



REPORTABLE

CASE NO: SA 34/2019

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

FIRST NATIONAL BANK OF NAMIBIA LIMITED

Appellant

and

ELIZABETH NGHISHIDIVALI

First Respondent

CHRISTOPHINA MAGGY MBANGO

Second Respondent

Coram: SMUTS JA, HOFF JA and FRANK AJA

Heard: 6 November 2020

Delivered: 3 December 2021

Summary: This is an appeal against the orders of the Labour Court reversing a decision of an arbitrator during arbitration proceedings in which the arbitrator found that the dismissal of the first respondent by the appellant was both procedurally and substantively fair.

The first respondent was employed by the appellant in the position of sales and services coordinator at its Oshikango branch in Namibia. At the time of the incident

giving rise to the institution of disciplinary proceedings against the first respondent she was acting as branch manager.

On 2 December 2015, the appellant was issued with an intervention order from the Financial Intelligence Centre (FIC) directing the appellant not to proceed with any transactions on two bank accounts that may result in the depletion of the current positive balances. The very next day, an email was sent from appellant's anti-money laundering office addressed specifically to the first respondent informing her that there was a hold placed on the aforesaid two bank accounts as a consequence of instructions received from the FIC. Despite such instructions, the first respondent authorised a withdrawal of N\$75 000 on one of the aforesaid accounts. On 9 December 2015, the first respondent provided the appellant with a written explanation regarding the withdrawal from the account on hold, acknowledging approving the transaction without following proper procedures. She admitted that she did not see the hold on the account, that she was negligent and apologised for the oversight. An investigating officer, Mr Sydney Tjipuka, was appointed by the appellant to investigate the incident. Mr Tjipuka's report revealed that hefty administrative sanctions could be imposed on the bank as per FIC directives due to such non-compliance. He furthermore recommended *inter alia* final written warnings, valid for 12 months, be issued upon an admission of guilt. On 29 December 2015, first respondent signed an admission of guilt statement and received a final written warning, which was valid for 18 months.

On 9 May 2016 the appellant received a notice from the FIC in terms of the provisions of s 56(7) of the Financial Intelligence Act 13 of 2012 (FIA). In this notice the appellant was informed that an administrative penalty of N\$7 million had been imposed as a result of the non-compliance with the intervention orders issued in terms of s 42 of FIA. In its notice the FIC cited specifically the first respondent's conduct as one of the breaches on the basis of which the penalty had been imposed. In terms of the aforesaid notice, N\$5 million of the penalty imposed was suspended

for a period of five years on certain conditions. The remaining amount of N\$2 million was paid by the appellant on 20 May 2016 to a nominated FIA account.

As a result of the penalty imposed, the appellant on 21 July 2016 issued the first respondent with a letter of suspension (on full remuneration) and notice of disciplinary action. At the conclusion of the disciplinary hearing, the first respondent was found guilty of gross negligence and was subsequently dismissed. The first respondent lodged an internal appeal but the appeal forum confirmed the conviction and the sanction imposed. The first respondent's employment was terminated effective from 30 November 2016. Aggrieved, the first respondent registered a dispute with the Labour Commissioner, stating the nature of the dispute as an unfair dismissal, an unfair labour practice and double jeopardy.

Arbitration proceedings were conducted and on 5 January 2018 the arbitrator pronounced herself on the dispute. The arbitrator found on the evidence presented that the appellant had a valid reason and utilised a fair procedure when it terminated the services of the first respondent. In respect of the ground of an unfair labour practice, the arbitrator held that she had no jurisdiction to hear this ground as the first respondent failed to indicate which practice tabulated under s 50(1) of the Labour Act applied. In respect of the final ground of double jeopardy, the arbitrator referred to the case of *Branford v Metrorail Services (Durban) & others* and applied the same reasoning to the present case concluding that there was no double jeopardy and this ground was also dismissed. Commenting on the sanction imposed by the appellant, the arbitrator found that the sanction meted out against the first respondent was an appropriate one given the peculiar business of the appellant and she accordingly confirmed the dismissal imposed by the appellant. The first respondent subsequently filed a notice of appeal in the Labour Court against the entire arbitration award seeking to set aside the decision of the arbitrator indicating that her dismissal was both substantively and procedurally fair. In addition, first respondent claimed compensation equivalent to appellant paying her her monthly remuneration that she would have received over the period which she remained unfairly dismissed, that is from the date of dismissal to the date of the judgment of the Labour Court.

In the Labour Court nothing was smooth sailing for the first respondent. First respondent's legal practitioner failed to note her appeal on time in terms of s 89 of the Labour Act as well as prosecuting same within the time-frame provided by the Labour Act. A detailed out-lay of her non-compliance was filed in various condonation applications which was successfully accepted by the Labour Court.

Aggrieved by the Labour Court's decision to accept such explanation and reversing the decision of the arbitrator, the appellant appealed to this court.

Held that on the strength of *Di Savino v Nedbank Namibia Ltd* 2017 (3) NR 880 (SC), the granting of the condonation application is not appealable since it did not dispose of the relief claimed in the main proceeding, namely, the merits of the appeal.

Held that the conduct of the first respondent with regards to noting and prosecuting her appeal late was not flagrant.

Held that the appellant erred when it submitted that the imposition of a penalty by the FIC was a new material fact justifying the appellant instituting disciplinary proceedings which culminated in the dismissal of the first respondent.

Held that the appellant at the time of issuing the first respondent with a final warning was alive to the possibility that the FIC could impose a penalty.

Held that the appellant elected to give first respondent a final written warning and not to dismiss the first respondent at that stage. It therefore 'condoned' the misconduct of the first respondent by the imposition of a final written warning.

Held that it would be manifestly unfair under the circumstances to haul the first respondent before a second disciplinary hearing and to dismiss her on the same set of facts present when she already received a final written warning.

Held that the Labour Court did not misdirect itself or err in upholding the appeal against the decision of the arbitrator.

Held that the order of the Labour Court was incomplete – the Labour Court by finding that the appeal succeeded was required to set aside the arbitrator’s award and in its discretion could make an order as contemplated by s 89(10) of the Labour Act.

Held that, in dismissing the appeal, this court is empowered to amend or set aside and thus correct the order which is the subject of appeal and make an order which the circumstances may require.

Held that the appellant is ordered to compensate the first respondent in accordance with the order of this court.

The appeal is dismissed.

APPEAL JUDGMENT

HOFF JA (SMUTS JA and FRANK AJA concurring):

[1] This is an appeal against the orders of the Labour Court reversing a decision of an arbitrator during arbitration proceedings in which the arbitrator found that the dismissal of the first respondent by the appellant was both procedurally and substantively fair.

[2] The Labour Court made the following orders:

- (a) The application for condonation of the late noting of the appeal is granted.
- (b) The appeal against the decision of the arbitrator dated 5 January 2018 succeeds.
- (c) There is no order as to costs.

Background

[3] The first respondent was employed by the appellant in the position of sales and services coordinator at its Oshikango branch in Namibia. At the time of the incident giving rise to the institution of disciplinary proceedings against the first respondent she was acting as branch manager.

[4] On 2 December 2015, the appellant was issued with an intervention order from the Financial Intelligence Centre (FIC) directing the appellant not to proceed with any transactions on two bank accounts that may result in the depletion of the current positive balances.

[5] On 3 December 2015, an email was sent from appellant's anti-money laundering office addressed specifically to the first respondent and another employee where the first respondent was informed that a hold was placed on the aforesaid two bank accounts as a consequence of instructions received from the FIC, the regulator.

[6] On 4 December 2015, the first respondent in her capacity as acting branch manager authorised a withdrawal of N\$75 000 on one of the aforesaid accounts,

notwithstanding the hold placed on that account and the email communication to her advising her of the prohibition of any debits (withdrawals) on that account. The first respondent was able, the same day, to recover N\$55 000 from the client who made the withdrawal.

[7] On 9 December 2015, the first respondent provided the appellant with a written explanation for the withdrawal from the account on hold, acknowledging approval of the transaction without following proper procedures. She admitted that she did not see the hard-hold on the account, that she was negligent and apologised for the oversight.

[8] The investigating officer appointed by the appellant, Mr Sydney Tjipuka, prepared an investigation report after collecting statements from the involved staff members. The report notes that the violation of the directive of the FIC carries hefty administrative sanctions on the bank. Mr Tjipuka recommended that final written warnings, valid for 12 months, be issued upon an admission of guilt. He further recommended that additional conditions 'can be considered to the proposed sanctions, such as withholding performance bonuses over the same period'.

[9] On 29 December 2015, the first respondent signed an admission of guilt statement wherein she admitted guilt to the offence of 'non-compliance with established rules and procedures'. In paragraph 4 of this statement the first respondent confirmed her understanding that should she sign the admission of guilt, the matter 'shall be disposed off by way of shortened proceedings without the need

for a fully fledged hearing . . .'. She further acknowledged that when she would receive a final warning it would remain valid for a period 18 months. On the same day she was issued with a final written warning. In this written warning the appellant acknowledged that 'when' it is found 'non-compliant with direct orders received, huge penalties can be imposed on the bank resulting in reputational, operational and legal risks'. In the last paragraph the following appears:

'This warning is valid for a period of **18 months** from the date hereof. Should you commit the same or a related offence or any other offence of a serious nature within this period, further disciplinary action may be taken against you, which may result in your dismissal.'

[10] On 9 May 2016, the appellant received a notice (dated 22 April 2016) in terms of the provisions of s 56(7) of the Financial Intelligence Act 13 of 2012 (FIA) from the FIC. In this notice the appellant was informed that an administrative penalty of N\$7 million had been imposed as a result of non-compliance with the intervention orders issued in terms of s 42 of FIA on 2 December 2015 and 4 December 2015 respectively. In its notice, the FIC cited specifically the first respondent's conduct as one of the breaches on the basis of which the penalty had been imposed. In terms of the aforesaid notice N\$5 million of the penalty imposed was suspended for a period of five years on certain conditions. The appellant paid N\$2 million on 20 May 2016 to the FIA's nominated account.

[11] On 21 July 2016, the appellant issued the first respondent with a letter of suspension (on full remuneration) and notice of disciplinary action which reads in part as follows:

'You received a final written warning for non-compliance with established rules and procedures. However since the sanction was issued your non-compliance resulted in the regulatory body, FIC (Financial Intelligence Centre) taking steps against First National Bank, Namibia, which resulted in a N\$7,000,000 (Seven Million Namibian Dollars) of which N\$5,000,000 (Five Million Namibian Dollars) is suspended, fine, a fact not known at the time of the issuing of the final written warning.

Consequently the Bank suffered losses and prejudice and its good name was brought into disrepute from a legal compliance perspective. Due to this change of events the Bank has no option but to revisit the incident and in addition to the non-compliance misconduct your conduct constitutes gross negligence leading to severe consequences and losses to the Bank, a fact not known at 29 December 2015.

The Bank intends to take further disciplinary steps on the changed facts. The notice of the allegations is hereto attached for your consideration.'

[12] At the conclusion of a disciplinary hearing on 30 August 2016, the first respondent was found guilty of gross negligence and was subsequently dismissed. The first respondent lodged an internal appeal but the appeal forum confirmed the conviction and the sanction imposed. The first respondent's employment was terminated effective from 30 November 2016.

[13] On 15 February 2017, the first respondent registered a dispute with the Labour Commissioner, stating the nature of the dispute as an unfair dismissal, an unfair labour practice and double jeopardy.

Arbitration proceedings

[14] Arbitration proceedings were conducted and on 5 January 2018 the arbitrator announced her arbitration award.

[15] During the arbitration proceedings the first respondent testified herself and three witnesses testified on behalf of the appellant.

[16] In respect of the ground of unfair dismissal the arbitrator referred to the provisions of s 33(1) of the Labour Act 11 of 2007 (Labour Act) and noted that in all cases of alleged unfair dismissals the onus of proof rests on an employer to prove that there existed a valid and fair reason to charge an employee and hence justifying the dismissal. The arbitrator found on the evidence presented that the appellant (respondent in the arbitration proceedings) had a valid reason to dismiss the first respondent. This finding related to the issue of substantive fairness.

[17] In respect of procedural fairness, the arbitrator found that the appellant followed a fair procedure when it terminated the services of the first respondent.

[18] The arbitrator found that the appellant had proved its case on a balance of probabilities, that the first respondent was negligent when she authorised the withdrawal from the account which was put on 'hard-hold' without first scrutinising such account.¹

¹ Negligence was in any event admitted by the first respondent.

[19] In respect of the ground of an unfair labour practice, the arbitrator explained that where an unfair labour practice is alleged an applicant must indicate which of the practices tabulated under s 50(1) of the Labour Act are applicable, for which the other party is allegedly guilty of, 'otherwise failure to do so is fatal'. The arbitrator found that this ground raised was defective, that she had no jurisdiction to hear this ground and dismissed this ground.

[20] In respect of the ground of double jeopardy, the arbitrator referred to the case of *Branford v Metrorail Services (Durban) & others*² and remarked that in that matter the Labour Court found that *Branford* had not been subjected to two disciplinary enquiries, because the employee was first issued with a warning, in circumstances where the employee was not formally charged and did not appear before a disciplinary enquiry. The same reasoning was applicable in respect of the case of the first respondent, there was no 'double jeopardy' and this ground was also dismissed.

[21] In respect of an appropriate sanction, the arbitrator pointed out that the sanction prescribed by a disciplinary code for a specific disciplinary offence is generally regarded as the primary determinant of the appropriateness of the sanction. It was further stated that the more serious the offence, the more likely it is that the employer will consider a dismissal appropriate. The arbitrator found that the sanction meted out against the first respondent was 'an appropriate one given the peculiar business' of the appellant. The arbitrator confirmed the dismissal imposed by the

² DA 19/2002, delivered 13 November 2003 by the Labour Appeal Court of South Africa.

appellant. The first respondent in her notice of appeal dated 25 September 2018 appealed against the entire arbitration award made by the arbitrator on 5 January 2018 (and received by the first respondent on 16 January 2018), where the arbitrator found that:

- (a) the dismissal of the first respondent was both procedurally and substantively fair; and
- (b) the first respondent's dismissal was confirmed.

Proceedings in the Labour Court

[22] The relief sought by the first respondent in her notice of appeal³ was firstly, an order that the decision of the arbitrator be set aside on the basis that her dismissal was both substantively and procedurally unfair, and secondly, an order directing the appellant to compensate her by paying her monthly remuneration that she would have received over the period which she remained unfairly dismissed, that is from the date of dismissal (1 December 2016) to the date of the judgment of the Labour Court. The judgment of the Labour Court was delivered on 4 April 2019.

[23] Section 89(2) of the Labour Act provides that an appeal of arbitration awards must be noted within 30 days after award was served on the party and s 89(3) provides that the Labour Court may condone the late noting of an appeal on good cause shown.

³ In terms of the provisions of s 89(1) of the Labour Act and which notice was dated as 25 September 2018.

[24] On 26 September 2018, the first respondent signed a founding affidavit in Ongwediva in support of condonation application and on 4 October 2018 signed a notice of motion in respect of the condonation application in which first respondent sought an order condoning her non-compliance with the provisions of s 89(2) of the Labour Act and for an order reinstating her appeal.

[25] In her founding affidavit the first respondent explained the reasons for the late filing of the notice of appeal as follows:

- On 16 January 2018, she received the arbitration award by e-mail. On 17 January 2018 she approached Legal Expenses Insurance Namibia (Pty) Ltd (Legal Wise) in order to obtain legal representation to challenge the arbitration award.
- On 1 February 2018, Legal Wise appointed the legal representative, Shailemo & Associates. On 1 February 2018 and 15 February 2018 consultations were conducted telephonically. On 16 February 2018, first respondent was informed by her legal representative that her notice of appeal was not filed on time and that she needed to bring a condonation application.
- On 17 February 2018, first respondent went to the offices of her legal representative to sign a confirmatory affidavit in support of the condonation application. First respondent stated that in the application the legal representative accepted responsibility for the late filing of the notice of appeal and attached a copy of an affidavit by her legal representative in support of the condonation application.

- On 5 March 2018, first respondent was called to the office of her legal representative to sign another confirmatory affidavit in support of the condonation application for the late filing of her notice of appeal. She signed another confirmatory affidavit on the same day.
- First respondent states that she was informed by her current legal practitioner, Ray Silungwe, that her condonation application and appeal were only noted with the Labour Court on 4 April 2018 through the e-justice system.
- On 20 June 2018, Shailemo & Associates requested her to make payments for copies of the record of appeal. She paid the money the next day.
- On 25 June 2018, she approached Legal Wise in order to assign another legal representative to her because she was unhappy with the services of Shailemo & Associates who had according to her delayed the prosecution of her appeal. The mandate of Shailemo & Associates was terminated by Legal Wise and on 29 June 2018 they withdrew as legal representatives of record.
- On 20 July 2018, Legal Wise instructed Nixon Marcus Public Law Office to represent her. These instructions were accepted on the same day. Her file, which contained amongst other things, the arbitration award and the record of the appeal was forwarded from the offices of Legal Wise in Ongwediva to Nixon Marcus Public Law Office in Windhoek and were received on 23 July 2018.
- On 24 July 2018, she was invited to attend a consultation in Windhoek. First respondent stated that as she was at that stage in 'nursing school' in Ongwediva she was only able to travel to Windhoek on 30 July 2018.

- During the consultation she learnt that her appeal had not been prosecuted within 90 days from the date of noting her appeal and that the appeal had lapsed. She was advised that it was necessary to apply for condonation and reinstatement of her appeal.
- The legal representative prepared the affidavit on 31 July 2018 and emailed it to her on 1 August 2018. She signed it on the same day and sent it back.
- On 2 August 2018, her legal representative filed an application for condonation for her non-compliance with rule 17(25) of the Rules of the Labour Court, and reinstatement of the appeal filed under case number HC-NLD-LAB-AA-2018/00006. First respondent stated that unbeknown to her legal representative, at the time of the filing of the condonation application the appeal under aforementioned case number had been removed from the roll on 23 July 2018.
- According to first respondent it was impossible for her legal representative to have known that the matter had been removed from the roll because the court order was only filed on e-justice on 17 August 2018 about 15 days after the legal representative had filed the condonation application and the application for reinstatement of the appeal.
- First respondent stated that her legal representative was unable to place the matter back on the court roll due to the fact that e-justice was experiencing technical difficulties, in that it did not make provision for the setting down of the matter on the court roll, as it should.
- According to first respondent her legal representative telephoned a Ms Hango of the first respondent's legal practitioners (the current appellant) and she

confirmed that she was also experiencing technical difficulties on e-justice regarding her appeal as Ms Hango was unable to come on record as legal representatives of the first respondent (current appellant). It was then decided in concurrence with the deputy registrar to proceed with her appeal as if it was a paper file and not an e-justice matter.

- On 22 August 2018, her legal representative telephoned the deputy registrar to seek assistance with placing the matter back on the court roll. On 24 August 2018 Ms Hango informed her legal representative that she had sought assistance in fixing the technical problem on e-justice unsuccessfully and would personally attend the High Court for further assistance.
- Subsequently her legal representative received a letter dated 29 August 2018, from the deputy registrar, informing him that her appeal had not been properly registered by her previous legal representatives and that the appeal should be re-registered.
- On 12 September 2018, her legal representative was directed to a Mr Mukwata, a court official, who advised her legal representative to note an appeal afresh, since there was no need to continue from her previously incorrectly filed appeal.
- On 13 September 2018, her legal representative prepared the affidavit and her notices of appeal. The documents were e-mailed to her on 25 September 2018.
- In the affidavit the first respondent also dealt with the prospects of success on appeal.

[26] The Labour Court granted the condonation application. The Labour Court looked at the role the first respondent played in the non-compliance with the rules. It found that the erstwhile legal practitioner, who admitted that she acted negligently, was responsible for the non-compliance of the rules and that it would be grossly unfair to saddle the first respondent with the 'sins' of the legal practitioner.

[27] The Labour Court also looked at the prospects of success in respect of the merits of the appeal and found that in the circumstances it was unfair to have held a second enquiry.

Submissions on appeal in this court

[28] In respect of the appeal against the granting of the condonation application counsel for the appellant *inter alia* criticised the Labour Court's finding that 'the widely held view that a litigant should suffer the consequences of its legal representative's negligence should obtain only where a litigant personally selected its own legal practitioner. It should not be applicable where a litigant had no choice regarding a legal practitioner', creates the risk of conflicting precedent which is best finally resolved on appeal in this court. The legal practitioner on behalf of the first respondent submitted in granting the condonation application, the Labour Court exercised a judicial discretion which is not easily overturned on appeal.

[29] This Court posed the question to counsel whether the granting of the condonation application was appealable in the first place and invited written submissions on this point which were subsequently provided by counsel.

[30] Counsel for the appellant referred to s 18(3) of the High Court Act⁴ which provides that a party may appeal against a judgment or order of the High Court (the Labour Court being a division of the High Court). In such an appeal two requirements must be met: (a) the judgment or order must be appealable and (b) where the judgment or order is interlocutory, leave to appeal must be granted. Counsel referred to the requirements of appealability, namely, where the judgment (i) is final in effect and not susceptible to alteration by the court of first instance; (ii) is definitive of the rights of the parties ie it must grant definitive and distinct relief; and (iii) disposes of at least a substantive portion of the relief claimed in the main proceedings.

[31] It was submitted that the granting of condonation by the Labour Court (exercising a statutory power on application and having the effect of alleviating the first respondent of the consequences of not having noted an appeal within the peremptory statutory time period) is: (a) final; (b) definitive of the rights of the parties; and (c) disposes of the condonation application *in toto* insofar as the issue of condonation (including the impact of s 89(2) of the Act and the exercise of the Labour Court's power under 89(3) of the Act) is concerned and clearly a judgment or order contemplated by s 18 of the High Court Act.

[32] It was submitted that the granting of a condonation application in the context of the present matter is not akin to applications being struck off the roll for lack of

⁴ Act 16 of 1990.

urgency nor is it a simple interlocutory order, it was submitted, neither a procedural order.

[33] It was submitted that not only can the competence of the order granting condonation be questioned, but the rationale to avoid piecemeal appeals simply does not arise in this instance since this court is seized with an appeal not only in respect of the order granting condonation but also upholding the appeal. It was submitted that where an order is incompetent eg where it offends the principle of legality (which includes an incorrect application of the law) it is a *fortiori* appealable even if interlocutory.

[34] The legal representative on behalf of the first respondent⁵ submitted that as a matter of judicial policy no good is served to allow a party to appeal against orders of the Labour Court condoning non-compliance with its rules, since the court granting the condonation is best placed to decide the issue and secondly the rights of the party who is unsatisfied are not detrimentally affected; that allowing appeals against orders granting condonation may well frustrate the intention of the legislature that labour disputes be dealt with speedily and effectively, and that the object of labour disputes is to deal with the substantial merits of the dispute with minimum formalities; that to revisit interlocutory procedural determinations by the Labour Court, in this court, when the merits have been fully dealt with by the Labour Court, runs counter to the legislative intent; that the argument that leave to appeal against the condonation application was granted by the Labour Court is not dispositive, since it remains an

⁵ Instructed by Legal Wise.

issue to be decided by this court; that the condonation decision by the Labour Court was not definitive of the appellant's rights, nor did it dispose of the relief claimed in the main proceedings.

Was the granting of the condonation application appealable

[35] This court in *Di Savino v Nedbank Namibia Ltd*⁶ referred with approval to *Zweni v Minister of Law and Order*⁷ in which the three attributes of an appealable judgment or order was spelled out – referred to by counsel for the appellant in his additional submissions and which appears in para 30 *supra*.

[36] Where one of these attributes is lacking, the judgment or order may be non-appealable. It is acknowledged that these attributes or requirements are not immutable and serve as guidelines and not rigid principles to be applied invariably.

[37] The Labour Court in the condonation application first considered the requirements of condonation applications and thereafter considered the merits of the appeal which was the main proceeding. I am of the view that with due regard to the requirements referred to *supra* that the granting of the condonation application by the Labour Court is not appealable since it did not dispose of the relief claimed in the main proceeding, namely, the merits of the appeal.

⁶ 2017 (3) NR 880 (SC) para 16.

⁷ 1993 (1) SA 523 (A), a decision of the South African Appellate Division.

[38] In any event to the extent that it is necessary, I agree that the conduct of the first respondent, in spite of the time lapse, was not flagrant. The first respondent tried her best in the circumstances to prosecute her appeal and this was not an instance where a court could have rejected her explanation for the late noting of her appeal, without considering the prospects of success on the merits.

The merits of the appeal

Submissions on behalf of the appellant

[39] In respect of the issue of double jeopardy, this court was referred to the matter of *BMW (SA) (Pty) Ltd v Van der Walt*⁸ where it was stated that whether or not a second disciplinary hearing may be opened against an employee would depend on whether it is in all the circumstances fair to do so and that it would probably not be considered to be fair to hold more than one disciplinary enquiry save in rather exceptional circumstances.

[40] It was submitted that double jeopardy found no application since: firstly, two disciplinary enquiries against the first respondent did not occur – there was no charge sheet or formal disciplinary hearing to the written warning; and secondly, even if there were two disciplinary enquiries, it was fair under the circumstances for the appellant to have held a second disciplinary enquiry.

⁸ (2000) 21 ILJ 113 (LAC) para 12.

[41] It was submitted that the penalty subsequently imposed by the FIC (after first respondent was given a written warning) is a new material fact which did not exist when the first respondent admitted guilt to the contravention of the company policy.

[42] Therefore on the authority of 'Law at Work'⁹, it was contended that:

' . . . where new evidence comes to light after an enquiry, or where a supervisor makes ill-considered or inappropriate decision, the courts and arbitrators will be more inclined to hold that an employer is justified in the conducting of the second enquiry.'

[43] It was submitted that in the circumstances it was fair and appropriate for the appellant to act in the manner it did.

Submissions on behalf of the first respondent

[44] It was submitted that it was unfair of the appellant to have imposed a second punishment of dismissal, because the matter had been completed when the appellant decided to give the first respondent a final warning; that the appellant could not have imposed a second punishment without transgressing the basic tenets of fairness and justice since: firstly, the final written warning was a valid disciplinary sanction in accordance with the appellant's disciplinary code; and secondly, the sanction of a final warning was imposed by the appellant conscious of the gravity of first respondent's transgression and the likelihood of a penalty by the FIC. It was submitted that by imposing a different punishment for the same offence violated the first respondent's right to dignity, by not treating her worthy of respect and concern.

⁹ A van Niekerk *et al* *Law at Work* 4 ed (2018) p 314.

[45] It was submitted that decisions which are arbitrary, irrational or perverse and disrespectful of the dignity of workers are offensive to the values of the Namibian Constitution and will be unfair.

[46] It was submitted that the imposition of the penalty was not a new material fact as argued by the appellant, since that fact was known and considered when the final written warning was imposed. It was submitted that the Labour Court correctly found that it was unfair to have imposed a second punishment of dismissal as the matter had been completed at that stage.

Evaluation of the judgment of the Labour Court

[47] The appellant's argument is that at the time the written warning was given, the appellant had not been aware of the new facts ie the heavy penalty subsequently imposed by the FIC.

[48] The question in my view to be considered is whether the appellant is correct to submit that the imposition of a penalty by the FIC was a new material fact justifying the appellant to institute disciplinary proceedings which culminated, in the dismissal of the first respondent.

[49] At first glance one would be inclined to agree that the imposition of the penalty was a new material fact because at the time of imposing the sanction of a final

warning, the penalty had not been imposed by the FIC. However in my view one must look at the evidence presented on this point.

[50] During the arbitration proceedings the operations manager of the appellant, Ms Christofina Namweya was asked by the appellant's legal representative as follows:

'Now, if you knew that the bank¹⁰ can impose a penalty why was it necessary to deal with the issue of the non-compliance first without waiting for the bank to first pronounce itself?

Ms Christofina Namweya: Because the hard-hold was a directive from the regulator, the Financial Intelligence Centre. So it is a directive that was there, and before the directive there were already rules and guidelines on what the bank¹¹ could face if any of the employees remained out of line or is not compliant to the process. So, for the FNB, because this is direct non-compliance so meaning that the staff should be held accountable for their actions, irrespective even if the Financial Intelligence Centre did not come back to intervene.'

[51] A subsequent exchange between the first respondent's representative and the witness, Ms Namweya reads as follows:

'Okay. Now, when you gave the final written warning to the applicant, you have also taken into consideration that there can be a fine which goes up to 1 million, am I correct?

Ms Christofina Namweya: Mm.

¹⁰ Reference to the 'bank' in this paragraph refers to the Bank of Namibia within which the FIC resorts.

¹¹ 'Bank' refers to the appellant.

Applicant's representative: So you have expected that it can be 100 million or less than 100 million, not above 100 million?¹²

Ms Christofina Namweya: Yes.'

[52] It should be apparent from the above passages that the appellant at the time of issuing the first respondent with a final warning was alive to the possibility that the FIC could impose a penalty. What the appellant did not know was whether the eventuality (of the penalty) would ensue and the extent of the penalty.

[53] Nevertheless in the face of receiving 'serious administrative sanctions',¹³ the appellant elected to proceed with the disciplinary enquiry and not to wait for the decision of FIC.¹⁴

[54] Although the imposition of a penalty did not exist as a fact at the time of the issuing of the final written warning, the appellant was quite aware of the fact that a penalty could possibly be imposed by the FIC and indeed anticipated the imposition of such a penalty. I do not agree that the subsequent imposition of a penalty was a new material fact. What the appellant did not know at the stage of issuing the admission of guilt punishment, was whether or not such a penalty would be imposed by the FIC, and the extent of such a penalty. In my view on the evidence presented, the penalty was clearly foreseen.

¹² In terms of s 54(5) of FIC a fine not exceeding N\$10 million may be imposed. The figures of N\$1 million and N\$100 million are erroneous.

¹³ Words used by Mr Sydney Tjipuka in his report to the appellant on an investigation into the withdrawal of N\$75 000.

¹⁴ It should be noted that in terms of its disciplinary policy the appellant was obliged to institute disciplinary proceedings within a prescribed period.

Was there only one disciplinary hearing?

[55] The starting point in considering the issue of double jeopardy is a principle enunciated in *BMW (supra)* that it would probably not be considered to be fair to hold more than one disciplinary enquiry save in rather exceptional circumstances.

[56] It was submitted on behalf of the appellant that the court *a quo* erred in law and/or on the facts and misdirected itself, *inter alia*, by not finding on the basis of the principles articulated in the matters of *Branford* and *BMW*, that double jeopardy was not applicable in the present matter.

[57] The Labour Court distinguished this matter from the decision in *Branford* on the basis that: 'first respondent (appellant) was aware of the gravity of appellant's (first respondent's) offence and the likelihood of a penalty from FIC'.

[58] In *Branford*, the majority judgment,¹⁵ referred with approval to the decision in *BMW* where writing for the majority Conradie JA stated the following principle at para 12:

[12] Whether or not a second disciplinary hearing enquiry may be opened against an employee would, I consider, depend upon whether it is, in all the circumstances fair to do so. I agree with the dicta in *Amalgamated Engineering Union of SA & others v Carlton Paper of SA (Pty) Ltd* (1998) 9 ILJ 588 at 596A-D that it is unnecessary to ask oneself whether the principles of *autrefois acquit* or *res judicata* ought to be imported into labour law. They are public policy rules. The advantage of finality in criminal and

¹⁵ By Jafta AJA, concurred by Nicholson JA.

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. See also *Botha v Gengold* [1996] BLLR 41 (1C); *Maliwa v Free State Consolidated Gold Mines (Operations) Ltd* (1989) 10 ILJ 934 (IC). I should make two cautionary remarks. It may be that the second disciplinary enquiry is *ultra vires* the employer's disciplinary code (*Strydom v Lesko Ltd* [1997] 3 BLLR 343 (CCMA) at 350F-G). That might be a stumbling block. Secondly, it would probably not be considered to be fair to hold more than one disciplinary enquiry save in rather exceptional circumstances.'

Jafta AJA explained the aforementioned passage at para 13 as follows:

'The learned Judge of appeal mentioned the issue of exceptional circumstances merely as one of two caveats and not as the actual or real text to be applied. Therefore, in my view, it is incorrect to contend that the test espoused in *Van der Walt* is that a second enquiry would only be permissible in exceptional circumstances. The true legal position as pronounced in *Van der Walt* is that a second enquiry would be justified if it would be fair to institute it.'

I agree.

[59] Regarding the question of fairness, Jafta AJA referred with approval to the case of *National Union of Metal Workers of SA v Vetsak Co-operative Ltd & others* 1996 (4) SA 577 (A) where Smallberger JA made the following remarks at 589C-D:

'Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances (*NUM v Free State Cons* at 446I). And in doing so it must have due and proper regard to the objectives sought to be achieved by the

Act. In my view, it would be unwise and undesirable to lay down, or to attempt to lay down, any universally applicable test for deciding what is fair.'

[60] I agree with the court *a quo* that the matter presently under consideration is distinguishable from *Branford* on the facts.

[61] In *Branford*, evidence was presented that the employee (Branford) committed certain irregularities. The supervisor, Palmer, who eventually issued the warning made certain enquiries and thereafter requested a meeting with a senior manager Pillay. Smit (the superior of Palmer) and Branford were present. At the conclusion of the meeting Smit asked Branford to give him a full written report and stated that the matter would be put to rest. After the meeting Palmer escorted Branford to his office where he gave him a 'dressing down', followed by a written warning without any formal enquiry. No evidence relating to the matter was given to Palmer. A written warning was issued before Branford could furnish a written report requested by his superior, Smit.

[62] The court *inter alia* stated the following in para 15:

'The problem in this matter is that Palmer, it would appear, did not know how to discipline an employee properly. Although it may have needed a lawyer to properly interpret the facts in question i.e. did they constitute a mere irregularity or a forgery, fraud and/or theft, it was still unfair to the company to have it denied the opportunity of having the facts evaluated by its Human Resources Manager who was probably more familiar with its disciplinary code than Palmer who hastily decided to discipline the appellant even though he had insufficient information and the latter had not then furnished a written report. In these circumstances it would be manifestly be unfair for

the company to be saddled with a quick, ill-informed and incorrect decision of its employee who misconceived the seriousness of the matter and hurriedly took an inappropriate decision leading to an equally inappropriate penalty.'

[63] It appears from an audit investigation done subsequently that the investigators had not been informed that Palmer had already disciplined Branford. It became apparent from those investigations that Branford was not just guilty of irregularities but of fraud, forgery and dishonesty. This led to the formal enquiry which led to Branford's dismissal.

[64] Similarly in *BMW*, the employee (Van der Walt) removed certain wheel alignment equipment belonging to his employer, BMW, and was brought before a disciplinary enquiry which found that the employee did not commit any transgression, save for a misrepresentation by him when the equipment was removed for repairs. No sanction was imposed on the employee.

[65] Subsequently new information became known which resulted in the employee being charged with a new and different charge of misconduct in that it was alleged that the employee made certain misrepresentations when the wheel alignment equipment was removed from the premises of BMW. The new information was a quotation for the repair of the equipment addressed to BMW marked for the attention of the employee (Van der Walt). It was this quotation which brought home to BMW the enormity of the employee's deception since up until then it was thought that the equipment had been acquired by the employee.

[66] Conradie JA *inter alia* stated the following at para 13:

‘Although the charges both involved misrepresentation, the full import of the deception was not realised at the first disciplinary enquiry. It would be unfair to compel an employer to retain an employee in whom it has justifiably lost all confidence. That must have been the case here when the full extent of the respondent’s deceit became apparent. And since this loss of confidence justifiably occurred only after a first disciplinary enquiry had been held, I do not consider that it was unfair to hold another.’

[67] In the present matter as stated earlier, at the stage when the admission of guilt form was signed the appellant foresaw the possibility of the imposition of a fine by the FIC. It could not have come as a complete surprise when it was eventually imposed.

[68] The submission on behalf of the appellant that there was only one hearing is based on form and not substance. It is correct that there was no charge sheet or formal disciplinary hearing when the final warning was issued, but it does not mean that the written warning should be disregarded as a penalty.

[69] The appellant itself regarded the admission of guilt statement signed by the first respondent as ‘*shortened disciplinary proceedings*’.¹⁶ (Emphasis provided)

[70] The appellant regarded the shortened disciplinary proceedings as a valid proceeding and the imposition of the sanction appropriate in the circumstances. The warning stood and was valid for 18 months. The first respondent was of the view that that concluded the disciplinary proceedings. However, the written warning was deemed insufficient by the appellant in light of the penalty imposed by the FIC. The

¹⁶ The language used as it appears in paragraph 5 of the admission of guilt statement.

misconduct of not complying with the rules and procedures is a serious and dismissible offence. The appellant elected to give first respondent a final written warning – it elected not to dismiss the first respondent at that stage.¹⁷

[71] The first respondent was told that if she signs the admission of guilt together with the warning that would be the end of the matter, unless she committed the same offence during the 18 month period, but blissfully unbeknown to her, the appellant continued with the ‘investigation’ after the imposition of the penalty.

[72] To the surprise of the first respondent she received a suspension letter on 21 July 2016 and expressed the view: ‘. . . if you kill me once, you cannot come back to me and kill me twice again’.

[73] The Labour Court asked a rhetorical question in its judgment namely, if the FIC had not imposed a heavy penalty on the appellant, would the appellant have revisited the matter, and answered, that, in all probability they would not have, because the final warning was to remain hanging over the first respondent’s head for a period of 18 months. The Labour Court was also of the view that no new evidence or facts, which were not present when the first respondent was punished, emerged.

¹⁷ The disciplinary code of the appellant prescribes the sanction of a final written warning or for a dismissal for the misconduct of non-compliance with the rules and procedures.

[74] The motive to recharge the first respondent and dismiss her can be gleaned from the testimony of Ms Mada Opperman who testified on behalf of the appellant during the arbitration proceedings as follows:¹⁸

'But the right thing is also what would the FIC think if we did not do what we were supposed to do right now, *and that is to acknowledge and honour the fact the FIC considers this a very serious breach*, a very serious non-compliance and what should any reasonable person then do with this. If it is so serious and it pertains to financial crime, anti-money laundering that they regarded it so serious that they imposed a fine on us, should we keep on having the applicant or entertain this? Is that the message we want to send out to the world even that we condone this action and it is okay?'

(Emphasis provided)

[75] The appellant was obviously concerned about reputational damage. The appellant had already, in the words of Ms Opperman, 'condoned' the misconduct of the first respondent by the imposition of a final written warning.

[76] An option which the appellant had, if dissatisfied with the penalty, was to appeal to the Appeal Board,¹⁹ the heavy penalty of N\$7 million (if one has regard to the maximum penalty which may be imposed and the fact that the appellant itself reported the incident to the FIC).

[77] Would it in these circumstances be fair to the first respondent to haul her before a second disciplinary hearing and to dismiss her on the same set of facts

¹⁸ Page 235 of the appeal record.

¹⁹ In terms of the provisions of s 58 of FIA.

present when she received a final written warning? I am of the view that it was manifestly unfair to do so and to dismiss her.

[78] In my view, the Labour Court did not misdirect itself or err in upholding the appeal against the decision of the arbitrator.

Compensation

[79] Something needs to be said about the issue of compensation. The first respondent in her summary of dispute prayed to be compensated for the loss of 'salaries and benefits from the date of dismissal until date of reinstatement'.

[80] Although reinstatement was not expressly sought as a separate item, it is however clear that her summary of dispute was directed at achieving that and compensation until reinstatement. This was further clarified by her evidence where she stated: 'So my expectation is to be reinstated and to get my full remuneration from 1 December 2016 to date with my benefits'. The first respondent was dismissed with effect from 30 November 2016. The appellant did not take issue with this by for instance raising the failure on her part to mitigate her loss of income.

[81] During the arbitration proceedings the first respondent testified that her monthly salary was N\$24 000 plus a monthly pension contribution.

[82] The arbitrator having heard first respondent's testimony, for obvious reasons (she found that first respondent had been fairly dismissed) did not deal with the issue of compensation.

[83] The arbitrator's award was to the effect of dismissing her complaint of dismissal and confirming that her dismissal was procedurally and substantively fair.

[84] In the notice of appeal to the Labour Court, the first respondent also prayed for an order directing appellant to compensate her by paying her monthly remuneration that she would have received over the period she remained unfairly dismissed ie from 1 December 2016 until date of judgment and did not seek reinstatement. Judgment in the Labour Court was delivered on 4 April 2019. The Labour Court did not express itself on the issue of compensation.

[85] The Labour Court merely ordered that 'the appeal against the decision of the arbitrator dated 5 January 2018 succeeds'. This order is both incorrect and incomplete.

[86] Section 89(10) of the Labour Act, 11 of 2007 provides:

'If the award is set aside, the Labour Court may:

- (a) in the case of an appeal, determine the dispute in the manner it considers appropriate;
- (b) refer it back to the arbitrator or direct that a new arbitrator be designed; or

- (c) make any order it considers appropriate about the procedures to be followed to determine the dispute.’

[87] In this instance, the Labour Court, by finding that the appeal succeeded, was required to set aside the arbitrator’s award and in its discretion could make an order as contemplated by s 89(10). The order was incomplete by merely effectively setting aside the award (by upholding the appeal). Although reinstatement was originally sought in her referral of dispute and in her evidence, the first respondent on appeal to the Labour Court merely sought the confined order of compensation of her salary and benefits from 1 December 2016 to the date of the judgment of the Labour Court.

[88] The first respondent, even though represented, did not cross appeal the incomplete order of the Labour Court and the failure to grant the compensation order sought. Despite this, in dismissing this appeal, this court is empowered to amend or set aside and thus correct the order which is the subject of the appeal and make an order which the circumstances may require.²⁰ Although the appeal fails, it is incumbent upon this court to correct the incomplete order of the Labour Court and the issue of compensation along the lines sought on appeal which was appropriate in the circumstances, seeing that the first respondent no longer sought reinstatement.

[89] The first respondent’s legal practitioner was instructed by Legal Wise and did not seek a court order in respect of the costs of appeal in this court. The order of this court should reflect that.

²⁰ Section 19 of Act 15 of 1990.

[90] In the result the following order is made:

- (a) The appeal against the granting of the condonation application is struck from the roll.

- (b) The appeal is dismissed and paragraph 2 of the order of the Labour Court is corrected and substituted by the following:
 - ‘(i) The award of the arbitrator dated 5 January 2018 is set aside on the basis that the first respondent’s dismissal was substantially and procedurally unfair;
 - (ii) The appellant is ordered to compensate the first respondent by paying her monthly remuneration from 1 December 2016 to the date of the Labour Court judgment, namely 4 April 2019.
 - (iii) The compensation is to be paid to the first respondent on or before 31 December 2021.’

- (c) No costs order is made.

SMUTS JA

FRANK AJA

APPEARANCES

APPELLANT:

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