

NEWSLETTER

The Official Newsletter of SEENA Legal Consult.



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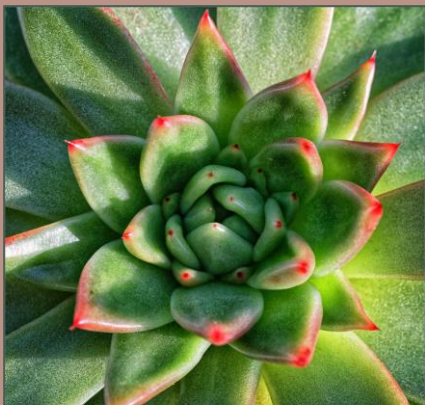
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2024 has kicked off with a bang and we are already in the second month of this new year. The previous year presented us as business owners with numerous challenges. Hopefully your company faced up to these challenges.

Ons sien egter uit na nuwe uitdagings wat gedurende hierdie nuwe jaar in ons rigting kom. Wat enige arbeidsuitdagings betref, waarmee u besigheid gekonfronteer mag word, wil ons weereens op u hart druk om nie sonder ons advies arbeidsprobleme te probeer oplos nie.

We wish to make use of this opportunity to bring to your attention, the fact that our affiliation with Odula Bookkeeping Service (Pty) Ltd, will terminate on 29 February 2024.

Hier by SEENA het ons ook met leedwese kennis geneem van die afsterwe van ons land se president, Dr Hage Geingob. Our thoughts and prayers are with his loved ones.

We wish all of our clients a happy and prosperous 2024.

SEENA groete,

Koos Barkhuizen
Managing Director

CONSISTENCY IN APPLICATION OF DISCIPLINARY SANCTION

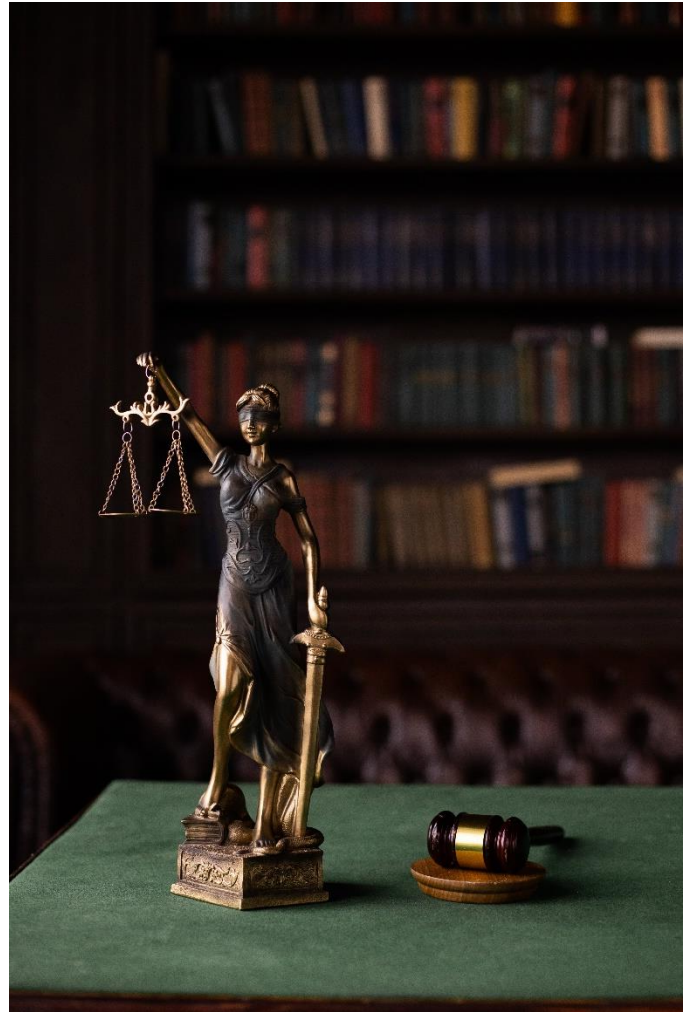
Consistency in disciplinary sanctions is critical to ensuring fairness and promoting a sense of trust among employees subject to such actions. When sanctions are applied inconsistently, it not only undermines the credibility of the entire disciplinary process, but also amplifies perceptions of bias and favouritism.

Consistency guarantees that individuals facing disciplinary actions can reasonably predict the consequences of their actions and that similar offenses will be treated equally in similar circumstances. Often referred to as the "Parity Principal", the basic tenet of fairness requires that like cases be treated alike.

Under Namibian labour law, employers are obligated to follow fair and consistent disciplinary procedures, ensuring that employees are not subjected to discriminatory treatment.

From a consistency perspective, distinction is drawn between:

- Historical / Past Consistency:**
 These are the consequences that were attached to past disciplinary infractions of a similar nature. For the sake of consistency, offenses of a similar nature should carry the same punishment, without sudden or unexplained deviations from past precedent. (This does however, not mean that employers may not adopt a different approach with regard to their stance toward particular forms of misconduct that have become more problematic over time, but merely requires that employees should be given advanced notice of any changes in the employer's stance and tolerance to a particular offence.)
- Contemporaneous Consistency:**
 The general idea is that disciplinary transgressions committed under the same circumstances, at the same time and by multiple offenders should, generally



speaking, be subject to the same sanction / punishment.

So, if fairness dictates that treating employees who have committed similar misconduct differently is generally unfair, will every differentiation then always be automatically unfair? What weight can be attached to differences in the personal circumstances of employees and do considerations such as length of service, past disciplinary record, remorse (or lack there-of), risk of continued employment of the employee, etc. carry any weight at all?

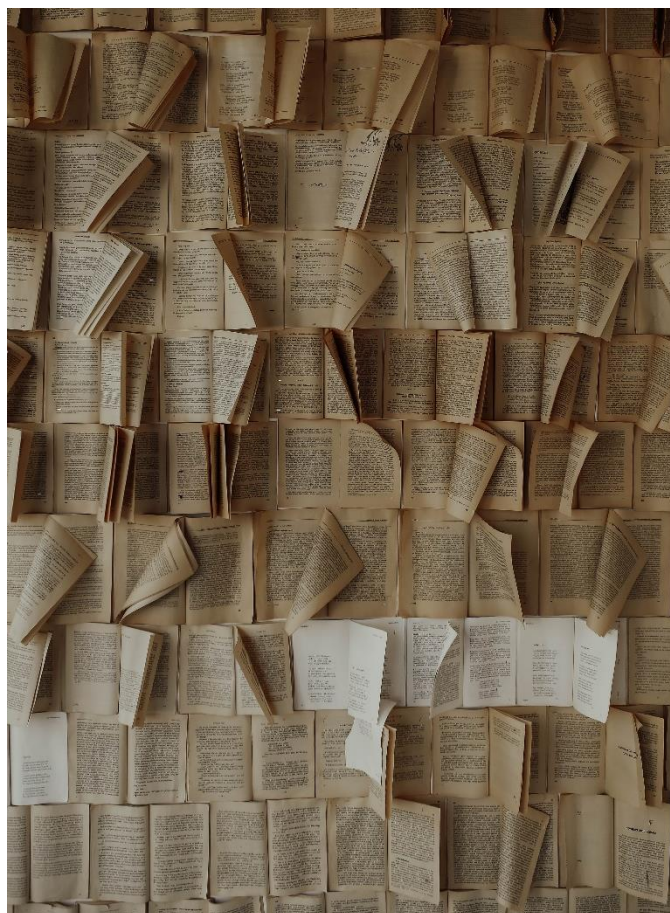
Our courts dealt with this subject in the recent case of *Telecom Namibian v Mandjolo*.¹ Following the dismissal of two employees for misappropriating client payments, the dismissed employees chose to challenge the fairness of their dismissal. They premised their challenge on evidence that another Telecom employee, one Mr. Sasele, having committed a similar offence, received a penalty short of

dismissal and therefore, their argument being, that Telecom treated them unfairly by selectively subjecting them to a harsher form of punishment. In considering their argument the Court referred to the South African case of *Southern Sun Hotels v CCMA & Others*,² which differentiates between a subjective -, and an objective element, to the test aimed at determining the fairness of deviations in disciplinary consequence.

The subjective element entails awareness on the part of the Employer. A consistency challenge will fail, if the Employer was not aware of the conduct committed by the Employee being used as a comparator. The objective element of the test entails that the comparator should be in the form of a similarly circumstanced employee that was subjected to different treatment, usually in the form of a disciplinary penalty that was less severe. By permitting considerations of circumstance, it is evident that it is not only similarity of offence that is of value to the courts, but also similarity of circumstance. As a result, an inconsistency challenge will be unsuccessful where the employer is able to justify the differentiation between employees on the basis of differences in personal circumstances, the severity of the misconduct or other material factors.

The party who wishes to challenge the fairness of a dismissal based on consistency, will carry the burden of proof. It is not sufficient for an employee to only lead superficial evidence of similar past conduct leading to a different outcome. An employee relying on an inconsistency challenge must also prove similar circumstances.

To quote Judge Sebeya in the Telecom case: *"In casu, save for alleging that a certain Mr. Sasele was convicted of a similar offence to theirs, the respondents failed to prove similar circumstances of their matter compared to that of Mr. Sasele. The details of the nature of the offence allegedly committed by Mr. Sasele were not brought to the hearing. The number of charges on which Mr. Sasele was allegedly convicted of is also unknown. In my view, the respondents made bare allegations of inconsistent application of the Disciplinary*



Code without evidence to substantiate their claim."

In conclusion: It is important to treat every case based on its own individual merit. Consistency is an element of fairness, but by no means the only one. Simply terminating the services of an employee for the sake of consistency, without due consideration of individual circumstance, can prove to be as costly, as applying discipline in arbitrary and selective fashion. Let the merits of the case determine the outcome; do not deviate from past precedent without sound justification, but also do not hesitate to deviate where sound reasons to do so, are evident.

Written by Nicky Smit.

1. *Telecom Namibia v Mandjolo* (HC – MD – LAB – APP – AAA – 2022/00076 [2023] NALCMD 20 (12 May 2023)
2. *Southern Sun Hotels Interests (Pty) Ltd v CCMA and Others* [2009] 11 BLLR 1128 (LC)



CLIENT PRICE LIST

JUNIOR MANAGEMENT

Management Principles
Planning & Organisation
Leadership
Management Skills
Decision Making

6 HOURS

N\$1800

INITIATOR

Gathering Information
Substantiating Information
Applying facts on Disciplinary Code
Charging
Disciplinary Procedures

FULL DAY

N\$2500

CUSTOMER SERVICE

Introduction to Customer Service
Exceptional Customer Service
Communication
Problem Solving Skills

4 HOURS

N\$1250

PERSONAL ASSISTANT

PA Principles
understanding the business culture
Office equipment and filing
Communication Skills
Project Management & Planning
Finances and personal branding

6 HOURS

N\$2500

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