



THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable
Case No. PR87/20

In the matter between:

**SAFICON INDUSTRIAL EQUIPMENT
(PTY) LTD t/a TOYOTA FORKLIFT**

Applicant

and

SEASANI, N N.O.

First Respondent

**METAL AND ENGINEERING INDUSTRIES
BARGAINING COUNCIL**

Second Respondent

NUMSA obo S BOOI & 7 OTHERS

Third Respondent

Heard: 29 October 2025

Delivered: 14 November 2025

JUDGMENT

MAKHURA, J

- [1] Before this Court is an application to review and set aside the arbitration award issued by the first respondent commissioner.¹ The commissioner found that the dismissal of the eight third respondent employees was substantively unfair and ordered the applicant company to reinstate them and pay their backpay from the date of their dismissal. Although the application was brought against the whole of the award, the company and five of the eight employees have since concluded a settlement agreement. These five employees are no longer part of the application.
- [2] The application is opposed by three employees, viz, Mvuyisi Merele (Merele or Vince), Wandile Mchiza (Wandile or Mchiza) and Siyanda Sali (Sali), represented by their trade union, the National Union of Metalworkers of South Africa (NUMSA).
- [3] Central to the dispute between the parties and the charges against the employees is the assault against Thozamile Keli (Keli) on Friday, 22 June 2018, by Christopher Nqonqoza (Chris or Nqonqoza), Brian Mejenge (Majenge) and Sinetemba Booï (Booi), which occurred at the North End Lake (lake), after working hours. The commissioner found that Keli was assaulted but that there was no nexus between the assault and the company's operations.
- [4] The three employees before this Court did not carry out the assault. Their sin, according to the company, was their failure to disclose the assault to the company. The first charge against them was formulated as follows:
- 'Dishonesty – Failure to act in good faith and in the best interests of the company.'
- [5] The reason these three employees and two others were charged with dishonesty was articulated by the company's General Manager: Employee Relations, Arveen Ramdhani (Ramdhani) during his examination in chief as follows:

¹ Part of the transcript of the proceedings is not fully before this Court. However, the company was satisfied with the record and elected to proceed with the review application based on the record as it is.

MR CRAWFORD: In what way has the company alleged they were dishonest?

MR RAMDHANI: Well for the fact, for the mere fact that the other, the other five employees did not report to the company and they concocted their story together, they were dishonest in their testimony to the company when interviewed, and not one was forthcoming with the truth.'

[6] In addition, Merele and Mchiza were charged with failure to follow a valid and/or reasonable instruction for their alleged failure to provide the company with the code to unlock the company's cellphone allocated to them after verbal and written instructions to do so. The company alleged that the insubordination had *"serious operational implications"*.

[7] The crisp question before the commissioner was whether the company had authority to discipline the employees for the misconduct that occurred at a social gathering organised and attended by a group of its employees after working hours and away from the premises of the company. The commissioner found that the incident that occurred at this gathering had nothing to do with the business of the company. She found that:

'Focusing on the charge of dishonesty levelled against the remaining applicants, the evidence before me showed that Keli was indeed assaulted on the day in question. Evidence on who saw what and when was lengthy however, the incident occurred outside their working hours and during the applicant's time. Those who witnessed the incident might have failed to disclose same however, they were under no obligation to report the incident to the respondent.

As stated above, there was no link between the incident and the respondent's operations. There was also no evidence led showing a link between the incident in question and the respondent's vehicle that was at the lake.' (Emphasis added)

[8] Having found that there was no nexus between the assault and the company's operations, the commissioner proceeded to deal with the second charge against Mchiza and Merele. She found that:

'Dealing with the last charge against Chris, Wandile and Vince, the evidence showed that at no stage were the applicants advised as to why the respondent wanted access to their phones. All three applicants gave reasons on why they were unable to provide the respondent with pins to the cellphones.

The instruments in question belonged to the respondent and there was no policy in place prohibiting the applicants to use same for personal use. Which meant that they were entitled to store personal information on the cellphones.

The applicants argued that the instruction in question was unreasonable, as they did not know why the respondent wanted access to their cellphones and that there was personal information on same. The respondent on the other hand argued that there was no obligation on its part to advise the applicant on why it wanted pins to their cellphones, as it was conducting investigation on Keli's assault.

I do appreciate the respondent's argument on this issue however, even if the cellphones were its property, the privacy of the applicant should have been taken into consideration. Means should have been made to ensure that the applicants' privacy was protected, e.g allowing them to remove their personal information in the presence of the respondent's management.

I cannot help but conclude that the respondent was hasty in formulating this charge against Chris and Wandile.

Focusing on the instruction to Vince, the evidence showed that at no stage did he refuse to provide the respondent with a pin to unlock his phone. In fact, he attempted on a number of occasions in Mr Ramdhani's presence to unlock his phone, who subsequently confiscated the phone from him, stating that he was deliberately entering a wrong pin.

One needs to note that Vince was not charged with deliberately entering an incorrect password on his phone with the intention to block it but with failure to observe an instruction to unlock his phone.' (Emphasis added)

- [9] The company contends that the commissioner committed an error of law and reached an unreasonable conclusion by finding that there was no nexus between the assault on Keli and its business. In addition, the company contends that the findings that there was no impact on the employment relationship between the company and the employees on the one hand and between the victim (Keli) and the alleged perpetrators or intra-employees on the other, that there was no obligation to disclose the assault notwithstanding that the employees were questioned about the assault and were dishonest about it, and that reinstatement was an appropriate remedy were erroneous and unreasonable.
- [10] The review test is trite. This Court must determine whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach². It is a test that is outcome-focused and seeks to ensure that awards are not interfered with based on minor irregularities and/or errors.
- [11] As a general legal principle, employers have no authority to discipline their employees for misconduct committed outside working hours and away from the employer's premises. However, if the conduct contravened the rule regulating the conduct that is of relevance to the workplace, the employer would have the authority over the employee. The employer must establish that the conduct is indeed of relevance to or sufficiently connected to the workplace. The LAC had dealt with this issue in *Horn v Beesnaar NO & others*³ as follows:

[16] Item 7(a) of schedule 8 to the Labour Relations Act of 1995 (the LRA) provides a guideline for the treatment of misconduct “in, or of relevance to, the workplace”. In *Hoechst (Pty) Ltd v Chemical Workers Industrial*

² *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (Sidumo)* [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 110; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and others* (2008) 29 ILJ 964 (LAC); [2008] 3 BLLR 197 (LAC) at para 100; *Bestel v Astral Operations Ltd and others* [2010] ZALAC 19; [2011] 2 BLLR 129 (LAC) at para 18; *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others* (2014) 35 ILJ 943 (LAC); [2014] 1 BLLR 20 (LAC) at paras 16 - 21; *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA); [2013] 11 BLLR 1074 (SCA) at para 25; *Head of Department of Education v Mofokeng and Others* (2015) 36 ILJ 2802 (LAC); [2015] 1 BLLR 50 (LAC) at paras 31 – 33.

³ [2021] ZALAC 56; (2022) 43 ILJ 115 (LAC).

Union & another it was made clear that an employer is not necessarily precluded from disciplining an employee's misconduct which occurs away from the workplace, but that the decision to discipline is subject to a factual enquiry:

"This enquiry would include but would not be limited to the nature of the misconduct, the nature of the work performed by the employee, the employer's size, the nature and size of the employer's work-force, the position which the employer occupies in the market place and its profile therein, the nature of the work or services performed by the employer, the relationship between the employee and the victim, the impact of the misconduct on the work-force as a whole, as well as on the relationship between employer and employee and the capacity of the employee to perform his job. At the end of the enquiry what would have to be determined is if the employee's misconduct "had the effect of destroying, or of seriously damaging, the relationship of employer and employee between the parties".

[17] Such factual enquiry enables an employer to determine the relevance for a workplace of misconduct which occurred outside of that workplace, as contemplated in schedule 8. The conduct which is the subject of this appeal was of a serious nature. It occurred before work on a road outside the mine and involved employees of the second respondent, including the appellant who was employed on the management level. As such, it was clearly of relevance to the second respondent and had a direct impact on the employment relationship. The second respondent was therefore entitled to take disciplinary action against the appellant in such circumstances.'

[12] The principle enunciated above has been applied by the Industrial Court⁴ even before the current LRA. The same principle was adopted by this Court in *Edcon*

⁴ See for example *National Union of Mineworkers & others v East Rand Gold & Uranium Co Ltd* (1986) 7 ILJ 739 (IC), where the IC found that the company can discipline employees who assaulted a fellow employee on a company bus transporting them from work to their homes. The Court stated that although the assault had not occurred at their workplace, it occurred within the scope of their employment in the bus which was owned by the company and that the company owed a duty to all its employees to whom it provided the said transportation to ensure that they were conveyed to safety, peacefully and without molestation to their sleeping quarters; In *Van Zyl v Duvha Opencast Services (Edms) Bpk* (1988) 9 ILJ

*Ltd v Cantamessa & others*⁵ and by the LAC judgment in *Campbell Scientific Africa (Pty) Ltd v Simmers & others*⁶ (*Simmers*). Ultimately, the enquiry before the commissioner was whether there was a connection between the two incidents of assault against Keli and the company's business. If the connection is established, the next enquiry is to determine the impact the misconduct had on the operations of the company. If the impact is such that a continued employment relationship is impossible and/or that the trust relationship had broken down irretrievably, the employer would have succeeded in discharging its onus that the dismissal was substantively fair.

- [13] The company sought to establish the nexus between the assault with an incident that occurred on 21 June 2018 between Mchiza and Keli. On that day, Mchiza and Keli had an argument about the key to the storeroom. Mchiza's evidence was that he explained to Keli that he needed the key because he is sometimes called to report for work when he is on standby, which necessitates that he should collect his tools from the storeroom. For this reason, Mchiza wanted access to the storeroom. Keli was not willing to give him the key and told Mchiza to remove his tools from the storeroom. The company intervened. Keli said Mchiza was angry, and Mchiza disputed that he was angry. It is unclear how the issue was resolved, but there is no reference to Mchiza shouting or calling Keli any names during the incident.
- [14] Subsequently, Keli informed Chris about the incident, and Chris' response was that since he arrived at the company, he had taken other people's work. Keli's testimony was that he did not think that he was assaulted because of this incident.

905 (IC), the employee had assaulted his supervisor against whom he bore a grudge at work outside working hours and away from the employer's premises. The Court held that the assault was sufficiently related to the work environment or employment situation to justify the employer taking disciplinary action against the employee. Further, that the assault made a harmonious working relationship improbable.

⁵ [2020] ZALCJHB 273; (2020) 41 ILJ 195 (LC).

⁶ (2016) 37 ILJ 116 (LAC); [2016] 1 BLLR 1 (LAC).

[15] On Friday, 22 June 2018, the employees knocked off at 14h00. Keli was invited to attend a braai at the lake by Sinethemba Booi (Booi) and Brian Majenge (Brian or Majenge). The three travelled in Booi's vehicle. Chris followed them, driving a company vehicle. They went to a liquor store and bought two bottles of brandy. Whilst at the teller buying the alcohol, Siyanda Sali (Sali) arrived. They drove to the lake, where they met a certain individual who gave them two live chickens. Thereafter, they drove to Nandi's place to prepare the chickens. Nandi was one of the third respondent employees.

[16] After they prepared the chickens, they drove back to the lake. Keli travelled with Chris in the company vehicle back to the lake because Booi was going to pick up his wife. Sali followed them driving his vehicle. At the lake, they found Merele and Mchiza waiting for them. They prepared the fire. Merele cooked the chicken.

[17] Two incidents of assault took place. First, Chris slapped Keli. Keli explained the incident as follows:

MR KELI: Then Chris moved around the back of the other workers and then came in front of me and slapped me.

MR CRAWFORD: Did he say anything?

MR KELI: He said that I am an *impimpi* at work.

...

MR CRAWFORD: Did you tell anybody else about this?

MR KELI: I went to Vince and Wandile, Sinazo and Nandi.

MR CRAWFORD: And what did Nandi say?

MR KELI: Nandi said I must leave Chris because he had something to drink.

...

MR CRAWFORD: Did you ask him why he hit you?

MR KELI: I did ask but he did not respond.

MR CRAWFORD: Did Sinazo say anything?

MR KELI: She said I must leave him.

MR CRAWFORD: Okay, what happened next?

MR KELI: Okay, the conversation proceeded and nothing happened.' (Emphasis added)

[18] From the above, Keli's evidence is that after he was slapped by Chris, he asked him why he hit him, and Chris said he was an *impimpi*. Shortly thereafter, he was asked the same question and his answer was that Chris did not respond. After he was hit by Chris, Keli went to inform his other colleagues, including Merele and Mchiza.

[19] The second and main assault happened in the early evening, or after they had finished eating. It involved Chris, Majenge and Booi. The evidence, per the Global Positioning System (GPS) coordinates of the company vehicle that was driven by Chris, shows that the vehicle left the park at approximately 20h41, which was shortly after the incident. Keli was allegedly pushed by Chris when he wanted to get his bag from Chris' car. Keli testified as follows:

'Okay, after we had eaten, then there was conversation and then it was like sunset, the sun was setting.'

[20] He continued:

'And then I approached Chris and asked him to open his bakkie for me. He then pushed me in the face and said I must move away from him.'

[21] After he was pushed by Chris, Majenge then held him, he wrestled and freed himself from Majenge. After freeing himself, Chris told him that the bakkie was open on the other side. He opened the bakkie and took his jacket and bag. He put on his jacket and "*walked fast*" because he was "*scared*". As he was walking,

he saw Boozi and Majenge following him, “*coming very fast*” and he “*then ran*”. Boozi and Majenge then caught up with him, tripped him, and he fell. They started assaulting him. He screamed and asked them why they were assaulting him, to which they did not respond. He “*then got up and sat up ... looked around*” to see if there was “*anyone who could help me*”. He continued:

MR CRAWFORD: Did anybody help?

MR KELI: Nobody and at the time when I got up, I just saw everybody running to their vehicles.

MR CRAWFORD: All right, what happens next?

MR KELI: And as I was still in that position, then I noticed Vince coming to me in his bakkie.

...

MR KELI: He then opened the door of the bakkie and said I must get inside, these people are going to kill me.’

- [22] Keli was asked why he was assaulted. He was asked whether his version was that he was assaulted because of the incident that took place on Thursday, 21 June 2018. He answered in the negative. Asked what he thought the reason for his assault (the second assault) was, he said:

‘As I said they both alleged that I am an *impimpi* and I came to Toyota to take over other people’s jobs.’

- [23] In addition, he said he was assaulted because he did not join the union and that the employees were jealous of him because of his hard work and dedication, which gained him the nickname, *Sphithiphithi*.

- [24] Keli did not dispute that Mchiza and Sinazo were not members of the union. There is no link between his alleged nickname (*Sphithiphithi*) and the assault. As to the incident of 21 June 2018, Keli said that he did not think that was the

reason he was assaulted. Keli said Chris called him *impimpi*. His evidence was, however, contradictory because he was also asked if he had asked Chris why he assaulted, to which he said Chris did not respond. On the assault by Booi and Majenge, Keli's evidence was that he asked them why they were assaulting him, but they did not respond. Again, later on, he said they called him *impimpi*.

- [25] The issue is whether the two incidents of assault against Keli by Chris and later Majenge and Booi are relevant to and/or sufficiently linked to the business of the company. There was no reference to or any evidence presented by the company relating to any workplace where Keli had reported any incident against any of the employees, except what happened on 21 June 2018, which he testified that he did not think it was the cause for his assault. Even if Keli's version of *impimpi* is accepted, the mention or reference to him as *impimpi*, without more, does not create a sufficient nexus between the assault and the business of the company. On this basis, the award cannot be interfered with.
- [26] On the second assault, this happened after hours of indulging in alcohol. This started when Keli wanted his bag from Chris' car. Chris allegedly pushed Keli, and what followed was Majenge holding Keli, and later Keli running away. Keli's evidence was that he did not know why Booi and Majenge assaulted him but later said that they both said he was an *impimpi*. This marks the end of the enquiry into the nexus between the assault and the company's business.
- [27] The assault in this case happened at a gathering organised by the employees, which was attended voluntarily, after work, away from the premises and not on their way to or from work, travelling on a company vehicle. The gathering was not organised to further the company's business or activities. Some of the employees went home first before attending this social gathering. The assault was committed by other employees, not the employees before this Court. The company bore the onus that the assault and the consequent failure to disclose it were sufficiently linked to its business and led to a disharmonious working

relationship between the employees in this case, and Keli on the one hand and the employees and the company. No evidence of disharmony was presented.

- [28] Even if I am wrong and there was a sufficient nexus, particularly on the basis of Keli's own contradictory evidence that he was called an *impimpi*, there was no evidence that the employees before this Court witnessed the assault. On his own version during the arbitration proceedings, Keli went to inform the employees, at least Merele and Mchiza, of the assault after Chris slapped him. Keli's evidence was consistent with his evidence at the disciplinary hearing against Chris, which was summarised as follows:

'Mr Keli stated no one saw this as he was standing alone. He then went to Vince and asked him why Chris was slapping him. Vince told him to leave it. Mr Keli stated that he then went to Wandile.' (Emphasis added)

- [29] As to the second assault, Keli did not give evidence that Mchiza, Merele and Sali witnessed the assault. Keli's evidence was that he was not told the reason for the assault. He would later testify that he was called an *impimpi* by Majenge and Booi. This incident started with Chris pushing Keli after he (Keli) approached him to get his bag from Chris' car. Keli said that he ran away and was chased by Booi and Majenge who then caught up with him, tripped and assaulted him. During cross-examination, Keli did not seriously dispute that Mchiza remained in his car most of the time. It was put to Keli that Mchiza was drinking his own alcohol sitting in his car and that he was not sitting at the table with the other employees. Keli gave a somewhat confusing response. He said that he was "*not disputing that, because the liquor was on the table*" and they served themselves, that he "*was not watching*" but "*according to what I know he was at the table*" and "*Wandile was in his car but he was there*". Mchiza was not cross-examined on this aspect.

- [30] Sali had earlier left the lake with two other employees. They came back after the other employees had already finished eating. Merele, who was responsible for cooking, dished for Sali and the other employees upon their return to the lake.

After dishing, he went to the car where the other employees were making noise. He testified that Keli hit his car with a glass, turned around and ran. He saw Majenge running after him. He did not witness the assault. During his evidence at the disciplinary hearing against Booï, Keli testified that after he was assaulted, he stood *“up and look for help”* and *“Vince came with his bakkie and he got into the vehicle”*. The same evidence was led during Merele’s disciplinary hearing. There is a dispute whether Majenge and Booï brought Keli back to the car or whether Merele drove to the area where he was assaulted. What is not in dispute is that Merele was not at the scene of the assault. Further, it is common cause that Merele drove with Keli and dropped him off at Dan Qeqe stadium. Sali was not placed at any proximity by Keli to have witnessed the assault. Sali was last seen getting food from Merele. There was no further evidence against him.

- [31] The company’s failure to establish the nexus marks the end of the enquiry, and the employees cannot be found guilty of the first charge. The second enquiry, whether the conduct caused disharmony or impacted on the company’s operations, is irrelevant if the misconduct is not connected to the operations of the company. However, even if the nexus was established, the next enquiry is whether the employees witnessed the assault and failed to disclose it. In this case, the employees before the Court did not witness the assault. Even if they witnessed the assault, the next enquiry is whether their misconduct, that is, the failure to disclose the assault, created disharmony as argued by the company. The company failed to demonstrate the impact of the assault, and for present purpose, the employees’ failure to disclose the assault, on its operations.
- [32] The company sought to rely on Merele’s successful claim before the Small Claims Court for payment of damages to his car window against Keli to show the disharmony and breakdown of trust relationship. The company also said that Merele’s conduct established a nexus between the misconduct and its operations. It also relied on the interview Ramdhani had with Sinazo Ntondini (Sinazo).

[33] The suggestion that the conduct of Merele to serve the documents on Keli and demand payment after his successful claim constituted a further nexus between the misconduct (assault and failure to disclose it) is absurd. This argument has no merit and falls to be dismissed outright. That conduct occurred after the assault and after the dismissal of the employees. The company argued that this conduct created a disharmony which also made reinstatement impossible. The company led inadmissible hearsay evidence in relation to Merele's attendance to Keli's mother's house to serve the Small Claims Court documents. The direct evidence led by Keli relate to Merele's attendance at his residence. Merele attended Keli's residence, accompanied by members of the South African Police Service to serve the Small Claims Court papers. In October 2018, Merele's claim against Keli was successful. As of 27 February 2019, Keli had not paid Merele despite knowledge of the order. On 27 February 2019, Merele approached Keli at the Commission for Conciliation, Mediation and Arbitration (CCMA) to demand payment. He had in December 2018 demanded payment and Keli failed to pay. The company argued that Merele intimidated Keli when he approached him at the CCMA.

[34] Keli testified that Merele entered the CCMA hearing room "*angry and confronted*" him about when he would pay his money, and that Merele called him a "*dog*". Asked how he responded, Keli testified:

MR KELI: I then stood up, then saw the Commissioner coming out of the door, through the door. I then raised my hand.

MR CRAWFORD: Yes?

MR KELI: And I said to the Commissioner that he is coming to disturb me here ... He came to intimidate me.'

[35] The commissioner told Merele to leave the room. Keli said that he felt "*shocked*" and "*scared*" and that he was escorted by the security guard to the vehicle. Keli paid this debt in March 2019. Insofar as the company suggested that this created disharmony between Keli and Merele, and Merele should not be reinstated, the

incident was not connected to the company's operations. Regardless, Keli had confirmed that he had a good relationship with Merele. He described his relationship with Merele during cross-examination as "*good*" – he said they "*were on a good note*". On Keli's own evidence, I am not persuaded that there was any form of intimidation or any disharmony between him and Merele. Mchiza's cross-examination on his relationship with Keli confirmed a good relationship between the two:

MR CRAWFORD: Would it be fair to say that there was no love loss (sic) between you and Thoze [Keli]"

MR MCHIZA: Not at all, sir.'

[36] The company also argued that the assault created disharmony in that Sinazo was scared and tearful during her interview with Ramdhani that she said to Ramdhani that "*you do not know what these people are capable of*" and that the company decided to send her home to Mthatha as a result. Sinazo however disputed the claims by the company. She testified that she was not fearful nor scared. Sinazo was one of the employees who was at the lake, and she was also charged with dishonesty for failing to disclose the assault. The company's argument is that the employees' failure to disclose the assault had an impact on the workplace as evidenced by one of the charged and dismissed employee (Sinazo) who felt fearful and scared. Even if the company's evidence is accepted that Sinazo uttered those words, there is no evidence who "*these people*" are. Did she refer to those who carried out the assaults or those who allegedly witnessed the assault?

[37] For the above reasons, I find that the employees did not witness the assault and therefore could not disclose what they had not witnessed. Even if the employees witnessed the assault, the company failed to establish that the assault was connected to its business operations and that it created disharmony. Accordingly, the employees are not guilty of the charge of dishonesty. Ultimately, the commissioner's finding that the employees are not guilty is a reasonable one.

Their dismissal on this charge was therefore substantively unfair, and the commissioner's award of reinstatement should not be interfered with.

[38] Mchiza and Merele faced an additional charge. The company alleged that they failed to follow verbal and written valid and/or reasonable instructions in that they failed to provide the company with the code to unlock the company phone allocated to them. Per the charge sheet, the conduct allegedly had a "*serious operational implications*". Based on the commissioner's finding that the assault was not connected to the business of the company, this investigation was unwarranted and therefore, the charge should be dismissed because it is based on an incident that the company had no authority to investigate. However, if I am wrong, I address the substance of the charge and the commissioner's decision below.

[39] The written instruction was issued on 29 June 2018 by Ramdhani. His letter reads as follows:

'CELLPHONE ACCESS

As an employee of the company you are obliged to comply with and adhere to all prevailing company policies, rules and regulations.

In terms of clause 4.2 of the company's ICT policy, the company reserves the right to examine any data, including personal data held on EIE systems. The company issued cellphone remains the property of the company at all time and thus the company in its sole discretion may at any time access the data on such cellphones.

Accordingly, you are hereby instructed to immediately make available your password to access the company cellphone. Your failure to comply with this reasonably (sic) instruction may lead to a disciplinary enquiry against you.

You are required to comply with this instruction by no later than Monday, the 2nd of July 2018 at 10:00.'

[40] The ICT Acceptable Use Policy provides that:

‘4.1 All allocated usernames, passwords and e-mail addresses are for the exclusive use of the individual to whom they are allocated, the user is personally responsible and accountable for all activities carried out under their username. The password associated with a particular username must not be divulged to any person.

4.2 The Company reserves the right for appropriately authorised staff to examine any data including personal data held on EIE systems or, when operationally necessary, for example to give access to an account to a line manager or higher. Authorisation would need to be obtained from a General Manager or higher for access to an individual’s account. Certain ICT staff within EIE have been authorised to examine files, e-mails and data within individual accounts, but will only do so when operationally necessary.’

[41] The Business Conduct and Ethics Policy provides that:

‘3.4 The company respects and values the cultural diversity of its customers and employees. The company also respects its employees’ personal privacy, but it does expect them to be law-abiding and to conduct their personal affairs like good and responsible citizens, especially where any indiscreet or antisocial behaviour could affect the individual’s performance or reflect badly on the company.’

[42] Ramdhani testified on this charge. He said that the *“instructions were given first and foremost by their managers at the branch at Port Elizabeth, thereafter secondly be given by the general manager of the business”* before he issued the written instruction. He, however, did not know who specifically gave the instructions to the employees, and the branch managers and general manager did not give evidence relating to the terms of the instructions. In the absence of this evidence, the company’s case could only be based on the written instruction issued by Ramdhani.

[43] Ramdhani was asked why he issued the written instruction. His response was:

‘Okay, so we were seeking any information, any what is it, photographs, messages that occurred from 25 June onwards... For the purposes of this investigation.’

- [44] He also said that he was looking for “*any videos, WhatsApp messages, video clips relating to the incident*”. It would appear from Ramdhani’s evidence that this approach was motivated by the fact that during his interview with Sinazo, she showed him a video clip that was on her phone or tablet, which showed whoever she was travelling with in the car exiting the lake. There was no reasonable suspicion that the employees had information in their cellphones that could assist in the investigation. At least, this was not the company’s evidence. In fact, the company did not inform the employees why it wanted the code to unlock the phones. The company’s evidence through the letter and Ramdhani was that the cellphones were the company’s assets and therefore they could access them whenever they want. This, despite Ramdhani stating that the employees were allowed private use of the cellphones. To support the allegation that Mchiza and Merele were insubordinate, Ramdhani testified that:

‘... Also on Wandile there was confidential information and with Mr Merele, he actually tried to unlock the phone because the phone had a pattern... I came down on 29 June... so I came to Mr Merele, he was trying to unlock the phone by the pattern and he tried it a couple of times and eventually I felt that you know, he deliberately was trying to lock his phone, so I physically walked up and I took the phone from his hand... Then I issued them with official letters.

To date, to date these three company phones are sitting with us, it cannot be used and ja, we have no access to these phones whatsoever.’

- [45] The commissioner found that there was no policy prohibiting private use of the cellphones. Further, that the instruction was unreasonable as the employees were not informed of the purpose for accessing the cellphones. Third, that the company should have taken into account the employees’ privacy and allowed them to remove their personal information in the cellphones. Insofar as Merele is concerned, the commissioner found that he did not refuse the instruction. The

commissioner found the employees not guilty. These findings have been well substantiated that any interference in review proceedings is unwarranted. Further, the company did not lead to demonstrate how the alleged refusal to follow the instruction seriously impacted on its operations.

[46] Having considered the award, the evidence and the review grounds and the test for review, I am satisfied that the commissioner considered the principal issue and evaluated the evidence presented before her, provided reasons for her conclusions and that her ultimate decision that the dismissal of Mchiza, Merele and Sali was substantively unfair, on the totality of the evidence, meets the reasonableness threshold. Equally, her award of reinstatement passes the reasonableness threshold. For all the reasons above, the review application stands to be dismissed.

[47] This being a labour dispute, a party seeking costs must persuade the Court that the requirements of law and fairness dictate that costs be borne by a losing party. No case has been made for deviation from this trite legal principle.⁷ Accordingly, there shall be no costs order.

[48] In the premises, the following order is made:

Order

1. The late delivery of the review application is condoned.
2. The review application is dismissed with no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

⁷ See section 162 of the LRA; *Member of the Executive Council for Finance, KwaZulu-Natal & another v Dorkin NO & another* [2007] ZALAC 34; (2008) 29 ILJ 1707 (LAC); *Zungu v Premier of the Province of KwaZulu-Natal and Others* [2018] ZACC 1; (2018) 39 ILJ 523 (CC); *National Union of Mineworkers on behalf of Masha & others v Samancor Ltd (Eastern Chrome Mines) & others* (2021) 42 ILJ 1881 (CC).

Appearances:

For the Applicant: Mr. JD Crawford of Crawford & Associates

For the 3rd Respondent: Mr. I Lambrechts

Instructed by: Purdon & Munsamy Attorneys