THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: D345/14

In the matter between:

DUNLOP MIXING AND TECHNICAL SERVICES (PTY) LTD	**First Applicant**
DUNLOP BELTING PRODUCTS (PTY) LTD	**Second Applicant**
DUNLOP INDUSTRIAL HOSE (PTY) LTD	**Third Applicant**

and

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA ("NUMSA") obo KHANYLIE,NGANEZI AND OTHERS	**First Respondent**
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**Second Respondent**
COMMISSIONER ALMEIRO DEYSEL	**Third Respondent**

Heard: **27 January 2016**

Delivered: **11 May 2016**

Summary: **Review. Derivative misconduct Application granted**

JUDGMENT

GUSH, J

[1] This is an application by the applicants to review and set aside portion of the award handed down by the third respondent pursuant to an arbitration conducted into a dispute declared by the first respondent on behalf of certain of its members (the respondent employees) arising from their dismissal by the applicants.

[2] The applicants are all wholly-owned subsidiaries of Dunlop Industrial Products (Pty) Ltd and all carry on business at the factory situated at Induna Mills Road Howick.

[3] During August 2012 the applicants' employees (the striking employees), all of whom were members of the first respondent, embarked on protected industrial action "in furtherance of a wage dispute"[1]. During the course of the industrial action the striking employees became involved in serious acts of misconduct all of which are described in detail in the third respondent's award and the applicants' evidence.

[4] The strike took place at the respondents' premises in Induna Mills Road and commenced on 22 August 2012. It is apparent from the papers that from the outset of the industrial action the strike was characterised by violent confrontations between the striking employees and supervisors, managers and representatives of the applicants. In his award the third respondent described evidence relating to the striking employees' conduct as "painting a picture of a dangerously volatile situation" involving attacks on vehicles and "tantamount to placing the company's premises under siege."[2]

[5] The conduct of the striking employees was the subject of an interdict granted by this court on 22 August 2012 *inter alia* restricted the striking employees from being within 50m of the access road to the applicants' premises and interdicting the unlawful conduct.

[1] award paragraph 14 page 23
[2] Award paragraph 76 page 35

[6] It is apparent from the record of the arbitration that despite the interdict the misconduct continued unabated until the dismissals.

[7] On 26 September 2012 the applicants' terminated the striking employees' employment for derivative misconduct. The third respondent found the derivative misconduct arose from the failure of the striking employees to provide particulars to the applicants of the identities of the perpetrators of the "acts of violence intimidation and harassment committed from 22 August 2012 to 26 September 2012".[3]

[8] At the conclusion of the arbitration the third respondent found that those employees listed in paragraphs (a) (b) and (c) (the respondent employees) of the award had been unfairly dismissed and ordered the first second and third applicants to respectively reinstate the respondent employees listed under each paragraph from the date of the award.

[9] The applicants apply to review and set aside paragraphs (a) (b) and (c) of the third respondent's award and for the award to be corrected by determining that the dismissal of those employees was fair.

[10] The pre-arbitration conference minute referred to in the award by the third respondent listed that of a total of 107 striking employees, all members of the first respondent Union, who had been dismissed. 29 had been dismissed for specific misconduct as well as derivative misconduct and "the remaining 78 union members were dismissed for derivative misconduct. [4]

[11] Although not specifically included in the third respondents order that appears under the under the heading AWARD, during the course of the award the third respondent concluded that the dismissal of 42 of the striking employees dismissed by the applicants was both substantively and procedurally fair.[5] Whilst some of these employees had been found guilty of direct misconduct a number of these employees who were found to have been fairly dismissed were dismissed for derivative misconduct only.

[3] Award paragraph 60 page 32
[4] Award paragraph39 and 40 page 28
[5] Award page 50

[12] The 65 respondent employees listed in paragraphs (a) (b) and (c) of the award had all been found guilty of derivative misconduct by the applicants and dismissed.

[13] The review is confined only to the conclusion by the third respondent that the dismissal of the listed respondent employees for derivative misconduct was unfair. There is no cross review regarding the finding by the third respondent that the dismissal of the remainder of the employees by the applicants was fair. The respondents do not take issue with the third respondents decision that the applicants' procedure was fair or that the sanction of dismissal for derivative misconduct was appropriate.

[14] The first respondent confines it opposition to the applicants' application to the simple averment that there was insufficient "evidential basis" for a finding of derivative misconduct as the respondent employees "were not mentioned" in the evidence before the arbitration; and that the "evidence led by the applicants that it could not trust any of the striking workers, whether there was evidence of misconduct on their part or not, is irrational and irrelevant in the absence of any evidence of wrongdoing on the part of such employees".[6]

[15] This approach ignores the fact that the nature of the derivative misconduct lies in the failure of the striking employees to come forward and assist the employer to identify the perpetrators. This issue is dealt with in detail below.

[16] The background to and the circumstances and detail of the misconduct that led to the dismissal of the employees is comprehensibly set out in the award. The third respondents summary of the background, the survey of evidence and argument is not challenged by respondents or the applicants.

[17] The review is confined to the third respondent's finding that the distinguishing factor between those employees fairly dismissed for derivative misconduct and those found to have been unfairly dismissed for derivative misconduct was simply whether or not the applicants' had discharged the

[6] Answering affidavit para 12 page 65

onus of establishing that those employees listed in paragraphs (a) (b) and (c) of the award were present during the commission of the "acts of violence, intimidation and harassment" (the "direct or principle misconduct") and therefore obliged to provide the applicants with the "particulars of the identities of the perpetrators".[7]

[18] The third respondent in addition held that the derivative misconduct for which the employees were dismissed for "was misconduct relating to an alleged failure on their part to provide the [applicants] with particulars of the identities of the perpetrators of acts of violence, intimidation and harassment committed from 22 August 2012 to 26 September 2012"[8]

[19] Based on the evidence adduced by the applicants the third respondent was satisfied that they had established the serious acts of direct misconduct described in the award and that those striking employees involved in this direct misconduct had been fairly dismissed.

[20] Specifically, the third respondent was also satisfied that those striking employees who were identified in the evidence as being present during the direct misconduct were guilty of derivative misconduct, serious enough to justify their dismissal. In particular the third respondent found that these striking employees were, by failing to provide the applicants with particulars of the identities of the perpetrators, guilty of derivative misconduct and accordingly had been fairly dismissed. The first respondent has not challenged this finding by the third respondent.

[21] The essence of the applicants' ground of review is directed at the third respondent's conclusion that the applicants had not discharged the onus of establishing that respondent employees, who were not specifically identified as having been present during the "direct misconduct", were accordingly not guilty of derivative misconduct.

[22] In their evidence, the applicants' witnesses amplified and explained the basis of their averment that the respondent employees, despite not being

[7] Award paragraph 60 page 32
[8] Award paragraph 60 page 32

identified, were guilty of derivative misconduct and therefore fairly dismissed as it could be inferred that they were present during the acts of misconduct.

[23] The applicants' evidence went further than simply relying on the respondent employees' failure to provide "particulars of the identities of the perpetrators". In their pleadings and during the evidence the applicants aver that the respondent employees are guilty of derivative misconduct in that they committed a breach of the trust relationship by failing to come forward and either:

a. exonerating themselves by explaining they were not present during the "picketing" and "direct or principle misconduct" or could not identify the perpetrators: or

b. come forward and identify the perpetrators.[9]

[24] The applicants' aver it was "illogical and unreasonable [for the third respondent] to hold that such respondents were entitled to decide not to testify because there was no evidence against them".[10]

[25] The applicants aver that accordingly the decision of the third respondent is not one which could be reasonably reached on the evidence and other material placed before him.

[26] Crucial to the enquiry is firstly a careful consideration of the nature and extent of the derivative misconduct. The third respondent concluded that the derivative misconduct related only to a failure on the employees part to provide the applicants with particulars of the identities of the perpetrators of the acts of violence, intimidation and harassment.

[27] This finding by the third respondent was made seemingly despite the evidence of the applicants regarding the essence of the derivative misconduct relied upon by the applicants' *viz* that it amounted to more than simply a failure to provide particulars of the identities of the perpetrators. The applicants clearly relied, in addition to the employee's failure to come

[9] Pleadings paragraphs 53 and 54
[10] Applicants' heads paragraph 5.4

forward and identify the perpetrators, on a breach of the trust relationship between employer and employee by the respondent employees who by remaining silent commit derivative misconduct in circumstances where it can be inferred from the evidence that they were present during the direct misconduct. The issue is whether it is consistent with the evidence that the inference can be drawn that all the respondent employees were present during the strike and if so whether that placed an obligation on the striking employees to provide an explanation and whether their deliberate refusal to do so strikes at the heart of the employment relationship.

[28] The applicants evidence regarding the nature of the derivative misconduct, as set out in the award, is:

> "It refers to a situation where there is a form of misconduct and that misconduct cannot be attributed to any one specific individual but when it occurred in agreeable collective manner. The notion of derivative misconduct stems from the trust relationship which is embodied in a contract of employment. In such a relationship … Where there is knowledge amongst the group that these misconduct were performed and on the basis of trust it is expected of any one with such such knowledge to come forward and assist the employer in correcting such misconduct…".

[29] In this regard what requires consideration is the extent to which it can inferred that the respondent employees were present during the misconduct and, in the light of nature of the employment relationship, whether in the specific circumstances of this matter there was an evidentiary burden on both those respondent employees who were present to give evidence regarding the perpetrators as well as those if they were not present to come forward and exonerate themselves.

[30] The evidence clearly establishes that right from the commencement of the strike, given the extent of the violence, that the applicants had called upon the first respondent to obtain details of the identity of the perpetrators of the violence from the striking employees and that this had been communicated to the striking employees and the first respondent Union. The third respondent in fact finds that all the striking employees knew that the

applicants required them to provide information about the perpetrators of the misconduct.

[31] It is clear from the record that the employees relied solely on the argument that if they had not been identified during the arbitration as being present during the acts misconduct that they had no obligation whatsoever to come forward either to exonerate themselves or identify the perpetrators.

[32] The issue to be determined therefor is whether the inference can be drawn that the employees (including the respondent employees), all of whom were on strike at the time, were present during the many and repeated acts of direct misconduct.

[33] It would follow that in the light of the trust nature of an employment relationship there is an evidentiary burden on those it can be inferred were present to give evidence or provide some explanation. That explanation could serve either to identify the perpetrators or equally importantly to exonerate the respondent employees who were not able to identify the perpetrators or who were not present.

[34] What is abundantly clear from the record of the arbitration is that the applicants adduced clear and unequivocal evidence of serious acts of unacceptable misconduct during the strike by the striking employees. The applicants lead the evidence of nine witnesses, eight of whom dealt the acts of misconduct and one who translated what could be heard from the recordings of the actions of the striking employees. The third respondent found this evidence to be “highly probable” and accepted it.

[35] The third respondent went further in his award by finding variously that:

a. The applicants’ “witnesses proved on an overwhelming balance of probabilities that the acts of misconduct … did occur”. Their evidence was probable in a was in many respects supported by photographic evidence and further because it explained why the respondents had to obtain the interdict, why the respondent secured the presence of a number of security officials to effectively form a barricade between the

strikers and the company premises and why there was a police presennce throughout most of the strike.;

b. “The evidence as a whole proved on a balance of probabilities that the so-called strike that was embarked on was tantamount to placing the company premises under siege.”

c. “The evidence proved on a balance of probabilities that the lease during the first few days of the strike the strike has blocked the access road to the company premises by some of them armed with sticks. During this period they attacked vehicles going to and from the respondents premises”; and

d. “The most probable inference is that they did so in order to intimidate non-striking employees such as managers not to work during the strike in order to intimidate the drivers of vehicles such as supply of vehicles to refrain from going to the respondents premises. The video footage shown during the arbitration did not relate specifically to incidents that the applicants were dismissed for but it painted a picture of a dangerously volatile situation existed during the strike.” [11]

[36] In response to this evidence the first respondent called three witnesses. The third respondent refers to this evidence in his award as follows:

“The [respondents] denied at the time that any misconduct occurred and also denied any knowledge who perpetrated such acts of misconduct as may have occurred. That continued to be the main defence that the applicants during the arbitration”[12]

[37] Two of the three witnesses called by the first respondent were employees and applicants before the arbitrator (Duma and Grantham). The third respondent dealt with their evidence as follows:

“Mr Grantham and Mr Duma, in their evidence in effect denied seeing any blocking of the road or stone throwing, but that was in keeping with

[11] Award paragraph 76 page 35
[12] Award paragraph 75 page 35

> the general tenor of the evidence which was that they did not see any of the significant incidents. Their evidence in this regard was so improbable that it rendered the whole of their evidence unreliable"[13]

[38] It is not unreasonable to infer not only from the applicants" evidence but from the evidence of the respondents at the arbitration that the all striking employees were engaged in and participated in the strike and accordingly, in the absence of any explanation, were present.

[39] The third respondent in considering whether the applicants' had established that the employees were guilty of derivative misconduct starts by referring to the matter of *CEPPWAWU v NBCCI & Others*[14]. In the judgement the court held that:

> … In cases of collective misconduct an employer can only act against those employees can prove to have **committed the misconduct complained of**.[15] (my emphasis)

[40] It is important to repeat the third respondents finding regarding the nature of the derivative misconduct for which the employees were dismissed.

> I accordingly find that [the employees] were dismissed for **derivative misconduct relating to an alleged failure on their part to provide the [applicants] with particulars of the identities of the perpetrators of acts of violence, intimidation and harassment committed from 22 August 2012 to 26 September 2012**"[16] (my emphasis)

[41] The third respondent concluded that the applicant bore the onus of "proving on a balance of probabilities **that the [employees] knew who the perpetrators of the principal misconduct were and that they failed to disclose such information** to the [applicants]".[17]

[42] This conclusion ignores the fact, as dealt with above, that the derivative misconduct the applicants relied upon related, in addition to failing to identify

[13] Award paragraph 94 page 38
[14] [2011] 2 BLLR 137 (LAC)
[15] paragraph 20 page 141
[16] Award paragraph 60 page 32
[17] Award para 65 page 33

the perpetrators, to a breach of trust arising from the failure to come forward. Either to identify the perpetrators or exonerate themselves.

[43] It is necessary however to place the decision in the *CEPPWAWU* matter in the context in which it was held. The issue in question related to an argument by the applicants relating to selective application of discipline. The union had suggested that where the employer had not disciplined all the employees involved in the strike that this rendered the dismissal of those charged with misconduct during the strike unfair.

[44] In this matter the issue is whether the dismissed employees' (all of whom were on strike) failure to give evidence and/or come forward to exonerate themselves or provide the names of the perpetrators of the direct misconduct constituted dismissible derivative misconduct despite not being directly identified as being present during the misconduct.

[45] When dealing with derivative misconduct the third respondent relied on the matter of *Chauke & Others v Lee Service Centre t/a Leeson Motors*[18] and in particular the following:

> … Two lines of justification for a fair dismissal may be postulated. The first is that the worker in the group which includes a perpetrator may be under a duty to assist management in bringing the guilty to book. Where a worker has or may reasonably be supposed to have information concerning the guilty, his failure to come forward with 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 service. Failure to assist an employer in bringing the guilty to book violates this duty and may itself justify dismissal.[19]
>
> This approach involves a derived justification, stemming from an employee's failure to offer reasonable assistance in the detection of those actually responsible for misconduct. **Though the dismissal is designed to target the perpetrators of the original misconduct,** the justification is wide

[18] (1998) 19 ILJ 1441 (LAC)
[19] Para 31 page 1447

> enough to encompass **those innocent of it, but** who through their silence make themselves guilty of a derivative violation of trust and confidence.[20] (The words in bold are omitted from the quoted passage in the third respondents award).

[46] The third respondents conclusion that the derivative misconduct was simply confined to **proving "…that the [employees] knew who the perpetrators of the principal misconduct were and that they failed to disclose such information** to the [applicants]"[21] ignores not only the applicants' evidence regarding the breach of trust but the inference that the respondent employees were present and accordingly guilty of derivative misconduct by remaining silent.

[47] The third respondent in the award then proceeds to consider the onus on the applicant in proving the derivative misconduct. In this regard the third respondent relies on the decision *RSA Geological Services v Grogan NO & Others*[22] and in particular:

> The employer must prove on a balance of probabilities that the employees knew or must have known about the principle misconduct and elected without justification not to disclose what they knew.[23]

[48] In analysing the evidence it is apparent that the third respondent in determining whether the applicants had discharged the onus, lost sight in the final analysis of that aspect of the derivative misconduct for which the employees were found guilty and dismissed. The third respondent failed to consider firstly whether a reasonable inference could be drawn that the respondent employees were present and secondly if such an inference could be drawn whether the failure of the employees to come forward and provide either an explanation exonerating themselves or providing the names of the perpetrators constituted derivative misconduct.

[20] Para 33 page 1447
[21] Award para 65 page 33
[22] (2008)29 ILJ 406 (LC)
[23] Para 49 page 419

[49] The third respondent, having determined that the derivative misconduct was only a "failure on their part to provide the [applicants] with particulars of the identities of the perpetrators of acts of violence, intimidation and harassment committed from 22 August 2012 to 26 September 2012" appears to have proceeded on the premise that the only misconduct the applicants were required to prove on a balance of probabilities was **that the [employees] knew who the perpetrators of the principal misconduct were and that they failed to disclose such information** to the [applicants]"[24]

[50] This raises two issues.

[51] Firstly: there is a clear distinction between:

a. Proving on a balance of probabilities that the employees knew who the perpetrators were and failed to come forward and disclose this information as was found by the third respondent to be the onus resting on the applicants; and

b. Considering whether, as was postulated in the *Leeson Motors* matter[25], the respondent employees were under a duty, consistent with the "essential … trust and confidence" of an employment relationship to come forward with an explanation.

[52] Secondly the third respondent does not consider whether the evidence of the applicants' witnesses was sufficient to require the respondent employees to do more than simply remain silent.

[53] In *Leeson Motors* the Court, referring to the decision in *FAWU v ABI*[26] said the following:

> None came forward at the workplace hearings or in the industrial court to affirm the innocence or to volunteer any evidence about the perpetrators. Nugent J … suggested that "In the field of industrial relations, it may be that policy considerations require more of an employee than that he merely

[24] Award para 65 page 33
[25] *Supra* at page 1447
[26] (1994) 15 ILJ 1057

remained passive in the circumstances like the present, and that his failure to assist in an investigation of this sort may in itself justify disciplinary action."

This approach involves a derived justification, stemming from an employee's failure to offer reasonable assistance in the detection of those actually responsible for the misconduct. Though the dismissal is designed to target the perpetrators of the original misconduct, the justification is wide enough to encompass those innocent of it, but who through their silence make themselves guilty of a derivative violation of trust and confidence.

In *FAWU v ABI*, the court held that, on an application of the evidentiary principles of failure by any of the workers concerned give evidence either in the workplace hearings or in the Industrial Court justified the inference that all those present at the workplace on that day either participated in the assault and the support to it. There were other inferences compatible with the evidence. But the inference of involvement was most likely since "this is pre-eminently a case in which, at one or more of the appellants had innocent explanation, they would have tended it, and in my view that failure to do so must be weighed in the balance against them." [27]

[54] It is abundantly clear from the record and the evidence as summarised and analysed by the third respondent that the applicants themselves regarded the failure of the employees to come forward with information relating to the perpetrators of principal misconduct **or** to exonerate themselves constituted a breach of the relationship of trust and confidence.

[55] In analysing the evidence and considering the various incidents the third respondent appears to concentrate only on the simple issue of whether the applicants were able to identify who was present or not. This approach is inexorably linked to the third respondent's failure to consider whether it could be inferred that the respondent employees were present and "through their silence make themselves guilty of a derivative violation of trust and confidence".[28]

[27] At paragraph 32 – 34 pages 1447/8
[28] *Leeson Motors supra*

[56] The third respondent despite referring to the inference to be drawn from the evidence only relies on a consideration of whether the employees were identified by the witnesses. The third respondent does not appear to consider whether the evidence adduced by the applicants was sufficient to create an inference that the respondent employees were all on strike and present.

[57] The third respondent finds that the parties were subject to a picketing rules agreement; that it was proved by the evidence of the first respondent's Mr Sibisi that it had been conveyed to the respondent employees that the applicants' required information regarding the perpetrators of the misconduct and that they should provide such information. The third respondent also finds that the defence raised and relied upon by the respondents at the time of the misconduct and the arbitration was to deny the misconduct.

[58] The record reflects that it was not the respondents' case that the respondent employees were neither on strike nor present during the acts of misconduct. The respondent employees simply remained silent. The witnesses who gave evidence on behalf of the respondents simply denied any misconduct, breach of the strike and picketing rules or the interdict.

[59] It is trite that the arbitration was a hearing *de novo*. The respondent employees had been afforded an opportunity to come forward before they were dismissed. This opportunity was again available to them at the arbitration. In the face of the extensive evidence relating to the presence of the striking employees and of the serious misconduct the first respondent and the employees elected deliberately not to give evidence or an explanation. (Besides Duma and Grantham whose evidence was simply to the effect that no misconduct took place, which evidence was rejected by the third respondent.) The right to remain silent is sacrosanct in criminal matters where accused persons are presumed to innocent until found guilty. This is not a criminal investigation and the presumption of innocence does not apply.

[60] The issue in question in this matter is whether the respondent employees were entitled despite the nature of the employment relationship to passively remain silent in the face of an opportunity to assist in the investigation. The Courts have repeatedly stressed the nature and essence of the employment relationship which is based on trust and good faith. The response by the respondent employees in this matter particularly taking into account the evidence adduced by the applicants to simply remain silent was a breach of that trust.

[61] In the course of the award the third respondent recognises that an inference may be drawn from the applicants' evidence but limits that inference only to where the employees are identified:

> In respect of the misconduct relating to the blocking of Induna Mills Road and damaging of vehicles and acts of intimidation including the carrying of sticks and other weapons, if an applicant was present on any day on which such misconduct was committed, and acceptable explanation was called for and in the absence of such explanation the most probable inference to be drawn is that such applicant at best for him or her committed derivative misconduct by not supplying the [applicants] with information regarding the perpetrators of such misconduct. In my view it would not make a difference to the outcome of this matter to make findings with such [respondents] committed principal misconduct or derivative misconduct. Either misconduct destroyed the trust relationship and warranted the sanction of dismissal.[29] And
>
> If any of the applicants were present in the group of strikers who blocked the road and the entrance to the respondents premises and/or attacked vehicles and/or intimidated anybody by standing in the road singing and dancing while some were armed with sticks they would either have been perpetrators of the principal misconduct or be liable for derivative misconduct on the basis that they knew the perpetrators of the principal 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

[29] Award paragraph 81 page 36

> defence was. Mr Grantham and Mr Duma testified but their evidence was rejected …[30]

[62] The applicants argued that the evidence adduced was sufficient to create an inference in respect of the respondent employees, whether they were identified or not that required them to provide an explanation. The applicants' regarded the failure or refusal to come forward as a breach of the trust relationship. The evidence clearly established that all relevant times the first respondent and the employees were well aware of the applicant's attitude towards the failure of the employees to come forward and identify the perpetrators as well as its intention to rely upon derivative misconduct arising from that failure.

[63] Insofar as the employees identified as being present during the direct misconduct there is no dispute. The inference was properly drawn that their failure to come forward and give evidence justified their dismissal for derivative misconduct.

[64] The question arises is whether the evidence adduced by the applicants was sufficient to create the inference that the employees were present during the misconduct and that in turn placed a burden the employees exonerate themselves or identify the perpetrators of the misconduct.

[65] The evidence clearly established that the dismissed employees (the applicants before the arbitration) were members of the first respondent and were all on strike. The applicants on numerous occasions during the duration of the strike communicated to the first respondent that they sought particulars of those directly involved in the principal misconduct from the employees and they regarded the failure by the striking employees to assist as a breach of the trust relationship constituting derivative misconduct.

[66] In response the evidence adduced by the applicants, the respondent employees simply remained silent.

[30] Award paragraph77 page 35

[67] The only evidence adduced by the respondent was that of Sibisi (the union organiser) and Grantham and Duma employees whose evidence was discredited. Mr Sibisi gave evidence that he addressed the strikers, warned them not to commit misconduct. His evidence was that the strikers at all times denied any misconduct or any of the incidents the applicants had complained of.

[68] The third respondents in the award finds that it was proven that:

> It was conveyed to the striking union members i.e. the applicants [the employees], that the respondents [applicants] were seeking information about the perpetrators of the misconduct and they should let the union know if they had any information. … Some of the applicants [the employees] had not received the message one would have expected them to give evidence to such effect. In the absence of such evidence I find that all applicants knew that the respondents required of them to provide information about the perpetrators of misconduct.[31]

[69] The employees were given an opportunity to explain, either to identify the perpetrators of the direct misconduct or to exonerate themselves both prior to their dismissal and at the arbitration. The employees eschewed such opportunities. The only evidence adduced by or on behalf of the first respondent and the employees relating to was present was confined simply to denying any direct misconduct. It was never suggested by the employees that they were not present during the direct misconduct that took place during the strike.

[70] In *FAWU v ABI*[32] matter the Labour Appeal Court held the following:

> In argument before us it was accepted by the appellants' counsel that if it was found that each of the appellants had associated themselves with the assault in one or other of the forms alleged by the respondent, the dismissal was justified.
>
> It was submitted by the appellant's counsel that the onus of establishing this was upon the respondent, and that the onus was to be discharged as

[31] Award paragraph 74 page 34 is
[32] (1994) 15 ILJ 1057

a matter of probability. I have assumed for purposes of this appeal that that submission is correct.

There was no direct evidence linking any of the appellants to any particular act in relation to the assault, and the respondent's case was based on inference alone. None of the appellants gave evidence, either in the court a *quo* or in the course of the disciplinary hearing. The attitude adopted by the appellants throughout was that it was for the respondent to establish their complicity, and that no case had been made out against any of them which called for a reply.

The extent to which a party's failure to give evidence may properly give rise to an inference against him has received considerable attention from the courts. What emerges from the decided cases is that his failure to do so cannot by itself constitute proof of what is alleged against him. Nevertheless the evidence against him, though not conclusive, may be such that an explanation would be expected if one was available. In such cases his failure to provide an explanation may be placed in the balance against him.
In the field of industrial relations, it may be that policy considerations require more of an employee than that he merely remain passive in circumstances like the present, and that his failure to assist in an investigation of this sort may in itself justify disciplinary action. [33]

[71] More recently the issue of derivative misconduct was considered by the Labour Appeal Court in the matter of *Western Platinum Refinery Ltd v Hlebela & Others*[34] where the Honourable Judge of Appeal Sutherland, after considering the judgment in *Chauke & Others v Lee Service Centre t/a Leeson Motors*[35] stated the following:

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. And controversially, and on general principle, a breach of the duty of good faith

[33] Pages 1062-1063

[34] (2015) 36 ILJ 2280 (LAC)

[35] supra

> can justify dismissal. Nondisclosure 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 *Leeson Motors* 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.[36]

[72] The third respondent held that an employer that relies on derivative misconduct is obliged to prove on a balance of probabilities that the employees knew or must have known about the principle misconduct and did not disclose it. The issue is whether on the evidence the inference can be drawn that the employees in this matter were present.

[73] The third respondent in referring to the respondent employees who were not identified as being present indicates that he took into account that it was "possible they did not testify in order to implicating themselves" and "in my view however equally possible that they did not testify because they were of the view that the respondent had not made out a case for them to meet". The third respondent simply concluded that "in the circumstances respondents failed to prove on a balance of probabilities that the applicants falling into this group of applicants committed misconduct."[37]

[74] By failing to consider whether or not the applicants evidence created inference that the respondent employees were present or under an obligation to exonerate themselves the third respondent does not consider whether the failure to give evidence or provide an explanation was acceptable or whether such conduct constituted derivative misconduct.

[75] In the *ABI* matter the court when considering the inference to be drawn said the following:

> The inference which the respondent seeks to draw from the evidence is that all the appellants were present at the time the assault took place, and either actively participated in the assault or at least supported and

[36] Paragraph 8 page 2285
[37] Awardpragraph79 pages 35/36

encouraged the actual perpetrators. It is a cardinal rule of logic when reasoning by inference that the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn (*R v Blom* 1939 AD 188 at 202-3). In my view all the evidence in the present case is consistent with that inference.

The appellant's counsel submitted that the evidence shows no more than that most of the crewmen were present when the assault took place, and that this does not assist in establishing as a matter of probability the presence of any one of the appellants. The reasoning is undoubtedly correct, but in my view none of the evidence establishes that it was only a majority of the appellants who were present. The evidence is equally consistent with them all being there.

The fact that the evidence is consistent with the inference sought to be drawn does not of course mean that it is necessarily the correct inference. A court must select that inference which is the more plausible or natural one from those that present themselves (*AA Onderlinge Assuransie Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A)). In the present case however no alternative inferences have been advanced which have a foundation in the evidence. It was suggested in argument that one or more of the appellants may have been absent, or may have been unwittingly caught up in the events. This, however, is no more than speculation, as there is no evidence to suggest that this is what occurred. In my view this is pre-eminently a case in which, had one or more of the appellants had an innocent explanation, they would have tendered it, and in my view their failure to do so must be weighed in the balance against them.[38]

[76] I am satisfied that the only reasonable and plausible inference that can be drawn from the evidence is that the respondent employees were present during the strike and accordingly during the misconduct. If they weren't present or had no information regarding the perpetrators they would have said so. They, despite the opportunities afforded them, did not.

[77] It is entirely reasonable for an employer to expect protected industrial action to be accompanied by orderly conduct by those employees who have embarked on the industrial action. This is particularly so in circumstances

[38] Pages 1062/3

where the employer has not only entered into a picketing rules agreement with the representative trade union regulating the conduct of striking employees but has as a result of the conduct of the employees been forced to obtain an interdict restraining the striking employees from committing misconduct. That strikes are often visited with violence and misconduct does not justify such acts.

[78] Despite the fact that tension often runs high during industrial action the level of misconduct and violence and the duration thereof in this matter reinforces the necessity for employers to be able on to rely on the "duty of good faith towards the employer" and that the employee "breaches that duty by remaining silent about knowledge possessed by the employee regarding the business interests of the employer being improperly undermined."[39] This duty must extend to the opportunity to exonerate oneself. Specifically when the employer has repeatedly requested information regarding the perpetrators of the misconduct and the striking employees are well aware of this.

[79] In the circumstances of this matter and in particular given the serious nature of the misconduct suggests the failure to provide an explanation constituted misconduct and justified the disciplinary action. The evidence adduced by the applicants created an inference that the respondent employees were present Accordingly, as employees of the applicants, the "essentials of trust and confidence"[40] demanded that they do more than simply remain silent. Their failure to come forward and provide an answer constituted derivative misconduct. The third respondent did not consider whether such an inference could be drawn and in so doing did not take into account material that was properly placed before him. This constitutes a valid ground of review.

[80]

[39] *Western Platinum Refinery supra* page 2285
[40] Per Cameron J *Leeson Motors supra* page 1446

[81] As far as the sanction of dismissal is concerned there was no suggestion by the first respondent the sanction of dismissal for derivative misconduct was inappropriate. The respondents relied solely on the respondent employees not being identified.

[82] Given the nature of this matter I am not satisfied that it is appropriate to make a costs order.

[83] In the circumstances and for the reasons set out above I make the following order:

i. Paragraphs (a), (b) and (c) of the third respondents award dated 16 March 2014 under case reference KNPM 2439 – 12 are reviewed and corrected by the deletion of paragraphs (a), (b) and (c) and substituted with an order that the dismissals of those persons whose names appear in paragraphs (a), (b) and (c) were substantively and procedurally fair.

ii. There is no order as to costs.

_____

Gush J

Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:	Adv A J Dickson SC
Instructed by:	Farrell and Associates
On behalf of the Respondent:	Adv P Schumann
Instructed by:	Brett Purdon Attorneys