(1) Reportable ~~Yes~~/No
(2) Of interest to other Judges: ~~Yes~~/No
(3) Revised

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Signature Date

**THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case No: JR 2539/21

In the matter between:

| | |
|---|---|
| **MATSHELISO BUTHELEZI AND 4 OTHERS** | **Applicants** |
| and | |
| **RAND WATER – ZUIKERBOSCH WATER** | **First Respondent** |
| **COMMISSION FOR CONCILIATION,** | |
| **MEDIATION AND ARBITRATION** | **Second Respondent** |
| **COMMISSIONER MOHAMMED JASSAT N.O.** | **Third Respondent** |

**Heard: 13 November 2025**

**Delivered: 3 February 2025**

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**JUDGMENT**

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**HOLMES, AJ**

<u>Introduction</u>

[1] This is an application in terms of section 145 of the Labour Relations Act[1] (LRA), wherein the Applicants seek to review and set aside an arbitration award issued under the auspices of the Second Respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA) by the Third Respondent, Commissioner Mohammed Jassat (the Commissioner), dated 28 October 2021, under case number GVL1813 – 20.

[2] The Commissioner found the dismissal of the Applicants to be substantively fair.

Background

[3] The First Applicant is Matsheliso Buthelezi, the Second Applicant is Neo Tshabalala, the Third Applicant is Sarah Mphuthi, the Fourth Applicant is Cathrine Mukatoni, and the Fifth Applicant is Alinah Sekeleme (hereinafter collectively referred to as "the Applicants"). At the time of the termination of their employment, the Applicants were employed by the First Respondent in its kitchen section as kitchen aides, cooks, and a kitchen supervisor.

[4] Following an investigation conducted by the First Respondent, the First, Second, Fourth and Fifth Applicants were charged with two counts of misconduct, as set out in the charge sheet as follows:

> "Charge 1: Schedule B, paragraph 1.22 (Serious transgression of Rand Water's Code of Ethics)
>
> Failure to report fraudulent activities pertaining to your overtime claims between the period 2017-2018, and
>
> Charge 2: Schedule B, paragraph 1.18 (Any deliberate act which causes real or potential prejudice to the employer) in that:
>
> You intentionally colluded with a supervisor to tamper with timesheets by claiming overtime you have not worked between the period of 2017 and 2018, and your action as stated resulted in you being unduly benefited to a total amount of [different amounts per individual applicant]."

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[1] 66 of 1995, as amended.

[5] The Third Applicant, Sarah Mphuthi, who was employed as a kitchen supervisor, was charged with two counts of misconduct, as reflected in the charge sheet as follows.

> "Charge 1 : You failed to report fraudulent reports from your subordinates to temper (sic) with their time sheets and allocate them overtime not worked during the period 2017 and 2028; and
>
> Charge 2 : You intentionally colluded with your subordinates to temper (sic) with their timesheets by claiming overtime for the period not worked during 2017 to 2018 and your actions as stated above resulted in them being unduly benefitting the total amount of R53 654,54."

[6] The Applicants pleaded guilty to the misconduct.

[7] The Applicants were dismissed on or about 4 December 2019. Following their dismissal, the Applicants referred an unfair dismissal dispute to the CCMA, challenging only the consistency of the sanction. Relying on the parity principle, the Applicants argued that the sanction of dismissal was unfair because two comparators, Messrs Naidoo and Jacobs ("the comparators"), had previously received a final written warning for an offence committed under Schedule B, paragraph 1.8 of the First Respondent's disciplinary code. The comparators had likewise pleaded guilty to, *inter alia*, submitting fraudulent travel claims.

[8] The Commissioner found that the dismissal of the Applicants was substantively fair on the basis that the Applicants' misconduct was distinguishable from the comparators and the seriousness of the misconduct.

<u>The review test</u>

[9] In terms of section 145(1) of the LRA, a party may review an arbitration award if the party alleges that the arbitration award is defective. Section 145(2) then goes on to state that a 'defect' referred to in sub-section (1) means.

> "(a) that the Commissioner –

(i) Committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) Committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) Exceeded the commissioner's powers; or

(b) that an award has been improperly obtained."

[10] Rule 7A(2)(c) of the Rules for the Conduct of Proceedings in the Labour Court (the Rules applicable at the time) provided as follows:

"(2) The notice of motion must—

…

(c) be supported by an affidavit setting out the factual and legal grounds upon which the applicant relies to have the decision or proceedings corrected or set aside."

[11] It is trite that an applicant for review must identify and articulate the grounds of review upon which reliance is placed in the founding (and, where applicable, supplementary) affidavit. A reviewing court is confined to those grounds in determining the application and may not formulate or advance a case for review that has not been pleaded.

[12] As set out in *Mpe v Polokwane Local Municipality and Others*:[2]

"[10] Rule 7A(2)(c) provides that the notice of motion must be supported by an affidavit setting out the factual and legal grounds upon which the applicant relies to have the decision or proceedings corrected or set aside. As to the requirement of setting out the legal grounds upon which the applicant relies in the founding affidavit, this requires the applicant to set out, with sufficient precision and detail, the ground of review and the bases on which the ground are relied upon.

[11] …

[2] (JR101/2023) [2024] ZALCJHB 426 (7 November 2024) at paras 10 to 14.

[12] …

[13] The role of the reviewing Court is limited to deciding issues that are raised in the applicant's founding (and supplementary) affidavit. This was confirmed by the Constitutional Court in Commercial Workers Union of SA v Tao Ying Metal Industries and Others3 (Tao Ying) where it was held that:

'…the role of the reviewing court is limited to deciding issues that are raised in the review proceedings. It may not on its own raise issues which were not raised by the party who seeks to review an arbitral award. There is much to be said for the submission by the workers that it is not for the reviewing court to tell a litigant what it should complain about. In particular, the LRA specifies the grounds upon which arbitral awards may be reviewed. A party who seeks to review an arbitral award is bound by the grounds contained in the review application. A litigant may not on appeal raise a new ground of review. To permit a party to do so may very well undermine the objective of the LRA to have labour disputes resolved as speedily as possible.'

[14] A party who seeks to review an arbitration award is bound by the grounds for review contained in the review application, subject to one qualification, namely that the Court is obliged to deal with a point of law apparent from the papers."

[13] The Applicants have not, as required in terms of section 145 of the LRA read together with Rule 7A, identified any ground of review including any failure or error on the part of the Commissioner in their founding papers. Instead, the Applicants have merely rehashed the background facts and arguments presented at arbitration and asked this court to find that the dismissal of the Applicants was unfair.

[14] The Applicants' attorney attempted, belatedly, to submit from the bar that the award is reviewable because (a) the Applicants did not act in unison, alternatively (b) that the comparators must likewise have conspired with other persons in the organisation otherwise they would not have been paid for travel

claimed. These submissions are not helpful as these grounds of review are not articulated in the Applicants' papers nor are they supported by the record.

[15] As set out by this Court in *Northam Platinum Ltd v Fganyago NO and Others*:[3]

> "[27] … In my view the law is very clear that a ground for review raised for the first time in argument cannot be sustained. The basic principle is that a litigant is required to set out all the material facts on which he or she relies on in challenging the reasonableness or otherwise of the commissioner's award in his or her founding affidavit. In Country Fair v CCMA & Others [1998] 6 BLLR 577 (LC), at page 580 paragraph 8 the Court in dealing with this issue held that a party that relied on the provisions of section 145 of the Labour Relations Act 66 of 1995, in its notice of motion and founding affidavit could not invoke the provisions of section 158 (1) (g) of the same Act as a ground for review during argument.
>
> [28] The principle that a litigant cannot seek to introduce a new ground for review having failed to do so in the founding or supplementary papers is set out succinctly in Director of Hospital Services v MISTRY 1979 (1) SA 626 ) at 635A — 636F (AD), where the Court in dealing with this issue had this to say:
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> "When as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by KRAUSE J in Pountos' Trustees v Lahanas 1924 WLD 67 at 68 and as has been said in many other cases:
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> "… an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon to confirm or deny."

[16] Having carefully considered the Applicants' founding papers, it is apparent that no reviewable defect as envisaged in section 145 of the LRA has been

[3] (JR233/07) [2009] ZALCJHB 55 (26 August 2009) at paras 27 and 28.

pleaded or established. The Applicants have not alleged misconduct, gross irregularity, excess of powers, or any impropriety in the procurement of the award. Rather, the application amounts to an attempt to persuade this Court to substitute its own view for that of the Commissioner, which is impermissible in review proceedings. In these circumstances, there exists no basis for this Court to interfere with the arbitration award, and accordingly the review application must be dismissed.

<u>Consistency</u>

[17] For the sake of completeness, I will nonetheless address the issue of consistency:

[18] The Commissioner addressed the issue of inconsistency based on, firstly the factors differentiating the Applicants from the comparators, and secondly the seriousness of the misconduct.

[19] Central to the Commissioner's finding that the Applicants' misconduct was distinguishable from that of the comparators was the conclusion that the Applicants had acted in unison with their supervisor in a deliberate scheme to defraud the First Respondent. The Commissioner described the fraud as "*well-orchestrated, planned and deviously thought out*", and found that it had "*undeniably caused an impact on the Respondent's business*". In these circumstances, the Commissioner concluded that the Applicants' misconduct was materially distinguishable from that of the comparators.

[20] This Court had regard to the test to be applied in *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*,[4] and held as follows:

> "[10] The courts have distinguished two forms of inconsistency - historical and contemporaneous inconsistency. The former requires that an employer apply the penalty of dismissal consistently with the way in which the penalty has been applied to other employees in the past; the latter requires that the penalty be applied consistently as between

[4] (2010) 31 ILJ 452 (LC) para 10.

two or more employees who commit the same misconduct. A claim of inconsistency (in either historical or contemporaneous terms) must satisfy a subjective element - an inconsistency challenge will fail where the employer did not know of the misconduct allegedly committed by the employee used as a comparator (see, for example, Gcwensha v CCMA & others [2006] 3 BLLR 234 (LAC) at paras 37-38). The objective element of the test to be applied is a comparator in the form of a similarly circumstanced employee subjected to different treatment, usually in the form of a disciplinary penalty less severe than that imposed on the claimant. (See Shoprite Checkers (Pty) Ltd v CCMA & others [2001] 7 BLLR 840 (LC) at para 3.) Similarity of circumstance is inevitably the most controversial component of this test. An inconsistency challenge will fail where the employer is able to differentiate between employees who have committed similar transgressions on the basis of inter alia differences in personal circumstances, the severity of the misconduct or on the basis of other material factors.'

[21] In *Association of Mineworkers and Others v Opsicol Mining Services CC*,[5] this Court held that:

"[15] I deal first with the applicants' submissions regarding what it contends was the inconsistent application of discipline. <u>The test to be applied to determine inconsistent conduct in the form of contemporaneous inconsistency on the part of an employer is objective, to the extent that the comparator must necessarily be a similarly circumstanced employee subjected to different treatment</u>. Thus, in Southern Sun Hotel Interests (Pty) Ltd v CCMA & others [2009] 11 BLLR 1128 (LC), this court noted that an inconsistency challenge will fail if the employer is able to differentiate between employees who have committed similar transcriptions on the basis of amongst other things, differences in personal circumstances, the severity of the misconduct or any other material factors." [Own emphasis added]

[22] Having regard to the Commissioners' reasoning and relevant authorities, the conclusion that the Applicants' misconduct was distinguishable from that of

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[5] (JS703/2018) [2023] ZALCJHB 177 (5 June 2023) at para 15.

the comparators falls within the band of decisions a reasonable decision-maker could reach.

[23] The Commissioner further found that, having regard to the seriousness of the misconduct, the Applicants could not escape the sanction of dismissal simply on the basis of the parity principle.

[24] It is well-established that consistency is merely an element of fairness, and ought not to be implemented in such a way as to permit employees who commit serious misconduct to escape the consequences thereof. This principle was expressed as follows by the Labour Appeal Court (LAC) in *ABSA Bank Ltd v Naidu and others*:[6]

> "[36] However, it ought to be realised, in my view, that <u>the parity principle may not just be applied willy-nilly without any measure of caution</u>. In this regard, I am inclined to agree with Professor Grogan when he remarks as follows:
>
> '[T]he parity principle should be applied with caution. <u>It may well be that employees who thoroughly deserved to be dismissed profit from the fact that other employees happened not to have been dismissed for a similar offence in the past or because another employee involved in the same misconduct was not dismissed through some oversight</u> by a disciplinary officer, or because different disciplinary officers had different views on the appropriate penalty."
>
> [37] In SACCAWU and Others v Irvin and Johnson (Pty) Ltd, this Court (per Conradie JA) stated:
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> 'In my view too great an emphasis is quite frequently sought to be placed on the principle of disciplinary consistency, also called the 'parity principle' … There is really no separate principle involved. Consistency must be measured by the same standards … Discipline must not be capricious. It really is the perception of bias inherent in selective discipline that makes it unfair. Where, however, one is faced with a large number of offending employees, the best one can hope for is reasonable consistency. Some inconsistency is the price to be

[6] (2015) 36 ILJ 602 (LAC) at paras 36 to 42.

paid for flexibility, which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness to the other employees. It would mean no more than his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In a case of plurality of dismissals, a wrong decision can only be unfair if it is capricious, or induced by improper motives or worse, by a discriminating management policy … Even then I dare say that it might not be so unfair as to undo the outcome of other disciplinary enquiries. … If, for example, one member of a group of employees who committed a serious offence against the employer is, for improper motives, not dismissed, it would not … necessarily mean that the other miscreants should escape. Fairness is a value judgment.'"

…

[42] Indeed, in accordance with the parity principle, the element of consistency on the part of an employer in its treatment of employees is an important factor to take into account in the determination process of the fairness of a dismissal. However, as I say, it is only a factor to take into account in that process. It is by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss. In my view, the fact that another employee committed a similar transgression in the past and was not dismissed cannot, and should not, be taken to grant a licence to every other employee, willy-nilly, to commit serious misdemeanours, especially of a dishonest nature, towards their employer on the belief that they would not be dismissed. It is well accepted in civilised society that two wrongs can never make a right. The parity principle was never intended to promote or encourage anarchy in the workplace. As stated earlier, I reiterate, there are varying degrees of dishonesty and, therefore, each case will be treated on the basis of its own facts and circumstances…"

(Own emphasis added)

[25] The LAC in *Nyathikazi v Public Health and Social Development Sectorial Bargaining Council*,[7] amplified on the above decision as follows:

> "[26] In short, the parity principle may well mean that in the previous case which is invoked in support of the application of an argument concerning discriminatory discipline, then the gravity of the initial disciplinary offence had not been properly appreciated. In such circumstances, it may be unjustified to invoke the parity principle, where an employee has committed a serious offence against the employer and the only defence raised is that in a previous case a wrong decision had been arrived and so that the employee's misconduct in the subsequent case can be overlooked. In the present case, the egregious misconduct of the appellant in two cases, justifies the application of the caution adopted by Ndlovu JA in the Absa case. However, as no cross-appeal was lodged by the third respondent against this part of the finding of the second respondent which, in turn, was confirmed on review by the court a quo, the appellant can therefore count herself fortunate in this regard. In Assmang (Pty) Ltd t/a Khumani Mine v Commission for Mediation, Arbitration and Conciliation and Others the Labour Court criticized the Commissioner's findings on inconsistency as follows:
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> 'The arbitrator in this case clearly did consider the issue of consistency to be dispositive of the issue of substantive fairness. It is perhaps this underlying misconception coupled with his single-minded focus on the failure to initiate disciplinary action against the members of the third respondent's team which resulted in the arbitrator failing to address important factors which did distinguish why it was justified in dismissing the third respondent, even if it should not have simply failed to make an effort to also charge his subordinates."
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> (Own emphasis added)

[26] In *Nedbank Ltd v Commission for Conciliation Mediation and Arbitration and Others*,[8] the Labour Court noted that:

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[7] (2021) 42 ILJ 1686 (GJ) (26 May 2021) at para 26.
[8] (JR 3166/10) [2013] ZALCJHB 226 para 12.

> "[12] The purpose of requiring employers to enforce discipline consistently is mainly to protect employees against discrimination. The parity principle does not require employers to mete out the same treatment to employees who have committed the same misconduct. In Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and Others the court adopted the following approach in applying the parity principle:
>
> <u>"When deciding the issue of parity, the gravity of the misconduct of the employee who seeks to rely on that principle should receive serious attention'. Where the employee's actions breached the trust relationship the parity principle cannot rescue an employee</u>."
>
> [Own emphasis added]

[27] The Applicants' misconduct involved dishonesty going to the heart of the employment relationship. As set out in the record, the trust relationship had broken down, and operationally the First Respondent cannot be expected to continue employing persons it does not trust. As stated by the LAC in *Shoprite Checkers (Pty) Ltd v CCMA and Others*:[9]

> "[16] In brief, this court has consistently followed an approach, laid out early in the jurisprudence of the Labour Court in Standard Bank SA Limited v CCMA and others [1998] 6 BLLR 622 at paras 38 - 41 where Tip AJ said: 'It was one of the fundamentals of the employment relationship that the employer should be able to place trust in the employee… A breach of this trust in the form of conduct involving dishonesty is one that goes to the heart of the employment relationship and is destructive of it.'"

[28] In light of the serious and deliberate nature of the misconduct to which the Applicants pleaded guilty, their reliance on the parity principle to avoid dismissal is misplaced. This Court has repeatedly emphasised that the parity principle should be applied with caution and is not intended to shield employees from the consequences of dishonesty. Where, as in this case, the dishonesty is such that the continuation of the employment relationship would

[9] (2008) 29 ILJ 2581 (LAC) para 16.

be intolerable, the Commissioner's conclusion that dismissal was an appropriate and fair sanction is reasonable and falls within the band of decisions a reasonable decision-maker could reach.

[29] The issue of costs is regulated by section 162 of the LRA, and the Court has a discretion to make such an order. This is not a matter warranting a departure from the trite legal principle that costs do not follow the result in this Court.[10]

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

Order

1. The review application is dismissed.

2. There is no order as to costs.

K. Holmes

Acting Judge of the Labour Court of South Africa



[10] *Zungu v Premier of the Province of KwaZulu-Natal and Others* (2018) 39 ILJ 523 (CC); See also *National Union of Mineworkers on behalf of Masha and others v Samancor Ltd (Eastern Chrome Mines) and others* (2021) 42 ILJ 1881 (CC).

Appearances:

| | |
|---|---|
| For the Applicant: | N Thejane |
| Instructed by: | Stephina Motlhamme Attorneys Inc. |
| For the Respondent: | LK Siyo |
| Instructed by: | Salijee Govender van der Merwe Inc. |