



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C213/2023

In the matter between:

CITY OF CAPE TOWN METROPOLITCAN MUNICIPALITY

Applicant

and

SAMWU OBO VUYANI SILIMELA

First Respondent

SA LOCAL GOVERNMENT BARGAINING COUNCIL

Second Respondent

ANNE ERWIN N.O.

Third Respondent

Heard: 23 July 2025

Delivered: 14 November 2025

Review of arbitration award: unfair labour practice (benefits). Such disputes vindicate the right to fair labour practices. A dispute concerning a benefit is not a claim to the benefit itself but to the fair employer conduct. Commissioner found the City's conduct unfair and awarded compensation. A review cannot succeed on the basis that the commissioner sanctioned conduct allegedly ultra vires the employer's policies, since the focus is on conduct, not entitlement. Review dismissed, award upheld.

VARIATION: JUDGMENT

HARVEY AJ

Introduction

- [1] This case arises from a promotion that took something away. For years, while employed in the City of Cape Town's Solid Waste Directorate, Mr Silimela used a City vehicle to travel safely between his home in Parow and his shifts. When he was promoted and transferred to the Safety and Security Directorate, that transport was withdrawn. He found himself walking, hitchhiking, and relying on friends while others in similar posts continued to drive City vehicles. He referred an unfair labour practice dispute to the bargaining council, where the City's defence was that his use of its vehicles was not lawfully authorised.
- [2] The commissioner agreed that the City's conduct was unfair and ordered that Silimela be provided transport in accordance with the criteria of the City's now-current transport directive, together with compensation of R50 000.
- [3] The City challenges the award on several grounds, alleging gross irregularities and errors of law, and contending that the commissioner unreasonably validated unlawful conduct. Those contentions go to the merits of the review, but before turning to them I must first deal with three preliminary applications: for reinstatement, for condonation for the late filing of the review application, and for leave to file additional affidavits.

Preliminary matters

Reinstatement

- [4] A portion of the record was discovered to be missing due to the parties' mutual oversight. Once identified, the parties acted with haste to locate and deliver the missing material. Whilst under clause 11.2 of the Practice Manual then in force the review was deemed withdrawn, under the present Rule 37(13) the applicant would not be sanctioned in such circumstances. There was no prejudice to either party and the application is not opposed. The application for reinstatement is granted.

Condonation

- [5] The review application was filed 21 calendar days late. The delay arose from the City's internal processes to obtain the necessary authorisation and to brief a legal representative. The delay, whilst not insignificant, is satisfactorily explained, and caused no prejudice. The employee does not oppose the application for condonation. Condonation is granted.

Leave to file additional affidavits

- [6] Following the late discovery and filing of the missing portion of the record, the parties agreed to deliver an additional set of affidavits so that the review could be determined on a set of papers addressing all the material before the commissioner. The application to file the additional affidavits is, like the others, unopposed and granting it is in the interests of justice. Leave is accordingly granted under Rule 41(1).

Background

- [7] The first respondent employee, Mr Silimela, has been employed by the City of Cape Town since 2011. He initially served in the Solid Waste Directorate and, in August 2021, was promoted to the post of Inspector within the Safety and Security Directorate. The promotion, however, coincided with the withdrawal of the transport benefit he had utilised in his former post.
- [8] Silimela resides in Parow and he had been travelling to and from work using a City vehicle. After his promotion, however, he was required to make alternative arrangements. His new duties required him to work irregular hours, including midnight shifts, leaving him to navigate a public transport system which was unreliable and unsafe at those hours. He often had to hitchhike while in uniform, or rely on friends or family for lifts.
- [9] Silimela observed that many other employees continued to use City vehicles to travel between home and work. He considered this differential treatment to be unfair and, in December 2021, he lodged a grievance. His supervisor and several colleagues supported his grievance, acknowledging his safety concerns and the operational need. The Executive Director nevertheless declined the

request on the basis that he had no delegation of authority to approve such transport for Silimela's personal use.

- [10] In May 2022, the City issued a directive requiring staff to apply for transport on the basis of operational necessity. Mr Silimela submitted applications under this directive, but they were not successful. He inferred that his grievance had triggered a stricter application of the policies, and that he had been singled out for harsh treatment.
- [11] He referred a dispute to the CCMA, alleging that the City was treating him unfairly, amounting to an unfair labour practice relating to benefits. At arbitration, he and several witnesses testified that other employees in comparable roles continued to use City transport notwithstanding similar working patterns and risks. The City maintained that the facility had always been restricted to 'operational' use and that no lawful delegation authorised home-to-work travel.

The Arbitration Award

- [12] The commissioner found that the City's refusal to provide the employee with transport between his home and workplace constituted an unfair labour practice relating to benefits. She reasoned that the employee had previously enjoyed the use of City transport and that other employees in comparable positions continued to do so. She accepted that the employee had no contractual entitlement to the benefit, but was nevertheless satisfied that the City's conduct in treating him differently was inconsistent and unfair.
- [13] The commissioner ordered the City to apply its current transport policy (a new policy had been issued dated 1 August 2022) to the employee, and to compensate him for the unfairness he had suffered in the amount of R50,000, being roughly equivalent to two months' remuneration.

Review grounds

- [14] The review grounds, though variously framed, share a common theme: the City argues that the award is unreasonable because it validates conduct that the City could not lawfully authorise.

- [15] The first ground is an alleged error of law: it challenges the commissioner's reference to the night-work provisions in the Basic Conditions of Employment Act when it comes to transport, pointing out that the employee earned above the Ministerial earnings threshold. The argument is that by relying on the BCEA the commissioner introduced an error of law that distorted the outcome. Secondly, the City contends that the commissioner overlooked the absence of a contractual or delegated entitlement to the use of City vehicles for home-to-work travel, and that the dispute arose before the later transport directive. The further grounds attack her reference to that directive, claim that she ignored the City's statutory and delegation framework thereby legitimising an unlawful claim, and attack the award of compensation on the basis that it irrationally validates an unlawful benefit and was arrived at without evidentiary basis and without inviting submissions on quantum. In essence, the City's case is that a benefit which cannot lawfully be granted cannot give rise to an unfair labour practice.
- [16] The employee, on the other hand, maintains that the commissioner correctly characterised the dispute as one concerning unfair conduct rather than any contractual or statutory entitlement, and that she properly applied the approach as clarified by the LAC in *Apollo Tyres South Africa (Pty) Ltd v CCMA and Others*.¹ The reference to the nightwork and transport provisions in the BCEA, he says, provided relevant context underscoring the social importance of the operational and safety risks that motivated his request for transport, rather than the source of a right. The commissioner correctly looked to the later transport directive in order to craft a pragmatic and valid remedy, not to determine unfairness. As to the evidence, he maintains that the commissioner evaluated it fairly: he was required to work irregular and night shifts in unsafe conditions, while others in comparable positions continued to receive transport. The employee submits that the award is reasonable and within the commissioner's discretion, and that the compensation granted in the exercise of the commissioner's discretion reflects a proportionate and equitable remedy for unfair conduct, not for any unlawful benefit.

¹ *Apollo Tyres South Africa (Pty) Ltd v CCMA and Others* (2013) 34 ILJ 1120 (LAC) (*Apollo Tyres*).

Legal Framework

- [17] Section 186(2)(a) of the Labour Relations Act provides that an unfair labour practice is an unfair act or omission that arises between an employer and an employee involving unfair conduct by the employer relating to (among others) the provision of benefits. The focus of the provision is on the fairness of the employer's conduct, rather than on the source of any entitlement.
- [18] In *Apollo Tyres*² the Labour Appeal Court confirmed that, for purposes of an unfair labour practice dispute, it is not necessary to show an entitlement to a benefit arising from contract or statute. The enquiry is rather whether the employer's conduct in granting or withholding the benefit was unfair, including whether it was arbitrary, capricious, or inconsistent. Lawful conduct may nevertheless be unfair; lawfulness is not a defence to unfairness.
- [19] The review test, likewise, is well established. The Labour Court will not interfere merely because the commissioner erred in law or fact, but only where such error results in an outcome that a reasonable decision-maker could not reach on the material before her. The focus is on the reasonableness of the result rather than on the commissioner's reasoning process and individual misdirections are of no moment unless they led directly to an unreasonable result.³

Evaluation

- [20] The City's review grounds, considered individually or collectively, rest on a misconception of the unfair labour practice and the commissioner's task. The question before the commissioner was not whether the employee had a lawful or contractual entitlement to use a municipal vehicle, but whether the City's conduct in refusing him transport while others continued to receive it was unfair. That is the distinction drawn in *Apollo Tyres*: the fairness enquiry concerns the

² *ApolloTyres* note 1 above.

³ *Herholdt v Nedbank Ltd and Another (Congress of South African Trade Unions as Amicus Curiae)* [2013] 11 BLLR 1074 (SCA).

employer's conduct, not the existence of a legal right. That principle is by now trite.

- [21] It follows that the City's reliance on the absence of lawful delegation, or the potential irregularity of past practices, could not justify its unfair conduct or dispose of the dispute. Lawfulness and fairness are not interchangeable concepts. A municipality must act within the limits of its statutory powers, but considerations of internal policy do not immunise its conduct *qua* employer from being evaluated for fairness – policy decisions are themselves vulnerable to scrutiny. An employer may act lawfully, yet still unfairly, especially where similarly placed employees are treated differently without rational justification.
- [22] The award demonstrates that the commissioner appreciated this distinction. She acknowledged that the employee had no contractual right to the use of a vehicle, but found that the City's inconsistent application of its transport arrangements, coupled with the very real operational and safety difficulties faced by the employee, rendered its conduct unfair. She crafted a pragmatic remedy, incorporating the current transport directive and awarding reasonable compensation for the unfairness. The commissioner did not compel the City to act outside of its lawful powers; she directed that Silimela be treated in accordance with the same criteria as others.
- [23] The City's further review grounds, relating to the alleged absence of evidence, the use of irrelevant material, and the quantum of compensation, do not disclose any irregularity that lead directly to an unreasonable outcome. The evidence before the commissioner included the employee's testimony about his working hours, the safety risks he faced, and the continued provision of transport to others. The compensation of R50 000, roughly equivalent to two months' salary, was justified, and falls within the broad discretion afforded by section 194. Compensation for unfair labour practices does not address patrimonial loss, but redresses the impact of unfair treatment.
- [24] On the totality of the record, I am satisfied that the award is one that a reasonable decision-maker could reach. The commissioner applied the correct test, considered the relevant facts, and fashioned a fair remedy within her discretion. The review application must therefore fail.

Costs

- [25] Counsel for Mr Silimela sought a costs order against the City, noting that his legal expenses would likely exceed the compensation awarded to him. In argument, counsel pressed for a limited costs order from 23 April 2025, prior to which the employee had alternative and union representation. The City contended that no order as to costs should be made, in line with the general approach in employment matters.
- [26] Section 162 of the Labour Relations Act empowers the Court to make orders for costs according to the requirements of law and fairness. In *Zungu*⁴ the Constitutional Court confirmed that the ordinary rule that costs follow the result does not apply in labour matters, endorsing the principle in *MEC for Finance, KwaZulu-Natal v Dorkin NO*⁵ that costs should be awarded only where fairness so requires. This approach seeks to balance, as Zondo JP put it, the need to discourage frivolous or vexatious litigation against the risk of deterring parties from approaching the Labour Court to vindicate their rights.
- [27] In *Mugavazi*⁶ the Court ordered costs limited to the interlocutory stage because the respondents had raised meritless preliminary points, reasoning that the employee should not be left out of pocket for having had to defend such unnecessary points. In *Masinga*⁷ the Court granted fifty per cent of the employee's costs where the employer's unfounded defences had compelled him to litigate to secure payment of his salary, observing that fairness cannot mean a litigant must redirect a large portion of his legitimate claim towards legal fees. In *Brandt v Quoin Rock Wines*⁸ the Court awarded full costs because a dismissal for reasons related to pregnancy was egregiously unfair.
- [28] These decisions affirm that, while the norm remains that in labour disputes each party usually bears its own costs, fairness may justify a limited or

⁴ *Zungu v Premier of the Province of KwaZulu-Natal & others* (2018) 39 ILJ 523 (CC) at 23-24.

⁵ *Member of the Executive Council for Finance, KwaZulu-Natal & another v Dorkin NO & another* [2007] ZALAC 41; (2008) 29 ILJ 1707 (LAC) (*Dorkin*) at para 19. See also *Vermaak v MEC for Local Government & Traditional Affairs, North West Province* [2017] ZALAC 2.

⁶ *Mugavazi v SAA Technical SOC Ltd* (2024) 45 ILJ 2597 (LC).

⁷ *Masinga v Almar Investments (Pty) Ltd* (2025) 46 ILJ 379 (LC).

⁸ *Brandt v Quoin Rock Wines* (2023) 44 ILJ 309 (LC).

proportionate award where the litigation has imposed unjust and avoidable expenses on a party who acted reasonably.

[29] This dispute concerned one of the most basic employment rights: the right to fair labour practices, guaranteed by section 23 of the Constitution and given effect through section 186 of the LRA. Mr Silimela approached the bargaining council to vindicate that right in a forum intended to provide free, fast and final resolution of such disputes. He did not initiate the proceedings in this Court – however he was ultimately obliged to defend a justified arbitration award against a review that lacked merit, the principles established in *Apollo Tyres* and *Herholdt* being, by now, trite.

[30] The compensation awarded to Mr Silimela is modest, and it would offend fairness were it to be consumed by his legal costs. Having regard to the arguments presented, and to the requirements of law and fairness, I am satisfied that it is just and equitable to direct the City to pay fifty percent of the employee's legal costs incurred after 23 April 2025 on the party-party scale, with fees of counsel on scale A.

[31] In the result, the following order is made:

Order

1. The review application is reinstated.
2. Condonation is granted for the late filing of the review application.
3. The application for the filing of additional affidavits is granted.
4. The review application is dismissed.
5. The City must pay 50% of the first respondent's legal costs, limited to those incurred after 23 April 2025, including costs of counsel on scale A.

SJ Harvey

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms September instructed by Mosdell Pama & Cox

For the Respondent: Mr Lawrence instructed by SchoemanLaw

LABOUR COURT