

Passive Employees and Failure to Assist in an Investigation: The Principles of Derivative Justification

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Abstract

Derivative misconduct (also referred to as residual misconduct) refers to as a situation where an employee possesses information that would enable an employer to identify wrongdoers. When the employee fails to come forward when asked to do so, they violate the trust upon which the employment relationship is founded and may justify dismissal. Substantive fairness has to do with the reason of the dismissal. The underlying principle of substantive fairness is that the sanction meted out to the employee must be commensurate with the misconduct of such employee. The approach involved a derived justification, stemming from an employee's failure to offer reasonable assistance in the detection of those actually responsible for the misconduct. The justification is wide enough to encompass also those innocent of it, and make themselves guilty of a derivative violation of trust and confidence. Justice must not only be done but it must be seen to be done.

Keywords: Misconduct, substantive fairness, trust and procedural fairness.

1. Introduction and Background

A fair and constructive approach to the management of the conduct and performance of employees can contribute towards a harmonious working environment. Discipline management should be based on clear and known standards and a progressive correction of transgression. Misconduct is one of the grounds recognised by the law that may give reason for the dismissal of an employee. The law promotes the principle of progressive discipline.

Whilst the efficiency of the business operation is recognised as primary, disciplinary action should at the time be for a valid reason (substantive fairness), in accordance with fair procedure (procedural fairness). The dismissal should be effected in a procedurally fair manner.

Derivative misconduct (also referred to as residual misconduct) refers to as a situation where an employee possesses information that would enable an employer to identify wrongdoers. When the employee fails to come forward when asked to do so, they violate the trust upon which the employment relationship is founded. Derivative misconduct may justify dismissal

The principle of "derivative" misconduct or "residual" misconduct was first formulated in the Labour Appeal Court decisions of *FAWU & others v Amalgamated Beverage Industries Ltd* (1994)15 ILJ 1057 (LAC) as the arbitrator stated "employee's silence justifies an inference that he participated or supported the particular misconduct that he had failed to disclose to his employer". The employee has a duty of good faith to report for example theft, even if he/she was not directly involved therein. An employee's failure to disclose information that would assist the employer's investigation amounted to derivative misconduct.

In cases where derivative misconduct is alleged, an employer must show that the employee knew or could have acquired knowledge of the misconduct and that the employee unreasonably failed to disclose this knowledge to the employer.

An employee's uncommunicativeness in disclosing helpful information may lead to the interference that the employee has something to be justified in instituting disciplinary proceedings derived from an employee's failure to offer reasonable assistance in detecting those actually responsible for misconduct and through his silence make himself guilty of a derivative violation of trust and confidence.

2. Substantive Fairness

Section 192 of the Labour Relations Act 66 of 1995 (the LRA) read with s 188(1)(a)(i) thereof, places the onus in the court

of the employer to show that it complied with the rationale of substantive fairness. Section 188(1)(A)(i) of the LRA compels a commissioner to ensure that an employer dismissed an employee fairly and in doing so, for him or her, in terms of section 188(2) of the LRA to "take into account any relevant code of good practice" in terms of this Act.

In Schedule 8 of the Code of Good Practice sets out the guidelines for employers to follow when dismissing an employee for misconduct. In terms of item 7 of schedule 8 of the LRA the employer is required to show:

- That the employee contravened a rule or standard (derivative misconduct);
 - That the rule or standard was valid and reasonable;
 - That the employee knew or should have known the rule or standard;
 - That the rule or standard was applied consistently, and
 - That dismissal was fair and an appropriate sanction.
- An employee cannot be dismissed on mere "suspicious" of dishonestly.

3. Case Law of Derivative Misconduct

3.1 *Chauke and Others v Lee Service Centre CC t/a Leeson Motors*

In *Chauke and Others v Lee Service Centre CC t/a Leeson Motors* (1998)19 ILJ 1441 (LAC) refers to as a situation where an employee possessed information that would enable an employer to identify wrongdoers. The case presents a difficult problem of fair employment practice. When the employee fails to come forward when asked to do so, they violate the trust upon which the employment relationship is founded. Derivative or residual misconduct may justify dismissal in appropriate circumstances. Through silence an employer could make themselves guilty of a derivative violation of trust and confidence. Even in common law, conduct inconsistent with that essential of trust and confidence warranted termination of employment (*Council for Scientific and Industrial Research v Fijen* 1996 17 ILR 18(A)). This approach involved a derived justification, stemming from an employee's failure to offer reasonable assistance in the detection of those actually responsible for the misconduct.

3.2 *NUM AND Others/RSA Geological Services, a division of De Beers Consolidated Mines Limited*

The question to ask is which prerequisites must be met before an employer will be able to prove that an employee is guilty of derivative misconduct. And what are the consequences. The prerequisites for derivative misconduct were clearly articulated by the arbitrator in *NUM and Others/RSA Geological Services, a division of De Beers Consolidated Mines Limited* [2004] 1 BALR. First that the employee knew or could have acquired knowledge of the wrongdoing; second that the employee failed without justification to disclose that knowledge to the employer, or to take reasonable steps to help the employer acquire that knowledge. This approach involved 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. The arbitrator accepted that the respondent act on a balance of probabilities.

This particular form of misconduct "has at its very core and essence that the employee's silence justifies an inference that he participated or supported the particular misconduct that he had failed to disclose to the employer." The requirements for this form of misconduct have been described as twofold. First, that the employee knew or reasonably could have acquired knowledge of the wrongdoing; second, that the employee failed without justification to disclose that knowledge to the employer, or take reasonable steps to help the employer acquire that knowledge. In this matter the Commissioner held that the Employee tried to protect the consultant when she did not report the theft for a period of 3 days but only after the shortage in the float had been discovered. This conduct on the employee's part displays an intention to withhold the information from the regional manager to whom she should report. The fact that this happened in the financial industry was regarded as an aggravating factor. AS the trust relationship between the parties had been severely tarnished, the dismissal was held to have been fair and the application was dismissed.

3.3 *Chemical Energy Paper Printing Wood and Allied Workers Union (EPPWAWU) obo Hlebela v Lonmin Precious Metals Refinery*

In *Chemical Energy Paper Printing Wood and Allied Workers Union (EPPWAWU) obo Hlebela v Lonmin Precious Metals*

Refinery, the CCMA found that an employee's failure to disclose information that would assist the employer's investigation regarding its loss of approximately 200kg of platinum per month amounted to derivative misconduct. The applicant was employed as an "operator" in the respondent's platinum processing enterprise at a monthly remuneration of approximately R14, 000.00 when dismissed for an alleged loss of trust on Tuesday, 17 August 2011 (see Item 2 of Part B of form LRA 7.11). In this case, having being alerted to the fact that some of its employees live extravagant lifestyles; the employer initiated a lifestyle audit and found that Mr Hlebela was leading an extravagant lifestyle that he would not have been able to maintain on his salary. The employer concluded that Mr Hlebela was somehow involved in the theft of its precious metals. The employer requested that Mr Hlebela make full disclosure of his assets but he refused to do so. He was therefore charged with having knowledge of the loss of precious metals but not disclosing information that could assist the employer in its investigations into the loss. Mr Hlebela via CEPPWAWU, on 1 September 2010, declared a dispute at the CCMA in Ekurhuleni alleging an unfair dismissal for which he sought retrospective reinstatement with full back-pay as relief.

In cases where derivative misconduct is alleged, an employer must show that the employee knew or could have acquired knowledge of the misconduct and that the employee unreasonably failed to disclose this knowledge to the employer. The Commissioner referred to literature on the topic which found that the dishonesty can include *inter alia* withholding information from the employer. The Commissioner therefore held that the employer's request for disclosure was eminently reasonable and that Mr Hlebela's silence justified an inference that he participated or supported the loss of the metals. Accordingly, his failure to disclose the requested information following the lifestyle audit amounted to derivative misconduct and his dismissal was found to be fair.

Evident from this case, in instances where there is no evidence against any specific employee, derivative misconduct may become relevant. An employee's reticence in disclosing helpful information may lead to the inference that the employee has something to hide. Therefore, an employer may be justified in instituting disciplinary proceedings derived from an employee's failure to offer reasonable assistance in detecting those actually responsible for misconduct and through his silence make himself guilty of a derivative violation of trust and confidence.

The issue to be decided was whether the dismissal of the applicant, Mr Arnold Hlebela, was procedurally and substantively fair as provided for in terms of s185(a) of the Labour Relations Act, 66 of 1995 ("the LRA"), read with s188(1)(a)(i), s188(1)(b) and s188(2) thereof. If not, the arbitrator was to then apply his mind to the relief sought by Mr Hlebela.

As regards the survey of evidence and argument, the commissioner reflected on charge 2, as reflected on p 115 in exhibit 1, for which Mr Hlebela was found guilty and dismissed. It read as follows: "It is alleged that you have knowledge of the enormous losses of PGMs ('Platinum Group metals' — commissioner's insert) at PMR ('Precious Metal Refinery' – commissioner's insert), but you have made no full and frank disclosure to PMR about what could assist PMR in its investigations herein."

The guilty finding on this charge must be read with p 117 in exhibit 1 whereby the applicant, after a lifestyle audit which purportedly showed a way of life vastly higher than someone who earned R14, 000.00 per month, was requested to make certain disclosures in his private life to his employer to justify/clarify such a purportedly extravagant way of life.

These included vehicle transactions for 24 months and details of the applicant's immovable assets, such as houses, flats, townhouses and so forth.

The respondent also sought disclosure on any private company or close corporations and, finally, a list of any valuable items purchased in the last 24 months such as designer clothing and jewellery.

It is further common cause that the applicant, on the advice of his trade union, declined this invitation and that he was eventually dismissed for what is referred to in labour law as "derivative misconduct", which simply means that Mr Hlebela, on a balance of probabilities, must have known how these vast quantities of precious metals were being pilfered from his employer.

4. Substantive Fairness

It is generally accepted that the employer need only prove the commission of the offence on a balance of probabilities (Grogan; 2001). Substantive fairness has to do with the reason of the dismissal. The underlying principle of substantive fairness is that the sanction meted out to the employee must be commensurate with the misconduct of such employee (Grossett; 2002). Mr Hlebela's dismissal was effected for a fair reason.

Insofar as substantive fairness is concerned, the "Code of Good Practice: Dismissal" as contained in Schedule 8 to the LRA sets out the guidelines for employers to follow when dismissing employees for misconduct. There must be a valid reason for the termination of the contract of employment.

In terms of Item 7 of Schedule 8 the employer is required to show that:

- the employee contravened a rule or standard;
- the rule or standard was valid and reasonable;
- the employee knew or should have known the rule or standard;
- the rule or standard was applied consistently; and
- dismissal was a fair and appropriate sanction.

An employee cannot be dismissed on mere "suspicions" of dishonesty. Offences should be judged on their merits and the employer should take into account the nature of the job and the circumstances surrounding the offence itself. However, in this particular matter of Mr Hlebela, strong and convincing circumstantial evidence was presented that Mr Hlebela was probably guilty as charged.

5. Circumstantial Evidence

At p 21 in *Principles of Evidence*, Swikkard and Others, 2nd edit 2002, Van der Merwe SE had this to say on circumstantial evidence, such as that presented before the arbitrator against Mr Hlebela:

"Circumstantial evidence often forms an important component of the information furnished to the court (or CCMA commissioner). In these instances the court (or CCMA commissioner) is required to draw inferences, because the witnesses have made no direct assertions with regards to the fact in issue. These inferences must comply with certain rules of logic. Circumstantial evidence furnishes indirect proof ..."

Circumstantial evidence is not necessarily weaker than direct evidence. In some instances it may even be of more value than direct evidence ... In civil proceedings the inference sought to be drawn must also be consistent with the proved facts, but it need not be the only reasonable inference: it is sufficient if it is the most probable inference (see S v Cooper 1976 2 SA 732 (N) 734 and MacLeod v Rens 1997 3 SA 1039 (E))."

In S v Reddy 1996 2 SACR 1 (A) at 8i, Zulman AJA quoted from 'Best on Evidence' (10 ed) paragraph 297 as follows:

"Even two articles of circumstantial evidence, though each taken by it weigh as much as a feather, join them together, you will find them pressing on the delinquent with the weight of a mill stone."

This really appropriate quote from Zulman AJA was time after time in fact "being solidified" and "brought to life" right before the very eyes of the arbitrator.

The respondent's representative would again and again direct Mr Hlebela to some of the expensive properties in exhibit 1, request some sort of an explanation, and the applicant would refuse to answer pleading his constitutional right to privacy as advised by CEPPWAWU or evade or not answer at all.

Eventually, as reflected above, the pressure of the cross-examination undoubtedly just got too much for Mr Hlebela who eventually conceded that he owned, amongst others, a construction company.

It needs to be reflected in this award that Mr Hlebela, on the advice of CEPPWAWU, as he certainly was constitutionally entitled to, insisted on having all questions put to him firstly in Tsonga and then, after carefully listening, he would respond in Tsonga.

Ngcamu AJ, in *Aluminium City (Pty) Ltd v MEIBC and Others* (2006) 27 ILJ 2567 (LC), reviewed and set aside an arbitration award where an arbitrator adopted an erroneous approach to circumstantial evidence.

The learned judge made it clear that once an employer established a prima facie case of misconduct (as in this case before the arbitrator) that the onus shifted to the employee to provide a credible explanation – which Mr Hlebela could not supply the arbitrator with.

6. Bare Denial

Mr Hlebela's case was essentially throughout this arbitration one of a bare denial – and occasionally hiding behind the SA Constitution, if even that.

Revelas J commented on the implications of a "bare denial" as an applicant's "defence" in the unpublished matter under case number JR 1046/02 in Shoprite Checkers (Pty) Ltd v CCMA and Others as follows at [13]:

"[13] It does not lie in the mouth of a party who denies misconduct, to derive any benefit from the version which proves her denial to be false ...

[144] ... Unfortunately she chose to deny the incident. Sadly, it happens so often that misconduct is falsely denied, which only further compounds the breach of trust of the employer in the employee ..."

7. Derivative Misconduct

In assessing the merits of the case before him, the arbitrator could come to no other conclusion than that the matter before him constituted a classic example of "derivative misconduct".

This particular form of misconduct was first suggested by the labour appeal court in *FAWU v Amalgamated Beverage Industries* (1994) 15 ILJ 1057 (LAC) and has, as the arbitrator stated above, at its very core and essence that the: "employee's silence justifies an inference that he participated or supported the particular misconduct that he had failed to disclose to his employer."

In *Chauke and Others v Lee Service Centre CC t/a Leeson Motors* (1998) 19 ILJ 1441 (LAC), the court with approval noted that:

"This approach involved 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."

In the case before the CCMA, Mr Hlebela did not give "reasonable assistance" to explain to Western Platinum, in fact, he gave "no assistance".

These prerequisites for derivative misconduct were clearly articulated by the arbitrator at [29] on p 8 of NUM and Others/RSA Geological Services, a division of De Beers Consolidated Mines Limited [2004] 1 BALR 1 (P) as:

"... first, that the employee knew or could have acquired knowledge of the wrongdoing; second, that the employee failed without justification to disclose that knowledge to the employer, or to take reasonable steps to help the employer acquire that knowledge" (See also: 'Employment Law' February 2004 Vol. 20 Part 1 on pages 23 and 24).

The arbitrator accepted that the respondent, on a balance of probabilities, had proven these two "ingredients".

The arbitrator made the following award:

- the dismissal of the applicant, Mr Arnold Hlebela, on the basis of him being guilty of derivative misconduct is upheld as procedurally and substantively fair;
- this frivolous and vexatious application is dismissed; and
- the CEPWAWU trade union and the applicant, Mr Arnold Hlebela are ordered to equally (50% + 50%) pay the costs incurred by Western Platinum Refinery for the two days that this matter sat before the commissioner at the CCMA in Ekurhuleni. Such costs shall be computed at Schedule A of the Magistrate's court Act, 32 of 1944 upon presentation of a Bill of Taxation by the respondent, Western Platinum Refinery as provided for in CCMA Rule 39(3).

8. Collective Guilt

In principle, the courts require the same standards to be applied in cases of so-called group misconduct as do in cases of individual misconduct. However, specific problems arise when a number of employees who were involved in the same act of misconduct are subjected to disciplinary action (Grogan; 2001). Employers are sometimes faced with misconduct but no evidence to prove it as the witnesses refuse to come forward or to testify. The common law duty to act in good faith towards the employer flies out of the window and the employer is faced with the difficult decision as to whether it is going to start charging witnesses for failing to report misconduct or to come forward with information and evidence. These problems relate to the selection of employees to be disciplined, the situation that arises when there is no direct evidence against any or all of the individual employees, and the consistency or otherwise of the sanction applied.

8.1 Selection for discipline

In *SA Commercial Catering & Allied Workers Union & others v Irvin & Johnson Ltd* the Labour Appeal Court upheld the dismissals of employees who had taken part in a violent demonstration, even though other workers who had participated

in the same offence had been acquitted by a different presiding officer because there was insufficient evidence of their involvement.

This suggests that employees who are guilty of misconduct cannot rely on the "party principle" to escape the consequences of their misconduct simply because their employer was unable to gather evidence against other employees who were also involved in the same misconduct. The situation is different if the employees can prove that the employer was wilfully remiss in obtaining evidence against other guilty employees for ulterior reasons.

8.2 Collective misconduct

When a large or unknown number of employees have engaged in collective misconduct, and the actual perpetrators cannot be identified, the employer may be tempted either to select some employees for dismissal as an example to others, or to dismiss all employees who could conceivably have been involved, whether innocent or otherwise, in the hope that the guilty employees will be caught in the net. The first option is plainly unacceptable the dismissal of the selected employees is unfair unless there is evidence to link them to the commission of the offence. Such dismissals will be stigmatised as arbitrary. On the face of it, the second option is equally unacceptable, as it appears to offend against the principle, endorsed by all civilised legal systems, that it is preferable for a guilty party to go free, than to convict an innocent person.

One way out of this problem is for the employer to rely on the notion of "derivative misconduct". In *Chauke and Others v Lee Service Centre CC t/a Leeson Motors* (1998) 19 ILJ 1441 (LAC) the court explained derivative misconduct as follows: "This approach involved 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." Although the principle in question causes problems in light of the principle of fairness in our law, Judge of Appeal Cameron formulated two lines of justification for a fair dismissal. First is where an employee who is part of a group of perpetrators is under duty to assist the employer in bringing the guilty to book. The second is where an employee has or may reasonably be supposed to have information concerning the guilty but fails or refuse to disclose same. His or her failure to come forward with the information may itself amount to misconduct as the relationship between employer and employee is in its essentials one of trust and confidence.

Although in both cases the courts' observation were *obiter*, it seems, however clear that the judgments lay down the principle that, in appropriate circumstances, dismissals will be accepted as fair if the employees were aware of the identity of the perpetrators of serious misconduct, but declined to disclose this information to their employer after being requested to do so.

In *Foschini Group v Maldi & others* (2009) 18 LAC 1.25.2; [2010] 7 BLLR 689 (LAC) five employees (the full staff compliment in that store) were charged with "failure to secure assets of the company" after substantial stock losses were detected at the clothing store where they had been employed. The employer could not prove that they were in fact stealing the stock, however they were dismissed in their absence for "Gross negligence by failing to take proper care of company property under their control resulting in a financial loss of R 207 000 as well as an irretrievable breakdown in the trust relationship. The company conducted a thorough investigation by sending a manager to the store in question, who conducted the investigation himself, which preceded and founded his report.

The Commissioner in the arbitration proceedings (and as confirmed by the LAC) looked at various cases where the question of collective misconduct or sanction was considered. According to Professor Grogan in *Snip Trading* the justification for the dismissal of each employee lies in his or her individual culpability for the failure of the group to attain the performance standard set by the employer. This justification is permissible if one accepts that an employer is entitled to introduce strict rules in order to protect its assets. It is often extremely difficult to prove that stock losses are caused by a particular employee. Consequently, it is acceptable for employers to introduce rules into the workplace and employment contracts which, if breached carry the sanction of dismissal, even for a first offence, and even if it is not a criminal offence. 'Unauthorized possession' and 'failure to follow security procedures' were examples given by Professor Grogan of such offences. These rules are reasonable, he reasoned because 'rules are assessed not only in terms of fairness, but also in terms of operational requirements.' Consequently, it is acceptable for employers to introduce rules into the workplace and employment contracts which, if breached carry the sanction of dismissal, even for a first offence, and even if it is not a criminal offence. It should be noted therefore that the principle is not that some (the innocent) must suffer because the employer cannot pin point the guilty. In this case, all are held responsible for not complying with the rule and not acting in good faith in executing their duties. It therefore lies in each employee's individual culpability for the failure of

the group to attain the performance standard set by the employer (Le Roux: 2011).

In *RSA Geological services v Grogan NO & others* the court revisited the concept of derivative misconduct in circumstances where the employer had established a *prima facie* that all employees in its employ had either been involved in misconduct or were aware of it, but could not identify the actual perpetrators. The court held that the onus was then on the employees to rebut the facts and inferences and that when they failed to do so it must find that all probably knew of the misconduct and participated in it, and that their dismissals were fair.

9. Conclusion

If employees possess information that would enable their employer to identify wrongdoer and those employees that fail to come forward when asked to do so, they violate the trust upon which the employment relationship is founded. The violation of that trust may justify dismissal in appropriate circumstances. This breach of the employee's common law duty of good faith has acquired the label of "derivative Misconduct" (Wallis labour and employment law, 1992). In order to be successful in a case of derivative misconduct, the employer will have to convince the presiding officer that two elements are present.

First that the employee knew or could have acquired knowledge of the wrongdoing and second that the employee failed without justification to disclose that knowledge to the employer, or to take reasonable steps to help the employer acquire that knowledge. (Employment Law February 2004 vol 20 part 1 p 23-24.

Finally the constitutional court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and others* 2008 (2) BCLR 158 (CC) confirm that the ultimate test that a commissioner must apply in a case is one of fairness. The commissioner's sense of fairness must prevail and not the employer's view. Therefore the commissioner will take into account the totality of circumstances. The commissioner must consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal.

The approach involved a derived justification, stemming from an employee's failure to offer reasonable assistance in the detection of those actually responsible for the misconduct. The justification is wide enough to encompass also those innocent of it, and make themselves guilty of a derivative violation of trust and confidence. Justice must not only be done but it must be seen to be done.

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Legislation

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