A Cautious Approach towards the Application of Team Misconduct - *South African Commercial Catering and Allied Workers Union v Makgop*ela 2023 44 ILJ 1229 (LAC)

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Abstract

The reality faced by the labour market is that employees are prone to committing acts of misconduct at the workplace from time to time. In case of an unexplained stock loss at the workplace, however, it becomes difficult for the employer to establish a *prima facie* case that any particular individual employee was involved in the commission of the offence before disciplinary action can be validly taken. Consequently, the notion of team misconduct was introduced to deal with the common challenge faced by an employer who has sufficient proof of stock loss but is unable to identify the perpetrators of the misconduct. Accordingly, the evidential difficulty posed by dismissal for misconduct where a transgression has been committed by a group of employees has given rise to the application of team misconduct.

In this regard the recent Labour Appeal Court case in *South African Commercial Catering and Allied Workers Union v Makgopela* 2023 44 ILJ 1229 (LAC) has contributed to the elucidation of the notion of team misconduct in the workplace. The learned Savage AJA maintained that the notion of a person's being guilty by association has no place in our law. It follows that in order for an employer to safely rely on team misconduct a factual basis must be established to infer that an entire group of employees was indivisibly culpable as members of a team for failing to ensure compliance with the employer's rule.

The Labour Appeal Court can be lauded for precisely evaluating the evidence presented and all the relevant factors which exonerated the applicants from the charge of team misconduct. This case note calls for a critical analysis of the impact of shrinkage in the retail sector, the application of the notion of team misconduct, practical methods for securing evidence in team misconduct cases, as well as the cautionary approach adopted by Savage AJA in the Labour Appeal Court judgement.

Keywords

Employer; employee; team misconduct; dismissal; retail sector.

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1 Introduction

The notion of team misconduct was introduced to deal with the common challenge faced by an employer who has sufficient proof of stock loss but is unable to identify the perpetrators of misconduct.[1] Consequently, the evidential difficulty posed by misconduct dismissal where a transgression has been committed by a group of employees has given rise to the application of team misconduct.[2] Regardless of the absence of direct proof of guilt of each individual employee, that does not necessarily mean that an inference cannot be drawn to prove that one or more of the employees has participated in the commission of the offence.[3] However, a court cannot draw an adverse inference in the absence of *prima facie* evidence adduced by the employer, no matter the financial loss the employer suffered as a consequence of the shrinkage. Grogan[4] submits that the employer needs to conduct a thorough investigation into the allegations of misconduct and present *prima facie* evidence against an employee. Therefore, a mere suspicion of guilt does not discharge the onus of proof which rests with the employer.[5]

Recently the Labour Appeal Court in *South African Commercial Catering and Allied Workers Union v Makgopela*[6] maintained the position that guilty by association has no place in our law. Accordingly, for an employer to safely rely on team misconduct a factual basis must be established to infer that as members of a team the group of employees were indivisibly culpable for the failure to meet the standard of performance set by the employer.[7]

In the light of the aforementioned, the Labour Appeal Court can be lauded for precisely evaluating the evidence presented and all relevant factors which exonerated the applicants from team misconduct. This case note calls for a critical analysis of the impact of shrinkage in the retail sector, the application of team misconduct, practical methods for securing evidence in

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1 Cohen 2003 *SA Merc LJ* 25.

2 *NUMSA obo Khanyile Nganezi v Dunlop Mixing Services (Pty) Ltd* 2019 8 BCLR 966 (CC) para 31; *SACCAWU v Cashbuild Ltd* 1996 4 BLLR 457 (IC) (hereafter the *Cashbuild* case) para 476. The court held that it was permissible to hold employees liable as a group notwithstanding that the concept of collective guilt is repugnant to our law.

3 Poppesqou 2018 *ILJ* 35.

4 Grogan *Workplace Law* 233.

5 *EAWTUSA v The Production Casting Co (Pty) Ltd* 1988 9 ILJ 702 (IC) 708G-J.

6 *South African Commercial Catering and Allied Workers Union v Makgopela* 2023 44 ILJ 1229 (LAC) (hereafter the *Makgopela* case).

7 *Makgopela* para 29.

team misconduct cases, and the cautionary approach adopted by the Savage AJA judgement.

2 Shrinkage in the retail sector

In the case of *SA Commercial Catering and Allied Workers Union v Pep Stores*[8] the court defined shrinkage as a failure to account for the loss of stock which could be attributed to customers or members of staff or to both colluding with one another.[9] In a retail sector that is already struggling with diminished profitability as a result of inflationary increases coupled with reduced consumer liquidity, shrinkage can seal the fate of a business.[10] According to the 2020 National Retail Security Survey[11] shrinkage in South Africa accounted for 1.62% of a retailer's bottom line, which resulted in the retail industry's losing $61.7 billion.[12] In order to protect their business interests, some employers have implemented workplace policies which deem shrinkage that exceeds a certain percentage of sales unacceptable and which hold the entire contingent of employees responsible for the loss.[13]

By illustration, in the case under scrutiny the employer accepted stock losses of 0.4 % as a measure to protect its business interests against shrinkages.[14] Retail shrinkages may occur in different forms, *inter alia* shoplifting or theft by customers, administrative errors, unattributed loss, return fraud, or internal theft by employees.[15] For the purposes of this case note, the focus will be on internal theft by employees. According to Keenan, internal theft by employees constitutes 90% of stock loss, as a result of which businesses' financial loss can be estimated at $50 billion per year.[16] Internal theft by employees may occur in different forms, including straightforward merchandise theft, ringing up fake returns and issuing fraudulent gift cards, neglecting to scan all of a friend's or family member's items, improperly using their employee discount for others, or skimming off the cash drawer.[17]

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8 *SA Commercial Catering and Allied Workers Union v Pep Stores* 1998 19 ILJ 1226 (LC) (hereafter the *Pep Stores* case).

9 *Pep Stores* para 16.

10 Cohen 2003 *SA Merc LJ* 16.

11 The 2020 National Retail Security Survey was conducted online among retail industry loss prevention and asset protection professionals. Participants were asked about their company's loss prevention performance and actions in Fiscal Year 2019.

12 National Retail Federation 2020 https://cdn.nrf.com/sites/default/files/2020-07/RS-105905_2020_NationalRetailSecuritySurvey.pdf.

13 *SACCAWU v Pep Stores* 1998 6 BALR 719 (CCMA); *SACTU obo Motaung v Pep Stores* 2001 8 BALR 905 (CCMA); *SAGAWU obo Mdiya v Pep Stores (Pty) Ltd* 2003 10 BALR 1172 (CCMA).

14 *Makgopela* para 3.

15 Keenan 2022 https://www.shopify.com/za/retail/retail-shrinkage.

16 Keenan 2022 https://www.shopify.com/za/retail/retail-shrinkage.

17 Keenan 2022 https://www.shopify.com/za/retail/retail-shrinkage.

Notwithstanding the implementation of appropriate loss prevention strategies in the workplace, shrinkage remains high, and shrinkage threatens the retail enterprise. Regardless of clear evidence of internal theft, the employer is often unable to identify the method of the theft or catch the culprits responsible for internal theft.[18]

3 The application of team misconduct

Accordingly, misconduct manifests itself in various ways, the foremost of which involves theft or the unauthorised possession of company property, dishonesty, negligence and absenteeism.[19] Even though dismissal based on misconduct is permissible in terms of the *Labour Relations Act* 66 of 1995 (the *LRA*), the employer is required to comply with certain substantive and procedural requirements.[20] It is trite law that the employer has to prove on a balance of probabilities that an employee was actually guilty of misconduct.[21] However, in cases of team misconduct it becomes difficult for the employer to show on a balance of probabilities that each individual employee was involved in the commission of the offence before disciplinary action is validly taken.[22]

It is evident from decided case law[23] that most employers have relied on the charge of team misconduct in circumstances where they face shrinkages but individual perpetrators cannot be identified. In the case of *FEDCRAW v Snip Trading (Pty) Ltd*[24] the court held that the employer had dismissed a group of workers because responsibility for the collective conduct of the group was indivisible.[25] The learned arbitrator Grogan submitted that it was not a requirement that the employer had to prove the individual culpability of employees.[26] According to Cohen,[27] proving misconduct is more complicated if it involves a group of employees, thus rendering the employer incapable of pinpointing the exact perpetrators of the offence. According to section 192(2) of the *LRA,* the employer bears the onus of proof on a balance of probabilities that an individual employee has committed an

18 Le Roux 2011 *CLL* 101.
19 Coetzer 2013 *ILJ* 57.
20 Items 7 and 4 of the Code of Good Practice: Dismissal (Schedule 8) of the *Labour Relations Act* 66 of 1995 set out the substantive and procedural requirements for pre-dismissal.
21 Section 192(2) of the *Labour Relations Act* 66 of 1995 (hereafter the *LRA*).
22 Schedule 8 of the *LRA* sets out specific guidelines, substantive and procedural requirements for the fair dismissal of an individual employee.
23 The *Makgopela* case; *Foschini Group v Maidi* 2010 7 BLLR 689 (LAC) (hereafter the *Foschini* case); the *Pep Stores* case.
24 *FEDCRAW v Snip Trading (Pty) Ltd* 2001 7 BALR 669 (P) (hereafter the *Snip Trading* case*).*
25 *Snip Trading* para 32.
26 *Snip Trading* para 32.
27 Cohen 2003 *SA Merc LJ* 20.

offence. However, in certain instances of prolonged and serious team misconduct collective discipline, though undesirable, is sometimes appropriate.[28]

The Labour Court in *SAMWU obo Abrahams v City of Cape Town*[29] reiterated that an employee cannot be dismissed on the basis of being a member of a group that committed an offence unless there is sufficient evidence to prove his guilt.[30] Accordingly, the employer cannot dismiss employees collectively because the concept of collective guilt is wholly foreign to our system and repugnant to the requirements of natural justice.[31] Cohen[32] submitted that the obvious concern with the application of collective guilt was the danger of disciplining or dismissing an innocent employee. The Industrial Court shared those sentiments in the *NUM v Durban Roodepoort Deep*[33] case.

In *NSCAWU v Coin Security Group (Pty) Ltd t/a Coin Security*[34] the Industrial Court stressed that:

> A feature of the application of collective guilt is a marked lack of specificity regarding the alleged misconduct and the absence of identification of the alleged wrong-doers.[35]

However, the Industrial Court in the *SACCAWU v Cashbuild Ltd* case stated that the questions to be answered on rules regarding shrinkage control were the following:

> Did the Respondent have a rule requiring the Applicants to control shrinkage; was it a reasonable or valid rule; did the Applicants know of the rule or could they reasonably have been expected to have known of the rule; was the rule consistently applied; and was their dismissal the appropriate sanction for the contravention of the rule?[36]

The court held that if the answers to the questions are positive, it is permissible to hold employees liable as a group notwithstanding the fact that the notion of collective guilt has no place in our law.[37]

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28 Cohen 2003 *SA Merc LJ* 20.

29 *SAMWU obo Abrahams v City of Cape Town* 2011 11 BLLR 1106 (LC) (hereafter the *Abrahams* case).

30 *Abrahams* para 32.

31 *Chauke v Lee Service Centre t/a Leeson Motors* 1998 19 ILJ 1441 (LAC) para 39.

32 Cohen 2003 *SA Merc LJ* 16.

33 *NUM v Durban Roodepoort Deep Ltd* 1987 8 ILJ 156 (IC) 162I. The Industrial Court stressed that there is a failure of justice even if a single innocent person is presumed to be guilty and is made to suffer with the rest.

34 *NSCAWU v Coin Security Group (Pty) Ltd t/a Coin Security* 1997 1 BLLR 85 (IC) (hereafter the *Coin Security Group* case).

35 *Coin Security Group* para 98.

36 *Cashbuild* para 475.

37 *Cashbuild* para 476.

In accepting the application of team misconduct, the court in *Snip Trading* held that:

> In cases of team misconduct, the employer dismisses a group of workers because responsibility for the collective conduct of the group is indivisible … as individual components of the group each has culpably failed to ensure that the group complies with a rule or attains a performance standard set by the employer.[38]

The court further expressed the view that where there is team misconduct it was lawful for the employer to dismiss the entire group of employees:

- if each member had a role to play in attaining the performance standard set for the team;
- if where that standard was not attained each member was given an opportunity to explain the team's failure;
- if the person to whom the explanations were given was objectively satisfied that the team's failure could not be blamed on any particular member of that team.[39]

However, Maqutu[40] contends that to pronounce that the conduct of a group is indivisible is artificial categorisation without meaningful practical application. She further contends that each employee has separate tasks which are undertaken simultaneously with other co-workers.[41] Consequently, there is no continuous indivisible group work in the manner contemplated by *Snip Trading.*[42] For instance, she notes that the assigned tasks for employees in a retail enterprise include those of a manager, a security guard, a cleaner, a cashier and perhaps a sales person.[43] Even if one may assume that there are instances where it can be established that the work of the team is indivisible or at least that members were in a position to observe improprieties performed by others, then the next step must be to show that the members participated in the misconduct.[44] In addition, the tenets of purposive interpretation dictate that it could not have been the intention of the legislature that where there has been shrinkage in the retail sector, employees may be deprived of the labour law requirement that an employer adduce evidence of wrongdoing prior to a finding of guilt.[45]

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38 *Snip Trading* para 32.
39 *Snip Trading* para 36.
40 Maqutu 2014 *Stell LR* 577.
41 Maqutu 2014 *Stell LR* 577.
42 *Snip Trading* para 32.
43 Maqutu 2014 *Stell LR* 577.
44 Maqutu 2014 *Stell LR* 577.
45 *NEHAWU v UCT* 2003 2 BCLR 154 (CC) paras 41-42.

In the *Maluleke v Cashbuild Orange Farm*[46] case, the commissioner was intolerant to the concept of team misconduct as enunciated by the Labour Appeal Court in *Foschini Group.*

Accordingly, the commissioner held:

> There was simply no evidence that any of the employees failed to ensure that they or their colleagues complied with a rule or performance standard, and it is absurd to contend that the employees *in casu* were guilty of team misconduct merely because they were employed in a store which had a shrinkage problem.[47]

Consequently Maqutu[48] endorsed the assessment approach adopted in *Maluleke*. She averred that from its inception the notion of team misconduct had not been clearly differentiated from the concept of collective guilt.[49] She further stated that the *Foschini Group* case recited the condemnation of collective guilt which was reiterated in the *Snip Trading* case and then attempted to cast team misconduct as a distinct entity falling under the umbrella of collective misconduct.[50] She concluded that they were not really different.[51] Accordingly, it is submitted that the decision of *Maluleke* is acceptable because the notion of team misconduct has not been adequately differentiated from the notion of collective guilt. Consequently, a purposive interpretation dictate leads to the conclusion that it could not have been the intention of the legislature that where there has been a shrinkage in the retail sector, employees may be deprived of the labour law requirement that an employer must adduce evidence of wrongdoing prior to finding an employee guilty of an offence.[52]

4 Practical methods to secure evidence in team misconduct cases

4.1 The application of closed circuit television (CCTV) cameras and surveillance drones

The use of CCTV cameras has been regarded as the most useful form of surveillance, as such cameras record both the sound and the image of an incident as and when it takes place.[53] Consequently, both the face and voice could be used to potentially link the suspect to the unlawful act.[54] In practice CCTV cameras are installed publicly or privately to monitor any commission

46 *Maluleke v Cashbuild Orange Farm* 2012 1 BALR 50 (CCMA) (hereafter the *Maluleke* case).
47 *Maluleke* para 4.4.
48 Maqutu 2014 *Stell LR* 576.
49 Maqutu 2014 *Stell LR* 576.
50 Maqutu 2014 *Stell LR* 576.
51 Maqutu 2014 *Stell LR* 576.
52 Maqutu 2014 *Stell LR* 576.
53 Du Plessis *Practical Guide to Labour Law* 25.
54 Du Plessis *Practical Guide to Labour Law* 25.

of misconduct by employees. For instance, it is submitted that privately installed CCTV cameras can be a useful tool to monitor and identify employees responsible for stock loss in retail stores.

In lieu of the aforementioned, video evidence is admissible during arbitration proceedings.[55] It has been accepted that video evidence is concise and reliable as it does not suffer from the failings of evidence supplied by human witnesses, who have fading memories and are prone to inconsistencies.[56]

In *S v Pistorius*[57] the court expressed the view that:

> Human beings are fallible and they depend on memories which fail over time. This court is in a fortunate position in that it has objective evidence in the form of technology which is more reliable than human perception and human memory and against which all the other evidence can be tested.[58]

Three important aspects need to be considered in order for video footage to be admissible as evidence: the relevance of the video footage, its authenticity, and the availability of expert witnesses to corroborate it.[59] By implication, employees may argue that the use of CCTV and drone surveillance to obtain evidence is an infringement of their enjoyment of their constitutional right to privacy. However, it is common knowledge that constitutional rights can be subjected to the limitation clause contained in the *Constitution*.[60] By illustration, the *SATAWU v Autopax*[61] case provides a good example of the admissibility of video evidence against the constitutional right to privacy.

The arbitrator had to consider the admissibility of a video recording made without the employee's knowledge by a private investigator who recorded the transaction of a false ticket.[62] The union argued that the video footage was an invasion of the employee's privacy and that it was unconstitutional

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55 Lazarus 2021 https://ceosa.org.za/admissability-of-video-evidence-in-an-arbitration.

56 *S v Baleka* (January 2005, CLL 14(6) 57).

57 *S v Pistorius* (CC113/2013) [2014] ZAGPPHC 793 (12 September 2014) (hereafter the *Pistorius* case).

58 *Pistorius* 3299.

59 Tenza 2017 *Obiter* 247.

60 Section 36 of the *Constitution of the Republic of South Africa*, 1996 provides that constitutional rights may be limited if it is reasonable and justifiable to do so in an open and democratic society based on human dignity, equality, and freedom, and having regard to:
(i) the nature of the right;
(ii) the importance of the purpose of the limitation;
(iii) the nature and extent of the limitation;
(iv) the relation between the limitation and its purpose; and
(v) less restrictive means to achieve the purpose.

61 *SATAWU obo Assagai v Autopax* 2001 22 ILJ 2773 (BCA) (hereafter the *Autopax* case).

62 *Autopax* 2776G.

and should be dismissed.[63] In finding that the video footage was admissible, the arbitrator considered the following;[64]

- Firstly, that the recording was not confidential as it was done during the scope and course of the employee's employment.

- Secondly, that the criminal law rule against the admissibility of unconstitutionally obtained evidence was inapplicable.

- Lastly, that it was necessary to balance the employer's interest in protecting its property and employee's right to privacy.

4.2 Entrapment

According to Schwikkard and Van der Merwe,[65] entrapment is a proactive investigative technique of obtaining evidence which can be utilised where there is evidence of repeated acts of theft in the workplace but the employer cannot apprehend the culprits. For example, entrapment can be effective in misconduct cases like cable theft, gold smuggling, shrinkages etc.[66] Entrapments are governed by section 252A(1) of the *Criminal Procedure Act*[67] and the provisions of section 252A(1) are applicable only to entrapments conducted by a law enforcement officer, an official of the state or any other person.[68] The provisions of section 252A(1) exclude entrapments conducted by private persons or the employer.[69] Despite the exclusion imposed by section 252A(1) on entrapments conducted by the employer, the Labour Court in the case of *Cape Town City Council v South African Municipal Workers Union*[70] granted an exception. The learned Stelzner AJ expressed the view that:

> Guidelines and parameters no less rigid or strict than those set out in section 252A of the CPA should be applied in the context of the employment relationship.[71]

In support of the use of traps in the employment context, Grogan states that:

> This is the fact that employers who set traps are normally seeking to protect their property. If the state is allowed to use trapping techniques in appropriate circumstances to combat crime, there is no reason in fairness why employers should not be allowed to do so where there is no other reasonable way of

63 *Autopax* 2776I.
64 *Autopax* 2777B-I.
65 Schwikkard and Van der Merwe *Principles of Evidence* 278.
66 Schwikkard and Van der Merwe *Principles of Evidence* 246.
67 *Criminal Procedure Act* 51 of 1977 (hereafter the *CPA*).
68 *S v Dube* 2000 1 SACR 53 (N) paras 70-71.
69 Section 252A(1) of the *CPA*.
70 *Cape Town City Council v South African Municipal Workers Union* (C367/98) [2000] ZALC 106 (22 September 2000) (hereafter the *Cape Town City Council* case).
71 *Cape Town City Council* para 56.

> controlling internal theft. If, as is universally accepted, the employment relationship is based on trust, employees should be expected to resist temptation when it comes to illegally profiting at their employer's expense.[72]

In *Mbuli v Spartan Wiremakers CC*[73] the employer was experiencing severe shrinkage of its product and had been informed that the applicant employee and another employee were involved in stealing and selling the product. The employer arranged with one of its employees, a buyer (who was acting as a trap) to approach the applicant and seek to buy rolls of netting wire from him cheaply. The applicant employee agreed to sell the wire at less than half its true price and this transaction was observed and recorded. After a disciplinary enquiry the applicant was dismissed.[74]

The arbitrator had to consider the admissibility of the evidence obtained as a result of an entrapment. The arbitrator affirmatively held that the provisions of section 252A may serve as a guideline in the employment context.[75] The court held that subsection 3 of s 252A of the *CPA* allows further for a discretion in regard to the admission of evidence, even where it is found that the conduct goes beyond providing an opportunity to commit an offence, but through a process of weighing up the public interest against the personal interest of the accused with reference to a list of stated factors.[76] The court accepted the evidence obtained by means of the trap, stated that the applicant had been a willing participant and had not been unduly induced, coerced or tricked into committing the theft, and furthermore noted the fact that staff theft was prevalent.[77]

Although entrapment may be regarded as offensive to the notion of fairness[78] because the means of entrapment are considered as deceitful, Schwikkard and Van der Merwe[79] are of the opinion that entrapments are a measure of last resort to arrest criminals where it is otherwise difficult to do so.

5 Pertinent facts of the *Makgopela* case

This case concerned the dismissal of employees on the grounds of team misconduct in July 2016. The basis of the charge was that the employees

72 Grogan 2001 *Employment Law* 8-9.
73 *Mbuli v Spartan Wiremakers CC* 2004 5 ILJ 1128 (BCA) (hereafter the *Mbuli* case).
74 *Mbuli* 1129.
75 *Mbuli* 1133F.
76 *Mbuli* 1134E.
77 *Mbuli* 1135C-E.
78 Lord Bingham in *Nottingham City Council v Amin* (2000) 1 WLR 1071 1076-1077 stated that there would be a violation of the concept of fairness if a defendant were to be convicted and punished for committing a crime which he committed only because he had been incited, instigated, persuaded, pressurised, or wheedled into committing it by a law enforcement officer.
79 Schwikkard and Van der Merwe *Principles of Evidence* 246.

as individual components of the group, each culpable, failed to ensure that the group complied with a rule or attained a performance standard set by the employer where shrinkage reached unacceptable levels in the amount of R202 317,72.[80] To curb stock losses Cashbuild (employer) decided on 0.4% of sales as an acceptable level of stock losses. In January 2016 stock losses were detected at the Klerksdorp branch in the amount of R21 871,00, which was equivalent to 0,47% of sales. Pursuant to the January stock loss, in February 2016 a further stock-take revealed stock shrinkage of R24 845,00, which was equivalent to 1.5% of sales. The last stock-taking occurred in March 2016. This revealed a stock loss of R88 000,00 which was equivalent to 2.74% of sales.[81] In the same month (March 2016) employees were issued with final written warnings valid for 12 months for failing to control shrinkage collectively or individually.[82]

As a result of the separate incidents of stock losses, the employer conducted a shrinkage workshop. Accordingly, employees were interviewed and given a questionnaire to complete in which they were asked to indicate the cause of the stock losses. In addition, the employees were encouraged to use an anonymous tip-off line. After the shrinkage workshop, stock-taking occurred in June 2016. This revealed stock losses in the amount of R106 848,00, which was equivalent to 3.63% of sales. Amongst the items missing in the June stock-taking were 6-metre lengths of timber and doorframes.[83]

The continuous stock losses suffered by the employer resulted in a further shrinkage workshop in June 2016. During the second shrinkage workshop, a number of systemic deficiencies in Cashbuild's systems were identified by the employees in the shrinkage questionnaires they completed. These included staff shortages, the lack of a permanent end controller stationed at the exit to the store, the lack of adequate controls at the stock-receiving section, the lack of control of the keys to the receiving area, and the fact that three of the CCTV cameras at the store were inoperative.[84]

5.1 The Commission for Conciliation, Mediation and Arbitration (CCMA) judgment

At arbitration, the Commissioner found that the employees had failed to report all they saw in the way of irregularities, that they might have been involved in irregularities, and that they had not been completely honest[85] The Commissioner refused to accept that the employees had undertaken their duties in the manner required. As a result, the Commissioner held that

80 *Makgopela* para 4.
81 *Makgopela* para 3.
82 *Makgopela* para 3.
83 *Makgopela* para 3.
84 *Makgopela* para 4.
85 *Makgopela* para 11.

the employees had contravened the employer's rule and had failed to disclose the cause of the stock losses.[86] In support of the findings the Commissioner made reference to *Western Platinum Refinery Ltd v Hlebela,*[87] which set out the requirements for derivative misconduct, and found that the employees had implicated one another in the shrinkage workshops questionnaire by referring to others among them who were not doing their duties.[88] The Commissioner concluded that the dismissal of the employees was both procedurally and substantively fair.[89]

The matter was taken on review and the Labour Court dismissed the review application on the basis that the CCMA award fell within the bounds of reasonableness.[90]

5.2 The Labour Appeal Court judgement

Unexpectedly, on appeal the learned Savage AJA found that the applicants' dismissal was substantively unfair on the basis of lack of evidence. The court found that there was no evidence of any attempt to ascertain through an investigation how stock was being lost or from which part of the large store this was occurring, including relying on CCTV footage or available documentary evidence.[91] The court further found that there was no evidence which indicated that, given the size of the store, employees in one section of the store would have been aware of stock being lost in another section.[92] The court indicated that the Klerksdorp branch was not a small shop in which it could be inferred that the limited number of employees would reasonably have collectively borne knowledge of any stock losses.[93] Consequently, due to the diverse functions performed by the employees across the large area of the store, the court stressed that it was improbable that all employees were aware of the stock losses occurring in the Klerksdorp branch.[94] Therefore, the court concluded that a primary inference could not be drawn that the applicants culpably participated in the misconduct.[95]

In contrast to the situation in the *FAWU v ABI*[96] case, the court stated the applicants had not remained silent, presumably in an attempt to protect one

86 *Makgopela* para 10.
87 *Western Platinum Refinery Ltd v Hlebela* 2015 ILJ 2280 (LAC).
88 *Makgopela* para 10.
89 *Makgopela* para 11.
90 *Makgopela* para 12.
91 *Makgopela* para 25.
92 *Makgopela* para 25.
93 *Makgopela* para 26.
94 *Makgopela* para 26.
95 *Makgopela* para 25.
96 *FAWU v ABI* 1994 15 ILJ 1057 (LAC).

another.[97] The evidence showed that they had participated in shrinkage workshops and completed shrinkage questionnaires in which they had identified system difficulties and proposed solutions to deal with the stock loss.[98] Accordingly, the court concluded that a secondary inference could not be drawn from the absence of any self-exculpatory evidence.[99]

6 Commentary

It is evident from decided case law that it is challenging for employers to present evidence to prove that each individual employee has committed an act of misconduct, whereupon the employers alleged that the responsibility for stock shortages is collective.[100] Many employers have resorted to immediate reliance on team misconduct to curb shrinkages in the workplace. However, it is submitted that in the *Maluleke* and *Makgopela* cases the employers prematurely relied on the application of team misconduct without establishing a *prima facie* case against the employees. Accordingly, one may argue that in both cases team misconduct was used as an easier means to justify the dismissal of the group of employees.

To avoid the mass dismissal of employees, the learned arbitrator Grogan stressed that caution must be exercised against the application of team misconduct to every instance of stock loss without serious attempts to identify and discipline individual employees.[101]

In casu the learned Savage AJA shared a similar sentiment in the following observation:

> This case illustrates the caution to be adopted where reliance is placed on collective misconduct as a basis for dismissal … Our law does not allow a determination of guilt simply by association. Where team misconduct is relied upon there must exist either a factual basis or sufficient grounds for inferring that all employees were indivisibly culpable as members of the team for failing to ensure compliance with the employer's rule. A reliance on generalised facts, arising from a scant investigation into the alleged misconduct, does not provide a sufficient basis on which to infer that collective responsibility exists.[102]

The Savage AJA judgement tells us that a *prima facie* case or a factual basis requires more than a scant investigation which may lead to an employer's suspicion of guilt. The employer needs to conduct a thorough investigation into the allegations of misconduct and present *prima facie* evidence against an employee.[103] It is submitted that evidence obtained

97 *Makgopela* para 27.
98 *Makgopela* para 27.
99 *Makgopela* para 27.
100 Maqutu 2014 *Stell LR* 568.
101 *Snip Trading* para 37.
102 *Makgopela* para 29.
103 Grogan *Workplace Law* 233.

from a CCTV footage may be sufficient to link the accused to stock loss. The *Woolworths v Commission for Conciliation Mediation and Arbitration*[104] and *Pistorius* cases are classic examples of the effectiveness of CCTV as a method of securing evidence to link an employee to the commission of an offence. It is further submitted that if Cashbuild had utilised CCTV during the incidents of stock loss, it is likely that the employer would have been able to tender a chain of evidence to link the applicants to the commission of the misconduct. Undoubtedly Savage AJA correctly found that the employer had failed to adduce evidence to ascertain how the stock losses had occurred and from which part of the large store.[105]

Remarkably, the court also considered the size of Cashbuild and the nature of the work performed by the applicants to determine whether a negative inference was warranted that the applicants culpably participated in the misconduct. Perhaps the thesis was that the smaller the size of the store, the greater the possibility that employees would work closer to each other, and, therefore, the greater the possibility that employees would reasonably bear knowledge of how the stock losses were occurring, which would warrant the drawing of a primary negative inference. In contrast, the Cashbuild Klerksdorp branch was so large that the employees performed diverse functions without working in proximity to one another.[106] In essence, it was highly improbable, as the court found, that the employees in one section of the store would have been aware of how the stock in another section was being lost.[107] As a result, the court correctly abstained from drawing a primary negative inference that the applicants culpably participated in the commission of the misconduct.[108]

Lastly, Savage AJA dismissed the drawing of a secondary negative inference on the grounds that the applicants had not remained silent, unlike in the *FAWU*[109] case. Although this worked in the applicants' favour, it is submitted that an employee's silence does not imply guilt, especially in the absence of *prima facie* evidence against the employee. The applicants participated in the shrinkage workshops and completed the shrinkage questionnaires in which they identified systemic difficulties and made proposals to solve the problem of the loss of stock.[110] Ignoring the proposed solutions to curb the stock losses, the employer failed to take positive steps to address the problems identified by the applicants in the March and June

104 *Woolworths v Commission for Conciliation Mediation and Arbitration* 2011 32 ILJ 2455 (LAC).
105 *Makgopela* para 25.
106 *Makgopela* para 25.
107 *Makgopela* para 25.
108 *Makgopela* para 25.
109 *FAWU v ABI* 1994 15 ILJ 1057 (LAC).
110 *Makgopela* para 25.

2016 questionnaires as contributing to shrinkage. Therefore, one may argue that the employer was the author of its own misfortune for failing to consider and implement the proposals made by the applicants.

7 Conclusion

In the above discussion of the *Cashbuild* case, it is evident that team misconduct cannot be used as a weapon of mass dismissal by an employer in the absence of sufficient evidence. The Savage AJA judgment clearly upholds the position that our law does not permit a determination of guilt simply by association. Hence, in order for an employer to successfully rely on team misconduct he needs to conduct a thorough investigation into his stock loss and adduce evidence that may directly or indirectly link his employees to the commission of the misconduct. Accordingly, CCTV and entrapment can be useful methods at the disposal of an employer faced with ongoing acts of team misconduct in the workplace. It follows that a court may not be inclined to draw a negative adverse inference where no *prima facie* evidence is presented by the employer before the court. In addition, employers need to take cognizance of the size of their enterprises, which may be a contributory factor to the inference that employees may reasonably, by proximity, have knowledge of the source of stock losses.

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List of Abbreviations

AJA	Acting Judge
CCMA	Commission for Conciliation, Mediation and Arbitration
CCTV	closed circuit television
CLL	Contemporary Labour Law
CPA	Criminal Procedure Act 51 of 1977
ILJ	Industrial Law Journal
LRA	Labour Relations Act 66 of 1995
SA Merc LJ	South African Mercantile Law Journal
Stell LR	Stellenbosch Law Review