

SOUTH AFRICA / JUDGMENT

SAMWU obo A N Malatsi v South African Local Government Bargaining Council and Others (JR 1211 / 2018) [2023] ZALCJHB 63; [2023] 6 BLLR 581 (LC) (13 March 2023) [2023] ZALCJHB 63

COURT

Labour Court Johannesburg

BEFORE

Prinsloo

CASE / FILE NUMBER

JR 1211 / 2018

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case

no: JR 1211 / 2018

In

the matter between:

SAMWU
obo A N MALATSI Applicant
and
SOUTH
AFRICAN LOCAL GOVERNMENT
BARGAINING
COUNCIL First
Respondent
A
N MAFA
N.O. Second
Respondent
GERT
SIBANDE DISTRICT MUNICIPALITY Third
Respondent

Heard:

22 February 2023

Delivered: 13 March 2023
This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email.
The date for hand-down is deemed to be 13 March 2023.

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicant seeks to review and set aside an arbitration award dated 3 May 2018 and issued under case number MPD 051705, wherein the Second Respondent (arbitrator) found that Mr Malatsi's dismissal was substantively and procedurally fair and his case was dismissed.

[2] The Third Respondent (Respondent or Municipality) opposed the application for review.

The

facts

[3] The Respondent employed Mr Malatsi in 2009 as an intern and he was permanently employed in September 2010 as an accountant: creditors.

[4] In early 2012, ABSA Bank alerted the Respondent that there were possible fraudulent activities going on within the Municipality and the services of Price Waterhouse Cooper (PWC) were procured to conduct a forensic investigation into the allegations. At that point, Mr Malatsi was working as an accountant in the Respondent's finance department and he was allocated a computer, with his own password, but he did not have authority to access the cash focus account via the internet.

[5] The computers of the employees working in the finance department were checked as part of the investigation. The investigations revealed irregularities, the nett effect of which was to expose the Municipality to a potential loss of R 9,7 million. PWC found that during the period 31 January to 23 February 2012, several attempts were made from Mr Malatsi's computer to access the cash focus internet portal to the Respondent's Absa bank account (bank account).

- [6] On 14 February 2013, Mr Malatsi was charged with misconduct after it was found that his computer was used in an attempt to access the Municipality's bank account. The charge levelled against Mr Malatsi was that he had failed to conduct himself with honesty and integrity in that he attempted to access the Respondent's account on 11 occasions on eight different dates between 31 January and 23 February 2012, and the alternative charge was fraud. Mr Malatsi was found guilty of misconduct and dismissed on 3 May 2013.
- [7] The Applicant subsequently referred an unfair dismissal dispute to the First Respondent (SALGBC). The dispute was arbitrated and during the arbitration proceedings, Mr Malatsi explained that he was given a

computer by the Respondent, which was specifically assigned to him and for which he had created his own password. Mr Malatsi's

case was that since he joined the Respondent, he was introduced to a culture of teamwork and as such, his colleagues could use his computer as much as he could use their computers, with the password. He even allowed the auditors to use his computer and his password was written on the calendar which was on the computer desk, to be used by his colleagues. He explained that about ten of his colleagues knew his password.

- [8] The evidence was that it was a normal practice to share computers and passwords, which were written on the calendars on the computer desks.
- [9] In an arbitration award issued on 1 August 2013 under case number MPD051308 (the first arbitration award), the presiding arbitrator, Mr Ntimbana, analysed the evidence in respect of the charge of misconduct, which Mr Malatsi was dismissed for. Mr Ntimbana found that there was no reason to reject the Respondent's argument that Mr Malatsi's computer was used to attempt to access the cash focus account and he accepted that Mr Malatsi's computer was solely allocated to him and that he had created his own password. It was found disturbing that Mr Malatsi's version was that he was introduced to a culture of working as a team, to an extent of sharing the password of his computer. The whole object of having or creating a password is to safeguard and block others from using the computer in the absence of Mr Malatsi and without his knowledge. Mr Ntimbana remarked that if more than ten others knew Mr Malatsi's password, which was written on his desk, he had allowed such easy access at his own peril and he cannot shift any responsibility in the event the computer is used by someone else.
- [10] Mr Ntimbana found that Mr Malatsi's sharing of his password was very irresponsible, but it would be harsh to dismiss him in circumstances where there was no evidence to conclude that it was indeed Mr Malatsi who attempted to access the bank account. Ultimately Mr Malatsi's dismissal was found unfair and the sanction of dismissal was found to be harsh and inappropriate. The presiding arbitrator found that because Mr Malatsi's "hands are also not clean, he cannot be reinstated with arrear wages as per his request and the period from his dismissal up to his reinstatement must be treated as a period of unpaid suspension".

- [11] In short, Mr Ntimbana found that Mr Malatsi's dismissal was unfair because it was not possible to conclude that it was he who had attempted to access the Respondent's bank account as he was not the only employee who had access to his computer, due to the common practice of sharing passwords and because his password was written on his desk calendar.
- [12] The Respondent sought to review the arbitration award, but the application was unsuccessful and Mr Malatsi was reinstated on 17 October 2016.
- [13] After his reinstatement and on 3 November 2016, the Respondent issued a notice to attend a disciplinary hearing to Mr Malatsi. Two charges of misconduct were levelled against him – the first charge was gross dishonesty in that Mr Malatsi acted dishonestly with the intention to deceive the Municipality by sharing his own computer-created password with other employees, during the period February 2012, whereby his computer was used for fraudulent activities. The second charge was for failure to comply with the Respondent's IT policy by sharing his computer's password with other employees, which resulted in his computer being used to do fraudulent activities.
- [14] Mr Malatsi was found guilty and dismissed and another unfair dismissal dispute was referred to the SALGBC. An arbitration award was issued on 3 May 2018, under case number MPD051705 (the second arbitration award) and Mr Malatsi's dismissal was found to be fair. The said arbitration award is the subject of this review application.

Analysis

of the arbitrator's findings and the grounds for review

The test on review

- [15] I have to deal with the grounds for review within the context of the test that this Court must apply in deciding whether the arbitrator's decision is reviewable. The test has been set out in *Sidumo and another v Rustenburg Platinum Mines Ltd and others*[1] (*Sidumo*) as whether the decision reached by the commissioner is one that a reasonable decision maker could not reach. The Constitutional Court held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.
- [16] The Labour Appeal Court (LAC) in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others*[2] affirmed the test to be applied in review proceedings and held that:

'In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts

presented at the hearing and came to a conclusion that is reasonable.'

- [17] The review Court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and determine whether a failure by the arbitrator to deal with it is sufficient to set the award aside. This piecemeal approach of dealing with the award is improper as the reviewing Court must consider the totality of the evidence and decide whether the decision made by the arbitrator is one that a reasonable decision maker could make, based on the evidence adduced.[3]
- [18] The review test to be applied is a stringent and conservative test of reasonableness. The Applicant must show that the arbitrator ultimately arrived at an unreasonable result.
- [19] It is within the context of this test that this application for review is to be decided.

The second arbitration award: the arbitrator's findings

- [20] The issue to be decided by the arbitrator was whether Mr Malatsi's dismissal was substantively fair and whether charging him twice constituted double jeopardy.
- [21] The arbitrator recorded the factual matrix of the matter as that Mr Malatsi was dismissed for gross misconduct in that he contravened the IT policy by sharing his password. Mr Malatsi testified that he was introduced to a culture of sharing passwords, whilst there is an IT policy in place, which prohibits the sharing of passwords. His version was that he was unaware of the existence of the IT policy, notwithstanding the fact that he attended an induction on the Respondent's policies, a version the arbitrator found improbable and which was rejected.
- [22] The arbitrator found that Mr Malatsi confirmed that he shared his password, whereby he effectively admitted that he had contravened the IT policy, which specifically prohibited the sharing of passwords. The arbitrator held that with or without a policy, Mr Malatsi, as an educated person with qualifications and experience and considering the position he held at the Municipality, should have known that the sharing of a password has a propensity of exposing the Respondent to financial risk and that he cannot hide behind the fact that it was a practice. The arbitrator further found it hard to accept that Mr Malatsi saw nothing wrong in sharing passwords. The arbitrator relied on authorities which confirmed that a sanction is aimed at correction

and rehabilitation, but will be of no purpose when an employee refuses to acknowledge the wrongfulness of his or her conduct. In casu, Mr Malatsi insisted that it was a practice to share passwords and he maintained that he did not see anything wrong or unethical in doing so. This was in the face of a policy that clearly provides that 'user passwords are not allowed to be shared'.

- [23] The arbitrator found that the conduct of Mr Malatsi exposed the Respondent to risk and it goes to the heart of the employment relationship, therefore his dismissal was appropriate and fair.

[24] On the issue of double jeopardy, the arbitrator considered the applicable authorities, referring to the yardstick of fairness, circumstances which would justify a second hearing and where not all the evidence was before the employer when the employee was initially disciplined and in view of that, found no double jeopardy. The arbitrator found that Mr Malatsi was charged on completely new charges, which emanated from the same facts.

[25] The arbitrator found his dismissal fair in all respects and Mr Malatsi's case was dismissed.

The ground for review

[26] It is evident from the Applicant's heads of argument and the argument that was presented in Court, that the review application is premised on one main ground for review, namely that the arbitrator unreasonably disregarded the fact that Mr Malatsi had already been sanctioned for the misconduct complained of and that the sanction in question had already been confirmed by the Labour Court on review. The Applicant's case is that a reasonable decision maker would have concluded that it was unfair to dismiss Mr Malatsi after he had already suffered a sanction in respect of the misconduct he was dismissed for, to wit an unpaid suspension for sharing or failing to secure his computer's password.

[27] The Applicant submitted that the question is whether a reasonable decision maker would find that it was fair to punish Mr Malatsi twice – first with the sanction of unpaid suspension and later with dismissal for the same misconduct, to wit that of failing to secure his password, in circumstances where the Labour Court had confirmed the initial sanction imposed by the presiding arbitrator, Mr Ntimbana. It was not open to the arbitrator to revisit the 2013 arbitration award or to second-guess the findings of the previous arbitrator or the Labour Court.

[28] According to the Applicant, the arbitrator could have concluded that the Respondent's IT policy incorporates a rule that passwords may not be shared, that Mr Malatsi indeed breached the rule, of which he reasonably ought to have been aware, that Mr Ntimbana already held that this conduct of failing to safeguard his password, deserved a sanction, but that dismissal was too harsh, that Mr Ntimbana's finding was upheld by the Labour Court and that Mr Malatsi had already been subjected to an unpaid suspension. No reasonable decision maker would hold that it was fair to dismiss Mr Malatsi because he had already been severely punished for the misconduct and because the Respondent's conduct leading to his dismissal, was in bad faith and was an attempt to avoid the consequences of the arbitration award and the Labour Court judgment, reinstating Mr Malatsi.

[29] This is a case of double jeopardy and therefor the arbitrator's finding must be set aside on review.

[30] The submissions made by the Applicant call for closer consideration and the starting point is to consider the principles of double jeopardy and how they find application in an employment law context.

Double jeopardy

- [31] The defence of double jeopardy derives from criminal law and provides that an accused person cannot be tried twice for the same offence. In an employment context, the defence is to the effect that once an employer has imposed a sanction or a disciplinary penalty, the matter may not be re-opened to allow the employer the opportunity to revise the penalty, and in particular, to impose a more severe penalty.[4]
- [32] However, as will be illustrated infra, the courts have not adopted the double jeopardy defence in an employment context without qualification or reservation. Instead, the courts adopted an approach to the effect that if an employee has already been disciplined for an offence, it does not (automatically) mean that the employer is precluded from holding another disciplinary enquiry and imposing a more severe sanction or dismissing the employee for the same offence. The ultimate determining factor is fairness and a second hearing will be permissible if the circumstances justify it.
- [33] In *BMW (SA) (Pty) Ltd v Van der Walt*[5] (Van der Walt), the majority of the LAC found that the question of whether a second disciplinary hearing may be held against an employee would depend on all the circumstances and whether it was, in all the circumstances, fair to do so. It was found not unfair to hold a second disciplinary enquiry where the full extent of the misconduct was not known to the employer at the time of the first disciplinary enquiry. The LAC held that:
- ‘... it is unnecessary to ask oneself whether the principles of *autrefois acquit* or *res iudicata* ought to be imported into labour law. They are public policy rules. The advantage of finality in criminal and civil proceedings is thought to outweigh the harm which may in individual cases be caused by the application of the rule. In labour law fairness and fairness alone is the yardstick.’[6]
- [34] The LAC emphasised that it would probably not be considered to be fair to hold more than one disciplinary enquiry save in rather exceptional circumstances.
- [35] In *Branford v Metrorail Services (Durban) and others*[7] (Metrorail), the LAC was again faced with a case where an employee was issued with a written warning, but subsequently, the employer became aware of the fact that the misconduct for which the employee was given a written warning, was more serious and the employee was charged again and dismissed. The arbitrator found the employee’s dismissal unfair as he held the view that the warning issued to the employee was binding on the employer and that it was not permissible for the employer to later charge him in respect of the same conduct.
- [36] The LAC clarified the test as set out in *Van der Walt* and made it clear that it was incorrect to contend that the test is that a second enquiry is only permissible in exceptional circumstances. It was confirmed that the test was one where fairness alone was the decisive factor in determining whether or not a second enquiry is justified. It was held that:

‘The concept of fairness, in this regard, applies to both the employer and the employee. It involves the balancing of competing and sometimes conflicting interests of the employer, on the one hand, and the employee on the other. The weight to be attached to those respective interests depends largely on the overall circumstances of each case.’[8]

[37] In *Mahlakoane v South African Revenue Service*,[9] the LAC had to determine whether the employee had been subjected to double jeopardy. Prior to her employment with the respondent, the employee had applied for social assistance grants, six years later she was employed and no longer qualified to receive social

assistance, however, she continued to receive and accept payments of the grants for a period of two years thereafter. The employer (SARS) discovered this and charged the employee with fraud. At the disciplinary hearing, she produced two letters from the SA Social

Security Agency (SASSA) stating that the grants had been cancelled. She was found not guilty of fraud and was issued with a final written warning for wrongfully receiving the grants. After the conclusion of the disciplinary hearing, the employee’s estranged husband approached the employer and disclosed that he had helped the employee falsify the SASSA correspondence. The employee was subsequently charged with fraud, found guilty and dismissed. The LAC held that it did not amount to a case of double jeopardy. The LAC, in considering the principle of double jeopardy, held that:

‘The principle of "double jeopardy" has, as its heart, fairness and this rule or principle simply entails that an employee cannot, generally, be charged again with the same misconduct that he or she was either found guilty or not guilty of. However, there are instances where breaches of this rule or principle can be condoned. The paramount consideration, however, is fairness to both sides.’[10]

[38] The LAC considered the fact that it was apparent that the charges of misconduct in the first disciplinary hearing in 2008 and those in the second hearing were not the same, so the double jeopardy principle does not arise for consideration. In the first disciplinary hearing, the appellant was charged with fraud, alternatively with a contravention of section 12(2) read with section 17 of the Social Assistance Act,[11] alternatively, with contravening clause 6.1 of the respondent's Codes of Conduct. The main allegation in that disciplinary hearing being that the appellant, well knowing that she did not qualify for the child support grants, received and accepted those grants.

[39] The charges in the second disciplinary hearing emanate from information subsequently supplied to SARS, and the charges in the second disciplinary hearing, centred on the falsification of the dates on the letters. It was never an issue or in contention before and never required resolution or investigation before.

[40] The LAC found that the misconduct charges in the first and second disciplinary hearings were distinct from each other and that the principle of double jeopardy found no application.

- [41] It is evident from the authorities that an employer can institute disciplinary action a second time for conduct that arose from the same set of facts and that fairness will determine whether the employer is justified in instituting disciplinary action a second time.
- [42] The disadvantages of the position where an employer could never subject an employee to a second disciplinary enquiry, are obvious.[12] It would create a situation where even when, subsequent to the first enquiry, an employer has received new evidence of a significant nature which, if it was led in the first enquiry, might have resulted in a more severe sanction than what was imposed, the employer would not be able to use such evidence. So too may an employer be forced to continue an employment relationship with an employee whom the employer reasonably and justifiably no longer wants to keep because of the information it has received which it did not have at the time of the first enquiry.
- [43] Each case has to be decided on its own merits, by a consideration of all the surrounding circumstances, in the light of what is fair to both parties.

Analysis

- [44] On 14 February 2013, Mr Malatsi was charged with misconduct after it was found that his computer was used in an attempt to access the Municipality's bank account. The charge levelled against Mr Malatsi was that he had failed to conduct himself with honesty and integrity in that he attempted to access the Respondent's account on 11 occasions on eight different dates between 31 January and 23 February 2012, and the alternative charge was fraud. Mr Malatsi was found guilty of misconduct and dismissed on 3 May 2013.
- [45] In an arbitration award issued on 1 August 2013, the presiding arbitrator found that Mr Malatsi's dismissal was unfair because it was not possible to conclude that it was he who had attempted to access the Respondent's bank account as he was not the only employee who had access to his computer, due to the common practice to share passwords and because his password was written on his desk calendar.
- [46] Mr Malatsi was subsequently reinstated and on 3 November 2016, the Respondent issued another notice to attend a disciplinary hearing to him. This time around, the charges of misconduct were gross dishonesty in that Mr Malatsi acted dishonestly with the intention to deceive the Municipality by sharing his own computer created-password with other employees, during the period of February 2012 and the failure to comply with the Respondent's IT policy by sharing his computer's password with other employees, which resulted in his computer being used to do fraudulent activities.
- [47] Mr Malatsi was found guilty and dismissed and after referring an unfair dismissal dispute, an arbitration award was issued on 3 May 2018 wherein Mr Malatsi's dismissal was found to be fair.

- [48] The Applicant's argument is that this is a case of double jeopardy and therefor the arbitrator's finding must be set aside on review.
- [49] The question that leaps out is whether this is indeed a case of double jeopardy. In my view, it is not.
- [50] In 2013, Mr Malatsi was charged for failing to conduct himself with honesty and integrity in that he attempted to access the Respondent's bank account on 11 occasions on eight different dates between 31 January and 23 February 2012, and the alternative charge was fraud. He was found guilty and dismissed, but after challenging the fairness of his dismissal, he was eventually reinstated.
- [51] On 3 November 2016, the Respondent issued another notice to attend a disciplinary hearing to him. The charges were that Mr Malatsi acted dishonestly with the intention to deceive the Municipality by sharing his own computer-created password with other employees and failure to comply with the Respondent's IT policy, by sharing his computer's password with other employees. These charges were triggered by the evidence that Mr Malatsi tendered during the first arbitration relating to the sharing and disclosing of his password, which was supposed to be kept secret and the sharing of which exposed the Municipality to a significant risk.
- [52] The evidence shows that the charges levelled against Mr Malatsi in the second disciplinary hearing emanated from information the Respondent did not have at the time of the first enquiry and of which it only became aware as a result of Mr Malatsi's evidence at the first arbitration hearing. The issue of sharing passwords was never an issue or in contention before and never required resolution or investigation before Mr Malatsi disclosed that during his testimony. Once the Respondent became aware of it, the conduct was viewed in a very serious light and upon reinstatement, disciplinary action was taken in respect of that.
- [53] Furthermore, the charges in the first disciplinary hearing, centred on the several attempts to access the Municipality's bank account, without authority to do so. The charges in the second disciplinary hearing centred on the sharing of a password and the failure to comply with the Respondent's IT policy, which resulted in Mr Malatsi's computer being used to do fraudulent activities and which exposed the Municipality to a serious risk.
- [54] The misconduct charges in the first and second disciplinary hearings were distinct from each other, a clear reason why the principle of double jeopardy finds no application.
- [55] The Applicant accepts that most of the reported authorities deal with instances where an employer imposed two successive sanctions for the same conduct, without the intercession of statutory bodies. However, the Applicant's case is different in that the Respondent dismissed an employee for conduct in respect of which he had already been reinstated by a bargaining council and by the Labour Court.

- [56] The Applicant's case is that Mr Ntimbana found that Mr Malatsi ought not to have allowed unfettered access to his computer and therefore his hands were not clean, as the whole purpose of a computer password was to prevent such access. According to the Applicant, Mr Malatsi was reinstated subject to a lesser penalty for his 'password related conduct' and his reinstatement was subject to a period of unpaid suspension, therefore he was found not guilty as charged, but guilty of an alternative charge and the sanction of dismissal was substituted with a lesser sanction of unpaid suspension.
- [57] The Applicant's case has a different angle in that the gist of the review application is that a reasonable decision maker would not find that it was fair to punish Mr Malatsi twice – first with the sanction of unpaid suspension and later with dismissal for the same misconduct, to wit that of failing to secure his password, in circumstances where the Labour Court had confirmed the initial sanction imposed by the presiding arbitrator, Mr Ntimbana. It was not open to the arbitrator to revisit the 2013 arbitration award or to second-guess the findings of the previous arbitrator or the Labour Court.
- [58] This ground for review is ill-conceived for a number of reasons. Firstly, Mr Malatsi was dismissed in 2013 for attempting to access the Respondent's bank account. After Mr Ntimbana found that Mr Malatsi's dismissal was unfair because it was not possible to conclude that it was he who had attempted to access the Respondent's bank account as he was not the only employee who had access to his computer, he was reinstated.
- [59] The Municipality subsequently charged and dismissed him for sharing his own computer-created password with other employees and his failure to comply with the Respondent's IT policy.
- [60] It is evident that the Respondent, as the employer, did not punish Mr Malatsi twice, as alleged by the Applicant - first with the sanction of unpaid suspension and later with dismissal for the same misconduct.
- [61] Mr Ntimbana, in the first arbitration, found that Mr Malatsi's sharing of his password was very irresponsible, but it would be harsh to dismiss him in circumstances where there was no evidence to conclude that he indeed attempted to access the Municipality's bank account. Ultimately, Mr Malatsi's dismissal was found unfair and the sanction of dismissal was found to be harsh and inappropriate. Mr Ntimbana found that because Mr Malatsi's "hands are also not clean, he cannot be reinstated with arrear wages as per his request and the period from his dismissal up to his reinstatement must be treated as a period of unpaid suspension".
- [62] The Applicant's case is that in the first arbitration award, Mr Malatsi was reinstated subject to a lesser penalty for his password related conduct, which reinstatement was subject to a period of unpaid suspension, therefore he was found not guilty as charged, but guilty of an alternative charge and the sanction of dismissal was substituted with a lesser sanction of unpaid suspension.

[63] It is trite and has been accepted by this Court that an employer has the right to discipline its employees, of course in a lawful and fair manner. In fact, the disciplining of employees is the duty and the prerogative of the employer and an employer remains dominis litis in deciding whether an employee is to be charged for misconduct and if so, what the nature of the charges would be.

[64] The Applicant's interpretation and understanding of the outcome of the first arbitration are opportunistic and incorrect. Mr Malatsi was not charged for sharing his password or any 'password related conduct', there was no alternative charge to that effect and therefore he could not have been found guilty of a non-existent alternative charge and the sanction of dismissal could not have been substituted with a lesser sanction, as punishment for the alternative charge.

[65] Mr Ntimbana could only decide the fairness of Mr Malatsi's dismissal, by considering the charges he was dismissed for and determining whether dismissal was an appropriate sanction.

[66] In *South African Municipal Workers Union and another v Ngaka Modiri Molema District Municipality and others*, [13] the Court held that:

'... a commissioner must determine amongst others whether the misconduct for which an employee has been dismissed attracts dismissal as a sanction. So if a commissioner is at large to formulate a charge for another party to the dispute, he or she would not be in a position to determine whether dismissal was appropriate. I say so because if an employee is charged and dismissed for charge X, a commissioner may and in fact is entitled to find that charge X cannot lead to a dismissal. To allow a commissioner at the altar of section 138(1) to formulate a charge that will attract dismissal as a sanction would be unfair in my mind. The other party, in particular the employee, will prepare his or her case around the misconduct that led to his or her dismissal...'

[67] It is not open to the arbitrator to formulate a charge, different to the charge the employee had faced during the disciplinary hearing and to find that the newly formulated charge constitutes a dismissible offence. In the same vein, an arbitrator who finds that an employee is not guilty of the charge he was dismissed for, cannot formulate an alternative charge and impose a lesser sanction for such charge.

[68] In *Palluci Home Depot (Pty) Ltd v Herskowitz and others*, [14] the LAC dealt with inter alia the question of whether the arbitrator had erred by making determinations on aspects of the charges on which the chairperson of

the disciplinary hearing or the employer had not relied on. The LAC held that by making a determination on aspects of the charges which neither the chairperson nor employer relied upon at the time of the employee's dismissal, the arbitrator had misconstrued the true nature of the enquiry and his mandate. It was held that:

[45] The chairperson of the disciplinary hearing, accordingly, refrained from enquiring into, and finding the first respondent guilty of the sub-charges relating to her purported refusal to carry out instructions as described in Charge “C”. He furthermore did not recommend to the appellant that she be dismissed on the basis of a guilty finding on this charge, and nor did the employer rely upon a finding on this charge as a basis for dismissing the first respondent. Although the chairperson of the disciplinary hearing touched briefly upon sub-charge “C2” relating to the removal of a cell phone from the control of the first respondent’s office, he did not find the first respondent guilty of this charge. What he did find, however, is that the first respondent failed to carry out the instruction “to determine which calls made from the phone were personal in nature in order to ensure that the responsible person was held accountable for incurring these costs”. It must be pointed out, however, that the appellant had never charged the first respondent with failing to carry out any such instruction.

[46] This finding by the chairperson was, in any event, made in the context of the poor work performance/incapacity charge (Charge “B”), and not the failure to carry out reasonable instructions (Charge “C”). This notwithstanding, the Commissioner in his award went beyond the findings of the chairperson in his recommendation, and dealt with all the sub-charges under Charge “C” and arrived at a finding that the first respondent had failed to carry out instructions as described in that charge. In *Fidelity Cash Management Service v CCMA and others*, this Court held that:

“It is an elementary principle of not only our labour law in this country, but also of labour law in many other countries that the

fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for the dismissal which the

employer gave at the time of the dismissal. The exception to this general rule is where, at the time of the dismissal, the employer

gave a particular reason as the reason for the dismissal in order to hide the true reason such as union membership. In such a case, the court or tribunal dealing with the matter can decide the fairness or validity of the dismissal not on the basis of the reason that an employer gave for the dismissal but on the basis of the true reason for the dismissal.”

Accordingly, the Commissioner undertook the enquiry in a misconceived manner by determining the fairness of the first respondent’s dismissal on the basis of reasons for the dismissal, which the appellant did not rely upon at the time of dismissing the first respondent. But for this error, I believe that the Commissioner would have arrived at a different result in the award.’[15]

[69] In *Mndaweni v JD Group t/a Bradlows and another*,[16] the employee was charged with misappropriation of customer money, following her disciplinary hearing, the employee was dismissed. At arbitration, the commissioner found that the employer had failed to prove the incident for which the employee had been dismissed for, however, he upheld the decision to

dismiss based on evidence raised at the arbitration of another incident that occurred subsequent to the disciplinary hearing of the employee. The employee had not been charged with this further misconduct. The court held that:

‘As I have stated a new charge was introduced during the arbitration proceedings for the first time. In my opinion it is clear that our law does not entitle a commissioner to hear a new charge which did not form the basis of the dismissal under consideration.

Our law in my opinion is similar to that of English law. The English law is set out in Harvey on Industrial Relations and Employment Law vol 1 para 682 as follows: ‘In determining the principal reason for the dismissal, the Tribunal must not take an account of events occurring subsequent to the dismissal, even of events, which predated the dismissal if they were not known to the employer when he dismissed the employee (*W Devis and Sons Limited v Atkins* [1792] EngR 3015; 1997 AC 931, 1977 30 ER 40 HL). Consequently as the Devis case itself indicates an unfair dismissal will not be rendered fair if the employer subsequently

discovers grounds of misconduct which would have justified the dismissal had they been known earlier. (Contrast the position in

Common Law in relation to wrongful dismissal, see *Boston Deep Sea Fishing and Ice Company v Ansol* (1888) 39 CHD 339).’[17]

- [70] Mr Ntimbana could not find Mr Malatsi guilty of an alternative charge, which never existed at the time he had to adjudicate the fairness of Mr Malatsi’s dismissal and he could not substitute dismissal with a lesser sanction of unpaid suspension in respect of a non-existing charge.
- [71] There is no merit in the Applicant’s submission that it was not open to the arbitrator to revisit the 2013 arbitration award or to second-guess the findings of the previous arbitrator or the Labour Court. The arbitration was a hearing *de novo*, on the fairness of Mr Malatsi’s dismissal, based on new charges that were not considered by Mr Ntimbana. The arbitrator considered the fairness of Mr Malatsi’s dismissal and in doing so he did not ‘revisit’ the first arbitration award or ‘second-guessed’ Mr Ntimbana’s findings.
- [72] The Applicant’s submission that the Labour Court had confirmed the initial sanction imposed by the presiding arbitrator, Mr Ntimbana is preposterous.
- [73] The Respondent filed an application to review and set aside the first arbitration award. The reviewing Court considered the grounds for review raised by the Respondent and dismissed the application for review. The reviewing Court nowhere made a finding or an order confirming the ‘initial sanction’ imposed by Mr Ntimbana, nor was the first arbitration award made an order of Court. Dismissal of a review application is just that – the converse of that is not a confirmation of what the arbitrator found in the award that was not reviewed and set aside. The Labour Court certainly did not reinstate Mr Malatsi, as alleged by the Applicant. The Labour Court merely dismissed the Respondent’s review application.

- [74] On the Applicant's own version, the arbitrator could have concluded that the Respondent's IT policy incorporates a rule that passwords may not be shared, that Mr Malatsi indeed breached the rule, of which he reasonably ought to have been aware. The Municipality viewed that in a serious light and considering the fact that Mr Malatsi persisted with his view that he had done nothing wrong and showed no remorse or insight into his own wrongdoing and the risks it exposed the Respondent to, dismissal was an appropriate sanction.
- [75] The arbitrator's finding that double jeopardy does not arise in that Mr Malatsi was charged with new charges, which emanated from the same facts is reasonable.
- [76] There is no merit in the Applicant's contention that the Respondent's conduct leading to the dismissal of Mr Malatsi was in bad faith and was an attempt to avoid the consequences of the arbitration award and the Labour Court judgment, reinstating Mr Malatsi. The Respondent was justified in charging Mr Malatsi for sharing his password and for breaching its IT policy and the Respondent's conduct was not unfair and does not constitute bad faith.
- [77] In short: the arbitrator's findings were reasonable and are not to be interfered with on review.

Costs

- [78] The last issue to be decided is the issue of costs.
- [79] In so far as costs are concerned, this Court has a broad discretion in terms of section 162 of the Labour Relations Act[18] (LRA) to make orders for costs according to the requirements of law and fairness.
- [80] The requirement of law has been interpreted to mean that the costs would follow the result. In considering fairness, the conduct of the parties should be taken into account and mala fides, unreasonableness and frivolousness are factors justifying the imposition of a costs order.
- [81] In *Zungu v Premier of the province of KwaZulu-Natal and Others*, [19] the Constitutional Court confirmed that the rule that costs follow the result does not apply in labour matters. The Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court to have their disputes dealt with and, on the other hand, allowing those parties to bring to this Court (or oppose) cases that should not have been brought to Court (or opposed) in the first place.
- [82] Mr Makoti for the Respondent submitted that the Applicant should pay the cost for pursuing a meritless application and that it would be unfair to burden the Respondent with the costs associated with opposing such a meritless application. This matter has a long history and the Respondent has spent a lot to pursue it and to oppose this litigation.

- [83] Mr Ndou for the Applicant submitted that the Respondent should pay the cost of this application as it undermined the first arbitration award and its conduct is an abuse of the law.
- [84] In view of the facts of this case and the meritless grounds for review raised, I am satisfied that the Respondent is entitled to costs. The provisions of the LRA, the applicable authorities, the test to be applied in an application for review and the possible prospects of success are factors a party should at least consider when an application for review is filed and other parties are dragged to Court.
- [85] In casu, this application was premised on an opportunistic interpretation and application of the principle of double jeopardy and the application was pursued notwithstanding the poor prospects of success, which should have been evident had the applicable authorities been considered properly.
- [86] I am mindful of the fact that the Respondent is a municipality, which is funded by taxpayers money. Taxpayers money should be used to render basic services and to fund the operation of the municipality, not to pay for legal fees to oppose matters that had no merit from the onset. Furthermore, no reasons were advanced as to why the trade union, acting on behalf of Mr Malatsi, should not be ordered to pay the costs of this application. On the contrary, both parties sought a cost order against the other, which is indicative of the fact that a cost order will not harm their collective bargaining relationship.
- [87] In the premises, I make the following order:

Order

1. The application for review is dismissed;
2. The Applicant is to pay the Third Respondent's costs.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Mr P F Ndou from Ndou Attorneys Inc

For the Third Respondent: Advocate M Makoti

Instructed by:

TMN Kgomo & Associates Attorneys

[1] (2007) 28 ILJ 2405 (CC) at para 110.

[2] (2014) 35 ILJ 943 (LAC).

- [3] Ibid at paras 18 - 19.
- [4] A van Niekerk, M Christianson et al, 'Law@work', (LexisNexis South Africa), 5th ed, at pp 315 – 316.
- [5] (2000) 21 ILJ 113 (LAC).
- [6] Ibid at para 12.
- [7] (2003) 24 ILJ 2269 (LAC).
- [8] Ibid at para 16.
- [9] [2018] 4 BLLR 337 (LAC).
- [10] Ibid at para 27.
- [11] Social Assistance Act 13 of 2004.
- [12] The disadvantages of such an approach was highlighted in the minority judgment in Van der Walt.
- [13] (2016) 37 ILJ 2430 (LC) at para 13.
- [14] [2015] 5 BLLR 484 (LAC).
- [15] Ibid at paras 45 – 46.
- [16] (1998) 19 ILJ 1628 (LC).
- [17] Ibid at 1639J – 1631C.
- [18] Act 66 of 1995, as amended.
- [19] (2018) 39 ILJ 523 (CC) at para 24.

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