THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: JR 2036/17

In the matter between:

DEPT OF EDUCATION: MPUMALANGA PROVINCE	**First Applicant**
MEC EDUCATION: MPUMALANGA PROVINCE	**Second Applicant**
HEAD DEPT OF EDUCATION: MPUMALANGA PROVINCE	**Third Applicant**

and

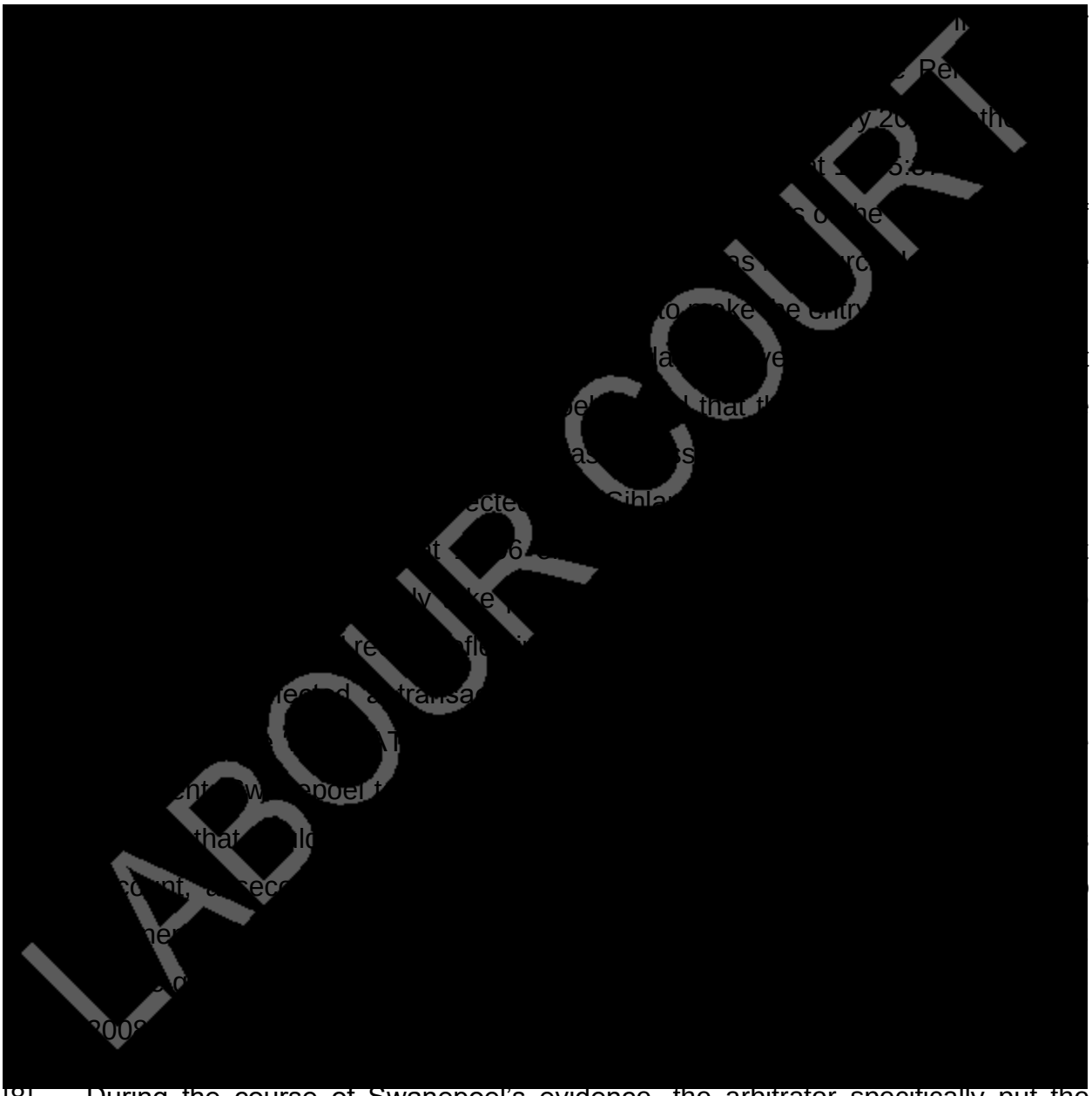
MATHALA N.O	**First Respondent**
GPSSBC	**Second Respondent**
XABA, SJ AND ANOTHER	**Third Respondent**

proceedings is that issued after the rehearing.

[3] The employees were employed as clerks in the first respondent's HR division. Sihlangu was employed as a principal personnel officer, and in this capacity was Xaba's supervisor. Xaba was employed as a senior administration officer. Xaba's functions included the making of adjustments to salaries, paying allowances and bonuses and the like on the Persal system; Sihlangu was required to approve the adjustments initiated by Xaba. (In Persal parlance, Xaba was a user or implementer, and Sihlangu a reviser.)

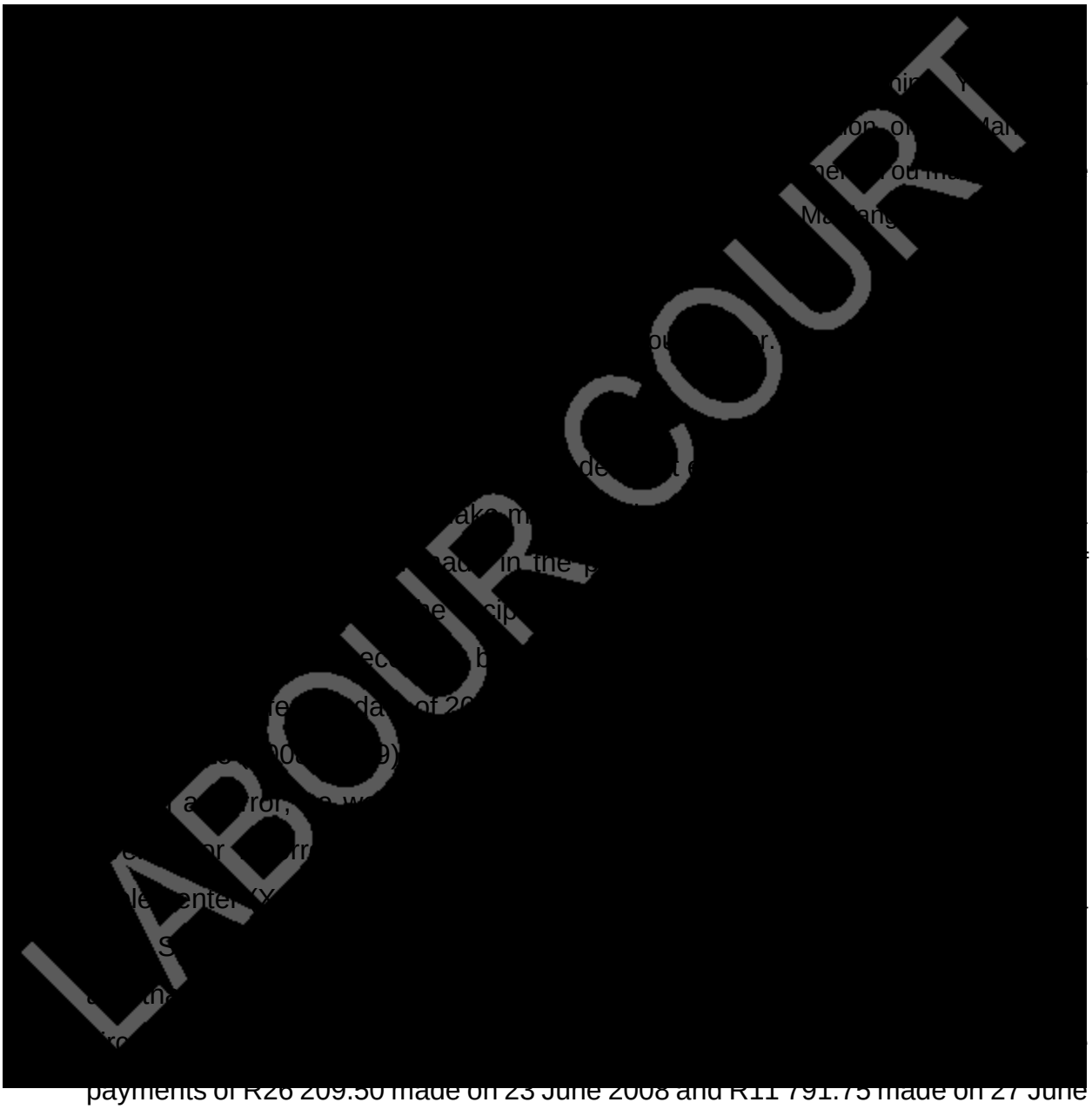
[6] The evidence is summarised by the arbitrator, and it is not necessary for present purposes to repeat all that was said. Given that the thrust of the review is an attack on the arbitrator's assessment of the evidence, the following precis is sufficient for present purposes. The first witness to testify was Mr. Elleck Nxumalo, a trainer in the Persal system. Persal is the system used in government to maintain personnel records and make payment of salaries and other emoluments to state employees. His testimony broadly concerned the Persal system, and two 'rules' that were conveyed during training. The first is to preserve the confidentiality of passwords;

the operation of the Persal system. They were duly qualified to perform their functions as implementer and approver respectively. He also testified that each operator had a unique user number. Xaba, as the initiator, was required to act only in receipt of a source document; in this instance, the proof of qualification. The document, dated 19 May 2008 recorded that Ms. AS Mahlangu had obtained the advanced certificate and that the diploma/degree would be issued at a graduation to be held on 4 September 2008. Xaba was required to determine whether the receipt of the qualification entitled Mahlangu to a once-off cash bonus or a notch increment, the date when the qualification was obtained. Mahlangu had a unique

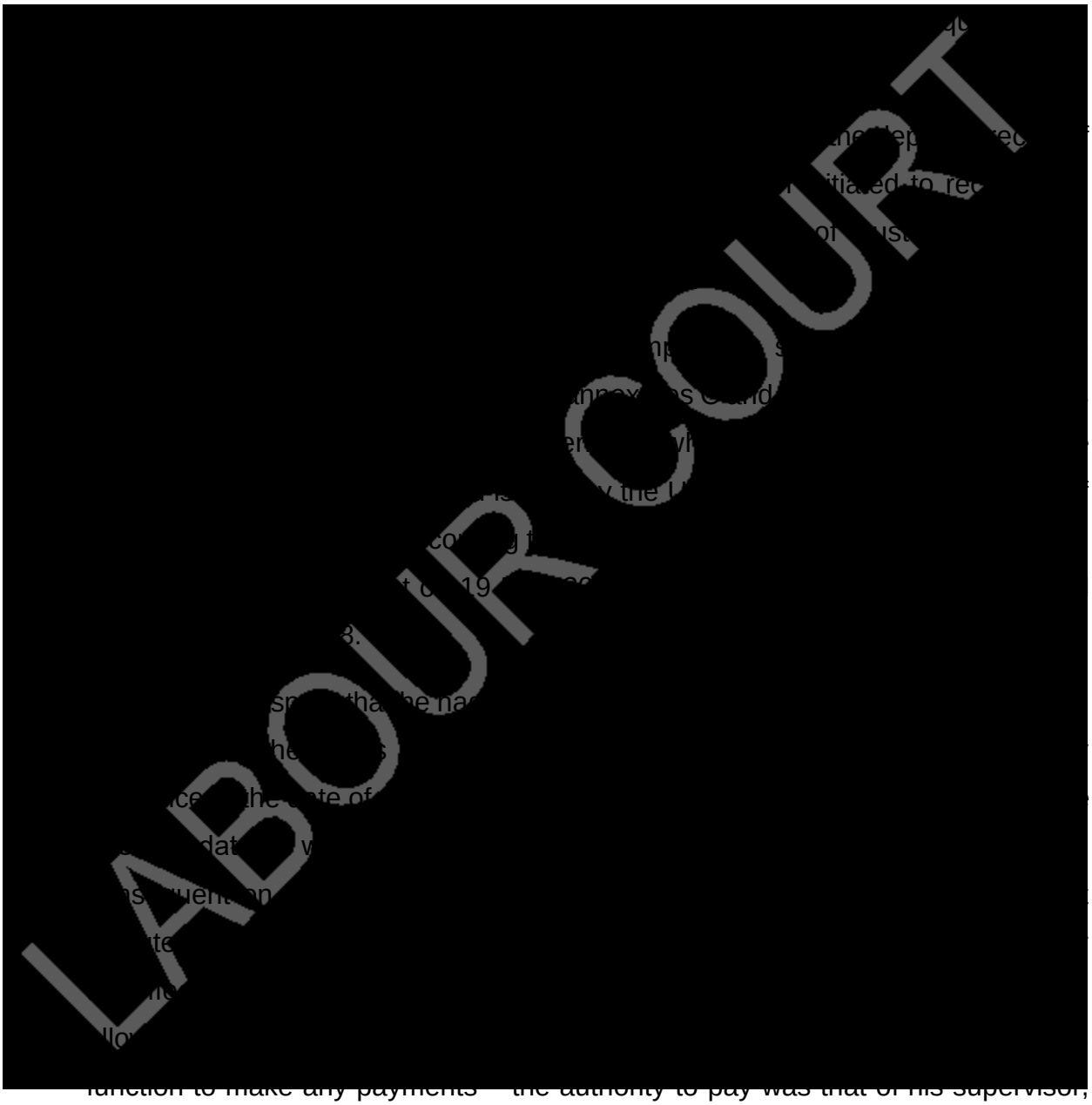


[8] During the course of Swanepoel's evidence, the arbitrator specifically put the following to him:

> ARBITRATOR: In summarizing your evidence, there are two ways that they could not have made a mistake – the source document and the Persal number?
>
> SWANEPOEL: And the Persal number, yes.
>
> ARBITRARAOR: Which is a unique number?
> MR SWANEPOEL: That is right.
>
> ARBITRATOR: Having those two, there is no way one can make a mistake?



payments of R26 209.50 made on 23 June 2008 and R11 791.75 made on 27 June 2008 were made in respect of two different persons, both named AS Mahlangu. In re-examination, Swanepoel testified that it was not possible for two persons named AS Mahlangu to share the same Persal number. The record reflected that the two payments that were the subject of the charge against the employees were paid to a single person with a unique Persal number. Swanepoel confirmed that it was not possible to approve a transaction in under a minute, as the record in respect of the first payment reflected and further, that the second transaction of R11 791.75 was

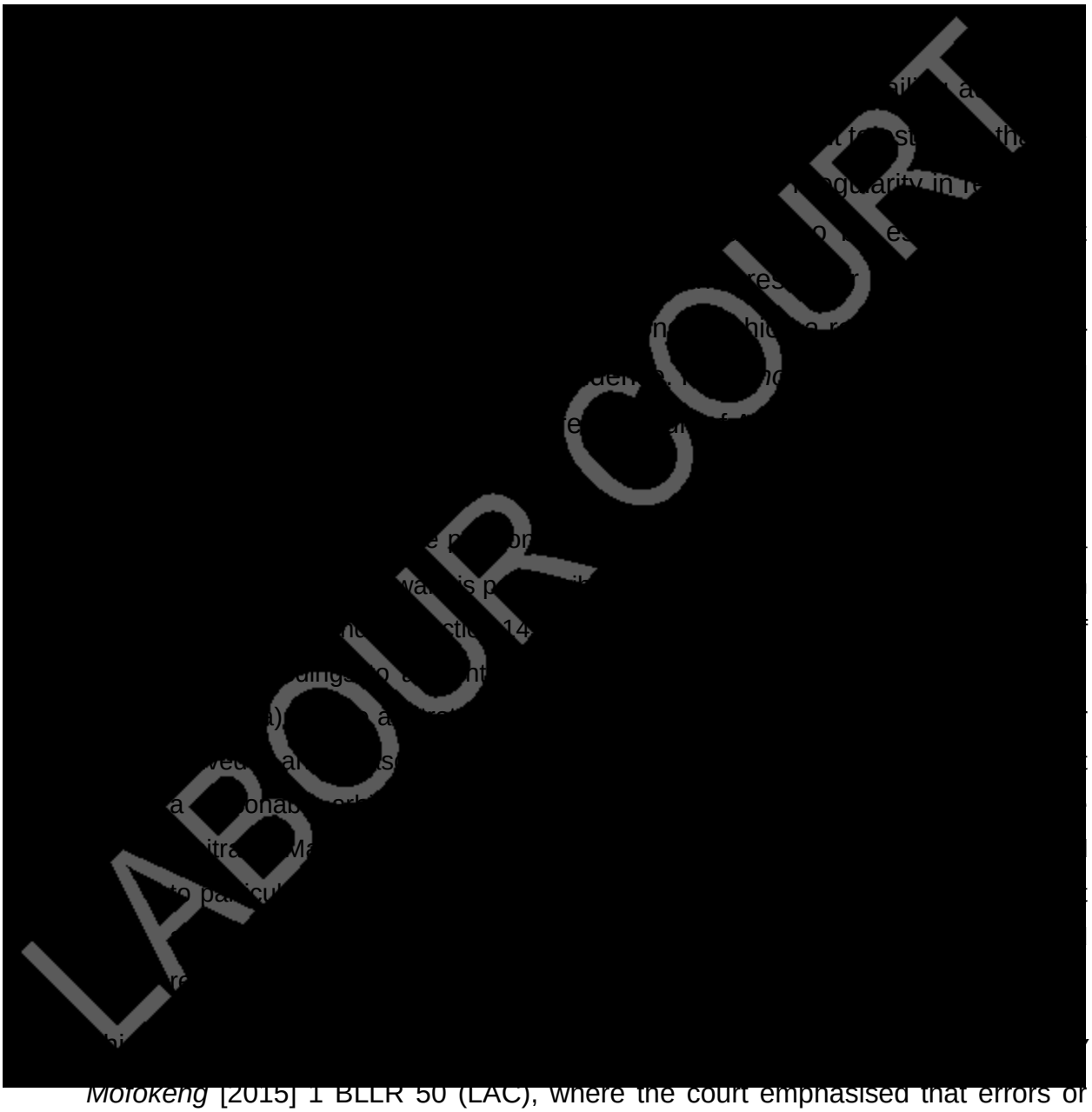


function to make any payments – the authority to pay was that of his supervisor, and his supervisor (Sihlangu) made payments. In other words, as he stated in cross-examination, his duties were confined to the capturing and updating of records on the Persal system. He described the process designed to effect payments on the Persal system. For example, a student submits a certificate on completion of a course, which is passed to the registry. When a personal file could not be located, a dummy file was created. Xaba stated that his entry of the date 2008-01-09 was a typing error; the date of completion of the qualification was 2008-05-19. The payment made on 27 June 2008 was for an adjustment of salary;

to steal, cheat lie or act fraudulently.' The arbitrator concluded that none of the applicant's witnesses had acted in this manner. No evidence had been presented connecting the employees to the money paid to Mahlangu, in the form of either a 'benefit or kickback' to them. The assertion by Mhalabane that the employees had intended to siphon money from the state was unsubstantiated.

[15] In so far as the employees defence that they had made a mistake was concerned, both Nxumalo and Swanepoel had conceded that mistakes had happened in the past, committed by Persal users. This inclined the arbitrator to the view that the

[17] In broad terms, the applicants submit first, that the arbitrator misconceived the nature of the enquiry, failed to make a credibility finding in the face of a material dispute of fact, and misdirected himself in relation to the central dispute. Secondly, the applicants submit that the arbitrator ignored relevant evidence, and made reference to irrelevant considerations. In the supplementary affidavit, the applicants amplified these grounds by reference to the record. The applicant submits that all of these misdirections had the consequence of an outcome that falls outside of the bands of reasonableness.

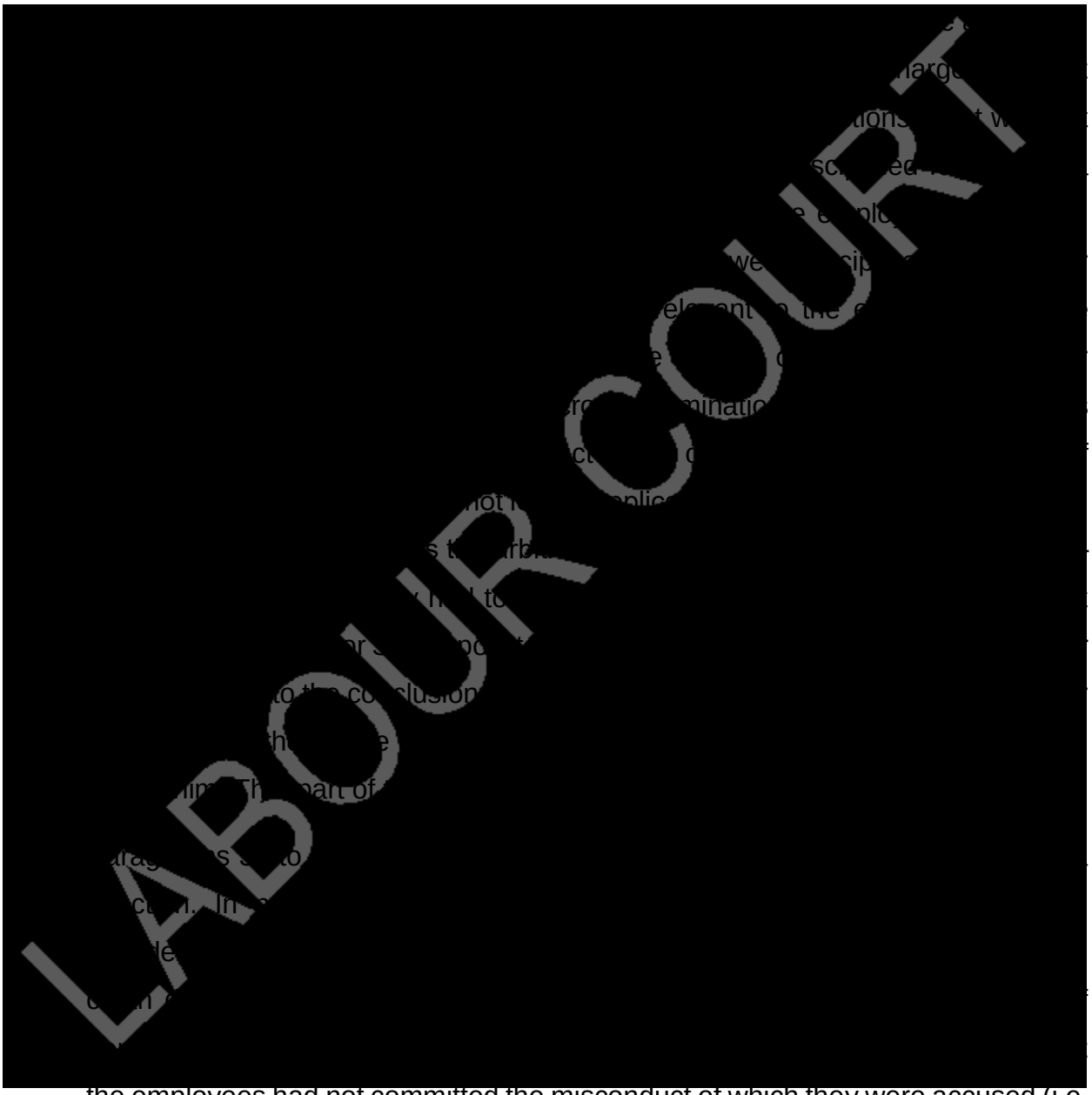


Molokeng [2015] 1 BLLR 50 (LAC), where the court emphasised that errors or irregularities in relation to facts or issues may or may not produce an unreasonable outcome; what matters is the materiality of the error or irregularity and its relation to the result. The court said the following:

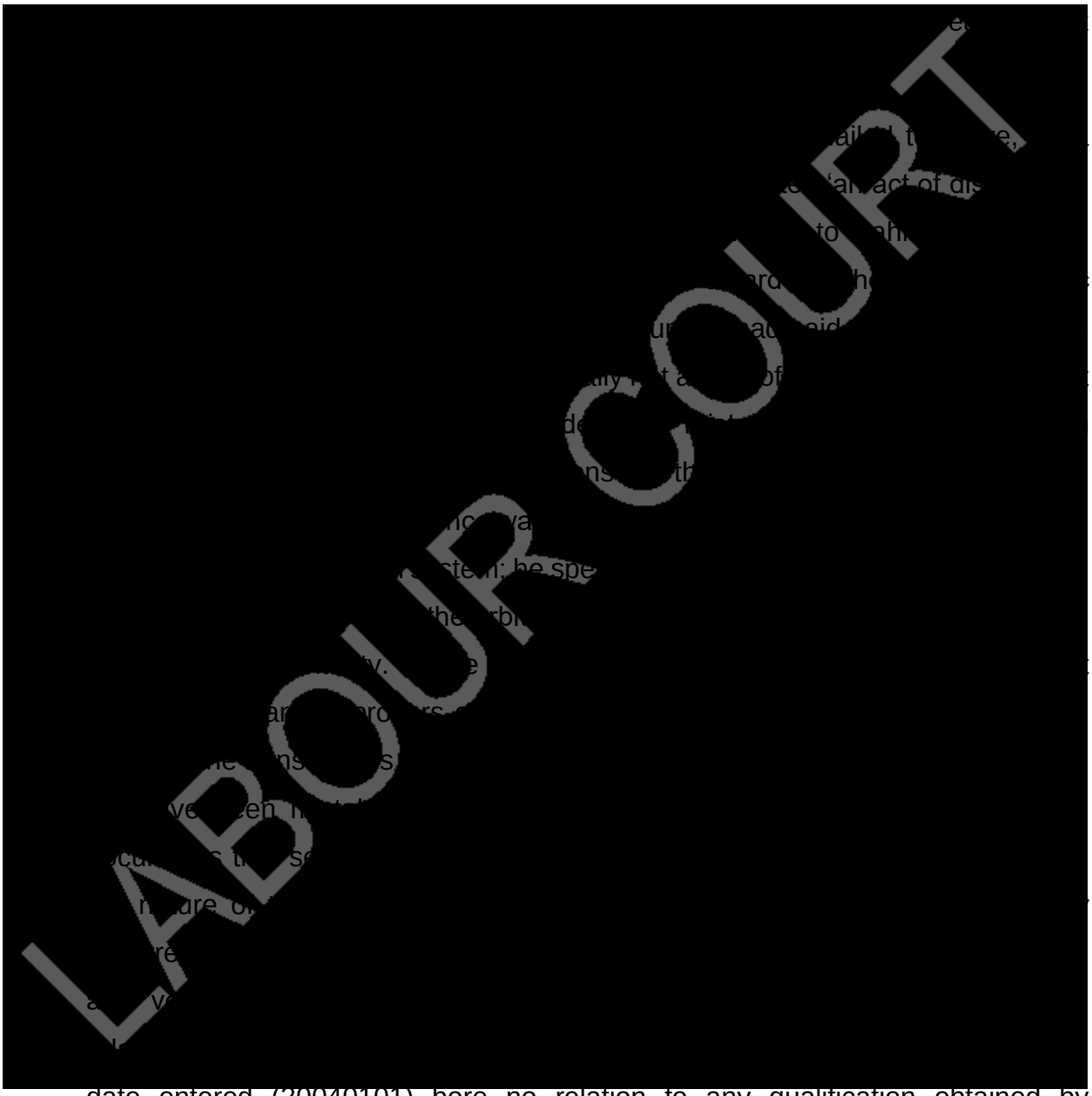
> Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A

to a mistake. It was never put to him in cross-examination that particular employees had in the past made mistakes and escaped disciplinary action. In Mhlabane's cross-examination, nothing was put to him regarding any inconsistent conduct on the part of the applicant. Indeed, it was the last witness, Sihalangu, who belatedly attempted to make out a case of inconsistency

[21] The arbitrator's finding that the applicant had acted inconsistently in applying a rule of conduct (in her mind, a rule against committing mistakes) by failing to discipline other employees who committed mistakes is not supported by the evidence, for at



the employees had not committed the misconduct of which they were accused (i.e. that they had made mistakes and had not acted dishonestly), none of this is relevant. There was no alternative charge of acting negligently, or 'making a mistake' - the employer's only charge was one of dishonest conduct. All of the considerations in these paragraphs address the appropriateness of dismissal as a sanction for proven misconduct, as opposed to some lesser penalty. To consider the factors relevant to a fair sanction after a finding that the employees were not guilty of the misconduct that they were alleged to have committed is irrational, and



date entered (20040101) bore no relation to any qualification obtained by Mahlangu, and yet was approved by both employees. Thirdly, in the ordinary course, the approval of a transaction would take at least five minutes – the approver would have to be given the file, scrutinise the source documents and the transaction, and approve them. In his view, this would take at least five minutes. Finally, the Persal numbers on the documents shown to him established that all of the transactions benefitted the same AS Mahlangu, whose Persal number was unique. The second payment could therefore not have been made to a 'different' AS Mahlangu. None of this evidence was seriously challenged in cross-

this court must broadly evaluate the evidence and consider whether the arbitrator's misdirections notwithstanding, the result is capable of justification for other reasons.

[26] Dishonest intent is a matter to be determined by the evidence. In *Nedcor Bank Ltd v Frank & others* (2002) 23 *ILJ* 1243 (LAC), the court referred to the elements of dishonesty as entailing '*a lack of integrity or straightforwardness and in particular, a willingness to steal, cheat, lie or act fraudulently*.' While this judgment is relied on by the arbitrator to find, it would seem, that there was no evidence of any

had been made in respect of two individuals with the same surname and initials, and in Sihlangu's case that she had been overworked, simply hold no water. In Xaba's case, the source document on which he sought to rely makes no reference to an effective date of 1 January 2004. Further, it was not disputed that the implementer receives a file from the registry with a unique Persal number – even if two employees share a common name, the transaction is effected on the basis of the Persal number. Xaba's assertion that the source document in respect of the second transaction was 'on the system' is similarly obviously contrived. This defence was never put to any of the applicant's witnesses, and fails to account for

Application to strike out

[29] Finally, there is the matter of the application to strike out. In response to the notice of motion and founding affidavit, the employees filed a supplementary affidavit. They did so prematurely, since the record and the applicant's Rule 7A (8) notice had not been filed. The applicant elected not to take issue with this state of affairs, 'from a practical perspective'. After the Rule 7A (8) notice and supplementary affidavit had been filed, the employees then filed a second answering affidavit, expanding on the content of the first. The applicants then objected on the basis that there is no provision in the Rules for the filing of a further affidavit. There is no

1. The arbitration award issued by the first respondent on 28 July 2017 under case number GPBC 1640/2009 is reviewed and set aside.
2. The award is substituted by the following:

   'The applicants' dismissal was substantively and procedurally fair, and the referral is dismissed.'

3. There is no order as to costs.


LABOUR COURT