

TOPIC

THE LAW RELATING TO DOUBLE JEOPARDY IN LABOUR LAW

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[REDACTED]

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I appreciate and acknowledge the sincere and continuous motivation by my mother Khaukanani Elisa Tshikovhi. I dedicate this work to my brothers Khumbudzo, Khavharendwe, Okhwathisa, Zwonaka and Uavhona and to all of my friends, relatives and colleagues who have been supporting me at all times.

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Rotondwa Happy Tshikovhi

Date

DEDICATION

I dedicate this piece of work to the lifelong inspirations by my late father Bishop Pandelani Alfred Tshikovhi who whilst alive, always encouraged me to focus on and pay attention to my studies. To my mother Khaukanani Elisa Tshikovhi and my brothers Khumbudzo, Khavharendwe, Okhwathisa, Zwonaka and Uavhona and to all my friends, relatives, colleagues and my supervisor. I would not have gone this far without your support.

DECLARATION

I, the undersigned declare that the dissertation hereby submitted to the University of Limpopo for the Masters of Laws has not been previously submitted by me or any other person to this university or any other university. This dissertation is my own work in design and execution and that all materials have been acknowledged.

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ABSTRACT

This research focuses on the application of the double jeopardy principle in labour law, section 188(1)(a (b) of the Labour Relations Act 66 of 1995, (herein the LRA) which provides that the dismissal is unfair if the employer fails to prove that the reason for the dismissal is fair and was effected in accordance with a fair procedure.

The first point which I would explain is the meaning of double jeopardy and whether it is applicable in labour law. The research articulates that the double jeopardy principle applies to labour law and enumerates ways it can be applied. The South African courts, in particular, the Labour Court and the Labour Appeal Court have delivered several judgements on the double jeopardy principle. These cases will be critically discussed in detail.

Comparison will be made with foreign labour law jurisprudence on the double jeopardy principle, particularly in Australia and the United States of America.

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CHAPTER 1

1.1 Introduction

The principle of double jeopardy or *ne is in idem* simply means that a person cannot be tried twice for the same offence.¹ This principle has long been adopted in both the civil practice and the criminal law and consequently, most labour law commentators² have argued that double jeopardy equally applies in labour law and this is because the courts have delivered judgements by applying and interpreting the double jeopardy principle in labour law. It is desirable, in the interest of justice, that cases are finalised.

Section 23³ of the Constitution provides that: “(1) Everyone has the right to fair labour practice”.

From this clause flows the rights entrenched in the Labour Relations Act⁴ (LRA) including, amongst others, the right not to be unfairly dismissed and the right not to be subjected to unfair labour practices.

The criminal law position is that an accused person cannot be tried twice for the same offence emanating from the same facts of the case which has been concluded and the accused person was acquitted. This principle is called *austrefois acquit*.⁵ The accused may also not be punished twice for the same offence after he/she has been convicted on the same facts, this is referred to as *austrefois convict*.⁶ The accused person may raise a defence or a plea that the matter has now been finalised.⁷

The South African civil courts have consistently applied and developed the principle of *res judicata*. This means that a party is not entitled to any relief from the same set of facts of a case previously finalised. The defendant may raise the special plea of *res judicata*.⁸

¹ Grogan J. *Workplace Law*, 10th edition, Juta, 2009, at page 237.

² Mischke C. *Contemporary Labour Law*, On second thought, Vol 19 No. 2 September 2009. See also Grogan J, *Workplace Law*, 10th edition, Juta, 2009, at page 237.

³ The Constitution of the Republic of South Africa Act 108 of 1996.

⁴ Act 66 of 1995.

⁵ Joubert JJ, *Criminal Procedure Handbook*, 8th edition, Juta 2007 at page 328. Du Toit, A Paizes, F De Jager and S Van Der Merwe, *Commentary on the Criminal Procedure Act*, Service 11, 1993, at page Juta.106.

⁶ Joubert et al. *Criminal Procedure Handbook*, 8th edition, Juta 2007 at page 327.

⁷ *S v Ngcobo* 1979 (3) SA 1358 (N).

⁸ Baxter L, *Administrative Law*, Juta, 1984, at page 537-9.

The labour law position on the application of double jeopardy is encompassed in the right to a fair hearing which, amongst others, includes the right to a fair and procedural hearing in terms of the LRA.⁹ The LRA also gives an express confirmation that the employer must prove that a dismissal was effected in accordance with a fair procedure.¹⁰ The Code of Good Practice: Dismissal¹¹ is also imperative in determining whether a dismissal was effected in accordance with a fair procedure.

The outcome of a disciplinary process may sometimes not come the way the employer anticipated. Usually, if the employer goes to the trouble of instituting a disciplinary hearing, there is an expectation that the employee shall be dismissed.¹² However, the chairperson of the disciplinary hearing may impose or recommend the sanction not expected or desired by the employer. More often than not, the employer would simply alter the sanction to a dismissal.¹³ This may be in contravention of the basic principle of double jeopardy since an employee may not be tried twice for the same misconduct. The question whether the employer should just change the sanction or appeal or review the decision will be dealt with later in detail in this dissertation.

The fact that an employee has been subjected to two disciplinary hearings has a bearing in the procedural fairness of the second hearing and if raised, the employee will most probably be reinstated in terms of the LRA¹⁴ unless the employer proves otherwise. This was confirmed by the Labour Court and the Labour Appeal Court in the case of *Volkswagen SA (Pty) Ltd v Brand NO & Others*¹⁵ and *Mzeku & others v Volkswagen SA (Pty) Ltd* respectively.¹⁶

⁹ Supra note 2.

¹⁰ Labour Relations Act 66 of 1995, section 188(1)(b).

¹¹ Schedule 8 of the Labour Relations Act 66 of 1995.

¹² Mischke C, *Contemporary Labour Law*, On second thoughts... at page 10, vol 19 No 2 September 2009.

¹³ *Greater Letaba Local Municipality v Mankgabe NO & others* [2008] 3 BLLR 229 (LC).

¹⁴ Labour Relations Act 66 of 1995, section 188(1)(b).

¹⁵ [2001] 5 BLLR 558 (LC).

¹⁶ [2001] 8 BLLR 856 (LAC).

In other circumstances, the appeal tribunal may also increase the sanction of the initial hearing and this may be challenged by the employee on the ground that the appeal tribunal is not empowered to do so and thus the hearing was procedurally unfair. In *Rennies Distribution Services (Pty) Ltd v Biermen NO & Others*,¹⁷ the Labour Court gave exceptions to the rule that sanction may not be increased on appeal. In this case, the employee was charged for unauthorised absence for three days and gross insolence by altering the shift system. The chairperson of the disciplinary hearing found the employee guilty and imposed a sanction of a final written warning valid for twelve months. The employee appealed and the chairperson of the appeal changed the sanction to dismissal. At arbitration, the commissioner found that the dismissal was substantively unfair but procedurally fair and ordered compensation for an amount of amount R76 717-12. On review, the Labour Court held

“firstly, except where express provision is made for such a power, a chairperson on appeal does not have the necessary power to consider imposing a harsher sanction. It would, in my view, be unfair to allow a chairperson in an appeal hearing to simply increase a disciplinary sanction.” This approach is different from criminal and civil law where the appeal court may increase the sentence or *quantum* respectively.

1.2 Research problem

The first part of the research is to determine whether the double jeopardy principle applies to labour law. The research examines the sources of the double jeopardy principle, taking into account that this principle is actually foreign in South African labour law¹⁸ since even decided cases are very recent. The most celebrated case which dealt with the application of the double jeopardy principle was decided by the Labour Appeal Court in 2000.¹⁹ The research is also informed by many instances where the employer and the

¹⁷ [2009] BLLR 685 (LC).

¹⁸ Mischke C, *Contemporary Labour Law*, On second thoughts... at page 10, vol 19 No 2, September 2009.

¹⁹ *BMW SA (Pty) Ltd v Van der Walt* (2000) 21 ILJ 113 (LAC).

employee litigate on whether a hearing was conducted in a fair manner, particularly where the employee was subjected to two disciplinary hearings or when the employer has changed the sanction imposed by the chairperson of the disciplinary hearing.

1.3 Methodology

The methodology used to establish the root cause and the possible solutions is based on a review of legal literature such as books, articles and case law. Other important sources utilised are legislation and international legal instruments. A comparative analysis will be made on the legal position of double jeopardy principle in Australia and the United States of America.

1.4 Literature review

There are a number of recent literatures on the application of the double jeopardy principle in labour law. The case of *Bramford v Metrorail Services (Durban) & another*²⁰ demonstrate the evolution of labour law position with regard to the double jeopardy principle. In this case, the appellant employee who had long service was charged and subsequently dismissed for making eight fraudulent petty cash claims totalling R834-00 for tea, sugar and other items. The appellant employee also forged a signature of his manager. Following a meeting with his line manager regarding the allegations, the line manager gave the employee a dressing down and issued a formal warning. The Regional management conducted a formal audit. After the audit, the employee was subjected to a disciplinary hearing and was later dismissed. The Labour Appeal Court *per* Jafta AJA with Nicholson JA concurring held that the current legal position as pronounced in the *Van der Walt's case*²¹ is that a second inquiry would be justified if it would be fair to constitute it.²² The court upheld the decision of the court *a quo* and dismissed the appeal with

²⁰ (2003) 24 ILJ 2269 (LAC).

²¹ *BMW SA (Pty) Ltd v Van der Walt* (2000) 21 ILJ 113 (LAC).

²² *Supra* note 19 at paragraph 15.

costs. The Labour Appeal Court went further to hold that fairness is the yardstick in labour matters.

In the case of *Ntshangase v MEC for Finance, Kwazulu Natal*,²³ the appellant was charged with twelve counts of misconduct for, amongst others, unauthorized purchasing of goods exceeding R500 00-00. The chairperson found the appellant guilty and determined a sanction of a final written warning. The second respondent brought an application to the Labour Court to review the sanction of the chairperson but the application was dismissed. The Labour Appeal Court set aside the Labour Court's ruling and set aside the sanction imposed by the chairperson of the disciplinary hearing. The Supreme Court of Appeal held that "the decision by Dorkin, who was the chairperson of the disciplinary hearing, amounts to administrative action." The court should have applied *Branford's* case in this regard as well as *Chirwa* since it would have been fair to constitute a second disciplinary hearing considering the charges and the sanction issued by the chairperson. There cannot be a reasonable and fair comparison between the facts and the sanction. The sanction issued by Dorking, is in my view unreasonable, given the facts and circumstances of that matter.

In *Chirwa v Transnet Ltd & others*,²⁴ the applicant (employee) was dismissed for inadequate performance following a hearing. The applicant referred a dispute to the Commission for Conciliation, Mediation and Arbitration for conciliation. After conciliation had failed, the applicant approached the High Court on the basis that her dismissal violated her rights to administrative action in terms of the Constitution²⁵ and the Promotion of Administrative Justice Act.²⁶ The High Court ordered reinstatement. The respondent (the appellant in the Supreme Court of Appeal) appealed to the Supreme Court of Appeal and the court held that the applicant's (respondent in the Supreme

²³ (2009) 30 ILJ 2653 (SCA) paragraph 17E.

²⁴ (2008) 29 ILJ 73 (CC).

²⁵ Constitution of the Republic of South Africa Act 108 of 1996.

²⁶ Act 3 of 2000.

Court of Appeal) reliance on the Promotion of Administrative Justice Act was misplaced and the dismissal was not administrative action.

The Constitutional Court *per* Skweyiya J for the majority held on paragraph 72 that:

“My finding that the High Court does not have concurrent jurisdiction with the Labour Court on this matter makes it unnecessary that I should arrive at a firm decision on the question whether the dismissal of Ms Chirwa by Transnet constitute administrative action. If, however I had been called upon to answer that question, I would have come to the same conclusion namely, that the conduct by Transnet did not constitute administration action under the 33 of the Constitution for the reason that has advances in his judgement.” Even if an employer constitutes a second hearing on the basis of the same facts, such conduct will not be an administrative action subject to review.²⁷ However, fairness will dictate whether it is fair to institute a second hearing.²⁸

The crucial question on whether the employer’s decision to increase the sanction was fair or not was considered in the most celebrated case of *Greater Letaba Local Municipality v Mankgabe NO & others*.²⁹ The employer instituted disciplinary proceedings against the employee after the later had been involved in an accident whilst driving the employer’s motor vehicle without the necessary authorisation, which vehicle was later written off. The employee was found guilty and the chairperson imposed a sanction of a final written warning and ten days suspension without pay. The Executive Committee of the employer approved the findings but dismissed the employee. The commissioner ruled that the dismissal was unfair and reinstated the employee. On review, the Labour Court *per* Rampai AJ held that there are two reasons why the employer’s sanction was procedurally unfair since the employee was not afforded an opportunity before the sanction

²⁷ (2008) 29 ILJ 73 (CC) paragraph 72.

²⁸ *BMW SA (Pty) Ltd v Van der Walt* (2000) 21 ILJ 113 (LAC).

²⁹ [2008] 3 BLLR 229 (LC).

was changed. The court further held that the dismissal was substantively fair but procedurally unfair and ordered two months compensation.

The principle of *audi alteram partem* rule should have been followed by the Executive Committee and the employee should have been given an opportunity to give reasons why the sanction should not be changed. The other important aspect of this case is that it establishes that substantive fairness outweighs procedural fairness.³⁰ This means that an employee whose dismissal has been procedurally unfair shall not be reinstated but compensation shall suffice.³¹ The fact that the sanction was effected without the employee's input contravenes section 188(1)(b) of the LRA which provides that the employer must prove that the employee's dismissal was effected in accordance with a fair procedure.³² It is grossly unfair to have the chairperson of a disciplinary hearing pronouncing the sanction after listening to the employer and employee's mitigation factors and willy-nilly changed the sanction without the employee given the opportunity to be heard.

1.5 Significance of the research

The significance of the research is to examine whether the double jeopardy principle applies in labour law or not and it also discusses how it applies. The principle of double jeopardy is contributing to the development of labour law. It assists in ensuring that cases that have been finalised are not re-opened. But the application of the principle in civil cases is different from criminal law.

This research will benefit labour law practitioners including employers, employees, organised labour, attorneys, presiding officers etc, as it shows that double jeopardy applies in labour law and how it does so. The impact of this research will also be to reduce disputes and litigation. The employer and employees will reduce the amount of time and costs which they spend in litigation. The court roll will not be congested due to solutions in this research.

³⁰ [2008] 3 BLLR 229 (LC) at page 238 paragraph 43.

³¹ [2008] 3 BLLR 229 (LC) at page 239 paragraph 46.

³² *BMW SA (Pty) Ltd v Van der Walt* (2000) 21 ILJ 113 (LAC).

The impact of international law, criminal law, civil law and laws of other states will be assessed and discussed in order to offer possible solutions to the application of double jeopardy in labour law.

CHAPTER 2
THE PRINCIPLE OF *RES JUDICATA* IN CRIMINAL LAW, CIVIL LAW
AND INTERNATIONAL LAW

2.1 Origin

The basic principle of *res judicata* originates from the common law and later codified in the Constitution.³³ Section 35(3)(m) of the Constitution provides that every accused person has the right to a fair trial which includes the right not to be tried twice for an offence in respect of an act or omission for which that person has previously been acquitted or convicted. The rationale is to ensure that cases are finalised and that those cases which are closed should not be re-visited except on recognised circumstances such as when there has been an error by both parties, when the matter was struck off the court roll or when the chairperson of the hearing did not apply his mind to the facts or was induced by corruption.³⁴

2.2 Criminal law

The criminal law position is that an accused person may plead criminal conviction or acquittal.³⁵ This is commonly known as *austrefois convict* and *autrefois acquit* respectively. The accused has to prove that there has been a prior conviction or acquittal on the same offence by a competent court. In order to ascertain whether the offence is the same as that which the accused has previously been convicted or acquitted on, the court will pay attention and evaluate the elements of the offence based on the evidence presented by the accused and the prosecution. The *austrefois convict* can only be pleaded after the accused has already been sentenced in the first trial.³⁶

The accused person who raises a plea of *austrefois acquit* must prove that he has been acquitted of the same offence with which he is now charged by the competent court on the merits. In the case of *R v Lamprecht*,³⁷ the accused was charged of theft and was acquitted. The accused was subsequently charged of fraud and then raised a plea of *austrefois acquit*. The court held

³³ Constitution of the Republic of South Africa Act 108 of 1996.

³⁴ *MEC for Finance, Kwazulu Natal & another* [2008] 6 BLLR 540 (LAC).

³⁵ Du Toit et al *Commentary on the Criminal Procedure Act*, Service 11 1993, Juta.

³⁶ *S v Louw* 1964 (4) SA 120 (O).

³⁷ 1958 (2) SA (C).

that an accused must present evidence and prove that he has been acquitted or convicted on the same charge which he has now been charged with. The court dismissed the plea. The rationale is that there must be a substantial identity of the subject-matter between the present charges and the charges which resulted in the acquittal of the accused. The technical irregularity on the procedure shall definitely not suffice.³⁸ The court must have considered the facts and the merits.

A court should deal with the pleas of *res judicata* before evidence on the merits is led³⁹ but the court which has rejected a plea of *res judicata* may at a later stage, during the trial, take the matter into reconsideration if it appears from the evidence that the earlier rejection of plea was justified.⁴⁰

Section 106(4)⁴¹ provides that an accused who has pleaded not guilty to a charge is entitled to demand that he be acquitted. This may happen, for instance, if the accused has pleaded but there have been several postponements and the court refuses a further postponement. The accused may be acquitted on the merits by the court.

The President of the Republic of South Africa has the power to pardon a person who has been convicted of a criminal offence.⁴² But this power is discretionary. The accused may raise a plea of Presidential pardon. In simple terms, a person cannot stand trial on the same facts on which the President has exercised discretion.⁴³

In *S v McCarthy*,⁴⁴ the Government of the United States of America sought extradition of the appellant from South Africa to stand Trial on indictment, of amongst others, conspiracy to commit murder. The appellant was subjected

³⁸ Joubert et al *Criminal Procedure Handbook*, 8th edition, Juta 2007.

³⁹ *S v Ncobo* 1979(3) SA 1358 (C), Du Toit et al *Commentary on the Criminal Procedure Act*, Service 11 1993, Juta.

⁴⁰ *R v Lamprecht* supra note 37.

⁴¹ Section 106(4) of the Criminal Procedure Act 51 of 1977.

⁴² Section 84(1) of the Constitution of the Republic of South Africa Act 108 of 1996.

⁴³ Joubert et al *Criminal Procedure Handbook*, 8th edition, Juta 2007, at page 241-242.

⁴⁴ 1995 (3) SA 731.

to an enquiry in the Magistrate's court aimed at the extradition. The first enquiry discharged the appellant. In the second hearing, the appellant raised earlier discharge of *res judicata* which was however dismissed by the magistrate's court. On review, the Witwatersrand Local Division dismissed the review. The appellant successfully petitioned the Chief Justice of the Appellate Division. The majority held that:

“In criminal matters the *lis* between the State and the accused is whether or not he is guilty of the crime which he is charged with or not. Hence in a subsequent trial concerning the same charge the accused cannot successfully rely upon a *res judicata* unless at the first trial he was declared not guilty of the crime in question. The discharge of the appellant at the first proceedings was not a judgement on merits.”⁴⁵

Even if the court errs in law in acquitting the accused person, the acquittal is on the merits and therefore, the accused may raise a plea of previous acquittal.⁴⁶ The question may be what happens if the accused does not raise a plea of *austrefois acquit* or *austrefois convict*? The most probable answer will be that the accused may be deemed to have waived his or her right to do so.⁴⁷

As a general rule, the following considerations are also imperative in applying the *austrefois acquit* or *austrefois convict*:

- The serious consequences of the conviction;
- The trials are by their very nature stressful to all the parties concerned;
- The fact that Prosecution has in the past and in the future been used as an instrument of tyranny;
- The fact that the powers and resources of the State as the Prosecutor are much greater than those of any individual.⁴⁸

⁴⁵ S v McCarthy at page 749E-F.

⁴⁶ Joubert et al *Criminal Procedure Handbook*, 8th edition, Juta 2007.

⁴⁷ Du Toit, et al. *Commentary on the Criminal Procedure Act*, Service 11 1993, Juta.

⁴⁸ Joubert et al *Criminal Procedure Handbook*, 8th edition, Juta 2007.

⁴⁸ Du Toit, et al *Commentary on the Criminal Procedure Act*, Service 11 1993, Juta.

2.3 Civil law

In trial or any proceedings, that there must be an end to litigation.⁴⁹ Proceedings can be stayed if it can be shown that the issue in dispute between the parties has already been adjudicated.⁵⁰ The usual way is that the defendant may by way of special plea raise a plea of *res judicata* to a claim that the matter has been finalised. This plea is basically that the court does not have jurisdiction and the matter may be heard on the merits after the special plea has been adjudicated. A party who pleads *res judicata* must show the following:

- That there has already been a prior judgment;
- The parties to the dispute were the same;
- The relief claimed is the same as the previous one in material respect;
- Issue(s) in dispute are the same.⁵¹

It is however not a requirement that the issue must have been determined by the civil court.⁵² Where the plaintiff was in default at trial and a default judgment was granted in favour of the defendant, such judgment cannot support a plea of *res judicata*⁵³ in terms of the Magistrate's Court Rules.⁵⁴ Where the Magistrates' court lacks territorial jurisdiction but otherwise has jurisdiction to grant default judgment, its judgment is not ineffectual to bar the raising of a special plea of *res judicata* in another Magistrate's Court.⁵⁵ In the case of *Jacobson v Havinga t/a Havingas*,⁵⁶ the plaintiff instituted action in the

⁴⁹ *Boshof v Union government* 1932 TPD 342 at page 350, *Evins v Shield Insurance Co Ltd* (1980) 2 SA 814 (A).

⁵⁰ *African Farms and Townships Ltd v Cape Town Municipality* 1963(2) SA 555 (A) at page 564C-E; *S v Ndou* 1979 (1) SA 668 (A) p 675; *Man Truck & Bus (SA) (Pty) Ltd v Dusbus Leasing* CC 2004 (1) SA (W) p 466D-467H; *Holtzhausen v Gore NO* 2002 (2) SA 141 (C) at page 148- 150.

⁵¹ *Herbstain & Van Winsent, The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa*, 5th edition, Juta, 2009.

⁵² *Horowitz v Brock* 1988 2 SA (A) at page 178 h.

⁵³ Rule 32(1) and (3).

⁵⁴ Rule 19.

⁵⁵ 2000 (2) SA 177 (T) at page 180.

⁵⁶ 2000(2) SA 177 (T) at page 179H.

court which did not have territorial jurisdiction and default judgement was granted. The court held that the default judgement granted was binding.

In *Bertram v Wood*⁵⁷ the court held that:

“The meaning of the rule is that the authority of *res judicata* induces a presumption that the judgement upon any claim submitted to a competent court is correct, and this presumption being *juris et de jure*, excluded every proof to the contrary. The presumption is founded on the public policy which requires that litigation should not be endless and upon the requirements of good faith which, as said... does not permit the same thing to be demanded more than once.”

In the case of *Bafokeng Tribe v Impala Platinum Ltd*⁵⁸ Friedman JP held as follows:

“from the foregoing analysis, I find that the essentials of threefold, the *exceptio res judicata* are threefold, namely that the previous judgement was given in an action or application by a competent court (1) between the same parties,(2) based on the same cause of action..,(3) with respect to the same subject-matter or thing. Requirement 2 and 3 are not immutable requirements of *res judicata*...conversely, in order to ensure overall fairness, (2) or (3) above may be relaxed. A court must have regard to the object of *exceptio res judicata* that it was introduced with the endeavour of putting a limit to needless litigation and in order to prevent the recapitulation of the same thing in dispute in diverse action, with the concomitant deleterious effect of conflicting and contradictory decisions.”⁵⁹

⁵⁷ 10 SC 177 at page 180.

⁵⁸ 1999 (3) SA 517 (B), *See also Man Trucks & Bus (SA) (Pty) Ltd v Dusbus Leasing CC* 2004 (1) 454 (W) and *Kommissaris van Binnelandse Inkomste v Absa Bank Bpk* 1995 (1) SA 653 (SCA).

⁵⁹ *Supra* note 58 at page 566F.

The onus is on the party raising *res judicata* to prove it even though the record of the previous action should be available.⁶⁰ However, reasons may be advanced as to the non-availability of the record which may be by way of affidavit.⁶¹ It is worth mentioning that a plea of *res judicata* must be expressly and specifically raised by a party within the prescribed *dies induciae* to file a plea or together with a plea.⁶² This will put the other party on notice. This is because action proceedings are based on pleadings, a party who fails to raise a special plea before filing a plea may not raise it unless the other party has consented to the amendment being made or with leave of the court.⁶³

It is also imperative to note that a judgement in criminal proceedings cannot bar a subsequent civil trial.⁶⁴ Neither proof of civil judgement for ejection constitutes evidence that the accused committed trespass or is a trespasser.⁶⁵ However, the record of the criminal trial of sexual offences was held to constitute *prima facie* evidence of the defendant's adultery in a subsequent divorce case.⁶⁶ In the case of *Christie v Christie*, the plaintiff alleged in the criminal trial that the defendant was committing adultery and further instituted divorce proceedings. The plaintiff relied on the record of the criminal trial to prove adultery and that the marriage relationship has broken down irretrievably. The court held that the records of the criminal trial only constitute *prima facie* case and the plaintiff must still prove that the marriage has broken down.

2.4 International Law

⁶⁰ *Jones & Buckle The Civil Practice of the Magistrates' Court in South Africa*, 9th edition, service 15 2005, Volume 2. *Lowry v Steedman* 1914 AD 532.

⁶¹ *Jones & Buckle The Civil Practice of the Magistrates' Court in South Africa*, 9th edition, Volume 2.

⁶² Rule 19(1) of the Magistrates' Court Rules.

⁶³ *Jones & Buckle, The Civil Practice of the Magistrates' Court in South Africa*, 9th edition, Volume 2. *Robinson v Randfontein Estates Gold Mining Co Ltd* 1925 AD 173 p 198. *Paarlberg Motors (Pty) Ltd t/a Paarlberg BMW v Henning* 2000 (1) SA 981 (C) p 987.

⁶⁴ *Cilliers, Loots & Nel The Civil Practice of the High Court and the Supreme Court of Appeal of South Africa*, Volume I, Juta, 2001, p 609-612.

⁶⁵ *Hornby v Municipal Council of Roodepoort-Maraisburg* 1917 WLD 54; *Ganca v Gagela* 24 SALJ 41; *R v Lechudi* 1945 AD 796.

⁶⁶ *Christie v Christie* 1922 WLD 109; *Dickson v Dickson* 1934 NPD 97.

The *ne bis in idem* or double jeopardy is reflected in major human rights treaties⁶⁷ as Protection of Human Rights and it is an expression of the broader principle of finality of cases.⁶⁸ The establishment of international criminal jurisdiction adds another dimension to the *ne bis in idem*.⁶⁹ The general relationship between the State and the International Criminal Court Statutes provide that no one may be tried for the same conduct after he has been prosecuted at the Tribunal. Article 20 of the International Criminal Court bars the ICC to proceed with the trial on the same facts. A conviction or acquittal by the ICC precludes the person to be tried by the national court or another international court for the crime that was the subject of the conviction or acquittal.⁷⁰

CHAPTER 3

DOUBLE JEOPARDY IN EMPLOYMENT LAW

3.1 Meaning

⁶⁷ Article 14 of the ICCPR and Articles 4 Protocol 7 to the ECHR.

⁶⁸ *Robert Cryer Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2007.

⁶⁹ *Supra* note 68 at page 68.

⁷⁰ *Supra* note 68 at page 67-69.

In the context of employment law, an employee who has been found guilty or acquitted at the disciplinary hearing or if the chairperson of the disciplinary hearing has imposed a sanction less severe than a dismissal, generally they cannot be subjected to a second hearing in respect of the same misconduct.⁷¹ The basic point of departure is that subjecting an employee to more than one disciplinary process on the same charges and relating to the same events would be a contravention of the double jeopardy rule.⁷² Management may not just ignore the decision of the chairperson of a properly constituted hearing and substitute such decision with its own.⁷³

Section 188 of the LRA provides that:

(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove:

“(a) that the reason for dismissal is a fair reason-

(i) related to the employee’s conduct or capacity; or

(ii) based on the employer’s operational requirements; and

(b) That the dismissal was effected in accordance with a fair procedure.

(2) Any person considering whether or not the reason for dismissal is for a reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice in terms of this Act.”

2. Does double jeopardy apply in labour law?

It is imperative to examine whether the principle of *res judicata* applies to employment law. The principle of double jeopardy applies to employment law.

⁷¹ Mischke C, *Contemporary Labour Law*, On second thought, Vol 19 No. 2 September 2009, at page 11.

⁷² Du Toit et al *Commentary on the Criminal Procedure Act*, Service 11 1993, Juta.

⁷³ Grogan J *Workplace Law*, 9th edition, Juta, 2008, at page 200.

In *Johnson v CCMA & others*,⁷⁴ the court held in paragraph 11 that a matter regarding the same parties and the same thing and the same cause of action of which a final arbitration award on the merits exist is *res judicata*. In the case of *City of Johannesburg Metropolitan & another v SAMWU & others*,⁷⁵ the applicant informed the first respondent that intended to implement revised shift system with effect from November 2010. On 22 November 2010, the first respondent (SAMWU) referred a dispute to the bargaining council. On the same date, the Labour Court granted an interim interdict against the first respondent from embarking on strike action which was confirmed on 10 December 2010.

On 7 January 2011, the first respondent referred another dispute to the bargaining council claiming, amongst others, that the shift system before 6 December 2010 be reinstated. On 14 January 2011, the second applicant invited the first respondent to pre-conciliation which did not bear fruits. During conciliation, the second applicant raised a point *in limine* that the bargaining council does not have jurisdiction since the referral is premature and invalid and the commissioner upheld the point *in limine*.

In the referred proceedings, the applicants contended, amongst others, that there is no dispute between the parties and that the court had already ruled that the dispute between the parties was dispute of right and not interest. The Labour Court held that Steenkamp J did not decide, nor was he required to decide whether the union's members were entitled to demand the reinstatement of the old shift system but was called only to decide whether the changes in the shift system constituted a unilateral change to terms and conditions of employment for purposes of section 64(4) of the LRA. The court went further and held that for the purposes of the present application, it is immaterial whether the changes introduced by the second applicant amounted to changes in terms and conditions of employment. This principle

⁷⁴ (2005) 26 ILJ 1332 (LC) on page 1336.

⁷⁵ *City of Johannesburg Metropolitan & another v SAMWU & others* (2011) 32 ILJ 1909 (LC) paragraph 16.

may interchangeably be referred to as *res judicata*. The court dismissed the application with costs.

However, there are other exceptional circumstances to the rule. Since the double jeopardy principle applies in employment law, the question now becomes what happens if the chairperson of the disciplinary hearing was biased against the employer or was unduly influenced? Should the employer accept the findings? The employee may be subjected to a second hearing if new evidence is discovered after the conclusion of the first hearing. In the case of *Branford v Metrorail Services (Durban) & others*,⁷⁶ the Labour Appeal Court held that whether or not a second hearing may be opened, depend upon whether it is, in all the circumstances, fair to do so. The *Branford* case confirms that the proper test in case of alleged breach of the double jeopardy rule is fairness. The *Branford* case further suggests that the court will be sympathetic with the employer where:

- “a) The presiding officer in the first hearing acted *mala fide* or without proper consideration of the facts;
- a) The presiding officer had no power to make a final decision but only made a recommendation;⁷⁷
- b) The first hearing was conducted in accordance with the employer’s disciplinary code.⁷⁸ The fact that the employer did not comply with its disciplinary code does not necessarily mean that such conduct is procedurally unfair. See *Highveld District Council v CCMA & others*;⁷⁹
- c) Whether and in what circumstances new relevant evidence came to light after the first hearing;⁸⁰
- d) The employer is acting in good faith when it decided to hold the second hearing;
- e) The time period between the first hearing and the second hearing etc.”

⁷⁶ (2003) 24 ILJ 2269 (LAC).

⁷⁷ *Wium v Zondi & Others* [2002] 11 BLLR 1117 (LC).

⁷⁸ *Frost v Telkom SA* (2001) 22 ILJ 1253 (CCMA).

⁷⁹ (2003) 24 ILJ 517 (LAC) at paragraph 15.

⁸⁰ *BMW SA (Pty) Ltd v Van der Walt* (2000) 21 ILJ 113 (LAC).

In *Dumisani & another v Mintroad Sawmills (Pty) Ltd*,⁸¹ the appellants who were two of the applicants in the court *a quo* brought an urgent application for an interdict against the respondent employer alleging that the employer had failed to make available certain information to them. The application was dismissed. The applicants challenged the fairness of their dismissal in the Labour Court. The trial Judge upheld a plea of *res judicata* by the respondent and held that “no issues or evidence has emerged in this matter which was not fully canvassed in the earlier application proceedings between the parties”.

The appellants with leave of the court *a quo* appealed against the judgement of the latter court. The unanimous Labour Appeal Court dismissed the appeal and held on paragraph 8 that “it does not, in my view, matter that the thing demanded in the first application was an interdict preventing the respondent from proceeding with the retrenchment without having complied with the provisions of s198 (3), and in the second application, was a declaration that the retrenchees had been unfairly dismissed and were to be reinstated. In each case the essential facts in dispute were the same and the same principles of law were applicable. The judgement in *Kommissaris van Binnelandese Inkomste v ABSA Bank Bpk 1995 (1) SA 653 (A)* has now made it clear that the doctrine of estoppel, as it has been applied in our law, has led to a new appreciation of the traditional *res judicata* doctrine.

The Court remarked in paragraph 6c that it is against public policy that a litigant should, on the same grounds, be able to keep demanding the same relief from the same adversary.

In *Naude v MEC for the Department of Health & Social Services, Mpumalanga Province*,⁸² the court held in paragraphs 10-11 that “Both parties have correctly submitted that the principles of the doctrine of issue *estoppel* or *res judicata* are applicable to labour law disputes. There are however, exceptions to the applicability of the principle enshrined in the *res judicata*

⁸¹ (2000) 21 ILJ 125 (LAC) at page 129.

⁸² [2008] 4 BLLR 312 (LC).

rule. One such exception which Mr Lagrange (the respondent's representative) referred me to is one pertaining to the absence of jurisdiction to determine a dispute by a forum a quo which has the effect of rendering its decision a nullity."

National Union of Mineworkers v Elandsafontein Colliery (Pty) Ltd,⁸³ the applicant filed an urgent application in the Labour Court seeking amongst others to restrain the respondent from retrenching its members and reinstating the employees who had been retrenched. The Labour Court dismissed the application with costs. The applicant then referred a dispute to the CCMA in terms of s 191(1)(b) and the matter remained unresolved at conciliation. Consequent thereto, the applicant challenged the substantive and procedural fairness of the dismissals in the Labour Court and the respondent raised a point *in limine* of *res judicata*. The court held:

"These observations related to different circumstances. But the points made are also opposite to situations where, as in *casu*, a union seeks first to interdict a retrenchment and then, having failed, returns to this court via s 191(5)(b)(ii).....It would be invidious if an employer, armed with a judgement that states that it complies with applicable provisions of the Act, was subsequently told that it had not complied with the Act, and was ordered to reinstate or compensate the dismissed employees..... .To allow it to return to this court via a different section of the Act would be to permit piecemeal litigation of the kind disallowed in *Fidelity Guards*". "The respondent's point in limine is upheld with costs."

In the case of *Fidelity Guards Holdings (Pty) Ltd v Professional Transport Workers Union & others*,⁸⁴ the appellant launched an application in the Labour Court on the 10th of September 1997 seeking a declaratory order that the strike called by the first respondent was unprotected. The Labour Court *per*

⁸³ (1999) 20 ILJ 878 (LC) at page 884 paragraph 16.

⁸⁴ (1999) 20 ILJ 82 (LAC), *Fidelity Guards Holding (Pty) Ltd v PTWU & Others* (1998) 19 ILJ 260 (LAC).

dismissed the application. An urgent appeal was heard by the Labour Appeal Court on the 26th of September 1997 and the appeal was dismissed.

In *Score Supermarket Kwa Thema v CCMA & others*,⁸⁵ the court held that “in law, for a plea of *res judicata* to succeed, it is necessary to establish that a final judgment has been made involving:

- (a) The same subject matter,
- (b) Based on the same facts, And,
- (c) Between the same parties.”

The court went further and held that:

“There is no doubt that the referral forms used by the employee and the union in both cases GA22967-04 AND GA33536-04 were the same. The subject matter is the same and the parties are the same. On the basis of this, the conclusion should be that the plea of *res judicata* is sustainable.⁸⁶ There is however, authority that in labour matters, consideration of whether or not to uphold a plea of *res judicata* depends on whether in all the circumstances of a given case it is fair to do so⁸⁷. It is apparent to me, in the circumstances of this case, that it would not be fair to uphold the plea of *res judicata*.” The reason adduced by the court was that the subject matter was based on the same facts already determined by the court.⁸⁸

In *Bouwer v City of Johannesburg & Another*,⁸⁹ the applicant was employed by the respondent as Senior Professional Officer: Environment. The applicant was previously employed by the Midrand Town Council as the Executive Manager: Environment & Recreation. The latter employer was consolidated

⁸⁵ [2008] 10 BLLR 1004 (LC); See also *Herbstein & Winsen, The Civil Practice of the Supreme Court of SA*, Juta, 4th edition at page 249.

⁸⁶ Supra note 85 at page 1004.

⁸⁷ *BMW (South Africa) (Pty) Ltd v Van der Walt* (2000) 21 ILJ 113 (LAC).

⁸⁸ Supra note 85 at paragraph 31.

⁸⁹ (2006) 27 ILJ 2590 (LC). See also *National Union of Mineworkers & others v CCMA & others* (2007) 28 ILJ (LC).

into the Greater Johannesburg Metropolitan Area. As a result, the applicant was offered his current position in March 2002 which he rejected on the basis that the position was lower than his previous post though the salary was equal. The applicant then referred a dispute to the Labour Court seeking amongst others that he is entitled to terminate his employment on three months notice which will entitle him to severance pay in terms of the National Fund for Municipal Workers rules. The court dismissed the application and ruled that without certain expert evidence he could not determine the matter.

The applicant brought the current application and the first respondent raised a point *in limine* of *res judicata*. The court held that:

“it is clear from the judgement and order made by Landman J that he had made a definitive and final order.” The court went further on paragraph 13E that Landman J had found inter alia that “the applicant had failed to lead expert evidence on the two different posts and therefore his case was shipwrecked. The applicant had failed to substantiate his case by sufficient evidence in the previous case. In launching the present application the applicant has attempted to salvage his wrecked ship which clearly he cannot do”. The court upheld the special plea and dismissed the application.⁹⁰

Clearly, the applicant was only trying to circumvent the previous court order although he had an ample opportunity to lead all evidence to substantiate the case.

There are, however, circumstances under which the court may not uphold a plea of *res judicata*. In *Ditsamai v Gauteng Shared Services Centre*,⁹¹ the applicant applied for a position of Forensic Auditor and was offered a Junior Forensic Auditor position on a month to month basis for a maximum period of six months. The applicant, however, discovered that two other people who responded to the advert were offered Senior Forensic Audit level 11 and 12

⁹⁰ Supra note 89 at page 2594 paragraph 12C.

⁹¹ (2009) 30 ILJ 272 9 (LC).

respectively on permanent basis. The applicant lodged a grievance and was dismissed on the same day. The Commission for Conciliation Mediation and Arbitration (CCMA) found that the dismissal was unfair and ordered compensation. After receipt of compensation the applicant referred another dispute to the CCMA for conciliation in terms of section 10 of the Employment Equity Act (EEA)⁹² and subsequently to the Labour Court. The respondent raised a point *in limine* of *res judicata* that the matter has already been adjudicated by the CCMA.

The court held as follows:

“It is clear from the facts in the present instance that the arbitration award granted in favour of the applicant related to unfair dismissal in terms of the LRA. The subject-matter of the case before the court relates to unfair discrimination in terms of section 10 of the EEA.” The court went further on paragraph 26 that “it is therefore my opinion that the claim lodged by the applicant in terms of section 10 of the Employment Equity Act is not *res judicata* and the point *in limine* raised by the respondent stands to be dismissed.” Although it is desirable that there should be an end to litigation, nothing stops a party to institute an action based on another piece of legislation from the same facts.⁹³

In the case of *Fredricks & others v MEC for Education and Training, Eastern Cape & others*,⁹⁴ the applicant (employee) was refused voluntary application for retrenchment determined in terms of the collective agreement. The applicant instituted action in the High Court claiming infringement of constitutional right in terms of section 9(b) band 33 of the constitution. The high court held that it does not have concurrent jurisdiction.

“It stated that that the high court erred as there was no general jurisdiction afforded to the Labour Court in employment in matters and that the jurisdiction of the high court was not ousted by section 157(1) of the LRA since the

⁹² Act 55 of 1998.

⁹³ Supra note 91 at paragraph 25.

⁹⁴ (2002) 29 ILJ 81 (CC).

applicant relied on the infringement of constitutional rights. The high court was incorrect that it lacked jurisdiction.”

It is trite that a claim of *res judicata* will succeed if a party proves the essential elements being that a decision was made on the subject-matter, based on the same facts/grounds and involving the same parties. These first essential elements were not present in the above matter hence the court dismissed the point *in limine*.

It is apparent from the authorities that the double jeopardy principle applies in labour law although imported from the civil and criminal practices. However, in labour law, much consideration and emphasis is placed on fairness to both parties being the employer and the employee.

CHAPTER 4

4.1 EMPLOYER'S DEVIATION FROM SANCTION IMPOSED BY THE CHAIRPERSON OF THE DISCIPLINARY HEARING

Discipline is the prerogative of management or the employer.⁹⁵ The employer has powers to appoint the employer representative and the chairperson of the disciplinary hearing in terms of the common law or even in terms of the applicable collective agreement.⁹⁶ The employer may at times be dissatisfied with the judgment and/or sanction of the chairperson of the disciplinary hearing. The question is therefore that: can the employer change or alter the sanction of the chairperson? Generally, it would probably be unfair to change such sanction since the chairperson is the agent of the employer by virtue of the appointment. For instance, a legal person cannot act on his own hence the person who has been authorised to take responsibility of maintaining discipline does not have to chair a disciplinary hearing. The authorised person may appoint a suitable person to chair a disciplinary hearing.⁹⁷ The chairperson is, in my view, performing duties on behalf of the employer.

In *Greater Letaba Local Municipality v Mankgabe NO & others*,⁹⁸ the employer instituted disciplinary proceedings against the employee after the later had been involved in an accident whilst driving the employer's motor vehicle without the necessary authorisation. The said motor vehicle was written off. The chairperson of the disciplinary hearing found the employee guilty and imposed a sanction of a final written warning and ten days suspension without pay. The Executive Committee of the applicant municipality approved the findings but was not satisfied with the recommended sanction and said that the sanction was too lenient and unfair in view of the seriousness of the misconduct. The Executive Committee summarily dismissed the employee.

The employee referred an unfair dismissal dispute to the CCMA. The matter remained unresolved at the conciliation stage and the certificate was issued in terms of section 135 of the Labour Relations Act.⁹⁹ During the arbitration proceedings, the employer conceded that the dismissal was procedurally

⁹⁵ Schedule 8: Code of Good Practice item 3, Labour Relations Act 66 of 1995.

⁹⁶ Clause 6.3 of the South African Local Government Bargaining Council: Disciplinary Procedure and Code Collective Agreement, 2010.

⁹⁷ Supra note 96, clause 6.4.

⁹⁸ [2008] 3 BLLR 229 (LC).

⁹⁹ 66 of 1995.

flawed but substantively fair. The commissioner ruled that the dismissal was unfair and reinstated the employee.

On review, the Labour Court held that there are two reasons why the employer's sanction was procedurally unfair:

“Firstly, the employee was not afforded an opportunity to address the executive authority in defence of a ruling which was made in his favour. The favourable sanction was reversed in his absence and, in his absence, substituted with the harshest sanction within the context of the workplace law. The employer's claim that ‘the employer also considered the rules of natural justice and followed procedural fairness’ was an attempt designed to conceal the true state of affairs. The truth is that the employer flagrantly violated the basic rule of natural justice. The employee's side with regard to sanction was not heard before the sanction with extremely adverse impact on his livelihood was imposed on him.”¹⁰⁰

“Secondly, it was not competent for the employer's executive committee to nullify the sanction recommended by the chairperson of the disciplinary hearing. This is so because it was agreed upon between the employer and the employee's union that the determination of the disciplinary tribunal shall be final and binding on the employer.”¹⁰¹

It is however clear from this case that substantive fairness prevails over procedural fairness. Moreover, the court reiterated the principle of natural justice commonly known as the *audi alteram partem* rule. However, the employer may deviate from the sanction imposed by the chairperson under certain circumstances which *inter-alia* may be as follows:

- For the sake of consistency;¹⁰²

¹⁰⁰ Supra note 98 at paragraph 16.

¹⁰¹ Supra note 98 at paragraph 17.

¹⁰² Hutchinson W. *Remedying Inconsistency by Conducting a Second Hearing, Industrial*

- If the employee is afforded a further opportunity to be heard in terms of the *audi alteram partem* rule;
- If the disciplinary code only gives the chairperson powers to recommend a sanction;
- If the sanction was completely inappropriate to the misconduct;
- If fairness so requires;
- If the chairperson of the first disciplinary hearing did not apply his mind to the given facts and that led to an unfair hearing on the part of the employer etc.

The employee in the *Greater Letaba* case¹⁰³ was not afforded an opportunity to state his case when the sanction was altered by the Executive Committee of the employer hence the court held that the dismissal was procedurally unfair but substantively fair. Had it not been that the employee was not given the right to make representations, the Labour Court would have undoubtedly dismissed the review application without any compensation.

In *De Beers Consolidated Mines Ltd v CCMA & others*,¹⁰⁴ Conradie JA held that:

“...it would, in my view, be difficult for an employer to re-employ an employee who has shown no remorse. Acknowledgment of wrongdoing is the first step towards rehabilitation.”

In this case, the court correctly ordered compensation as substantive fairness prevails over procedural fairness as in the *Greater Letaba's* case.

In the *Greater Letaba's* case, the court held that:

“where, as in this case, an employee, over and above having committed an act of dishonesty, falsely denies having done so, an

Labour Law, Juta, vol 27 October, 2006.

¹⁰³ *Supra* note 98 [2008] 3 BLLR 229 (LC).

¹⁰⁴ [2000] 21 ILJ 105 (LAC) at page 109.

employer would particularly where a high degree of trust is reposed in an employee, be legitimately entitled to say to itself that the risk to continue to employ the offender is unacceptably great.”

This for me, indicate that the nature and the seriousness of the misconduct is imperative in determining an appropriate sanction.¹⁰⁵

The primary function of maintaining discipline in employment context is to ensure that individual employees contribute effectively, efficiently to the employer’s business and promote the business interests of the employer. The power to prescribe workplace rules and to initiate disciplinary steps against transgressions is one of the most jealously guarded territories of managers in the workplace.¹⁰⁶ In modern employment law, the purpose of disciplinary sanction is regarded as corrective not punitive.¹⁰⁷ The fact remains that if an employee breaches the employers’ code of conduct, he or she may be summoned to appear in the disciplinary hearing. Management will then appoint an impartial person to serve as the chairperson who will preside over the hearing. Management will also appoint a person to serve as the prosecutor or initiator. Some disciplinary codes such as the South African Local Government Bargaining Council: Disciplinary procedure and code collective, 2010 provide that the chairperson may recommend sanction and management will finally impose a sanction. This does not mean that management may just impose a sanction other than that recommended by the chairperson.

In the recent decision of *MEC for Finance, KZN & Others v Dorkin NO & another*,¹⁰⁸ the second respondent, a director in the Kwazulu Natal Department of Education was charged with several counts of misconduct. The charges relates to granting of bursaries in excess of authorised amounts, unauthorised purchase of goods & loss of assets worth R1.2 million. The

¹⁰⁵ Supra note 98 at paragraph 33.

¹⁰⁶ Grogan J. *Workplace Law*, 10th edition, Juta, 2009 at page 230.

¹⁰⁷ Basson A *et al Essential Labour Law*, Volume 1, 3rd edition, Labour Labour Publications, 2002, page 75.

¹⁰⁸ (2008) 29 ILJ 1707 (LAC).

second respondent (who was the chairperson of the disciplinary hearing) found the employee guilty of all the charges and recommended a final written warning. Aggrieved by sanction, MEC for Finance instituted proceedings in the Labour Court for the review and setting aside the sanction. The Labour Court dismissed the application, amongst others, on the basis that the State could not review its own decision and that the first respondent made a recommendation which the department could have ignored.

On appeal, the Labour Appeal Court noted that there are many circumstances in which senior authorities in organisation, particularly State department, must be permitted to intervene in decision of the disciplinary tribunal and that it is the function of the court to ensure that the power was not abused. The court held that the Labour Court erred in holding that the presiding officer was empowered to make a recommendation in terms of the applicable disciplinary code and therefore the remedy was to ignore the recommendation. The Labour Appeal Court concluded by finding that given the gravity of the employee's misconduct, the chairperson's decision to impose a warning was so aberrant and was grossly unreasonable.

The Supreme Court of Appeal¹⁰⁹ held that:

“Having found that the decision by Dorkin amounts to administrative action, the pertinent legal question remains whether the second respondent (the employer) had *locus standi* to take the matter on review. ...” the Court went to held that “I agree that Dorkin's decision, measured against the charges on which he convicted the appellant, appear to be grossly unreasonable. Given the yawning chasm in the sanction imposed by Dorkin and that which the court would have imposed, the conclusion is inescapable that Dorkin did not apply his mind properly or at all to the issue of appropriate sanction. Manifestly Dorkin's decision is patently unfair to the second respondent”.

¹⁰⁹*Ntshangashe v MEC for Finance: Kwazulu Natal & another* (2009) 30 ILJ 2653 (SCA) paragraph 17 E.

The probable interpretation of this decision means that the employer may review a decision of the chairperson of the disciplinary hearing since the appointment of the latter constitutes administrative action. Although this decision is binding, with due respect, the learned Bosielo AJA and the full bench erred in law.”¹¹⁰ The appointment of Dorkin to chair the disciplinary hearing and his findings did not constitute administrative action and this issue has long been clarified by Constitutional Court in the case of *Chirwa v Transnet Ltd & others*,¹¹¹ Skweyiya J for the majority held on paragraph 72 that the finding that the High Court does not have concurrent jurisdiction with the Labour Court on this matter makes it unnecessary that to arrive at a firm decision on the question whether the dismissal of Ms Chirwa by Transnet constitute administrative action. If, however I had been called upon to answer that question. The constitutional court held that the conduct by Transnet did not constitute administration action under 33 of the Constitution for the reason that he advanced in his judgement.

Ncqobo J in the same case held that:

“in my judgment labour and employment relations are dealt comprehensively on s 23 of the Constitution. Section 33 of the Constitution does not deal with labour and employment relations. There is no longer distinction between private and public sector employees under our Constitution. The starting point under our Constitution is that all workers should be treated equally and any deviation should be justified. There is no reason, in principle, why public sector employees, who fall within the ambit of the LRA, should be treated differently from private sector employees and be given more rights than private sector employees. Therefore, I am unable to agree to the view that a public sector employee, who challenges the manner in which a disciplinary hearing has resulted in her/his dismissal, has two causes of action, one

¹¹⁰ At paragraph 20.

¹¹¹ (2008) 29 ILJ 73 (CC).

flowing from the LRA and another flowing from the Constitution and PAJA.”¹¹²

The *Chirwa’s* case was followed by the Constitutional Court in the case of *Gcaba v Minister for Safety & Security & others*.¹¹³ The court held on “that failure to promote and appoint the applicant was not an administrative action”. The court went further on paragraph 77 and held that “to the extent that this judgement may be interpreted to differ from *Fredricks*¹¹⁴ or *Chirwa*,¹¹⁵ it is the most recent authority.”¹¹⁶

The most appropriate route that the employer in *Ntshangashe* should have followed was to institute a second hearing on the ground that the sanction imposed by the chairperson was grossly unfair and unreasonable, to mention a few. Such hearing would have been fair since the chairperson of the first hearing clearly did not apply his mind to the facts.

The general rule subject to exceptions is that the employer may not deviate from the sanction imposed by the chairperson of the disciplinary hearing.¹¹⁷ In many instances, management is required to exercise discretion to appoint a person as the chairperson of the hearing by the collective agreement.¹¹⁸ However, the fact that the collective agreement has not been followed is not in itself unfair unless the actual procedure and the circumstances are unreasonable and unfair.¹¹⁹ In the local government sector, the Municipal Manager or his authorised agent may, if in their opinion the misconduct is serious, and this may, result in a sanction of a suspension, demotion or

¹¹² *Supra* note 111 paragraph 149.

¹¹³ (2009) 30 ILJ 2623 (CC).

¹¹⁴ *Fredericks & others v MEC for Education & Training, Eastern Cape Province & others* 2002 (2) SA 693 (CC) also reported at (2002) 23 ILJ 81 (CC).

¹¹⁵ *Supra* 111 on paragraph 57.

¹¹⁶ *Supra* note 113 paragraph 68.

¹¹⁷ Grogan J. *Workplace law*, 9th edition, Juta 2008 at page 200.

¹¹⁸ *South African Local Government Bargaining Council: Disciplinary Procedure and Code Collective*, 2010.

¹¹⁹ *Highveld District Council v CCMA & Others* 2003(24) 24 ILJ 517 (LAC); *Leonard Dingler (Pty) Ltd v Ngwenya* (1999) 20 ILJ 1171 (LAC); *NUMSA & Others v CCMA & Others* (2007) 28 ILJ 1614 (CC).

dismissal, constitute a disciplinary tribunal by appointing a suitably qualified person to serve as a presiding officer.¹²⁰

In terms of clause 6.6.3 of the South African Local Government Bargaining Council (SALGBC) Collective Agreement Disciplinary Procedure, 2010, the Municipal Manager or his/her authorised agent is required to constitute a disciplinary hearing by appointing suitable persons to serve as Chairpersons and Employer Representatives. Management, therefore, has discretion on who should be the chairperson of the disciplinary hearing.¹²¹ However, the employer may not be saddled with the chairperson's decision which is unfair.¹²² The employer may still afford an employee a fair opportunity to show cause on why the sanction of the disciplinary chairperson should not be changed and/ or altered and this will be in line with the cases of *Greater Letaba Local Municipality v Mankgabe NO & others*. In the event the employer does not afford an employee such opportunity, the dismissal shall be regarded as procedurally unfair and the employer may be ordered to pay compensation.

CHAPTER 5

5.1 CAN AN EMPLOYER CHARGE AN EMPLOYEE TWICE FOR THE SAME MISCONDUCT?

¹²⁰ *South African Local Government Bargaining Council Disciplinary Procedure Collective Agreement*, 2010, clause 6.3- 6.4.

¹²¹ *Supra* note 114.

¹²² *Greater Letaba Local Municipality v Mankgabe NO & others* [2008] 3 BLLR 229 (LC).

The question whether the employer can legitimately charge an employee twice for the same misconduct has been controversial in the employment law. There are a vast number of cases which provide guiding principles on the application of the double jeopardy principle. Generally, if an employee has been acquitted at the disciplinary inquiry, or if the chairperson has imposed a penalty less severe than dismissal, the employee cannot be subjected to the second inquiry in respect of the same misconduct.¹²³ A dismissal in such circumstances would invariably be regarded to be unfair.¹²⁴

The Labour Court's remarks in *FAWU obo Kapesi & others v Premier Food Ltd t/a Blue Ribbon Salt River*¹²⁵ are worth noting and imperative for purposes of these discussions. The court held that "A disciplinary hearing is not criminal trial. It is also not a civil trial. A disciplinary hearing is an opportunity afforded to the employee to state a case in response to the charges levelled against him or her by the employer." As pointed out earlier, the criminal law system is to a certain extent different from the labour law. The important principle in labour law is that an employee should be afforded an opportunity to state his case and answer to the charges in the disciplinary hearing.

The case of *BMW SA Ltd v Van Der Walt*¹²⁶ provided some important principles on the double jeopardy principle. In that case, the appellant (BMW) declared wheel alignment equipment to be having a nil value and redundant. The respondent employee discovered that the scrap value was actually R15 000-00. The employee arranged that his fictitious company should purchase the scrap metal. The employee received a repairing invoice of R11 000-00 and also an offer to purchase the scrap metal by R50 000-00. The employer instituted disciplinary proceedings against the employee. On or about January 1995, the disciplinary inquiry found that the employee has not committed misconduct and, as a result, no sanction was imposed. In February 1995, the employee was charged with a new charge of misrepresentation in

¹²³ Grogan J. *Workplace law*, 9th edition, Juta 2008 at page 200.

¹²⁴ *Botha v Gengold ltd* [1996] 4 BLLR 44(IC).

¹²⁵ (2010) 31 ILJ 1654 (LC) paragraph 46.

¹²⁶ (2000) 21 ILJ 113 (LAC).

that the employee made certain misrepresentations when the wheel alignment was removed from the employer's premises. The employee was dismissed.

Conradie JA with Nicholson JA concurring held that:

“whether or not a second disciplinary inquiry may be opened against an employee would, I consider, depend upon whether it is, in all the circumstances, fair to do so.” The court further held that “the attempted sale of the equipment took a different colour and demonstrated fraudulent intent far beyond making a false representation in order to move the goods out of the employers' premises.”

The court further considered and applied the *dicta* in *Amalgamated Engineering of SA & others v Calton Paper of SA (Pty) Ltd*¹²⁷ that:

“it is unnecessary to ask oneself whether the principle 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 civil proceedings is thought to outweigh the harm which may on individual cases be caused by the application of the rule. In labour law, fairness and fairness alone is the yardstick.” The majority of the Labour Appeal court found that the second hearing was justified and fair.

The minority's view was that there is no evidence that the first hearing was contrary to the disciplinary code. The minority per Zondo AJP held that the appellant employer was to be blamed for not properly conducting the investigation prior to the first hearing and thus it was unfair to subject the respondent employee to a second hearing. Zondo AJP went further and held that “In my view, the new information on the basis on which the appellant sought to justify its conduct in subjecting the respondent to more than one disciplinary inquiry does not constitute exceptional circumstances.”¹²⁸

¹²⁷ (1988) 9 ILJ 588 (IC) at paragraph 596.

¹²⁸ *Supra* note 127 at paragraph 36.

The judgment of Zondo AJP for the minority is an acknowledgment and confirmation that there are circumstances under which an employee may be subjected to a second hearing on the same facts.

The basic and underlying principle of fairness was applied in the above case. This means that the presiding chairperson has to strike the balance between the interests of the parties on the facts which are placed before him/her. I agree with both the findings and reasons thereof in the BMW case. If it so appears that it is unfair and prejudicial for the employer to charge an employee for the second time, I am of the view that the double jeopardy principle should apply. I disagree with the reasoning of the minority. The minority held that the appellant employer did not prove exceptional circumstances to subject the respondent to a second inquiry. However, the appellant has brought evidence relating to the attempted sale of the scrap metal, which in my view, constitutes a fair reason for holding a second hearing. This evidence was not available during the first hearing. Moreover, fairness does not only apply to employees alone but also to the employer and this means that the employer should have the hearing determined in a fair manner.

As in *NUMSA v Vetsak Co-Operative LTD*,¹²⁹ Smalberger JA held that:

“fairness comprehends that regard must not only be to the position and interests of the worker, but also those of the employer in order to make a balanced and equitable assessment. The court went further and held that in judging fairness a Court must apply a moral or value judgment to established facts and circumstances. It would, in my view, be very much unfair if employers are not allowed to charge an employee on the new evidence although emanating from the same facts.”

Both the majority and the minority in BMW have placed a very crucial limitation to the abuse of powers by placing fairness and exceptional circumstances respectively to determine whether an employee can be

¹²⁹ 1996(4) SA 577 (A) at paragraph 589.

charged twice on the same facts. It is also imperative that the fairness should be applied to both the employer and the employee.

The case of *Bramford v Metrorail Services (Durban) & another*¹³⁰ further demonstrates the correct labour law position with regard to the double jeopardy principle. In this case, the appellant employee who had 21 years in service was charged and subsequently dismissed for making eight fraudulent petty cash claims totalling R 834-00 for items such as tea, sugar, milk etc. The appellant employee also forged a signature of his manager. Following a meeting with his line manager regarding the allegations, the line manager gave the employee a dressing down and issued a formal warning. The Regional management conducted a formal audit. After the audit, the employee was subjected to a disciplinary hearing and was later dismissed on 20 October 2000. The arbitrator found that the second hearing was unfair and ordered reinstatement. The Labour Court reviewed and set aside the award.

The Labour Appeal Court *per* Jafta AJA with Nicholson JA concurring held that the current legal position as pronounced in *Van der Walt*¹³¹ is that a second inquiry would be justified if it would be fair to constitute it.¹³² The court further held that “there was only one hearing in the present matter but accepted that the appellant employee was subjected to two successive punishments and the employer is entitled to hold a second disciplinary inquiry. Further that the arbitrator has failed on the facts to apply them and consider issues placed before him”. At paragraph 22, Jafta AJA held that:

“the arbitrator was married to the idea that since it was competent for Palmer (line manager) to issue a written warning, the employer was bound by the latter’s action irrespective of whether Palmer’s decision to issue a warning was correct or not and despite possibility of Palmer having been influenced by ulterior motives.” The Labour Appeal Court concluded by holding that the employer was denied the opportunity of

¹³⁰ (2003) 24 ILJ 2269 (LAC).

¹³¹ *BMW SA Ltd v Van Der Walt* (2000) 21 ILJ 113 (LAC).

¹³² *Supra* note 130 at paragraph 15.

having the issue of fairness of dismissal considered in a fair public hearing and by means of applying relevant law. The court upheld the decision of the court *a quo* and dismissed the appeal with costs.

Although arbitration awards are not necessarily binding, Arbitrators have followed the reasoning of the case of *BMW*¹³³ and *Bramford*¹³⁴ in the most recent case of *Petusa obo Rootman v Absa*.¹³⁵ In this case, the applicant had been employed by the respondent for about 20 years and served as planner in its private bank division. The applicant invested fund from six clients using non-approved intermediary in 2005 despite memorandum that non-approved service providers could not be used. The applicant was charged and found guilty of not adhering to bank's policy and was given a final written warning. In 2008, it came to light that investments arranged by the applicant were not secured and that the bank is exposed to a loss of R1.2 million. The applicant was then charged with dishonesty and was dismissed. The commissioner ruled that the charges against the applicant employee in both hearings were similarly phrased. However, the commissioner held that when the bank became aware that it had suffered a significant loss, it must have suspected that the applicant deliberately misled them. The Commissioner concluded that in the circumstances, charging the applicant for the second time on the same facts was not *per se* unfair.

The findings and conclusions of the arbitrator are true reflection of the current employment position that it is not always unfair to subject an employee to two disciplinary hearings or sanctions.

The Labour Appeal Court in *Country Fair Foods (Pty) Ltd v CCMA & others*¹³⁶ held, without discussion, that the manager's decision "review" to set aside the sanction of a final warning , suspension and dismissal was unfair. The only reason given by the court was that there was no provision in the disciplinary

¹³³ *BMW SA Ltd v Van Der Walt* (2000) 21 ILJ 113 (LAC).

¹³⁴ *Bramford v Metrorail Services (Durban) & another* (2003) 24 ILJ 2269 (LAC).

¹³⁵ (2009) 30 ILJ 2544 (CCMA).

¹³⁶ (2003) 24 ILJ 355 (LAC).

code for interference with a penalty imposed after a properly constituted disciplinary inquiry.

The question whether an employee is fairly subjected to a second hearing may depend on some of the following factors *inter alia* as follows which comes from the case law:

- a) For the sake of consistency;
- b) The gravity of the employee's offence;
- c) The period elapsed between the first and the second hearing;
- d) The circumstances and availability of new and relevant evidence after first hearing.
- e) The chairperson of the first hearing failed to properly apply his mind to the facts, biased, unduly influenced or acted *mala fide*.¹³⁷

In the event the employer decides to subject an employee to a second hearing, such decision should be made timeously or within reasonable time. The question of what constitutes reasonable time depends on the circumstances of the case and measured on the reasonable man's test. In *Mokoetle v Mudau NO & others*,¹³⁸ the applicant employee was charged in 2006 of five counts of misconduct on events which occurred in 2003. The chairperson recommended a final written warning on four charges and a written warning on the fifth charge. The Group Chief Executive Officer of the South African Broadcasting Corporation (SABC) accepted the findings and informed the applicant employee as such. The applicant referred an unfair labour practice dispute to the CCMA claiming that there had been undue delay in instituting disciplinary proceedings. The conciliating Commissioner issued the outcome certificate but the arbitrating Commissioner refused to arbitrate on the ground that the arbitration process will serve no purpose since the employment relationship has terminated.

¹³⁷ *BMW v Van der Walt* (2000) 21 ILJ 113 (LAC), *Branford v Metrorail Services (Durban) & others* (2003) 24 ILJ 2269 (LAC), *Greater Letaba Municipality v Mankgabe NO & others* [2008] 3 BLLR 229 (LC).

¹³⁸ (2009) 30 ILJ 2755 (LC).

The Labour Court held in paragraph 19 G that “A *fortiori*, the applicant has approached this because of the actual prejudice occasioned by the third respondent’s delay in instituting disciplinary proceedings against him, assuming for a moment that it is at large to institute such proceedings after previously electing not to do so. (In my view it is not). The prejudice against the applicant is thus manifest.” The Court went further to order that the “third respondent was precluded on account of it binding election or waiver, from instituting and pursuing disciplinary proceedings against the applicant.”

In the case of *Bregem v De Kock NO & others*,¹³⁹ the applicant was charged after publishing a book on the court battle between the third respondent (employer) and another employee. The Chairperson of the disciplinary hearing ruled that the applicant (employee) and the third respondent (employer) should meet to agree on a financial settlement failing which the applicant will be automatically dismissed. On a meeting following the chairperson’s ruling, an agreement could not be reached as the applicant wanted five million but the third respondent was offering R150 000-00. The applicant, after this meeting, alleged criminal activities and threatened to report the alleged criminal activities to the authorities. The employer instituted further disciplinary proceedings on allegations of dishonesty and the applicant was found guilty and consequently dismissed. The Arbitrator found that the dismissal was fair.

The Labour Court held on paragraph 14 that:

“The effect of the order of the first disciplinary enquiry chairperson was clear and unambiguous in this respect: If the matter could not be resolved financially, the applicant would be automatically dismissed in terms of the charges levelled against him. The matter could not be resolved financially, and, therefore, the applicant was to be dismissed. It was not open for the third respondent to charge the applicant a second time in such circumstances....in that respect his second

¹³⁹ (2006) 27 ILJ 2352 (LC).

dismissal was unfair, apart from the fact that the first dismissal was also unfair....”

This case did not deal with double jeopardy. However, when one looks at the circumstances leading to the second hearing, it becomes abundantly clear that, in fact, the applicant was subjected to two hearings. The question whether the second hearing was fair can be looked at in the light of the facts of the case. The chairperson of the first hearing ruled that the applicant would be automatically dismissed in the event that no financial settlement was reached. On this basis, the applicant was no longer an employee when the second hearing was instituted. The settlement negotiations were, by their very nature, without prejudice. In any event, the applicant reported the criminal activities to the Auditors i.e PriceWaterhouseCoopers (PWC) and the South African Revenue Services (SARS) and these were surprisingly not disputed during the arbitration. I agree with the court’s findings and reasons thereof in the above case because the chairperson of the first hearing made a determination that the employee would be automatically dismissed in the event both the employer and the employee could reach a financial settlement. Technically, at the time when the employee was subjected to the hearing, he was already dismissed. It was only left for the employer to confirm and/ or implement the chairperson’s determination.

In the case of *Ekhuruleni Metropolitan Municipality v Mashazi NO & another*,¹⁴⁰ the municipality instituted disciplinary proceedings against the employee on allegations of misconduct. The chairperson of the hearing ordered the employee to repay the amounts received from the tenderer. The municipality instituted review proceedings contending that the disciplinary hearing was irregular as the employee was in contact with the chairperson and the sanction is shockingly inappropriate. The court held that the review application was brought in terms of section 158(1)(h) of the Act. It is clear that from the authorities cited above that no other cause of action on which to build a review exists in our law.” This conclusion was endorsed in *Transman (Pty)*

¹⁴⁰ [2009] 12 BLLR 1198 (LC) at paragraph 35-38.

*Ltd v Dick & another*¹⁴¹ where it was held that there was no need to permit a challenge based on the judicial review in employment dismissals. The application stood to be dismissed. The following cases were also referred to: *Kriel v Legal Aid Board SA*¹⁴² and *Makambi v MEC for Education, Eastern Cape*.¹⁴³

The court went further and held that the applicant (the municipality) is not left without remedies referring to *MEC for Finance, KZN & another*¹⁴⁴ and *BMW*.¹⁴⁵ The applicant should have in the circumstances instituted a second hearing on the grounds that the chairperson did not apply his mind to the facts and the seriousness of the misconduct but imposed an inappropriate the sanction.

5.2 CAN THE EMPLOYER INCREASE A SANCTION ON APPEAL?

The LRA does not provide for the right to appeal, however most disciplinary codes provide for the right to appeal.¹⁴⁶ The employee should in terms of the disciplinary code be afforded an opportunity to appeal unless he or she has waived the right to appeal. Waiver can be by means of failing to lodge an appeal or failing and/ or refusal to prosecute an appeal. The general rule is that the presiding officer of the appeal should not have been, in any way, involved in the initial hearing. This also applies even when the appeal takes the form of a hearing *de novo*.¹⁴⁷

In *UNISA v Solidarity obo Marshal & others*,¹⁴⁸ the respondent employee was found guilty of fraud and was dismissed. The appeal tribunal then altered the sanction to 12 months suspension without pay. The respondent referred a

¹⁴¹ (2009) 30 ILJ 1565 (SCA).

¹⁴² *Kriel v Legal Aid Board* [2009] 9 BLLR 854 (SCA).

¹⁴³ *Makambi v MEC for Education, Eastern Cape* [2008] 8 BLLR 711 (SCA).

¹⁴⁴ (2009) 30 ILJ 2653 (SCA).

¹⁴⁵ (2000) 21 ILJ 113 (LAC).

¹⁴⁶ *South African Local Government Bargaining Council: Disciplinary Procedure and Code Collective*, 2010.

¹⁴⁷ Grogan J. *Workplace Law* 10th edition at page 250. See also *Hotelica & another v Armed Response* [1997] 1 BLLR 80 (IC). *UASA obo Melville v SAA Technichal (pty) ltd* 2002 11 AMMSSA.

¹⁴⁸ [2009] 5 BLLR 510 (LC).

dispute to the CCMA. The Commissioner found that the 12 months suspension was not authorised by the Disciplinary code and ordered 3 months suspension without pay and a final written warning. In a review, the Labour Court *per* Moshwana AJ held that it makes no sense that the appeal committee would be guided by the same disciplinary code and procedure that guide the disciplinary committee, particularly when it comes to the issue of sanction. There seems to be no justification in law for such a disparity which evidence unfairness. If such argument is correct, it simply means that the employee would be saddled with a sanction imposed by the disciplinary committee *albeit* in excess of its powers. Although the above case does not answer the question whether the appeal tribunal may increase a sanction on appeal, it raised an important and interesting issue which emanated from the relationship between the disciplinary tribunal and the appeal tribunal. The said sanction suggests that it is unfair to increase a sanction on appeal.

The Labour Appeal Court in *Nasionale Perkeraad v Terblanche*¹⁴⁹ held that in labour law context where an appeal amounts to re-hearing, a Court should be slow to find that appeal proceedings could not correct a deficiency of the natural justice in the original proceedings. The court noted that in labour law, as opposed to administrative law, a wronged employee has a right to a trial *de novo* in court or in arbitration proceedings. There is no general rule that employees are entitled to an appeal before they could exercise statutory relief. However, if the employer and the employee have agreed that the latter has the right to appeal, the former may not refuse the employee to exercise such right. The employer may not institute an appeal tribunal in the event the employee has decided to utilize the statutory bodies created in terms of the LRA.

In *Rennies Distribution Services (Pty) Ltd v Biermen NO & Others*¹⁵⁰ the Labour Court gave exceptions to the rule that sanction may not be increased on appeal. The Court held “firstly, except where express provision is made for

¹⁴⁹ (1999) 20 ILJ 1520 (LAC).

¹⁵⁰ [2009] BLLR 685 (LC).

such a power, a chairperson on appeal does not have the necessary power to consider.”

It appears that the appeal tribunal may increase the sanction on appeal if permitted by the disciplinary code. On the principle of the *Mankgabe's* case,¹⁵¹ where the employer was found to have had a substantive reason for the dismissal but the procedure was unfair as the employee was not afforded an opportunity when the employer altered the sanction. The employer may also increase sanction if the employee has been warned and given reasonable opportunity to state his/her case about the possibility that the sanction may be increased.

CHAPTER 6

COMPARISON OF DOUBLE JEOPARDY IN THE SOUTH AFRICAN LAW, AUSTRALIAN LAW, THE UNITED STATES OF AMERICA

¹⁵¹ *Greater Letaba Local Municipality v Mankgabe NO & others* [2008] 3 BLLR 229 (LC).

7.1 INTRODUCTION

The Constitution of the Republic of South Africa¹⁵² recognises the foreign law and international law. Section 39¹⁵³ provides as follows: “

- (1) When interpreting the Bill of Rights, a court, tribunal or forum
 - (a) Must consider international law; and
 - (b) May consider foreign law.”

From the above provisions, it is important to always read the Bill of Rights with international law since the Constitution states that international law must be considered when interpreting the Bill of Rights. International law will be by means of treaties which are signed by the member States of the United Nations. Although the application of foreign law is not peremptory, its influence is part of our law. Foreign law is part of sources of South African law. In principle, foreign law should be considered by our courts in delivering judgments. This flows from the history of the country as well as the Constitution. Therefore, our courts may and should consider foreign law and international law.¹⁵⁴

7.2 DOUBLE JEOPARDY IN AUSTRALIA

Double jeopardy is known as one of those technical laws that prevent a repeat of prosecution for someone acquitted in a criminal trial by the Jury, the Judge or Appeal Court Judges. The justifications on the application of the double jeopardy are as follows:

- There must be a protection against prosecutors, who might maliciously abuse their powers after they failed to get a conviction in the first case,
- There must be closure and finality to court litigations.

¹⁵² Act 108 of 1996.

¹⁵³ Act 108 of 1996.

¹⁵⁴ Section 39 of the Constitution of the Republic of South Africa Act 108 of 1996.

In *Pradeep Deva v University of Western Sydney*,¹⁵⁵ the employee was dismissed during February 2005 and referred a dispute to the Australian Industrial Relations Commission in terms of section 170CE(1)(a) of the Workplace Relations Act¹⁵⁶ on the ground that the dismissal was harsh and unreasonable. The claim was dismissed in June 2005. In August 2005, the employee lodged a complaint with the Anti-Discrimination Board in terms of section 8(2)(c) of the Anti-Discrimination Act.¹⁵⁷ The Board declined the complaint. The employee then referred the matter to the Administration Decision Tribunal which refused to entertain the matter on the ground that the matter has been dealt with by the Commission. The employee took the matter on review which was also dismissed. The Appeal Court held that the subject matter referred to the Commission related to unfair dismissal as opposed to discrimination. The court upheld the decision and remitted the matter to the court *a quo*.

In *Crown Cork & Seal Co*,¹⁵⁸ the employer relied on essentially the same evidence to prove the employee's use of sabotage when its first attempt to discharge the employee for a verbal altercation with another employee was overturned. While arbitral double jeopardy appears straightforward enough as a general rule, the outcome of a double jeopardy defense often depends on the particular facts of the case as well as the proclivities of the arbitrator deciding the case.

It depends on whether the initial penalty was intended to be the final one, and was perceived by the employee as such. The result may depend on whether the employer had made it sufficiently clear that the first action was not the final decision on discipline. Thus, when a transit authority first issued a warning and afterwards discharged a bus driver for engaging in an altercation with a passenger, the arbitrator found that the warning was final action based in part on the way the employer's representative had marked the interview sheet, and found that the discharge constituted double jeopardy. *Chicago*

¹⁵⁵ (2008) NSWCA 137.

¹⁵⁶ Workplace Relations Act of 1996.

¹⁵⁷ Anti-Discrimination Act OF 1977.

¹⁵⁸ 111 LA 83, 87 (Harris, 1998).

Transit Authority,¹⁵⁹ See also, *Gadsden County Board of County Commissioners*,¹⁶⁰ (When the employer stated in a dismissal letter that “You were issued a written reprimand on December 10, 2008” in referring to one of the three incidents on which the employer relied for its discharge decision, the arbitrator found that double jeopardy applied as to the referenced offense. Once acquitted, a person cannot be tried twice despite new evidence, error of law, corruption in the process,¹⁶¹ whether or not law is itself in order to protect the innocents, it is quiet another thing to say that in certain circumstance human beings evade criminal prosecution.

The labour law position in South Africa is slightly different from the Australian labour law. In South Africa, the Labour Court in the case of *National Union of Mineworkers v Elandsfontein Colliery (Pty) Ltd*,¹⁶² held after the applicant launched an urgent application in the Labour Court seeking amongst others to restrain the respondent from retrenching its members and reinstating the employees who had been retrenched. The Labour Court dismissed the application with costs. The applicant then referred a dispute to the CCMA in terms of s 191(1)(b) and the matter remained unresolved at conciliation. Consequent thereto, the applicant challenged the substantive and procedural fairness of the dismissals in the Labour Court and the respondent raised a point *in limine* of *res judicata*. The court held:

“These observations related to different circumstances. But the points made are also opposite to situations where, as in *casu*, a union seeks first to interdict a retrenchment and then, having failed, returns to this court via s 191(5)(b)(ii). It would be invidious if an employer, armed with a judgement that states that it complies with applicable provisions of the Act, was subsequently told that it had not complied with the Act, and was ordered to reinstate or compensate the dismissed employees. To allow it to return to this court via a different section of the Act would

¹⁵⁹ 112 LA 713 (Goldstein, 1999).

¹⁶⁰ 38 LAIS 105, 110 LRP 50875 (Hoffman, 2010).

¹⁶¹ Prof G Craven, *Conversations with the Constitution*, University of NSW, Sydney 2004 p 165. ABC News 7th August 2007; <http://www.onlineopinion.com.au/view.asp>.

¹⁶² (1999) 20 ILJ 878 (LC) at page 884 paragraph 16.

be to permit piecemeal litigation of the kind disallowed in *Fidelity Guards*". The respondent's point *in limine* was upheld with costs.

The difference between the Australian labour law and the South African law is that in Australia, a person cannot be tried twice despite new evidence. In Australia, an employee cannot be tried twice unless the sanction was intended to be final which is different from South Africa. In South Africa, the Labour Appeal Court held in the case of *Branford v Metrorail Services (Durban) & others*¹⁶³ that whether or not a second hearing may be opened, depends upon whether it is, in all the circumstances, fair to do so. In this regard new evidence may prove fairness to institute a second hearing.

7.2 UNITED STATES

The United States has followed suit when it comes to the double jeopardy principle. In *Palmer v Miami-Dade County*,¹⁶⁴ the defendant terminated the plaintiff's employment on the ground that the latter falsified payroll records. The arbitrator recommended that the termination be upheld and a further appeal was also dismissed. The plaintiff, subsequently, brought a suit in the federal court alleging that termination was racially and sexually discriminatory. The defendant however argued that the claim was barred by *res judicata*. The court held that the doctrine of *res judicata* applies if four conditions exist that is:

1. Identity of the thing sued
2. Identity of the cause of action;
3. Identity of the parties; and
4. Identity of the quality in the person for or against whom the claim is made.

The court accepted that *res judicata* argument.

In the South African case of *Naude v MEC for the Department of Health & Social Services, Mpumalanga Province*,¹⁶⁵ the court held on paragraph 10-11 that "Both parties have correctly submitted that the principles of the doctrine of issue estoppel or *res judicata* are applicable to labour law disputes." In another

¹⁶³ (2003) 24 ILJ 2269 (LAC).

¹⁶⁴ *Palmer v Miami-Dade County case no 10-23478-CV-COOKE/S.D.FLA 2011.*

¹⁶⁵ [2008] 4 BLLR 312 (LC).

South African case of *Score Supermarket Kwa Thema v CCMA & others*,¹⁶⁶ the court held that “on law that for a plea of *res judicata* to succeed, it is necessary to establish that a final judgment has been made involving:

- (a) The same subject matter,
- (b) Based on the same facts, And,
- (c) Between the same parties.”

The legal position in the United States and Australia is in materially similar to the South African law regarding to the *autrefois acquit and autrefois convict* commonly known as the double jeopardy principle in that finality of cases is taken into account. It is on this basis that our legal system also reflects the position of other foreign countries which prompted the inclusion of section 39(1)(a)(b) of the Constitution which provides that when interpreting the Bill of Rights, the courts must consider international law and may consider foreign law. In Australia in particular, once a person has been acquitted in labour offences he/she cannot be tried again. The jurisprudence in Australia, United States of America and South Africa reflect that the principle of double jeopardy applies in labour law.

CHAPTER 7

7.1 CONCLUSION

The double jeopardy principle is commonly known as the *res judicata*. The underlying rationale is the finalisation of disputes and that a person should not

¹⁶⁶ [2008] 10 BLLR 1004 (LC); See also Herbstein & Winsen, *The Civil Practice of the Supreme Court of SA*, Juta, 4th edition at page 249.

be tried twice for the same offence. In employment law, this principle is qualified in the sense that fairness is the yardstick to determine whether a second hearing is appropriate. This is but one evolution of employment law. What is fair and how to determine whether a conduct is fair? The answers to these questions differ from one case to another, the underlying principles are well laid down in the cases of *BMW v Van der Walt* (2000) 21 ILJ 113 (LAC) and *Branford v Metrorail Services (Durban) & Others*.¹⁶⁷

The employer may within the parameters of fairness institute a second hearing against the employee on the same facts. It is also imperative to note that fairness does not only apply to the employer only when it comes to whether or not to institute a second hearing but the employee as well.

The employer may hardly be justified in increasing a sanction on appeal unless the employee has been a party to that effect and is given a reasonable opportunity to show reason(s) why the sanction should not be increased on appeal. The provision of the disciplinary code is important on this aspect. The employer may also not deviate from the sanction imposed by the chairperson of the disciplinary hearing unless the collective agreement and fairness so dictate.

In comparison, the position in South Africa is similar to Australia and the English laws. In principle, foreign law should be considered by our courts in delivering judgments.

7.2 RECOMMENDATIONS

- (a) An employer should appoint suitable persons as chairpersons of the disciplinary hearing;

¹⁶⁷ *Supra* note 137.

- (b) An employer should conduct a proper investigation before charging an employee;
- (c) Presiding Officers should apply double jeopardy principle in labour law;
- (d) An employer should constitute a second hearing when it is fair to do so;
- (e) Presiding Officers should analyse facts of a case as presented by both the employee and the employer before deciding whether it is fair to have a second hearing;
- (f) Employers should not increase a sanction without affording an employee an opportunity to state his/her case;
- (g) Employers should not increase a sanction on appeal without affording an employee an opportunity to state his/her case;

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