



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

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case No: C675/2023

In the matter between:

THE CITY OF CAPE TOWN

Applicant

and

SAMWU obo MKHULULI MLUNGWANA

First Respondent

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

Second Respondent

COMMISSIONER URSULAR BILBRING N.O

Third Respondent

Heard: 03 July 2025

Delivered: 19 February 2026

JUDGMENT

MAPOMA, AJ

[1] This is an opposed review application in terms of section 145, read with section 158(1)(g) of the Labour Relations Act¹ (the LRA). The City of Cape Town (the City), seeks to review and set aside the arbitration award that was delivered by the third

¹ Act 66 of 1995 (as amended)

respondent (the arbitrator) on 6 November 2023, in which the commissioner found that the dismissal of the first respondent (Mlungwana, represented by the South African Municipal Workers Union (SAMWU)) was procedurally fair but substantively unfair, and ordered that the applicant reinstate the employee with no back pay. The City also seeks condonation for the late launching of this application.

- [2] The review sought only relates to the arbitrator's finding that the dismissal is substantively unfair. The thrust of the review application is that, based on the various review grounds, the commissioner's award is irrational and is one which a reasonable decision maker faced with the same facts could not make.
- [3] The application is opposed by the first respondent, trade union on behalf of its member, the employee. The basis of the opposition is that the award is within the bounds of reasonableness and thus unimpeachable, for it is not that which a reasonable decision maker could not make.
- [4] The facts are fairly straightforward and can be summarised as follows. Mlungwana was employed by the City as an administrative clerk, stationed at the City's Drivers Licence Testing Centre (the DLTC) at New Ottery, Cape Town. He was dismissed on 7 February 2023, pursuant to a disciplinary hearing, on in which he was found guilty of committing an act of gross dishonesty when he claimed a two hour overtime, stating that he worked from 16h00 until 18h00 when he left the workplace at 17h46, meaning that he worked 14 minutes less than what he claimed.
- [5] The City took a view that Mlungwana's incorrect recording of the knock-off time as 18h00 on the manual clock in/out instead of 17h46 conduct showed dishonesty and that dismissal was an appropriate sanction therefor. He was found guilty of misconduct and consequently dismissed. Crucially, Mlungwana's supervisor, Tandi Phadi, who also left the workplace earlier than the claimed knock-off time was not charged for the same misconduct.
- [6] Aggrieved by the dismissal, the South African Municipal Workers Union (SAMWU), acting on behalf of its member, Mlungwana, referred a dispute of unfair dismissal to the bargaining council, and the matter ended up in arbitration. Having heard and considered the matter, the arbitrator delivered an award where she found that the City succeeded in proving on the balance of probabilities that Mlungwana was guilty

as charged for incorrectly recording that he worked until 18h00 when in fact he worked until 17h46, that is 14 minutes short of the claimed time.

- [7] The arbitrator found that the dismissal was procedurally fair. She however found that based on the totality of the circumstances in determining the fairness of the sanction, the dismissal was substantively unfair, for she reasoned that the sanction of dismissal was too harsh and inappropriate in the circumstances of the case. She then directed that Mlungwana be re-instated without back-pay.
- [8] In arriving at the decision, the arbitrator reasoned that in deciding on the appropriateness of dismissal, she noted that Mlungwana's action was dishonest, for he misrepresented the time by 14 minutes. She however found that she worked under her supervisor with whom she left earlier together. The arbitrator found that, based on the facts which are common cause, Mlungwana's supervisor committed the same offence for she misrepresented her time by nine minutes. She found that contrary to the City's "zero tolerance" policy on dishonesty, the City applied the policy inconsistently, in that by saying that it is acceptable to be dishonest by 9 minutes and dishonest by 14 minutes on a "zero tolerance" policy is contradictory.
- [9] The arbitrator noted that Phala was the supervisor, and that Mlungwana followed her lead. According to the arbitrator, by condoning Phala's conduct on zero tolerance and distinguishing her from Mlungisi was inconsistent application of discipline and was thus irrational and arbitrary, more so considering that Phala was a supervisor and thus a senior employee. This, according to the arbitrator's reasoning, made the sanction of dismissal to Mlungwana too harsh and unfair. The arbitrator also considered that Mlungwana had a clean disciplinary record.
- [10] Aggrieved by the arbitrator's finding that the dismissal was substantively unfair and directing the re-instatement of Mlungwana, the City approached this Court seeking the review and setting aside of the award in this regard. This is the bone of contention that brought about this review.
- [11] Having noted that the review application was lodged four days out of time, the City applied in terms of section 145(1A) of the LRA for condonation of the late filing of the review application. While the respondent filed opposing papers against the condonation application, the respondent did not pursue the opposition during the

hearing of the matter and same was left in the hands of the Court. Having considered the matter, the Court is satisfied that the applicant met all the requirements for the condonation sought and as such established good cause. Accordingly, condonation is granted for the late filing of the review application.

- [12] In attacking the award, the City advanced as grounds of review that the arbitrator *'erred in findings of fact; committed errors of law; failed to apply her mind to the issues before her; failed to demonstrate the rational and/or reasonable connection between the evidence before her and the eventual findings she made'*. To round it off, the City contends that the arbitrator's award is accordingly irrational and is not one which a reasonable decision maker could have made based on the evidence that was placed before her and thus falls to be reviewed and set aside.
- [13] In its supplementary affidavit, apart from regurgitating and elaborating on the above review grounds, the City added that the arbitrator committed a reviewable irregularity and reached an unreasonable outcome by considering and relying on the plea of inconsistency and finding that the sanction of dismissal was substantively unfair when such a plea was neither properly presented, ventilated nor tested before her.
- [14] The respondent opposes the application on the basis that the award is amply reasonable, for according to the first respondent, it is that which a reasonable arbitrator could have made. In particular, the respondents contend that it was common cause that the employee's supervisor was not charged in circumstances where she committed the same offense for which Mlungwana was dismissed and as such the disciplinary policy of zero tolerance was inconsistently applied.
- [15] The central issue for determination is whether the award contained reviewable defects that make the award an unreasonable decision which no reasonable decision maker could have made. This has to be considered in light of the review grounds advanced by the City.
- [16] In my view, the facts as gleaned from the evidence are clearly set out and properly analysed in detail by the arbitrator. The grounds of errors of fact, nor errors of law that are postulated in the application papers were not argued with any force during the hearing. I have not found any such errors. The central issue that the City relied on in attacking the impugned decision is that the arbitrator *firstly*, committed

irregularity in allowing the employee to lead new evidence of inconsistency late during re-examination, and *secondly*, reached an unreasonable outcome by considering the plea of inconsistency which was not properly placed before her.

- [17] Section 138(1) of the LRA gives a wide discretion to the arbitrator in conducting the proceedings in a manner that would enable her to determine the dispute fairly and quickly with minimum legal formalities. The section provides as follows:

- “(1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the *dispute* fairly and quickly, but must deal with the substantial merits of the *dispute* with the minimum of legal formalities.
- (2) Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question the witnesses of the other party, and address concluding arguments to the commissioner”

- [18] In my view, while the record shows that the issue of inconsistency was raised by the employee at the stage mentioned by the City, nothing turns from that on irregularity of the proceedings, given the wide discretion given by the statute to the commissioner. It was within her powers, to in her wisdom, allow that evidence to the extent that it dealt with the substantial merits of the dispute, namely, whether the dismissal was unfair. Importantly, the facts relating to the issue of inconsistency are not in dispute. Further, the City was at liberty to lead further evidence if it disputed those facts but elected not to. Thus, I find no merit in the argument of gross irregularity on the stated ground.

- [19] More precisely, on the facts it is not in dispute that on the day in question, Mlungwana left the workplace at the same time as his supervisor, and that both left the workplace before the claimed knock-off time. In so doing they both committed a misconduct for which Mlungawana was dismissed. It is also not in dispute that the supervisor was not charged for the misconduct which they both committed. The explanation offered by the City for not taking disciplinary action against the supervisor was that she left less than 10 minutes (9 minutes) earlier than the claimed time whereas Mlungwana left 14 minutes earlier. The arbitrator was not convinced that this made any difference

as they both breached the policy and that the City had a 'zero tolerance' policy on such a breach, hence the arbitrator reasoned that the selective disciplinary action constituted substantively unfair dismissal.

- [20] In short, this is a case of contemporaneous inconsistency, which arises where two or more employees have committed the same act of misconduct at the same time, but not all are subjected to disciplinary action, and only some are. The foundational principle underlying the requirement of consistency in the application of discipline in the workplace is traceable from section 9, read with section 23 of the Constitution of the Republic of South Africa, 1996 (the Constitution). Section 9 guarantees everyone to be equal before the law, and a right to equal protection and benefit of the law. This section is complimented by section 23 which guarantees everyone the right to fair labour practices. In the work context, the principle of consistency postulates that when fostering discipline like must be treated alike unless the employer can justify the differentiation of treatment.
- [21] In *Cape Town City Council v Masitho and Others*,² the Labour Appeal Court, per Nugent AJA (as he then was), addressed the principle of consistency in disciplinary actions in the workplace. The court emphasized that employees guilty of similar misconduct should be treated similarly. The court stated as follows:

"In *SACCAWU & Others v Irvin & Johnson* (1999) 8 BLLR 741 (LAC) at 751 B this court reiterated that consistency is an element of disciplinary fairness, and that it "is really the perception of bias inherent in selective discipline which makes it unfair", but went on to observe that the flexibility which is inherent in the exercise of discretion will inevitably create the potential for some inconsistency. I am not at all sure that disciplinary decisions involve the exercise of a discretion, but even if that is so, fairness would seem to me to generally require any such discretion to be exercised consistently. While it is true that an employer cannot be expected to continue repeating a wrong decision in obeisance to a principle of consistency (751D), in my view the proper course in such cases is to let it be known to employees clearly and in advance that the earlier application of disciplinary measures cannot be expected to be adhered to in the future. Fairness, of course, is a value judgment, to be determined in the circumstances of the particular

² (2000) 21 ILJ 1957 (LAC)

case, and for that reason there is necessarily room for flexibility, but where two employees have committed the same wrong, and there is nothing else to distinguish them, I can see no reason why they ought not generally to be dealt with in the same way, and I do not understand the decision in that case to suggest the contrary. Without that, employees will inevitably, and in my view justifiably, consider themselves to be aggrieved in consequence of at least a perception of bias." (Own emphasis)

- [22] It must be noted that consistency does not require that the same sanction be imposed in every instance where the same misconduct occurs. All it means is that same treatment in the form of procedure must be applied in addressing similar instances of the same act of misconduct. In this case, while the employee was charged and ultimately dismissed for the same act of misconduct, his supervisor with whom he committed the same offence was not even charged, and there is no evidence of any disciplinary action having been taken against her. The late argument by the counsel for the City during the hearing that the supervisor was still under investigation was not placed before the arbitrator.
- [23] In determining whether the sanction of dismissal for the misconduct is fair, one of the issues the arbitrator has to consider is whether *'the rule or standard has been consistently applied by the employer'* in terms of Item 7 (b) (iii) of the Code of Good Practice: Dismissal. In this case, the arbitrator did just that, because it would be dereliction of her duty if she were to disregard such an issue simply because it was raised rather late in the proceedings by the lay employee.
- [24] The record shows that upon being confronted by the allegation of inconsistent application of the rule, the City readily provided explanation to the arbitrator for the differentiation, namely, that Mlungwana's supervisor, who also committed the same offence with him, was not charged because she left work 9 minutes earlier whereas Mlungwana left 14 minutes earlier. The arbitrator found that the rule was inconsistently applied, because they both breached the rule, and the differentiation was not justified in the circumstances.
- [25] The *ratio decidendi* of the arbitrator in the award is that the City had not consistently applied the 'zero tolerance' policy on dishonesty with regards to its rules and sanction in the light of the misconduct complained of. Based on the above and the imperative

of consistent treatment of employees as crucial element of fairness, it is my view that based on the evidence placed before her, the arbitrator properly applied her mind and reasoned soundly that the dismissal was substantively unfair. In my view, the resultant decision of the arbitrator cannot be faltered.

- [26] Another issue raised by the City during argument in attacking the arbitration award is that the arbitrator failed to consider that there was irretrievable breakdown of trust in employment relationship between the City and Mlungwana. In this regard, it does not appear from the record that this issue was canvassed by the City at the arbitration proceedings. Also, no evidence was led before the arbitrator in this regard.
- [27] In a case where the employer seeks to justify the dismissal on the basis of breakdown of trust relationship with the employee, the Labour Appeal Court (LAC) in *Autozone v Dispute Resolution Centre and Others*,³ per Murphy AJA, eloquently articulated that in such cases it would be prudent normally of an employer to lead evidence in that regard unless the conclusion that the trust relationship had broken down is apparent from the nature of the offence or the circumstances of a dismissal.
- [28] My view is that in a case where like present, where a subordinate employee is charged with an act of misconduct that he committed together with the supervisor and the latter is not equally charged, it cannot be said that the breakdown of the trust relationship is apparent from that conduct or circumstances of the dismissal. This is so because it would not make sense that a similar conduct can have different consequences to different employees on the same set of facts. This is more so when such conduct has been condoned only to a senior employee who was responsible for, *inter alia*, instilling discipline and behaving in an exemplary manner. The circumstances of dismissal in this case do not illustrate a breakdown of trust relationship, so much so that the employer was absolved from leading evidence before the arbitrator in that regard.
- [29] In such circumstances, I find that the argument of breakdown of trust relationship is not convincing. In my view, it would be unfair to have expected the arbitrator to take judicial notice of the claimed breakdown of trust employment relationship in

³ (2019) 40 ILJ 1501 (LAC).

circumstances where there has been disparate application of discipline meted upon the employees who have committed the same act at the same incident.

[30] Having considered all the relevant issues at play in this matter, I am of the view that the arbitration award is not one that which no reasonable decision maker could have made on the facts placed before her. In my view the reasoning of the arbitrator is sound and the resultant award amply reasonable, and thus, the arbitrator cannot be faltered in the circumstances. It follows that the review application must fail.

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

Order

1. The condonation application for the late lodgement of the review application is granted;
2. The review application is dismissed;
3. There is no order as to costs



Z. L. Mapoma

Acting Judge of the Labour Court of South Africa

Appearances:

Counsel for the Applicant : Adv V September

Instructed by : Riley Incorporated, Cape Town

Counsel for the Respondent : Mr Elco Geldenhuys

Instructed by : Mc Gregor Erasmus Attorneys, Cape Town