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I hereby declare that I have read and understood the regulations governing the submission of Postgraduate Diploma in Employment Law dissertations/research papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/research paper conforms to those regulations.

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## ABSTRACT

This dissertation investigates the act of theft in the South African workplace, with the main purpose of exploring whether such an act of misconduct will always justify dismissal. It takes an in-depth look at the development of the principles surrounding theft in the workplace and considers whether two recent Labour Appeal Court judgments have changed these past principles. The research into this dissertation involved the consideration of common law principles, an examination on the statutory guidelines for dismissals relating to misconduct, and a thorough analysis of South African case law surrounding theft in the workplace over the past 20 years.

University of Cape Town

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## 1. INTRODUCTION

The majority of employers would agree that the phrase ‘theft in the workplace’ is synonymous with the word ‘dismissal’, plus, in the eye of the employer, handling cases of theft in the workplace has traditionally been understood as relatively straightforward. Once an employer is able to prove guilt for an allegation of theft in the workplace, it is merely a formality for the employer to point out that such an act is detrimental to the employment relationship and in light of this, there is no way the employer could be expected to retain the services of such a transgressor. This way of thinking makes perfect rational sense if you are an employer – why would you want a person that is on your payroll, who is exposed to your trade secrets, who handles company property (such as stock or cash), and that you cannot trust?

Whilst an employer’s thought process in this respect is justifiably not wrong, our employment law may not be as straight forward. Or is it?

This paper explores the question of whether theft in the workplace always justifies dismissal and in light of two recent Labour Appeal Court decisions, considers whether the principles surrounding theft in the workplace have changed.

The paper will look at the definitions of dishonesty and theft in the workplace, it will consider the statutory guidelines for unfair dismissals and what our legislator has provided for employers by way of a code or guideline, to assist in dealing with cases of misconduct. It will look at various jurisprudence concerning past approaches to theft within the workplace and will focus on and analyse two recent and apparently conflicting Labour Appeal Court judgments that may impact upon and challenge past principles.

## 2. DISHONESTY & THEFT: THE SAME DIFFERENCE

Dishonesty, defined as, ‘intending to trick people’,<sup>1</sup> is a common term used in the employment context for all forms of conduct involving an employee’s intention to deceive. Theft, more specifically, can be defined as, ‘the crime of stealing something

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<sup>1</sup> *Oxford Advanced Learner’s Dictionary*; 7<sup>th</sup> Edition at 419.

from a person or place',<sup>2</sup> which in the employment context would also involve an employee's intention to deceive.

As mentioned by Grogan in his book *'Dismissal, Discrimination & Unfair Labour Practices'*; "dishonesty entails 'a lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently'".<sup>3</sup>

Considering the above and in the context of employment, one can deduce that dishonesty is an act (although at times may be an omission), involving the intention to deceive and can take on a variety of forms, including theft. Further to this, due to the fact that theft is defined as a crime, it is seen as an unlawful act, and in light of the employment relationship, would be regarded as an act of very serious or 'gross' dishonesty, conceivably the most extreme form of dishonesty.

### 3. CONSIDERING THE LRA: STATUTORY GUIDELINES & DISMISSAL FOR MISCONDUCT

Prior to examining relevant case authorities and deducing the principles surrounding theft in the workplace, it is important to consider the applicable legislation and guidelines that impact on such a topic.

The Labour Relations Act 66 of 1995 (hereafter 'LRA'), although primarily committed to regulating collective bargaining, also includes individual employment rights and obligations. The prerequisite for a person to enjoy such individual employment rights, is that he or she needs to be an 'employee' of an 'employer' (i.e. a party to an employment relationship), as defined by the LRA.<sup>4</sup> Once such a relationship of

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<sup>2</sup> *Oxford Advanced Learner's Dictionary*; 7<sup>th</sup> Edition at 1532.

<sup>3</sup> First Edition (Juta 2005) at 247. As cited from *Nedcor Bank Ltd v Frank & Others* (2002) 23 ILJ 1243 (LAC).

<sup>4</sup> See definition of 'employee' in section 213 of the LRA. See also the Code of Good Practice: Who is an employee? Although the term 'employer' is not defined in the LRA, an employer may be a natural or juristic person.

employment has been established, employment legislation such as the LRA would therefore apply.<sup>5</sup>

In view of the LRA, Chapter VIII of this Act deals with the individual employment rights, specifically, the right of an employee not to be unfairly dismissed and not to be subjected to unfair labour practices.<sup>6</sup> It provides the meaning or definition of ‘dismissal’<sup>7</sup> and lists the various grounds that can never give reason for a dismissal, known as automatically unfair dismissals<sup>8</sup>. Further to this, and more importantly for the purposes of this paper, section 188 of the LRA provides for a dismissal or termination framework, and reads as follows:

- (1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove –
  - (a) that the reason for the dismissal is a fair reason –
    - (i) related to the employee’s conduct or capacity; or
    - (j) based on the employer’s operational requirements; and
  - (b) that the dismissal was effected in accordance with a fair procedure.
- (2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.<sup>9</sup>

Whilst it can be read from the above that an employee may not be unfairly dismissed, such section does indicate that an employer may however dismiss an employee for a *fair reason* related to either, his/her *conduct* or *capacity*, or the employer’s *operational requirements*, in accordance with a *fair procedure* (emphasis added in italics). It can also be inferred that substantive fairness (fair reason) and procedural fairness are independent from one another when determining a fair dismissal (i.e. a dismissal for a fair reason may be unfair due to the employer failing to follow a fair process, and *vice versa*). Further to this, the above cited section of the LRA places a requirement on employers to refer to the

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<sup>5</sup> The subject of ‘parties to an employment relationship’ is an entirely separate topic on its own and will not be dealt with in further detail in terms of this dissertation.

<sup>6</sup> Section 185.

<sup>7</sup> Section 186(1).

<sup>8</sup> Section 187(1).

<sup>9</sup> See Schedule 8, the Code of Good Practice: Dismissal.

Code of Good Practice: Dismissal<sup>10</sup> (hereafter “the Code”), which offers guidance to employers, arbitrators and the Labour Court when faced with considering a *fair reason* and *fair procedure* in a dismissal. Accordingly, it is important to consider these guidelines as set out in the Code.

For the purposes of this dissertation, out of the three reasons for dismissal mentioned above,<sup>11</sup> only dismissals relating to an employee’s conduct will be considered and discussed.

a) Fair Reason in terms of the Code

Item 7 of the Code provides, as a guideline, five questions that need to be asked by any person who is determining whether the reason for a dismissal for misconduct is fair or unfair.<sup>12</sup> These being:

- Whether or not a rule or standard, regulating the workplace or of relevance to the workplace, was contravened?
- If so, then whether or not the rule was a valid or reasonable rule or standard?
- Whether or not the employee was aware, or could reasonably be expected to have been aware, of the rule or standard?
- Whether or not the rule or standard has been consistently applied by the employer?
- Whether or not dismissal is an appropriate sanction for the contravention of the rule or standard?

In addition, an important principle of the Code is that it endorses the concept of corrective or progressive discipline and as such, when dealing with the question of appropriate sanction, efforts should be made to correct and rectify behaviour through a system of graduated disciplinary measures (i.e. counselling and warnings).<sup>13</sup> The Code further indicates that the sanction of dismissal should be reserved for cases of serious

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<sup>10</sup> Schedule 8 of the LRA.

<sup>11</sup> Conduct, Capacity or Operational Requirements.

<sup>12</sup> See for example, *Motswenyane v Rockface Promotions* (1997) 1 CCMA 7.4.6; *CWIU obo Flepu v Johnson & Johnson* (2000) 9 CCMA 8.8.1.

<sup>13</sup> Item 3(2).



misconduct and of such gravity that it makes the continued employment relationship intolerable.<sup>14</sup> It further suggests that when deciding whether or not to impose the sanction of dismissal, the employer should consider factors such as the employee's circumstances, the nature of the job the employee in question holds and the circumstances of the infringement itself.<sup>15</sup>

In terms of workplace rules or standards, item 3(1) of the Code encourages employers to adopt disciplinary rules that establish the standard of conduct required of their employees. These rules are generally set by the employer and may vary according to the size and nature of a business. Such rules however need to be reasonable and valid, and must create certainty and consistency and as such should be made available (i.e. communicated) to employees. It is understood however, that some rules may be so well established and known that it is not necessary to communicate them.

b) Fair Procedure in terms of the Code

Further to determining a fair reason, as a guideline, item 4 of the Code highlights a number of procedures that the employer should follow when dismissing an employee. In this respect, the employer should notify the employee of the allegations, allow the employee a reasonable time to prepare a response to the allegations and an opportunity to state a case in response to such allegations. The Code further indicates that if an employer intends taking disciplinary action against a trade union representative, office bearer or official, they must first inform and consult the trade union. Throughout this process, the employee should be entitled to the assistance of a trade union representative (if applicable) or a fellow employee. After the enquiry, the employer should communicate the decision taken with the employee and if dismissal is found to be an appropriate sanction, to provide the reasons for a dismissal (all of which should preferably be in writing). Finally, upon dismissal, the employer should remind the employee of any rights to refer the matter to a bargaining council or commission.

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<sup>14</sup> Item 3(4).

<sup>15</sup> Item 3(5).

Whilst the Code is not intended to be a substitute for an employer's disciplinary code and procedures,<sup>16</sup> it can be used as a guideline by employers who don't have their own disciplinary code and also used by employers to assess the fairness of their codes already in place. It is important to note that the Code highlights, that each case of misconduct is unique and accordingly departures from the norms established by it may be justified in appropriate circumstances.<sup>17</sup>

When considering the dismissal of an employee for an act of misconduct, it has been said that such dismissals 'essentially involves, in the broadest sense, an employer's legitimate loss of trust in an employee relating to one or more incidents demonstrating a lack of trustworthiness on the part of the employee'.<sup>18</sup> In light of this and in view of the definition of theft and dishonesty discussed in the previous section, we can conclude that the act of theft or dishonesty, carried out by an employee, is a form of misconduct in terms of the LRA, and as such the legislation and guidelines discussed above would apply and need to be consulted.

Outside of such legislation, it is important to note that the employment relationship is also governed by the common law, of which it is a common law principle that the employment relationship is essentially a relationship of trust, accordingly both parties to such a relationship have a duty to ensure that they act honestly at all times.

#### c) Unfair Dismissal Dispute Procedures

The final piece of the legislative termination framework relating to an act of misconduct by an employee pertains to the dispute procedure. Section 191 of LRA provides that if an employee has a dispute about the fairness of a dismissal relating to the employee's conduct, that the employee may refer the dispute in writing to a bargaining council (if applicable) or the Commission for Conciliation, Mediation and Arbitration (hereafter "the CCMA"), within 30 days of the date of dismissal. A commissioner from the CCMA must first conciliate, after which if the dispute still remains unresolved, will then arbitrate

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<sup>16</sup> Item 1(2).

<sup>17</sup> Item 1(1).

<sup>18</sup> Du Toit & Others, *Labour Relations Law*, Fifth Edition (LexisNexis 2006).

the dispute, and make an award on the matter, which is binding on both parties. A party to the dispute may not appeal an arbitration award and may only apply to the Labour Court to review such award.<sup>19</sup>

d) The Test of Fairness and the Reasonable Decision-Maker Test

Over and above the statutory guidelines (as discussed above), and staying with the topic of the ‘dispute of a dismissal’, in 2007 the Constitutional Court judgment of *Sidumo & Another v Rustenburg Platinum Mines & Others*,<sup>20</sup> developed, among others, a very pertinent principle that one must be cognisant of when dealing with any workplace dismissal dispute relating to misconduct. Although this judgment does not form part of the LRA *per se*, as it was made by the highest court of the land, it should be read in conjunction with the LRA, and therefore its principles would need to be considered in all disputes relating to dismissals for misconduct (i.e. the principles flowing from the judgment can be seen as an extension of the Code).

In this very lengthy judgment, the Constitutional Court, held that when determining whether a dismissal for misconduct is fair, the LRA makes it quite clear that the ultimate test that the commissioner must apply is one of fairness, and that ‘the decision to dismiss belongs to the employer but determination of its fairness does not, ultimately the commissioner’s sense of fairness is what must prevail and not the employer’s view’.<sup>21</sup> In commenting on a commissioner’s approach to a dismissal dispute, the court noted:

‘In approaching the dismissal dispute impartially, a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course 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. There are other factors that will require consideration. For example, the harm caused by the employee’s conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-

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<sup>19</sup> Grounds for review are set in Section 145(2) of the LRA.

<sup>20</sup> [2007] 12 BLLR 1097 (CC).

<sup>21</sup> At para 75.

service record. This is not an exhaustive list. ... What is required is that he or she must consider all relevant circumstances.<sup>22</sup>

It further noted that a commissioner must balance the interests of both employer and employee when determining the fairness of a sanction and dismissal. Accordingly, the court said:

‘fairness requires that regard must be had to the interests both of the workers and those of the employer. And this is crucial in achieving a balanced and equitable assessment of the fairness of the sanction.’<sup>23</sup>

In dealing with the standard that should be applied for reviewing (or interfering with) commissioners decisions, the court noted that the correct question one should ask is:

‘...Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.’<sup>24</sup>

#### 4. PAST APPROACHES OF THE COURTS & CCMA SURROUNDING THEFT IN THE WORKPLACE

Having considered the legislative framework in terms of dismissal for misconduct, it is now important to look at authoritative and/or guiding principles that pertain to theft within the workplace. Considering the fact that dismissal disputes for misconduct are dealt with in bargaining council or CCMA arbitrations rather than the Labour Court, the precedence that has been established by the Labour Court surrounding theft in the workplace, occurs mainly from review applications, where the basis for interference with an arbitrator’s award is limited.<sup>25</sup> Nevertheless, some important principles surrounding theft in the workplace have emerged over time, both from our courts and the CCMA or

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<sup>22</sup> At para’s 78 and 79.

<sup>23</sup> At para 180.

<sup>24</sup> At para 110.

<sup>25</sup> The principles of such limited interference are dealt with at length in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* [2007] 12 BLLR 1097 (CC). Also noted in, Benjamin & Thompson, *South African Labour Law*, [Service No 47, 2005] (Juta) at AA1-427.

Bargaining Councils. This section will attempt to highlight those cases that have developed such principles and shaped our law over time.

a. Approaches from the Courts

In *Olkers v Monviso Knitwear (Pty) Ltd*,<sup>26</sup> the Industrial Court found no distinction between an ‘accomplice’ to a case of theft and the actual ‘perpetrator’. They further found no distinction between ‘theft’ and ‘attempted theft’. In formulating their judgment in this respect, the court said the following:

‘This court is not concerned with criminal law distinctions between perpetrators and accomplices and theft and attempted theft but solely with the question whether the evidence shows, on a balance of probabilities, that applicant on the night in question knowingly intended to assist ... by allowing them the use of his motor car for the purpose of hiding the goods and taking them out of respondent’s yard ... If he did this he was with guilty knowledge involved in an attempt to deprive the respondent permanently of the aforementioned goods. And if this is the case there can in the opinion of this court be no question of applicant’s dismissal being an appropriate sanction for the offence committed by him.’<sup>27</sup>

In *Nkomo v Pick ’n Pay Retailers*,<sup>28</sup> decided in terms of the Labour Relations Act of 1956, the Industrial Court found that an employee who was dismissed for eating a portion of a pie, which was the property of the employer, was unfair. The court’s finding was largely due to the fact that the employer had confused consistency with inflexibility when instituting a sanction, that the employee’s misconduct did not show a ‘thieving propensity’, that no effort had been made to consider the employee’s personal circumstances and finally, that the employer had not considered any other appropriate sanction short of dismissal.

Following the respondent’s argument that shrinkage had caused them great financial loss and regardless of the nature and extent of the offence and regardless of the value of the item involved, that it was company policy to dismiss an employee who was guilty of

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<sup>26</sup> (1988) 9 *ILJ* 875 (IC).

<sup>27</sup> At 876E-G.

<sup>28</sup> (1989) 10 *ILJ* 937 (IC).

theft and that such a sanction of dismissal must be the same for all as the respondent must be consistent, the court responded as follows:

‘[The respondent] confused consistency with flexibility. Consistency requires that like cases be treated alike. ... All cases which are technically theft or unauthorised possession are treated alike. This is a rigid and inflexible approach, not a consistent one. It leads to the truly absurd notion that the manager could be dismissed for eating a toffee or, for that matter, one grape from a bunch of grapes. What must be looked at is not the technical classification of the offence but its substance, the circumstances under which it is committed and the position of the offender. The manager who pinches off one grape is not committing an offence like that of the cashier who steals the days takings of R100 000. Because of this inflexible view [the respondent] see’s no option save in exceptional circumstances, but to dismiss where the offence is technically theft. They have in that sense fettered their discretion.’<sup>29</sup>

Probably the most significant principle drawn from this judgment, was how the court dealt with the element of trust between the employer and employee in terms of theft in the workplace, and that to warrant dismissal, the act of theft needs to show a ‘thieving propensity’. In this respect the court said:

‘The commercial rationale for the decision to dismiss is not whether the employee’s deed can in law be classified as theft but whether a thieving propensity which caused him to mistrust the employee can be inferred ... The eating of a pie does not, in my opinion, show a thieving propensity which could cause the respondent reasonably to conclude that the applicant is no longer to be trusted.’<sup>30</sup>

Following from these comments and in dealing with the penalty of dismissal imposed by the respondent, the court further said:

‘The offence is in my opinion not such that it shows a degree of dishonest intent which would be unacceptable to an employer. Although taking a pie and eating it is technically theft, it must be remembered that he was employed in a bakery section of the shop. In my opinion, the penalty is extremely harsh and the case could have been met by a suitable suspension without pay.’<sup>31</sup>

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<sup>29</sup> At 940E-H.

<sup>30</sup> At 942A-C.

<sup>31</sup> At 943G-H.

In *Central News Agency (Pty) Ltd v Commercial Catering & Allied Workers Union of SA & Another*,<sup>32</sup> the Labour Appeal Court upheld an appeal, confirming, that an employee who stole five films from her employer valued at approximately R50, justified the sanction of a fair dismissal. The approach taken by the appeal court developed a principle which focused on the common law duty and the tacit term of an employment relationship – for an employee not to steal from his/her employer – that if breached would undoubtedly justify dismissal. In this respect Judge De Klerk in his judgment said the following:

‘In my view it is axiomatic to the relationship between employer and employee that the employer should be entitled to rely upon the employee not to steal from the employer. This trust which the employer places in the employee is basic to and forms the substratum of the relationship between them. A breach of this duty goes to the root of the contract of employment and of the relationship between employer and employee. ... I repeat, ... if an employee does steal from the employer that is such a breach of the relationship and of the contract between them and such a gross and criminal dereliction of duty that dismissal undoubtedly would be justified and fair.’<sup>33</sup>

Further to this, one may argue that the appeal court seems to give the impression that it was questioning the aptness of the earlier principle set out by the Industrial Court in the *Nkomo* judgment (supra). It seems to question whether one can actually draw a distinction between theft and ‘trivial pilfering’. In this respect, whilst not going into any detail, the appeal court commented as follows:

‘For the purposes of this judgment it is not necessary to attempt to draw a line between theft and “trivial pilfering”, *if there is a difference*, nor do I intend to discuss the consequences of *so called* “trivial pilfering”.’<sup>34</sup> (emphasis added in italics)

In 1992, in the matter of *Anglo American Farms t/a Boschendal Restaurant v Komjwayo*,<sup>35</sup> the Labour Appeal Court created an extremely important principle and test to be applied for incidents of theft in the workplace. In this case, the appeal court was faced with determining whether a waiter’s theft or attempted theft of a tin of Fanta, valued at 56 cents at the time, justified dismissal. In a lengthy judgment, that

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<sup>32</sup> (1991) 12 *ILJ* 340 (LAC).

<sup>33</sup> At 344E-I.

<sup>34</sup> At 344I-J.

<sup>35</sup> (1992) 13 *ILJ* 573 (LAC).

distinguished itself from the *Nkomo* and *Central News Agency* cases (supra), the appeal court created a very important principle and test for presiding officers to apply from then on when dealing with cases of theft in the workplace. This principle can be illustrated from the following comment made by the appeal court:

'I do not believe that it would be reasonable to expect a restaurateur to continue to employ a person as a waiter whom he could not trust to steal his merchandise. It seems to me that the relationship between such an employer and such an employee is of such a nature that, for it to be healthy, the employer, must, of necessity, be confident that he can trust the employee not to steal his stock-in-trade. If that confidence is destroyed or substantially diminished by the realization that the employee is a thief, the continuation of their relationship can be expected to become intolerable, at least for the employer. Thenceforth he will, as it were, have to be continually looking over his shoulder to see whether his employee is being honest. ... As I have said, *I regard the correct test to apply in these circumstances to be whether or not respondent's actions had the effect of rendering the continuation of the relationship of employer and employee intolerable.*'<sup>36</sup>  
(emphasis added in italics)

This judgment indicated from thereon, in respect of theft in the workplace, that despite the value of the item stolen, mitigating circumstances such as being a reliable employee in the past or the fact that it may have merely been "trivial pilfering", if the actions of an employee has the effect of rendering the continuation of the employment relationship intolerable, dismissal would be justified. Despite the appeal court having gone through the process of considering the employee's mitigating factors, it found that the impact of the employee's misconduct on the employment relationship, outweighed such mitigating factors.<sup>37</sup> Which was essentially highlighting that, where such conduct rendered the employment relationship intolerable, mitigating factors would mean very little in an employee's quest to be saved from the sanction of dismissal.

The approach followed in the cases of *Central News Agency* and *Anglo American Farms* (supra), appears to have been established as the foremost principle when dealing with matters of dishonesty and theft in the workplace,<sup>38</sup> and supports the common law

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<sup>36</sup> At 590I-J and 591A-C.

<sup>37</sup> At 592I-J and 593A-B.

<sup>38</sup> See also *Ngwenya v Supreme Foods (Pty) Ltd* [1994] 11 BLLR 77 (IC); *FWCSA & 2 Others v Peko Co-Operative* (1995) 1 ICJ 8.8.29.



duty for employees to act in good faith toward their employers, including the duty to act honestly and faithfully.

Whilst these judgments were made under the previous Labour Relations Act of 1956 (in terms of section 46(9)), when considering the Code of Good Practice: Dismissal (Schedule 8 of the LRA of 1995), as examined in the previous section, one will notice how the abovementioned cases have shaped parts of this Code. For example, the resultant principle taken from the *Anglo American Farms* case (supra) is clearly enshrined in Item 3(4) of the Code.<sup>39</sup>

Further to their influence on the Code, the precedence set from these abovementioned judgments have been followed by a number of subsequent rulings under the current LRA.

In *Standard Bank of South Africa Limited v CCMA & Others*,<sup>40</sup> the Labour Court determined, that despite 12½ years service and a clean disciplinary record, a branch administrator had been fairly dismissed for falsifying her staff attendance register for a day's wages and fraudulently claiming 2 hours overtime (an act of dishonesty, or as one might argue, theft). In justifying its reasons for such a finding, the court held:

'It is one of the fundamentals of the employment relationship that an employer should be able to place trust in an employee. A breach of this trust in the form of conduct involving dishonesty is one that goes to the heart of the relationship and is destructive of it.'<sup>41</sup>

Shortly thereafter, the Labour Court once again followed the same approach in *Metcash Trading Ltd t/a Metro Cash & Carry v Fobb & Others*.<sup>42</sup> A liquor store manager, employed at the employers Empangeni branch, was dismissed for drinking a 250ml plastic container of orange juice belonging to the employer. Following the arbitration award where the commissioner found the dismissal not to be an appropriate sanction due to the value of the item and other mitigating circumstances, the court on review, in analysing the award, held:

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<sup>39</sup> Which provides as a guideline, that an employee may be dismissed for a first offence where the 'misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, ... are gross dishonesty'.

<sup>40</sup> [1998] 6 BLLR 622 (LC).

<sup>41</sup> At para 38.

<sup>42</sup> [1998] 11 BLLR 1136 (LC).

“Theft is theft and does not become less so because of the size of the article stolen or misappropriated. Trust is the core of the employment relationship. Dishonest conduct by an employee breaches the trust the employer places on the employee.”<sup>43</sup>

Accordingly the court remitted the matter back to the CMMA to be arbitrated afresh by another commissioner.

The approach followed by the labour court in the *Standard Bank* and *Metro Cash & Carry* cases (supra), was confirmed by the Labour Appeal Court in *Toyota SA Motors (Pty) Ltd v Radebe & Others*,<sup>44</sup> in which case Nicholson JA, said the following before citing these very cases:

‘Theft and fraud have always constituted good grounds for dismissal as they frequently constitute a fundamental breach of the employment contract. The cases have in the past emphasised, with good reason, the breach of the relationship of trust that occurs where an employee is guilty of such a misdemeanour. The employer and employee are parties to an enterprise that produces goods or services which generate profits. If one party is dishonest to such a degree that the enterprise or a part of it is jeopardised then I am sure that there has been such a fundamental breach. The courts have frequently upheld dismissal for dishonesty ...’<sup>45</sup>

In *De Beers Consolidated Mines Ltd v CCMA & Others*,<sup>46</sup> where two truck drivers were dismissed for fraudulently claiming overtime pay for work they had not completed, the Labour Appeal Court once again confirmed that mitigating factors such as length of service and the value of the items stolen has little to do with justifying an imminent dismissal for theft in the workplace. The court held that a dismissal was a sensible operational requirement to risk management in an enterprise. With reference to these points, Conradie JA said this:

‘A senior employee cannot, without fear of dismissal, steal more than a junior employee. The standards for everyone are the same. Long service is not as such mitigatory. Mitigation, as the term is understood in the criminal law, has no place in employment law. Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in

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<sup>43</sup> At para 17.

<sup>44</sup> [2000] 3 BLLR 243 (LAC).

<sup>45</sup> At para 46.

<sup>46</sup> [2000] 9 BLLR 995 (LAC)

the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise.<sup>47</sup>

Needless to say, there have been a number of other cases involving acts of theft and dishonesty in the workplace, where our courts have adopted similar approaches, supporting these abovementioned principles.<sup>48</sup>

#### b. Approaches from the CCMA

Following from the precedents set by the court judgments as discussed above, there have been numerous and varying arbitration awards that have given an indication on how arbitrators have approached and handled theft in the workplace, which consequently, would have provided employers with important influential guidelines when dealing with such matters. It is important to consider some of these varying approaches.

#### Findings of unfair dismissals

In *Strydom v USKO Limited*,<sup>49</sup> the commissioner held that the removal (i.e. theft) of rusted and unused tools to the value of R50,00 from the premises of the employer, did not justify the destruction of the trust relationship between the employer and employee, and with thirteen years service, the dismissal of the employee was too severe a punishment and substantively unfair. Similarly, in *Qumza & Others v Shoprite Checkers*,<sup>50</sup> the commissioner held that it was unfair to dismiss three employees for eating fish crumbs of no financial value to the employer and which was to be thrown away.

In *SACCAWU obo Sandi v Solly Kramer*,<sup>51</sup> the commissioner held a dismissal for theft to be unfair, where an employee working as a cashier, who admitted to having

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<sup>47</sup> At para 22.

<sup>48</sup> See, for example, *Lahee Park Club v Garratt* [1997] 9 BLLR 1137 (LAC); *Leonard Dingle (Pty) Ltd v Ngwenya* (1999) 20 ILJ 1171 (LAC); *NUMSA obo Mudi & others v Goodyear SA* (2000) 9 CCMA 8.9.3; *Rustenburg Platinum Mines Ltd (Rustenburg Section) v NUM & Others* (2001) 22 ILJ 658 (LAC).

<sup>49</sup> [1997] 3 BLLR 343 (CCMA).

<sup>50</sup> [2001] 5 BALR 505 (CCMA).

<sup>51</sup> [1999] 10 BALR 1207 (CCMA).

consumed about four cans of coldrink per month without permission, over a period of a year and a half, knowing that he was not allowed to do so and that his actions amounted to stealing from the company. The commissioner held that each case is to be dealt with on its merits, and in this case the special circumstances (i.e. the employer's stock loss system was not foolproof, thereby also contributed to the situation; there was no evidence that the employee had been dishonest in respect of his actual cashier activities; and the concept of treating similar theft cases similarly, where another employee who had consumed one can of coldrink whilst on duty, in which the employer had accepted that particular employee's conduct not to be gross and accordingly was not dismissed), warrant a more lenient approach. Although the commissioner found the employee in question to be guilty of theft and such conduct as being dishonest, the commissioner noted that such conduct ought not be considered as "gross" but rather classified as "ordinary conduct", similarly to a second employee that had consumed one can of coldrink. Accordingly the commissioner found that the employee should be re-employed (possibly in a different capacity) and a final written warning be issued.

Also, in *Zwane v Shoprite Checkers & Another*,<sup>52</sup> dismissal of an employee was held to be unfair where there was uncertainty and no clear rule in place, around the prevention of employees taking food belonging to the employer, for the preparation of evening meals for night-shift staff. Over and above the uncertainty of a workplace rule, the commissioner mentioned that everyone benefited in good faith and it would have been different if the employee had taken the food items home with the intention to benefit alone through theft and disadvantage the employer.

### Findings of fair dismissals

Whilst some may argue that the above commissioners were lenient in their findings, more often than not the CCMA have taken a tough approach to cases of theft in the workplace. For example, in *UPSWU obo Phetla & Another v Fidelity Supercare Cleaning Services*,<sup>53</sup> the commissioner found that employees caught pilfering toilet paper and similar goods belonging to their employer, constituted a substantively fair dismissal, and commented in conclusion;

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<sup>52</sup> [2000] 9 CCMA 8.8.22.

<sup>53</sup> (2007) 16 CCMA 8.8.2.

'It simply never ceases to amaze me that applicants ... who were apprehended *in flagrante delicto* ("in the act") in essence – *of stealing* – and then still display the blatant audacity to approach the CCMA for relief as if they "had been the victim of the employer's injustice".'. .

In *CEPPWAWU obo Mtshisela and Formex Components & Another*,<sup>54</sup> an employee who removed more scrap goods than he was authorised to remove by his employer and later sold it to the public, was found guilty of theft. The Commissioner found that it did not matter whether the goods were good or scrap, the fact remained that the employee knew he had taken extra goods without authorisation, which still remained the property of the employer. Accordingly, the commissioner found that the employee was guilty of theft and had the propensity to commit crimes, and in conclusion said;

'it is trite law that where an employee steals, he effectively destroys the trust relationship between him and his employer. There is absolutely nothing to indicate that the trust relationship was not broken down to such an extent that it was intolerable'.

Also, in *SACCAWU obo Zwane & Others and Boxer Superstores (Pty) Ltd*,<sup>55</sup> the commissioner was satisfied that the employer had acted reasonably and fairly in dismissing four employees that had consumed food belonging to the employer (food ranging from a chip to a piece of chicken), while on duty and without paying for it. In justifying the reasons for the dismissal being fair, the commissioner relied on (among others) the rules set out in the *Anglo American Farms*, *Central News Agency* and the *Olkers* judgments (supra).

Perhaps one of the firmest approaches followed by an arbitrator in a case of workplace theft is found in the matter of *Komane v Fedsure Life*.<sup>56</sup> In this particular matter the commissioner found that theft invariably amounts to a fair reason for dismissal and for that reason, an employee who stole a packet of powdered milk from an office kitchen, from which office supplies had regularly been pilfered, was fairly dismissed, despite the small value of the item involved and the employee's unblemished service record of some 8 years. In his survey of evidence, the commissioner somewhat challenged the principle set out by the appeal court in the *Anglo American Farms* case

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<sup>54</sup> (2001) 10 CCMA 8.8.7.

<sup>55</sup> (2003) 12 CCMA 8.8.5.

<sup>56</sup> [1998] 2 BLLR 215 (CCMA).

(supra) and in view of this, mentioned that the ensuing guidelines as set out in the Code of Good Practice, should be ‘simply’ considered and not ‘slavishly followed’. The commissioner suggested rather that the central test was whether the dismissal was for a ‘fair reason’. In this respect the commissioner said the following:

‘To contend that dismissal can only be justified if a continued working relationship is rendered intolerable, would be to circumscribe the concept of a “fair reason” to a fixed set of rules or guidelines ... Theft is gross misconduct unless of a *de minimis non curat lex* nature. Whether the dismissal was for a “fair reason” is the overwhelming consideration, notwithstanding what the Code may suggest. Where one is dealing with a serious breach of the employment contract as in the case of theft, the dismissal of an employee will in my view, invariably amount to fair reason. By suggesting that the continuation thereof must be rendered intolerable, pitches the test too high. To reiterate, the nature and degree of the intolerability or breakdown, is not decisive since the guiding principle is “fair reason”.’<sup>57</sup>

In dealing further with theft as a ‘fair reason’ for justifying dismissal, the commissioner said the following:

‘I submit that in the absence of any unusual features, one would be hard pressed to contend that dismissals pursuant to a positive finding of guilt in theft cases, could conceivably not amount to a *fair reason* for imposing the ultimate sanction. To hold otherwise would be in effect to maintain the dismissal was *unfair* or unjust notwithstanding that the conduct of the employee was of a criminal nature going to the root of the employment relationship. Such a view would be untenable.’<sup>58</sup>

Whilst the commissioner may have in part disputed the principles of the *Anglo American Farms* judgment (supra), one can also take note of the commissioner’s focus on the act of theft being a serious breach of the employment contract, which certainly leans toward the principle, set out in the judgment in *Central News Agency* (supra).

### c. Theft of Co-Employee’s Property & Theft Outside the Workplace

Further to the cases discussed above, one may also ask the questions; “what about theft of a co-employee’s property, or, theft outside of the workplace?”

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<sup>57</sup> At 219F-I.

<sup>58</sup> At 221F-G.

If one considers theft of a co-employee's property, many employers would correctly and understandably view such theft, as dismissible on first offence. John Grogan, in *Workplace Law*,<sup>59</sup> states that an employer's position in this respect 'is understandable, since employers are entitled to expect their employees to behave honestly, and because an employer has a duty to protect the property of its employees in the workplace'.

Saying this however, in *Hoechst (Pty) Ltd v Chemical Workers Industrial Union & Another*,<sup>60</sup> the Labour Appeal Court held that an employee who was dismissed for the unauthorised possession of a co-employee's radio-tape deck, an offense not covered in the employers disciplinary code, did not justify a fair dismissal. The employee in question was found with a co-employee's radio-tape deck six months after it had been stolen from his co-employee's vehicle (which at the time, was parked in the employers parking lot). After evaluating the facts, the court was satisfied that there was no evidence to prove that the dismissed employee had actually been the one that stole the radio-tape deck and that such radio-tape deck could have changed hands a number of times prior to being found in the possession of the employee in question. Consequently, the court found that the employer did not have the competence to discipline the employee for the unauthorized possession of a co-worker's radio-tape deck.

More importantly, despite the outcome of the judgment, the court held that misconduct that does not necessarily fall within the employer's disciplinary code and that is committed outside the workplace, may very well lead to disciplinary action against an employee. In this respect the court said the following:

'Where misconduct does not fall within the express terms of a disciplinary code, the misconduct may still be of such a nature that the employer may none the less be entitled to discipline the employee. Likewise the fact that the misconduct complained of occurred away from the work-place would not necessarily preclude the employer from disciplining the employee in respect thereof. ... In our view the competence of an employer to discipline an employee for misconduct not covered in a disciplinary code depends on a multi-faceted factual enquiry. This enquiry would include but would not be limited to the nature of the misconduct, the nature of the work performed by the employee, the employer's size, the nature and size of the employer's work-force, the position which the employer occupies in the market place and its profile therein, the

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<sup>59</sup> Ninth Edition (Juta 2007) at page 170.

<sup>60</sup> (1993) 14 ILJ 1449 (LAC).

nature of the work or services performed by the employer, the relationship between the employee and the victim, the impact of the misconduct on the work-force as a whole, as well as on the relationship between employer and employee and the capacity of the employee to perform his job. At the end of the enquiry what would have to be determined is if the employee's misconduct 'had the effect of destroying, or of seriously damaging, the relationship of employer and employee between the parties'.<sup>61</sup>

It also seems evident from the last sentence of the above extract, that the court was also reconfirming its earlier principle set out in the *Anglo American Farms* judgment (supra), that of, dismissal is warranted where an employee's conduct makes the employment relationship intolerable (i.e. conduct such as theft of a co-employee's property that destroys or seriously damages the employment relationship).

Whilst the *Hoescht* judgment (supra) deals largely with misconduct not covered in a disciplinary code and theft of a co-employee's property, it touches on another important principle, that being, the concept of theft carried out by an employee outside of the workplace. In this respect, it has generally been accepted that an employer may not take disciplinary action against an employee for non work related misconduct, unless a connection between the off duty misconduct and the employment relationship can be established.<sup>62</sup> The arbitrator in *NEHAWU obo Barnes v Department of Foreign Affairs*<sup>63</sup> best summed up this particular principal by quoting a persuasive authority in the findings, which reads as follows:

'The following excerpt from P A K le Roux & Andre van Niekerk *The SA Law of Unfair Dismissal* at 184 is instructive: "As a general rule an employer has no right to institute disciplinary proceedings unless it can be demonstrated that it has some interest in the conduct of the employee. An interest would normally exist where some nexus exists between the employee's conduct and the employer's business. In the absence of such a nexus, the employee's conduct is likely to be non-work related conduct or, as it is sometimes termed, "off-the-job" conduct. ... It is for the employer to establish that it has

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<sup>61</sup> At 1459C-J.

<sup>62</sup> See for example *NUM & Others v East Rand Gold and Uranium Co Ltd* (1986) 7 ILJ 739 (IC); *Van Zyl v Duvha Opencast Services (Edms) Bpk* (1998) 9 ILJ 905 (IC); *April v Drake International* [2007] 12 BALR 1099 (MEIBC); *CEPPWAWU obo FAKU v Eco Tanks* [2007] 11 BALR 997 (MEIBC).

<sup>63</sup> (2001) 22 ILJ 1297 (BCA).



a legitimate interest in the matter which is sufficient to justify disciplinary action against the employee.”<sup>64</sup>

In *Visser v Woolworths*,<sup>65</sup> a manager at one of Woolworths retail outlets, was arrested for alleged theft at a competitors retail outlet, outside of working hours. She was charged at a disciplinary hearing with ‘gross misconduct in that she was arrested for theft, which resulted in a breach of the trust relationship’<sup>66</sup> and was consequently dismissed for merely being arrested. The employer’s disciplinary code provided that it was unacceptable behaviour to be ‘convicted of or being involved in or arrested for criminal conduct including, but not limited to acts of theft, dishonesty or fraud within or outside of the workplace’.<sup>67</sup> In dealing with the issue of conduct that had taken place off the employer’s premises and outside her normal working hours, the commissioner relied on the principles set out in *Barnes and Hoescht* (supra), and found that the employer was indeed entitled to take disciplinary action against Ms Visser. However, when considering the fairness of the dismissal, the commissioner found that the employee’s arrest could never constitute an offence, and for that reason the employee was dismissed for an invalid reason and therefore such a dismissal could never be fair. In this respect the commissioner stated:

‘an arrest is usually the consequence of and follows as a result of one’s actions. As such, it could never be an offence in itself, regardless whether this is listed as an offence in the respondent’s disciplinary code.’<sup>68</sup>

Whilst Woolworths had made their own mistakes in the matter, more importantly for the purposes of this paper, the commissioner then went on to give Woolworths (or any other employer for that matter), guidance in terms of theft that had taken place off the employer’s premises and outside normal working hours, as well as direction on how to deal with an employee whose alleged misconduct was pending criminal proceedings. The commissioner appropriately remarked:

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<sup>64</sup> At 1294H-I.

<sup>65</sup> (2005) 26 *ILJ* 2250 (CCMA).

<sup>66</sup> At 2252G.

<sup>67</sup> At 2252H.

<sup>68</sup> At 2255G.

“What the respondent ought to have done was to present evidence of the alleged criminal offence at the disciplinary enquiry instituted against Ms Visser. Once she was found guilty, on a balance of probabilities, the respondent would then have been entitled to dismiss the applicant. As explained in the *Fourie [v Amatola Water Board (2001) 22 ILJ 694 (LC)]* matter, the respondent need not have waited for the criminal proceedings to be finalized. It would have been justified to proceed with disciplinary action against the applicant on an allegation of theft, alternatively placing the name of the employer into disrepute.’<sup>69</sup>

#### d. The Resultant Rule and Principle Surrounding Theft in the Workplace

Following from the analysis of the abovementioned cases (both court judgments and arbitration awards), it is evident that irrespective of; the value of the item stolen, the existence of a thieving propensity, the length of service of the employee, or the existence of a clean disciplinary record, where an employee has been found guilty of theft in the workplace or even outside of the workplace or outside working hours, our courts would accept that dismissal is invariably justified on a first offence. The ensuing reasons for such a justification would simply be that the act of theft would irretrievably break down the ever important trust relationship and for that reason make the employment relationship intolerable.

John Grogan, in *Workplace Law*,<sup>70</sup> says “theft is regarded by the labour courts as one of the most serious forms of disciplinary offences, normally justifying dismissal at first instance, regardless of the value of the property involved, the employee’s length of service, the absence of prior warnings, or whether the employee subsequently returned the property.”

The abovementioned jurisprudence affirms the patently obvious rule; that an employer should trust and have confidence in an employee not to steal from him (or anyone else for that matter).

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<sup>69</sup> At 2255G-I.

<sup>70</sup> Ninth Edition (Juta 2007) at 167-168.

## 5. THE SHOPRITE JUDGMENTS THAT MAY HAVE CHANGED THE PRINCIPLES

Having discussed and examined the development of the principles surrounding theft in the workplace, the Labour Appeal Court, in 2008, handed down two varying judgments for acts of theft in the workplace (one of which may be labelled contentious and uneasy in terms of past precedence), that have now, undoubtedly, left practitioners and employers alike, confused about the very principles that were logically set out and which have been confidently and assertively applied in past years.

Interestingly, both of the Labour Appeal Court judgments involve the same employer (Shoprite Checkers), both involve the eating of the employer's food, and both acts of misconduct occurred during the same month and same year but just in different stores. Apart from these similarities, the judgments however take two very different approaches.

a) Shoprite Checkers (Pty) Ltd v CCMA & Others<sup>71</sup> (hereafter "Shoprite 1")

### Summary of the facts

The fourth respondent (employee) was employed by the appellant (Shoprite) as a deli supervisor in its Silverton store. He had joined the appellant in 1972 and had a clean disciplinary record throughout his almost thirty year tenure with them. As a result of concerns surrounding the increase in shrinkage from 1.5% to 4%, the appellant had video cameras installed inside the store to identify those responsible for the shrinkage. The appellant's workplace rules prohibited employees from eating the appellant's food without authorisation and prohibited employees from eating in any area in view of customers or any other designated restricted areas at the workplace.

During the period 4 September 2000 and 21 October 2000, the video cameras had captured three occasions when the fourth respondent could be seen openly eating in prohibited areas what the appellant believed were its products. The exact monetary value of the food eaten by the fourth respondent was unknown. As a result of the video

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<sup>71</sup> [2008] 12 BLLR 1211 (LAC). For the purposes of this paper I will deal primarily with the Labour Appeal Court Judgment.

evidence the appellant instituted disciplinary procedures, in which the fourth respondent was charged with three allegations of misconduct of eating the appellant's food without authorisation in areas where doing so was prohibited, in view of which the fourth respondent was found guilty and dismissed.

First Arbitration - The fourth respondent was aggrieved and referred an unfair dismissal dispute to the CCMA. In terms of the arbitration award of 3 April 2001, the commissioner found the dismissal to have been both substantively and procedurally unfair and ordered the appellant to reinstate the fourth respondent with full retrospective effect from the date of dismissal.

First Review Application - On 10 May 2001, the appellant initiated a review application in the Labour Court, requesting the arbitration award to be set aside. As a result of which, on 10 May 2002, the Labour Court found that the commissioner had committed gross misconduct in relation to her duties as an arbitrator and set aside the award and remitted the matter back to the CCMA to be heard afresh by a different commissioner.

Second Arbitration - After hearing the matter afresh, a second arbitration award was issued on 5 August 2003. This time around, the commissioner, like his colleague, found that the fourth respondent's dismissal had been both substantively and procedurally unfair. However the commissioner rejected the fourth respondent's defence where he claimed that he had been authorised to taste food and to taste it in the areas where the video recordings had captured him eating in, and that on one of the three occasions he was eating his own food. Accordingly the commissioner found him guilty of the allegations he was charged with, but also found that in terms of the appellant's disciplinary code, dismissal was not an automatic sanction. The commissioner highlighted that discipline had to be progressive, and due to the fourth respondent's thirty years service and being a first offender, dismissal was too severe and for that reason the commissioner ordered the fourth respondent to be reinstated with a severe final warning (valid for six months), and no compensation (back pay) was to be awarded to the fourth respondent due to the fact that he had consumed company products without permission.

Second Review Application - Once again the appellant was aggrieved by the arbitration award and launched a second review application in the Labour Court to have the award set aside. At the same time, the fourth respondent, upset by the finding that he

was found guilty of misconduct and that he was denied compensation, initiated a counter-review to set aside the finding of guilt and the order that he should not be compensated. Judge Wagley (the same judge from the first review application) expressed the view that there was no reason to interfere with the second commissioner's arbitration award and was therefore not open to review. Strangely enough however, on 13 August 2004 (three and a half years after the fourth respondents dismissal), Judge Wagley then went on to review the matter, setting the award aside, and in all probability to the anguish of both parties, referred the matter back to the CCMA to once again be arbitrated afresh by a different commissioner. His reasons being, that the transcripts before him did not contain sufficient details to find in favour of either party.

Appeal & Cross-Appeal - The appellant then appealed to the Labour Appeal Court on the submission that the dismissal of the fourth respondent was fair and appropriate and in light of this that the second arbitration award be set aside. Respectively the fourth respondent cross-appealed the second commissioner's award of finding him guilty of misconduct with a severe final warning, where he believed he was not guilty at all, and the failure to reinstate him with retrospective effect.

#### The Labour Appeal Court Judgment

The Appeal - In terms of the appellants appeal, the Labour Appeal Court found that the commissioner's finding of the fourth respondent being guilty of misconduct but dismissal being too harsh, was a reasonable conclusion and that the reinstatement of the fourth respondent should not be delayed. In commenting on the reasonableness of the commissioner's decision, Zondo JP, said:

'If one tests it against the test of unreasonableness in accordance with the decision of the Constitutional Court in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* ... there is no doubt, that it is reasonable because it cannot be said that a reasonable decision-maker could not reach the same conclusion. In fact, I would go so far as to say that there is no prospect that a reasonable decision-maker, including a CCMA commissioner, could on the facts of this case find that dismissal was a fair

sanction. Any attempt by the appellant to seek a forum that will make such a finding is, in my view, an exercise of futility.<sup>72</sup>

The Cross-Appeal - Turning to the cross-appeal, firstly, Zondo JP supported the second commissioner's finding of guilt for contravening the workplace rule on at least two occasions and agreed that the fourth respondent should be disciplined. Accordingly Zondo JP found that there was 'no proper basis to interfere with the commissioner's decision in this regard'<sup>73</sup>. Secondly, in terms of the question of retrospective reinstatement (i.e. back pay), the Labour Appeal Court found that the second commissioner did not competently explain his decision not to make an order of compensation. The court noted that the only reason the commissioner gave for not awarding compensation to the fourth respondent, was that the fourth respondent had consumed company products without any permission. In other words, the decision not to award compensation formed part of the penalty, basically saying that it was 'not only fair that the fourth respondent should be given the so called "severe final warning", but it was also fair that he should have gone without income for that length of time ...'<sup>74</sup>. Whilst weighing up the interests of both the appellant and the fourth respondent, Zondo JP emphasised the point that the value of the items eaten by the fourth respondent were significantly less than the value of his lost salary over this time period (despite the employers point of view that it may not have simply been about the monetary value of the items). In summing up his assessment of this area of the matter, he commented as follows:

'In my view this can simply not be right. Indeed, it can neither be justified nor reasonable. I know that from the appellant's point of view, this cannot simply be about the monetary value of the food that the fourth respondent ate. For the appellant, it is probably about a principle and the real problem of shrinkage that it and other similar businesses face every day. I am not ignoring any of this. I am mindful of it, but, nevertheless, when all the relevant circumstances are taken into account, I am of the opinion that a reasonable decision-maker could not, in the circumstances of this case, have concluded that an employee who had a clean disciplinary record as the fourth respondent and who had 30 years of service should, in addition to getting a "severe final

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<sup>72</sup> At 1217D-F.

<sup>73</sup> At 1218D.

<sup>74</sup> At 1219D.

warning” for this type of conduct, also forfeit about R33 000 for eating food that could well have cost less than R20. I do not think that a reasonable decision-maker could have sought to impose any penalty in addition to the “severe final warning”.<sup>75</sup>

He then went on to set aside this part of the arbitration award and replaced it with an order reinstating the fourth respondent with retrospective effect to the date of dismissal.

In light of the above, the Labour Appeal Court accordingly dismissed the appeal (confirming that the sanction of dismissal was too harsh) and upheld the cross appeal in part (awarded reinstatement with backpay).

It so happened that Shoprite subsequently sought leave to appeal with the Supreme Court of Appeal (hereafter “SCA”), against the Labour Appeal Court judgment. The appeal was limited only to ‘the correctness or otherwise the remedy that was allowed to the [fourth respondent].’<sup>76</sup> In other words it found no reason to question the second arbitrator’s decision that dismissal was too harsh a sanction. In a judgment that relied on *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*,<sup>77</sup> the SCA held that the Labour Appeal Court, in terms of its decision to reinstate retrospectively, had ‘misconceived the nature of its functions’<sup>78</sup> and by interfering with the second arbitrator’s decision (not to award compensation), the Labour Appeal Court was in effect ignoring its limitation of power’s of interference. The SCA further held, that an order of reinstatement which is not retrospective to the date of dismissal, is at the discretion of the arbitrator, and said ‘it has not been shown in this matter that the arbitrator exercised his discretion capriciously or upon a wrong principle or upon any other ground justifying interference’.<sup>79</sup>

Accordingly, the appeal was upheld, confirming the second arbitrator’s award (i.e. dismissal was too harsh a sanction and reinstatement was not retrospective).

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<sup>75</sup> At 1219I-J and 1220A-B.

<sup>76</sup> *Shoprite Checkers (Pty) Ltd v CCMA & Others* [2009] 7 BLLR 619 (SCA) at para 23.

<sup>77</sup> [2007] 12 BLLR 1097 (CC).

<sup>78</sup> At para 29.

<sup>79</sup> At para 32.

b) Shoprite Checkers (Pty) Ltd v CCMA & Others<sup>80</sup> (hereafter “Shoprite 2”)

*Summary of the facts*

The fourth respondent (employee) was employed by the appellant (Shoprite) as an assistant baker in its Louis Trichardt store. He had been employed by the applicant for nine years with an unblemished service record. This particular store had also experienced shrinkage problems, and it was highlighted by the appellant that in October 2000 it had lost 2.95% of turnover due to shrinkage which equated to a loss of R144 000. Uncontested evidence by the appellant unveiled that the employee's of the store were aware of the shrinkage problems and of the company rules designed to prevent and control such shrinkage. In order to curb such shrinkage, the appellant installed surveillance video cameras in the store. The appellant also highlighted the shrinkage problems in several meetings and on notice boards, which included posting the results after every stock take. Company rules prohibited employee's from eating the appellant's food without authorisation and prohibited employees from eating in various restricted areas at the workplace.

During October 2000, the fourth respondent was captured on the video cameras contravening store policy on a number of occasions. The fourth respondent was seen on video eating three helpings of ‘pap’ and a piece of bread in prohibited areas of the store and a department of the store in which he did not work, whilst at all times taking measures to try and carefully conceal his actions. Consequently, the appellant instituted disciplinary action and charged the fourth respondent with dishonesty (consuming company property without paying) and a breach of company rules in that he consumed food in places not designated therefore. On 13 December 2000, the fourth respondent was found guilty and subsequently dismissed.

The fourth respondent, upset by his dismissal, lodged an unfair dismissal dispute with the CCMA. The fourth respondents defence for his actions were; that the pap was his own that he had purchased from an informal food trader, who delivered the food to him at work; that the bread he had eaten was done so in the process of testing it which had been baked the day before for the deli staff to prepare sandwiches; and finally the

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<sup>80</sup> [2008] 9 BLLR 838 (LAC).



store manager had given employees in the bakery and deli, permission to drink tea and coffee and eat at their work places and therefore he could not have contravened any rule. Despite various flaws in the fourth respondent's defence (i.e. the informal food trader being unable to confirm whether the pap consumed by the fourth respondent belonged to her; contradictory versions why the fourth respondent had been seen eating bread in the deli area, a department of the store in which he did not work; and evidence presented by the appellant, indicating there to be no basis for the contention that employees in the bakery and deli area, who were allowed to drink tea at their workplace, were also entitled to eat at the same time), the commissioner found that the appellant had failed to prove that the fourth respondent was guilty of the charges brought against him, and for that reason found the fourth respondent's dismissal substantively unfair and ordered his reinstatement.

The appellant, in view of this, initiated an application for review to the Labour Court, to set aside the award. After hearing the matter, Revelas J, handed down a judgment in which she found the commissioner to have made a mistake by finding the fourth respondent not guilty but nonetheless found that the sanction of dismissal was unfair considering the circumstances. Therefore, the judge ordered the fourth respondent to be reinstated subject to a final warning. The appellant appealed this judgment before the Labour Appeal Court.

#### *The Labour Appeal Court Judgment*

On appeal, counsel for the fourth respondent agreed that the fourth respondent was guilty of the charges. The Labour Appeal Court held this to be a wise concession based on the clear video recording evidence and the fourth respondent's unsatisfactory and concocted defence – it was clear that the fourth respondent had dishonoured the store's rules.

The Court noted that Revelas J was incorrect in her approach with the matter, and prior to her dealing with the question of a sanction for dismissal, she should have first dealt with the question of whether the dismissal was fair. The Court went on to note that based on the evidence before it, the dismissal was in fact substantively fair. With no dispute about the procedural fairness of the dismissal, it was then a matter of determining what the appropriate sanction was.

Turning to the sanction, Davis JA referred to and analysed a number of previous judgments that dealt with dishonesty,<sup>81</sup> where the prevailing principle held that a breach of the trust relationship in the form of dishonesty is one that goes to the heart of the employment relationship and is destructive of it, and that dismissal for such misconduct is ‘a sensible operational response to risk management in the particular enterprise’.<sup>82</sup>

In dealing with an earlier case by the Labour Appeal Court, involving the appellant (the “Shoprite 1” case), and distinguishing this case from the *Shoprite 1* matter and previous jurisprudence on the matter of dishonesty and theft, Davis JA commented as follows:

‘[The Shoprite 1] decision appears to adopt a different approach to the body of jurisprudence as analysed in this judgment. However, in that case, the employee had 30 years of unblemished service. While that employee contended that he had been authorised to taste food in the areas where the video clip had showed him to have so eaten, and that, on one of the occasions, he was eating his own food, unlike the present case, he had not gone so far as to produce manufactured evidence that manifestly was concocted in order to support his own mendacious account, as was evident in the present dispute.

In this case, the respondent had engaged in a breach of company rules on two separate days ... On the 11 October 2000, he had consumed three separate bowls of pap. He had thus acted in flagrant violation of the company rules which had been implemented for clear, justifiable operational reasons. Other employees who had been similarly found to have so acted had been dismissed. ... In this sense, the facts are distinguishable from that of the *Shoprite Checkers* case, supra, and in keeping with the other decisions of this court.’<sup>83</sup>

The facts that the fourth respondent had been employed by the appellant for nine years, that he had a clean disciplinary record and that the value of the items stolen (eaten) was negligible, was not considered important. The Labour Appeal Court accordingly upheld

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<sup>81</sup> Cases as cited, include: *Standard Bank of South Africa Ltd v CCMA & Others* [1998] 6 BLLR 622 (LC); *Metcash Trading Ltd t/a Metro Cash & Carry v Fobb & Others* (1998) 19 ILJ 1516 (LC); *Leonard Dingler (Pty) Ltd v Ngwenya* (1999) 20 ILJ 1171 (LAC); *Rustenburg Platinum Mines Ltd (Rustenburg Section) v NUM & Others* (2001) 22 ILJ 658 (LAC); *Lahee Park Club v Garratt* [1997] 9 BLLR 1137 (LAC); *De beers Consolidated Mines Ltd v CCMA & Others* (2000) 21 ILJ 1051 (LAC).

<sup>82</sup> At page 838H-I

<sup>83</sup> At para’s 24 and 25

the appeal, set aside the award and the dismissal of the fourth respondent was declared to be fair.

## 6. THE IMPACT OF THE SHOPRITE JUDGMENTS ON THEFT IN THE WORKPLACE

Having considered at length the development of the jurisprudence (previous rules and principles) surrounding theft in the workplace, the question that now needs to be asked is; what are the implications, if any, of these two Shoprite judgments on theft in the workplace?

In terms of *Shoprite 1*, the Labour Appeal Court's support of the second commissioner's finding of the dismissal being too harsh a sanction, has made a significant move away from how presiding officers have previously viewed and handled theft in the workplace. The Labour Appeal Court has created a situation where all of a sudden the importance of mitigating factors (such as the length of service and clean disciplinary record of an employee), are now required to be taken into account when determining a fair and appropriate sanction for theft in the workplace.

If one looks back at the precedents set by our courts over the years, essentially led by the *Anglo American Farms* judgment (supra), when an employee was found guilty of theft, there was hardly the need to consider any mitigating factors, and even if such factors were taken into account, the act of theft itself and the resultant breakdown in the trust relationship would ultimately outweigh any mitigating circumstances. Essentially making mitigating circumstances of no real relevance, when faced with a case of theft in the workplace.

Further to this, and despite the SCA finding that the Labour Appeal Court had wrongly interfered with the arbitrator's decision of reinstatement with no back pay, Zondo JP, in dealing with the cross-appeal, nonetheless went into great detail about the importance of the value of the item stolen by an employee (in this case food), when determining an appropriate sanction.<sup>84</sup> Consequently, the value of the item stolen now appears to be an important factor in cases involving workplace theft. In the past,

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<sup>84</sup> At page 1220A-B

dismissal for theft was seen to be fair irrespective of the value of the item stolen,<sup>85</sup> in light of *Shoprite 1*; this principle now seems to be in doubt.

It is clear, that instead of keeping with the courts jurisprudence, the Labour Appeal Court's judgment in *Shoprite 1* has now amended the principles that have governed and given direction to both employers and presiding officers in matters of workplace theft.

Interestingly enough, as a result of the *Shoprite 1* judgment, the new emergent principles surrounding theft in the workplace, appear to draw a very similar comparison to those set out in the early judgment of *Nkomo v Pick 'n Pay Retailers* (supra). Reflecting back to *Nkomo v Pick 'n Pay Retailers*, apart from the clear principle at the time surrounding the requirement of a "thieving propensity" to justify dismissal for theft, the Industrial Court also held that it would be unfair to dismiss an employee for theft, where the small value of the item (a portion of a pie in this case) had not been considered, where the employees personal circumstances had not been taken into account, and where the employer had been inflexible when imposing a penalty of dismissal for theft (i.e. having not considered an alternative short of dismissal). Be it by chance, it appears that our Labour Appeal Court in *Shoprite 1* has adopted a similar approach to that of an out of date judgment from years gone by.

Whilst the *Shoprite 1* judgment has most certainly impacted on the past principles surrounding theft in the workplace, the most apparent argument in favour of Zondo JP accepting the second commissioners finding, would relate to the matter of *Sidumo & Another v Rustenburg Platinum Mines & Others* (supra). The Constitutional Court made it very clear that although the prerogative to dismiss lies with the employer, the determination of fairness of the dismissal does not, that lies with the commissioner. As discussed earlier in this paper, the *Sidumo* judgment held, that when presiding over dismissal disputes, the impartial commissioner must consider the totality of the circumstances of the matter (both employer's and employee's circumstances equally), and provided the commissioner applies his or her mind properly to the appropriateness of the sanction, and provided a reasonable decision-maker could have come to the same conclusion, ultimately it is the commissioners sense of fairness that must prevail. In this respect, Zondo JP made it clear that he was following the "reasonable decision-maker

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<sup>85</sup> See for example *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 ILJ 573 (LAC).

test” as set out in the Constitutional Court’s matter of *Sidumo* (supra), and accordingly came to the conclusion, that considering the facts of the case before the second commissioner, a reasonable decision-maker would have made the same decision (i.e. he was moving away from the “reasonable employer test” to that of the “reasonable decision-maker”). So whilst many employers and employment relations practitioners may question the sudden change in approach of theft in the workplace, it seems that Zondo JP was merely approaching the matter through the eyes of a reasonable decision-maker.

Turning to the *Shoprite 2* judgment, despite Davis JA commenting and relying on the principles that have been applied time and again surrounding theft in the workplace,<sup>86</sup> whilst delivering his judgment he unfortunately did not challenge the principles set out by Zondo JP in the *Shoprite 1* judgment. Instead he simply distinguished the matter before him from that of *Shoprite 1*. The implications of which have left us no option but to observe and acknowledge these amended principles.

Whatever the rationale around the judgment of *Shoprite 1*, the principles that have been at play for many years surrounding theft in the workplace, have nonetheless been changed. The impact of which will fall squarely on the shoulders of employers, officers presiding over disciplinary enquiries and commissioners.

It is also important to note that the judgment being considered here has come from the Labour Appeal Court, a very senior authority in terms of precedents setting in the employment arena. So until the same court or a more senior court makes a judgment that amends this particular ruling, the principles flowing from *Shoprite 1* are required to be followed by employers and arbitrators alike.

## 7. IN CONCLUSION

Whilst the jurisprudence, examined in the first part of this dissertation, indicated that dismissal for theft in the workplace would almost always justify dismissal on first offence, it now seems evident that in light of the two recent Labour Appeal Court

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<sup>86</sup> All of which support the principle that theft (dishonesty) by an employee destroys the relationship of trust with the employer beyond repair.

judgments (*Shoprite 1* and *Shoprite 2*), the principles surrounding the sanction of dismissal may not be as straightforward anymore.

As examined, prior to these Shoprite judgments, employers had a very straightforward approach to theft in the workplace – if an employer had evidence of theft by one of its employees, they would simply send the employee in question through the process of a disciplinary enquiry, and irrespective of the employee’s defence or mitigating circumstances presented, the employer could simply, without too much thought or justification, run through item 3(4) of the Code (i.e. such misconduct is seen as very serious, has broken down the trust relationship and ultimately made the employment relationship intolerable). With an act of theft rendering the employment relationship impossible, there was really no appropriate alternative but to dismiss the guilty party.

As such, ‘pre-Shoprite’ theft cases had not required to much argument around the sanction of dismissal. If theft was proven, dismissal was generally justified, irrespective of the unblemished length of service or the value of the item stolen. This approach made perfect sense, based on the fact that theft being “a crime of stealing something”, was the ultimate form of dishonesty in an employment relationship. So for such a gross act of dishonesty, it seemed perfectly reasonable that the ultimate sanction of dismissal should have followed.

However, having carefully analysed the Shoprite judgments, it is now evident that the uncomplicated and straightforward rules and principles surrounding theft in the workplace as developed and practiced for almost two decades, have now been changed. With the new approach now requiring the consideration of various mitigating factors, such as length of service, previous disciplinary record and also as it appears, the value of the item stolen. Coincidental as it may seem, if one has to go back and consider the guidelines as set out in the Code of Good Practice: Dismissal, this “new” approach merely appears to be following the guideline as laid out in item 5(3) of the Code,<sup>87</sup> part of which had in the past seemed to be erased or to hold very little significance in cases of workplace theft.

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<sup>87</sup> Which states: ‘When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider such factors such as *the employee’s circumstances (including length of service, previous disciplinary record and personal circumstances)*, the nature of the job and the circumstances of the infringement itself.’ (emphasis added in italics)

In light of the two recent Shoprite judgments, theft in the workplace no longer justifies automatic dismissal and as a result, under certain circumstances, employers may now be required to take a more lenient approach. Whether the Shoprite judgments will exist as the precedents for cases of workplace theft going forward, one does not know. More of an uncertainty is whether these new principles will actually be accepted and followed in practice in the workplace.<sup>88</sup>

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<sup>88</sup> Questions raised by Charl Mischke in his March 2009 Editorial, “*Theft – Have the Rules Changed?*” [www.irnetwork.co.za](http://www.irnetwork.co.za).

## BIBLIOGRAPHY

### Primary Sources

#### Cases

- Shoprite Checkers (Pty) Ltd v CCMA & Others* [2008] 12 BLLR 1211 (LAC)
- Shoprite Checkers (Pty) Ltd v CCMA & Others* [2008] 9 BLLR 838 (LAC)
- Shoprite Checkers (Pty) Ltd v CCMA & Others* [2009] 7 BLLR 619 (SCA)
- Sidumo & Another v Rustenburg Platinum Mines & Others* [2007] 12 BLLR 1097 (CC)
- Olkers v Monviso Knitwear (Pty) Ltd* (1988) 9 ILJ 875 (IC)
- Nkomo v Pick 'n Pay Retailers* (1989) 10 ILJ 937 (IC)
- Central News Agency (Pty) Ltd v Commercial & Allied Workers Union of SA & Another* (1991) 12 ILJ 340 (LAC)
- Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 ILJ 573 (LAC)
- Standard Bank of South Africa Ltd v CCMA & Others* [1998] 6 BLLR 622 (LC)
- Metcash Trading Ltd t/a Metro Cash & Carry v Fobb & Others* [1998] 11 BLLR 1136 (LC)
- Toyota South Africa Motors (Pty) Ltd v Radebe & Others* [2000] 3 BLLR 243 (LAC)
- De Beers Consolidated Mines Ltd v CCMA & Others* [2000] 9 BLLR 995 (LAC)
- Strydom v USKO Limited* [1997] 3 BLLR 342 (CCMA)
- SACCAWU obo Sandi v Solly Kramer* [1999] 10 BALR 1207 (CCMA)
- Zwane v Shoprite Checkers & Another* [2000] 9 CCMA 8.8.22
- UPSWU obo Phetla & Another v Fidelity Supercare Cleaning Services* (2007) 16 CCMA 8.8.2
- CEPPWAWU obo Mtshisela and Formex Components & Another* (2001) 10 CCMA 8.8.7
- SACCAWU obo Zwane & Others and Boxer Superstores (Pty) Ltd* (2003) 12 CCMA 8.8.5
- Komane v Fedsure Life* [1998] 2 BLLR 215 (CCMA)



- Qumza & Others v Shoprite Checkers* [2001] 5 BALR 505 (CCMA)
- Hoechst (Pty) Ltd v Chemical Workers Industrial Union & Another* (1993) 14 ILJ 1449 (LAC)
- NEHAWU obo Barnes v Department of Foreign Affairs* (2001) 22 ILJ 1297 (BCA)
- Visser v Woolworths* (2005) 26 ILJ 2250 (CCMA)
- Motswenyane v Rockface Promotions* (1997) 1 CCMA 7.4.6
- CWIU obo Flepu v Johnson & Johnson* (2000) 9 CCMA 8.8.1.
- Ngwenya v Supreme Foods (Pty) Ltd* [1994] 11 BLLR 77 (IC)
- FWCSA & 2 Others v Peko Co-Operative* (1995) 1 ICJ 8.8.29.
- Lahee Park Club v Garratt* [1997] 9 BLLR 1137 (LAC)
- Leonard Dingler (Pty) Ltd v Ngwenya* (1999) 20 ILJ 1171 (LAC)
- NUMSA obo Mudi & others v Goodyear SA* (2000) 9 CCMA 8.9.3
- Rustenburg Platinum Mines Ltd (Rustenburg Section) v NUM & Others* (2001) 22 ILJ 658 (LAC).
- NUM & Others v East Rand Gold and Uranium Co Ltd* (1986) 7 ILJ 739 (IC)
- Van Zyl v Duvha Opencast Services (Edms) Bpk* (1998) 9 ILJ 905 (IC)
- April v Drake International* [2007] 12 BALR 1099 (MEIBC)
- CEPPWAWU obo FAKU v Eco Tanks* [2007] 11 BALR 997 (MEIBC).

### **Statutes**

Labour Relations Act 66 of 1995

### **Secondary Sources**

*Oxford Advanced Learner's Dictionary*, Seventh Edition (Oxford University Press 2006)

John Grogan, *Dismissal, Discrimination & Unfair Labour Practices*, First Edition (Juta 2005)

John Grogan, *Workplace Law*, Ninth Edition (Juta 2007)

Du Toit & Others, *Labour Relations Law*, Fifth edition (LexisNexis 2006)

Benjamin & Thompson, *South African Labour Law*, [Service No 47, 2005] (Juta)

Charl Mischke, "*Theft – Have the rules changed?*" (March 2009, Editorial)  
<http://www.inetwork.co.za>

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