a large group of applicants who was not identified as being present in the group or in the vicinity of the group who committed the acts of misconduct in Induna Mills Road during the strike. They were also not identified as having been involved in the other acts of misconduct. I have taken into account that it is possible that this group of applicants did not testify in order to avoid implicating themselves. It is in my view however equally possible that they did not testify because they were of the view that the respondents had not made out a case for them to meet. In all the circumstances the respondents failed to prove on a balance of probabilities that the applicants falling into this group committed misconduct." (Emphasis added.)

[17] This last group, group (c), was then reinstated.[11] They are the applicants before us.

[18] The Labour Court found that the arbitrator acted unreasonably in finding that there was no evidence that the applicants were present during violent episodes in the strike, in that he ignored the circumstantial evidence and inferential reasoning that should have followed from it. Had he done so, their presence at the scenes of violence would have been proven.[12] Their derivative misconduct consisted in the failure to come

[11] See [5] above.

[12] Labour Court judgment above n 4 at para 35.

forward and either identify the perpetrators or exonerate themselves by explaining that they were not present and could not identify the perpetrators. The applicants breached their duty of good faith in the employment relationship by failing both the duty to disclose and the duty to self-exonerate.[13]

[19] The arbitration award was thus set aside.

[20] The majority in the Labour Appeal Court agreed that the arbitrator's finding on presence at the scenes of violence was unreasonable in its failure to consider circumstantial evidence and inferential reasoning and dismissed the appeal.

[21] Coppin JA, who concurred in the majority outcome, expressed concern that the Labour Court judgment "creates the impression that the mere presence of an employee at a scene where misconduct occurred triggered a duty for him to exonerate himself".[14] He recognised the potential for abuse inherent in a duty to exonerate and, accordingly, silence as a ground for dismissal:

> "While one appreciates that the employer must at least be able to invite an employee to disclose his or her actual knowledge (if any) of misconduct, and warn the employee of the consequences of refusing to do so, the absence of rules regulating for more extensive questioning by the employer leaves ample room for abuse. The very notion that an employee can be sanctioned for not speaking, irrespective of whether he or she has actual knowledge of the principal misconduct, or the identity of any of its perpetrators, is in itself potentially tyrannical."[15]

[22] This concern was put more forcefully by Savage AJA in her minority judgment:

> "Developing our labour jurisprudence to include an expansive duty upon an employee to act in good faith or with trust and confidence towards his or her employer, with a

[13] Increasing emphasis is placed on the duty to exonerate through the course of the Labour Court judgment. See id at paras 23, 29, 44, 48, 54 and 78.

[14] Labour Appeal Court judgment above n 5 at para 55.

[15] Id at para 68.

> duty to 'rat', as is suggested by this Court in *Hlebela*, 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."[16]

She then had regard to the policy considerations which should shape the approach to derivative misconduct in the particular context of a strike:

> "The '*policy considerations*' referred to in *Food & Allied Workers Union v Amalgamated Beverage Industries Ltd* which require consideration in determining the scope of an employee's duty to assist an employer protect its legitimate interests must, therefore, in my view, reflect appropriate regard for the position of both parties in the relationship. This would include an assessment of the appreciable risks which may arise for an employee in speaking out, in naming perpetrators or for purposes of exoneration and the dangers inherent which may arise in doing so."[17]

[23] Sutherland JA embraced earlier articulations of derivative misconduct, including his own comprehensive account in *Hlebela*.[18]

In this Court

[24] Both Dunlop and NUMSA largely confined themselves to a pragmatic approach, dealing with the question whether the arbitrator's award fell within the band of reasonableness standard for evaluating arbitration reviews under the LRA.

[25] Dunlop supported the Labour Appeal Court majority's finding 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

[16] Id at para 101.

[17] Id at para 102.

[18] Above n 8. See [37] to [43] below.

the disclosure of the identities of others or personal exoneration, neither of which was forthcoming. These failures were sufficient to prove derivative misconduct.

[26] NUMSA, on the other hand, disputed the correctness of the Labour Appeal Court majority's findings on inferences drawn from the circumstantial evidence. Even 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.

[27] It was left to the amicus curiae (friend of the Court), the Casual Workers Advice Office, to give more normative muscle to the argument that there can be no derivative misconduct in the form of a breach of a duty by employees to disclose information about the conduct of their co-employees in the context of strike action. It contended that this kind of duty could only flow from a fiduciary relationship, not merely from reciprocal good faith obligations in employment relationships. This distinction has thus far been inadequately recognised in our law. Furthermore, in the context of strikes, a duty to disclose would undermine a fundamental underlying feature of the history of collective bargaining, that of solidarity between workers. No duty to disclose exists in that context, and there can be no form of derivative misconduct based on it.

Issues

[28] Is there room for the separate existence of "derivative misconduct" in our labour jurisprudence? If there is, what is the nature and extent of this kind of misconduct? Were the applicants guilty of it here?

[29] I deal with these issues in this order:

(a) The grounds for dismissal of employees under the LRA.

(b) The origin of the doctrine of derivative misconduct in our law.

(c) The development and current state of the doctrine.

(d) The link between primary and derivative misconduct.

(e) Are derivative misconduct obligations fiduciary or contractual good faith obligations?

(f) Are strike situations different?

(g) Conclusion on the legal principles.

(h) Application to the facts.

Dismissal under the LRA

[30] The dismissal of an employee under the LRA is unfair if the employer fails to prove that the reason for the dismissal is a fair reason related to the employee's conduct or capacity, or the employer's operational requirements.[19] In a similar vein, an employee may forfeit the immunity for participating in a protected strike or for any conduct in contemplation or in furtherance of a protected strike and may be fairly dismissed for a reason relating to the employee's conduct or for a reason based on the employer's operational requirements.[20]

[31] Misconduct, incapacity and operational requirements are the gateways to fair dismissal under the LRA. For an employer, each has its own difficulties of proof and process. Dismissal for operational reasons involves complex procedural processes, requiring consultation, objective selection criteria and payment of severance benefits.[21] Dismissal for incapacity requires proof that performance standards deal with the alleged incapacity and that alternative ways, short of dismissal, were unsuccessfully pursued before dismissal can take place.[22] Dismissal for misconduct in circumstances where the primary misconduct is committed by one or more of a group of employees and the exact perpetrators cannot be identified, is complicated by the accepted principle that the misconduct must be proved against each individual employee. It is this kind of evidential difficulty that sowed the seed for the concept of derivative misconduct.

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[19] Section 188(1) of the LRA.

[20] Section 67(5) of the LRA.

[21] See Cohen "Collective Dismissal: A Step Towards Combating Shrinkage at the Workplace" (2003) 15 *SA Merc LJ* 16 at 18.

[22] Id at 19.

Origins of the doctrine of derivative misconduct

[32] Although not mentioned by name as derivative misconduct, the roots of the doctrine lie in an obiter dictum (non-binding statement) by Nugent J in *FAWU*:

> "In the field of the 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."[23]

The statement was non-binding because the Court held that, based on the evidence presented by the employer, the most probable inference to be validly drawn was that all the employees who were present at the place where the primary misconduct (an assault on a fellow employee) took place either participated in or supported the assault.[24] The failure of the appellants to provide an innocent explanation was a factor to be weighed in the inferential reasoning process.[25]

[33] *Chauke*[26] gave the doctrine its name of derivative misconduct. Cameron JA, writing for a unanimous Labour Appeal Court,[27] set the context:

> "The case presents a difficult problem of fair employment practice. Where misconduct necessitating disciplinary action is proved, but management is unable to pinpoint the perpetrator or perpetrators, in what circumstances will it be permissible to dismiss a group of workers which incontestably includes them?
>
> Two different kinds of justification may be advanced for such a dismissal. In Brassey and others *The New Labour Law*, the situation is posed where one of only two workers

[23] *Food & Allied Workers Union v Amalgamated Beverage Industries Ltd* [1994] ZALAC 1; 1994 (15) ILJ 1057 (LAC) (*FAWU*) at 1063.

[24] Id at 1064.

[25] Id. See Poppesquo "The Sounds of Silence: The Evolution of the Concept of Derivative Misconduct and the Role of Inferences" (2018) 39 *ILJ* 34 at 35-6.

[26] *Chauke v Lee Services Centre t/a Leeson Motors* 1998 (19) ILJ 1441 (LAC) (*Chauke*).

[27] A declaration of interest: I concurred as a member of that Court, together with Myburgh JP.

> is known to be planning major and irreversible destructive action, 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. It posits a justification on operational grounds, namely that action is necessary to save the life of the enterprise. That must be distinguished from the 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.
>
> The present case illustrates the second category. Management did not advance an operational rationale for the dismissal. It charged the twenty workers in the paint-shop and cleaning and polishing sections with misconduct – malicious damage to property – and concluded that they had all been guilty of it. Was this unfair?"[28] (References omitted.)

[34] The Court then found that the evidence justified drawing a primary inference of culpable participation, rather than a secondary inference arising from the absence of self-exculpatory evidence as was the case in *FAWU*.[29]

[35] For this reason, its further statements were also non-binding:

> "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 in its essentials one of trust and confidence, and, even at common law, conduct clearly inconsistent with that essential warranted termination of employment. Failure to assist an employer in bringing the guilty to book violates this duty and may itself justify dismissal. This rationale was suggested, without being decided, in *FAWU*.
>
> 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

[28] Above n 26 at paras 27-30.

[29] Id at para 41.

> through their silence make themselves guilty of a *derivative violation of trust and confidence*."[30] (Emphasis added and references omitted.)

[36] On these slender foundations the doctrine of derivative misconduct was developed.

Development of the doctrine

[37] For our purposes, it is not necessary to trace this development in detail because it came to a head in the Labour Appeal Court in *Hlebela*.[31] There, Sutherland JA, before addressing the facts, first dealt with the concept of derivative misconduct.[32]

[38] After referring to the judgment in *Chauke*, he stated:

> "Several important aspects of these dicta require clarification. Important to appreciate is that no new category of misconduct was created by judicial fiat. The effect of these dicta is to elucidate the principle that an employee 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. 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. Importantly, the critical point made by both *FAWU* and *Chauke* is that a *dismissal* of an employee is *derivatively justified* in relation to the *primary misconduct* committed by unknown others, where an employee, innocent of actual perpetration of misconduct, consciously chooses not to disclose information known to that employee pertinent to the wrongdoing."[33]

[30] Id at paras 31-3.

[31] Above n 8.

[32] Id at para 4.

[33] Id at para 8.

[39] In addition, *Hlebela* also articulates principles relevant to derivative misconduct that "seem to be axiomatic".[34] These include that the undisclosed knowledge of the wrongdoing must be actual rather than imputed or constructive,[35] it must be withheld deliberately,[36] the duty to disclose does not depend on the seriousness of the primary misconduct[37] or on the rank of the employee who needs to disclose,[38] and mere actual knowledge of the misconduct triggers the duty to disclose and is not dependent on a request from the employer.[39]

[40] Furthermore, the Labour Appeal Court held that:

> "[T]he anterior premise of these considerations is that an employee is a witness to wrongdoing, not a perpetrator. The misconduct lies within the bosom of a general duty of good faith to rat on the wrongdoers, not on culpable participation, even in a lesser degree than other perpetrators. The employee is thus not a person who has made common cause with the perpetrators. A disinclination to disclose the wrongdoing from a sentiment of worker solidarity or some other subjective sentiment of solidarity falling short of common purpose is likely to be a typical explanation for non-disclosure, but is per se not a defence to a charge of a breach of a duty of good faith."[40]

[41] Commenting on certain remarks made by Grogan in his capacity as an arbitrator in *RSA Geological Services (Arbitration)*,[41] *Hlebela* reiterates some of these points:

> "These remarks . . . in my view, require qualification. The notion that a breach of good faith occurs if an employee 'could have acquired knowledge of wrongdoing' seems to me too broadly or loosely stated. In my view, negligent ignorance of circumstances of

[34] Id at para 9.

[35] Id at para 10.

[36] Id at para 11.

[37] Id at para 12

[38] Id at para 13.

[39] Id at para 14.

[40] Id at para 15.

[41] *National Union of Mineworkers v RSA Geological Services (A Division of De Beers Consolidated Mines Ltd)* (2004) 25 ILJ 410 (ARB) (*RSA Geological Services (Arbitration)*).

> which an employee ought to have been aware should found a basis for culpability within the compass of negligence itself rather than intrude into the realm of breaches of good faith. Furthermore, if, as I have stated, actual knowledge is required to trigger the duty to speak up, the employer must prove actual knowledge not merely putative knowledge, and no room exists for considerations of negligent ignorance. Secondly, the notion that a refusal to disclose, pursuant to a duty of good faith, might be capable of justification in order to avoid *guilt* of a breach of the duty of good faith, seems to me to be incorrect. Logically, there is no room for such a defence. As alluded to above, the explanation for non-disclosure may afford, in a given case, mitigation of the culpability, but it would not stretch to a defence to the charge."[42]

[42] The discussion in *Hlebela* then concludes:

> "In my view, an appropriate way to discipline an employee who has actual knowledge of the wrongdoing of others or who has actual knowledge of information which the employee subjectively knows is relevant to unlawful conduct against the employer's interests would be to charge that employee with a material breach of the duty of good faith, particularising the knowledge allegedly possessed and alleging a culpable non-disclosure. This observation does not mean that the gravamen of such a charge might not also be articulated in another way, provided it is plain what is alleged and why it is alleged to be culpable."[43]

[43] The current state of the development of the doctrine brings one to the disputed aspects in relation to an employee's duty of disclosure and exoneration as evidenced by the different judgments of the Labour and Labour Appeal Courts in the present case.

The link between primary and derivative misconduct

[44] It is difficult to escape a sense that the jump to "derivative misconduct" in *Hlebela* flowed from a perceived, but understandable, need to address practical difficulties in identifying individual participation in collective violent misconduct.[44]

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[42] *Hlebela* above n 8 at para 17.

[43] Id at para 20.

[44] Id.

The difficulty was seen as one that required identification of individuals who were actually present at the scene of violence. The solution then given was to develop a derivative duty on other employees to disclose information about actual presence and participation of their co-employees in the collective misconduct. It is a double-edged sword: if the employees comply, they escape dismissal but their co-employees are implicated in the primary misconduct; if not, they are dismissed and unidentified perpetrators are not.

[45] This immediate recourse to "derivative misconduct" in logic and practice seems premature until all avenues of some form of individual and culpable participation in the collective violence are excluded. Why? First, because the possible duty to disclose misconduct of others only arises once that misconduct is established. Second, because it would be wrong to use the duty to disclose as an easier means to dismiss, rather than dismissal for actual individual participation in violent misconduct itself. And third, it may result in the imposition of a harsher sanction on employees who did not take part in the actual primary misconduct.

[46] Inferential reasoning in establishing actual participation or association in the primary misconduct was sufficient in *FAWU*, *Chauke* and *RSA Geological Services (Review)*.[45] The difficulty seems to be with the emphasis placed on the necessity of direct presence at the scene of the misconduct, as is also evidenced by the arbitrator's and Labour Courts' approach here.[46] 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 be required, but prior or subsequent knowledge of the violence and the necessary intention in relation thereto will still be required. And as Grogan aptly remarked in *RSA Geological Services (Arbitration)*, "[i]n any event, a

[45] *RSA Geological Services (A Division of De Beers Consolidated Mines Ltd) v Grogan N.O.* (2008) 29 ILJ 406 (LC) (*RSA Geological Services (Review)*) at para 49.

[46] See above n 3 in respect of the treatment of the second category identified by the arbitrator, where the dismissals were not challenged.

refusal to disclose information relating to an offence can in certain circumstances make a person an accessory".[47] He could have added "after the fact".

[47] This kind of participation is not "derivative misconduct". It is participation in the primary violent misconduct. Is anything more really needed or justified?

[48] A failure to appreciate that there are many ways, direct and indirect, for employees to participate in and associate with the primary misconduct carries the risk that an easier means to effect dismissal may be sought:

> "Employers find it particularly difficult to prove the participation of each individual in the impugned conduct where misconduct is alleged to be collective. Nonetheless, no one should be held accountable where no evidence can be adduced to substantiate the claim against individuals, solely on the basis of being part of the group."[48]

Fiduciary or contractual good faith obligations?

[49] *Chauke* suggested that the rationale for the extension beyond the actual primary misconduct was that "[t]he 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.*"[49]

[50] Grogan summarises derivative misconduct as—

> "the term given to an employee's refusal to divulge information that might help his or her employer to identify the perpetrator of some other misconduct – it is termed 'derivative' because the employee guilty of that form of misconduct is taken to task, not for involvement in the primary misconduct, but for refusing to assist the employer in its quest to apprehend and discipline the perpetrator(s) of the original offence. *Trust*

[47] Above n 41 at para 29.

[48] Maqutu "Collective Misconduct in the Workplace: Is 'Team Misconduct' 'Collective Guilt' in Disguise?" (2014) 25 *Stell LR* 566 at 568. See also *Association of Mineworkers and Construction Union v KPMM Road and Earthworks (Pty) Ltd* [2018] ZALAC 28; (2019) 40 ILJ 297 (LAC) (*KPMM Road and Earthworks*).

[49] Above n 26 at paras 31 and 33 (emphasis added).

> *thus forms the foundation of the relationship between employer and employee*. *Derivative misconduct is founded on this notion.* There is no general obligation on employees to share information about their colleagues with their employers, but at the very least employees must inform on their colleagues when they know that those colleagues are stealing from their employer, or that they have been guilty of misconduct which warrants disciplinary action."[50] (Emphasis added.)

[51] In *Hlebela*, the "trust and confidence" of *Chauke* was interpreted as a breach of the duty of good faith towards the employer that "[u]ncontroversially, and on general principle . . . can justify a dismissal . . . [for] [n]on-disclosure of knowledge relevant to misconduct by fellow employees".[51]

[52] Perhaps not so uncontroversially.

[53] Before us both Dunlop and NUMSA accepted that a duty to disclose, if it exists, must flow from the reciprocal duty of good faith that an employee and employer owe one another.[52] The reciprocal duties were not dealt with in either *Chauke* or *Hlebela*. This may be because the proper delineation between trust, confidence and good faith has not yet been at the forefront in our case law. It is now. In a seminal article, Idensohn trenchantly 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,

[50] Grogan "Derivative Misconduct" (2004) 20 *Employment Law Journal* 15 at 15.

[51] See [38] above, and *Hlebela* above n 8 at para 8.

[52] This duty of good faith in labour matters, as developed in English law, is expressed by Hawkins J in *Robb v Green* [1895] 2 QB 1 at 10-1. See also *Premier Medical & Industrial Equipment v Winkler* 1971 (3) SA 866 (W) at 867-8; *Standard Bank of SA Ltd v Commission for Conciliation, Mediation & Arbitration* (1998) 19 ILJ 903 (LC) at 913; and *University of Nottingham v Fishel* [2000] ICR 1462 at 1492-3.

> '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."[53]

[54] In the article she distinguishes, with reference to Australian, Canadian and English case law and literature, between duties that attach to all employees in their capacity as ordinary employees and those that attach to employees in their capacity as fiduciaries.[54]

[55] Fiduciary duties are duties that apply to persons who have access to, or power in relation to, the affairs of a beneficiary. These duties must be exercised for the sole purpose of promoting the beneficiary's interests.[55] The two core fiduciary duties are the no-conflict duty to avoid all potential conflict of interest situations and the no-profit duty which prohibits fiduciaries from obtaining any unauthorised profit for themselves that has not been properly disclosed or consented to by the beneficiary.[56] Breach of fiduciary duties gives rise to two distinctive remedies: the beneficiary's claim for rescission and for the fiduciary's profits coupled with the corresponding strict liability to account. Proof for these remedies to follow is also limited to showing, on a balance of probabilities, that the fiduciary made a profit in circumstances where there was a conflict of interests or by virtue of the fiduciary position.[57]

[56] In contrast, there are clearly areas of the employment relationship where employees are entitled to act in their own interests and contrary to those of the employer,[58] and in so doing, do not necessarily breach the contractual duty of good

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[53] Idensohn "The Nature and Scope of Employees' Fiduciary Duties" (2012) 33 *ILJ* 1539 at 1550.

[54] Id at 1541-2.

[55] Id.

[56] Id at 1543.

[57] Id at 1547.

[58] Id at 1548.

faith. An alleged breach of the contractual duty of good faith gives rise to ordinary contractual remedies and proof, subject to any applicable labour legislation.[59]

[57] Are these bright line distinctions between fiduciary duties and contractual duties of good faith clearly delineated in our existing case law? I think not, as Idensohn's article shows.[60] Is the underlying distinction between duties that require subservience to the beneficiary's interests and those that require consideration of the other contracting party's interests only in conjunction with the employee's own interests nevertheless compatible with our law despite the existing loose use of terms like "trust", "confidence", "loyalty" and "good faith"? Yes, I think so. But it is necessary to explain these two statements, which may appear to contradict each other.

[58] The apparent contradiction can be illustrated by the Supreme Court of Appeal's judgment in *Phillips*.[61] Dealing with a contention that the case was pleaded on the basis of contract and could not be decided properly on a wider basis, the Court stated:

> "Counsel for the appellant emphasised that the particulars of claim contained no reference in terms to a fiduciary duty. They submitted that the claim must be understood as a claim based on breaches of the contractual terms which had been pleaded and said that that was how they had understood and approached the case. If they did that, however, I think that they placed far too restrictive an interpretation upon the claim. The contract of employment (with its implied terms) is pleaded as a single element of a broader picture of why an opportunity that arose out of the appellant's employment properly belonged to the respondents. The implied duties (i.e. duties which derive *ex lege*) are said to have arisen in the context of a contract which defined the relationship between the parties. Compare *Hodgkinson v Simms*:
>
> > '[T]he existence of a contract does not necessarily preclude the existence of fiduciary duties between the parties. On the contrary, the legal incidents of many contractual agreements are such as to give rise to a fiduciary duty. The paradigm example of this class of contract is

[59] Id at 1551.

[60] Id at 1550.

[61] *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA); (2004) ILJ 1005 (SCA).

> the agency agreement, in which the allocation of rights and responsibilities in the contract itself gives rise to fiduciary expectations.'
>
> There is no magic in the term 'fiduciary duty'. The existence of such a duty and its nature and extent are questions of fact to be adduced from a thorough consideration of the substance of the relationship and any relevant circumstances which affect the operation of that relationship. While agency is not a necessary element of the existence of a fiduciary relationship, that agency exists will almost always provide an indication of such a relationship. The emphasis in the particulars of claim upon the representative nature of the appellant's status in dealing with Safika and the duty to account for profits acquired by him in that capacity should have been to counsel an unmistakeable beacon which marked the claim as one in which the appellant stood towards the respondents in a position of confidence and good faith which he was obliged to protect. No more was required to set up a case on a fiduciary duty."[62] (References omitted.)

[59] The authoritative historical precedent is *Robinson v Randfontein Estates*, where Innes CJ stated:

> "[T]he doctrine [that where a person has a duty to protect the interests of another, he cannot make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty] is to be found in the civil law, and must of necessity form part of every civilised system of jurisprudence. It prevents an agent from properly entering into any transaction which would cause his interests and his duty to clash. If employed to buy, he cannot sell his own property; if employed to sell, he cannot buy his own property; nor can he make any profit from his agency save the agreed remuneration; all such profit belongs not to him, but to his principal."[63]

[60] This was said in relation to the fiduciary duties of a company director. But it applies to all fiduciary duties. In *Osry*, Kotze JP made this clear:

> "Now in regard to the contention that an agent is exactly in the same category with an executor, I do not think that the two cases are precisely analogous. The executor has

[62] Id at para 27.

[63] *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 at 178.

> to liquidate the estate, the agent is merely appointed to sell property entrusted to him. But while the scope of their duties varies, they are both in a position of trust and are bound to promote the interests entrusted to their keeping. They cannot take any advantage to themselves out of the business for which they have been appointed, nor derive any benefit therefrom, beyond such commission and charges as the law allows in the particular instance."[64]

[61] So despite the possibly confusing references to trust, confidence, loyalty and good faith in our case law it is clear that where contracting parties "are bound to promote the interest entrusted to their keeping . . . [t]hey cannot take any advantage to themselves out of the business for which they have been appointed, nor derive any benefit therefrom, beyond such commission and charges as the law allows in the particular instance."[65] This essentially amounts to the duties that Idensohn identifies as distinctive of fiduciary duties: (a) that fiduciary duties require a unilateral obligation to act in the beneficiaries' interest; (b) the primary fiduciary obligations are only two – no profit and no conflict of interest; and (c) fiduciary remedies are strict, with no intent required.

[62] In our law, fiduciary duties are not implied by law into all employment relationships.[66] They may be inferred as a matter of fact from employment contracts and moral notions of trust, confidence, loyalty and good faith. But 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.

[63] That is because the legal contractual obligation of good faith is a contested one and must, at the very least, be of a reciprocal nature.

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[64] *Osry v Hirsch, Loubser & Co Ltd* 1922 CPD 531 at 564. In addition to company directors, such fiduciary duties are owed by trustees and legal guardians, among others.

[65] Id.

[66] As in other jurisdictions such as England, Canada and Australia. See Idensohn above n 53 at 1552.

[64] It is contested in different spheres and for different reasons. In "purely" private law contracts, the imposition of a good faith contractual obligation on parties as a free-standing norm capable of *ex lege* (from or by the law) enforcement is disputed as an unnecessary and unsound intrusion on personal freedom and autonomy. Some judges have curially[67] and extra-curially resisted importing good faith as a free-standing contractual obligation.[68] In our labour law context, the argument does not have the same traction.

[65] Dunlop insisted that doing away with derivative misconduct in the form that would warrant dismissal of the applicants goes against the entire march of this Court's contractual jurisprudence, which has been towards the greater incursion of the values of morality, good faith and ubuntu into the contractual relationship. Dunlop urged us to incorporate these developments into the employment relationship, so as to entail, in effect, fiduciary obligations on employees in violent strike situations.

[66] The argument cannot be sustained. The whole point of the employment relationship is that it generally entails hierarchical relationships, subordinating workers in submission to lines of authority. This Court's development of good faith and ubuntu in contractual relationships is intended to infuse good faith into unequal contractual relationships, or more equality into hierarchical relationships precisely where the hierarchy leads to the exertion of unfair power over the subordinated party. This is especially so in commercial contracts where the power of one party enables hierarchical exertions over the subordinated other. If the ubuntu analogy were appropriately applied here, it would be in relation not to the subordinated employee but to the employer. The analogy would therefore not do the work that Dunlop sought.

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[67] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 82; *South African Forestry Co Ltd v York Timbers Ltd* [2004] ZASCA 72; 2004 (4) SA 168 (SCA) at para 27; and *Brisley v Drotsky* [2002] ZASCA 35; 2002 (4) SA 1 (SCA) at para 22.

[68] Brand "The Role of Good Faith, Equity and Fairness in the South African Law of Contract: A Further Instalment" (2016) 27 *Stell LR* 238. For a recent general overview see Du Plessis "Giving Practical Effect to Good Faith in the Law of Contract" (2018) 29 *Stell LR* 379.

[67] Here the imposition of unilateral fiduciary obligations on either employees or employers could justifiably be seen as a choice favouring only one side, especially in matters relating to collective bargaining and recourse to strikes or lockouts. Applied to the context of a violent strike, it requires a recognition of the impact of the violence on both employer and employee. It is a fraught issue and it is a wise but also proper legal caution to remember that fair labour practices under the Constitution mean fair labour practices for employee and employer alike.[69]

[68] Nevertheless, the kernel of the idea does have some power. Not promoting the employer's interests outside the job description but in order to save the shared enterprise for its salvation and continued existence may be a shared interest of both the employer and the employee, despite the hierarchical ordering.

[69] But then 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. This may ground separate and indirect misconduct in the form of a failure to disclose information about the identity of co-employees involved in collective violent misconduct.

Are strike situations different?

[70] A further caution to be observed is that a duty to disclose might have an impact on the right to strike. 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. On the contrary, where a striking employee is dismissed for derivative misconduct, the particular setting of a strike cannot be ignored, if for no other reason than that an arbitrator or court should be wary of falling foul of section 187 of the LRA,

[69] See section 23(1) of the Constitution. See also *Sidumo* above n 6 at para 74; and *NEHAWU* above n 7 at para 40.

which defines an automatically unfair dismissal as including dismissal related to an employee's participation in a protected strike.

[71] The amicus curiae took these considerations considerably further, in submitting that a duty to report misconduct may, in some circumstances, be owed to the public but never to an employer. This was because the duty is a fiduciary duty, one of overarching loyalty and self-denial that requires the worker to act primarily in the employer's interest, which is a duty distinct from a reciprocal duty of good faith. Imposing a duty to report misconduct extends beyond the duty to refrain from harming the employer to one that requires positive action to protect the employer's interests from harm perpetrated by a third party. In the context of a strike, the imposition of a 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.

[72] There is much force in these submissions. Neither our criminal law nor our civil law generally requires us to be our neighbour's keeper.[70] To expect employees to be their employer's keeper in the context of a strike where worker solidarity plays an important role in the power play between worker and employer would be asking too much without some reciprocal obligation on an employer's part.

Summary and conclusion

[73] To impose a unilateral obligation on an employee to disclose information to her employer about the participation of a co-employee in misconduct in a protected strike would be akin to imposing a fiduciary duty on the employee. 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

[70] In particular, exceptional circumstances, however, legislation may require persons to report dangerous criminal conduct. See, for example, section 12 of the Protection of Constitutional Democracy Against Terrorism and Related Activities Act 33 of 2004.

reciprocally similar to the workers in the form of guarantees for their safety and protection before, when and after they disclose.

[74] The perspectives of both employer and employee, in relation to violent strikes, are important in finding the right balance between the parties in fair labour practice. On the one hand, the impact of violence on the employer, their business and their trust of the employee after the strike point to the rationale for this kind of indirect and separate misconduct. On the other hand, the intimidation of innocent, non-striking or non-picketing workers makes safe disclosure a prerequisite for even entertaining the possibility of this kind of misconduct, due to the reciprocity of good faith.[71]

[75] In finding this right balance between employer and employee 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. 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

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[71] The Code of Good Practice: Collective Bargaining, Industrial Action and Picketing, GN R1396 *GG* 42121, 19 December 2018, was issued as a response to the prevalence of violent strikes. See especially Part A, regulation 2 on the context to the Code of Good Practice. Regulation 2(3) provides:

> "Prolonged and violent strikes have a serious detrimental effect on the strikers, the families of strikers, the small businesses that provide services in the community to those strikers, the employer, the economy and the community. Serious measures are needed to induce a behaviour change in the way that trade unions and employers and employers' organisations engage with each other in the pre-negotiation, negotiation and industrial phases of collective bargaining."

On the prevalence of violence in strikes, see *KPMM Road and Earthworks* above n 54; *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v National Union of Food Beverage Wine Spirits & Allied Workers* (2016) 37 ILJ 476 (LC); *National Union of Metalworkers of SA v Lectropower (Pty) Ltd* (2014) 35 ILJ 3205 (LC); and *Food & Allied Workers Union obo Kapesi v Premier Foods Ltd t/a Blue Ribbon Salt River* (2010) 31 ILJ 1654 (LC).

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.

[76] Added to the difficulty of factually inferring a duty of disclosure is that the imposition of this kind of duty on the basis of good faith can never be unilateral. The duty to disclose 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. In the context of a strike, 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. Circumstances would truly have to be exceptional for this reciprocal duty of good faith to be jettisoned in favour of only a unilateral duty on the employee to disclose information.

Application to the facts

[77] The Labour Court and the majority of the Labour Appeal Court found that the arbitrator acted unreasonably in finding that there was no evidence that the applicants were present during violent episodes in the strike, in that he ignored the circumstantial evidence and inferential reasoning following from it. Had he done so, the most probable inference to be drawn was that they were present and thus guilty of misconduct in the form of non-disclosure of the real culprits.

[78] The arbitrator, Labour Court and Labour Appeal Court all proceeded on an acceptance that a derivative duty to disclose existed on the authority of *Hlebela*. As we have seen, this duty was sourced in the contractual duty of good faith without any reference to an employer's reciprocal good faith obligations. In accordance with the conclusion reached above,[72] Dunlop's reciprocal duty of good faith required, at the very least, that employees' safety should have been guaranteed before expecting them to

[72] See [73].

come forward and disclose information or exonerate themselves. That was not sufficiently done. The appeal must succeed for this reason.

[79] But even on the Labour Appeal Court majority's own reasoning, the chain of inferential reasoning before each of the employees may be found guilty is a long one. It must be the more probable inference that each of the employees was (a) present at an instance during the strike where violence was committed; (b) would have been able to identify those who committed the violent acts; (c) would have known that Dunlop needed that information from them; (d) with possession of that knowledge, failed to disclose the information to Dunlop; and (e) did not disclose the information because they knew they were guilty and not for any other innocent reason.

[80] 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.

[81] 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.

[82] 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. Dunlop's case also fails on these facts.

Costs

[83] As this is a labour matter where the employment relationship must be given a proper chance to be resurrected and to endure, the usual order of not awarding costs will follow.

Order

[84] In the result, the following order is made:

1. Leave to appeal is granted.
2. The appeal succeeds and the orders in the Labour Court and Labour Appeal Court are set aside.
3. The order in the Labour Court is replaced with the following:
   "The application is dismissed."
4. There is no order as to costs.

For the Applicants:	M Pillemer SC and P Schumann instructed by Brett Purdon Attorneys
For the First, Second and Third Respondents:	A J Dickson SC and M Mazibuko instructed by Farrell and Associates
For the Amicus Curiae:	S Harvey and B Ramji instructed by Casual Workers Advice Office