



IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not reportable
Case No: **C 185 / 21**

In the matter between:

WONGAMA MBOMBO

Applicant

and

DEPARTMENT OF CORRECTIONAL SERVICES

First Respondent

**GENERAL PUBLIC SERVICE SECTORAL
BARGAINING COUNCIL**

Second Respondent

JACQUES BUITENDAG N.O.

Third Respondent

Heard: 22 July 2026

Delivered: 28 July 2026

JUDGMENT

VENTER AJ

Introduction

- [1] This is an opposed application to review and set aside an arbitration award issued by the Third Respondent, Commissioner Jacques Buitendag N.O. (the Commissioner), under the auspices of the General Public Service Sector Bargaining Council ("the Bargaining Council"), under case number GPBC2389-2019. In the arbitration proceedings, the Applicant challenged the substantive fairness of his dismissal by the First Respondent, the Department of Correctional Services. The Commissioner found the dismissal to be substantively fair, prompting the present review application.
- [2] The review application was heard in Court on 22 July 2026. The Applicant was represented by Adv Casner whilst the First Respondent was represented by Adv Nyman.
- [3] The Applicant seeks an order reviewing and setting aside the arbitration award in terms of section 145 of the Labour Relations Act 66 of 1995 (the LRA). The application is aimed mainly at the Commissioner's finding that the Applicant was guilty of engaging in prohibited pecuniary dealings with an inmate and the subsequent finding that his dismissal was substantively fair.
- [4] The First Respondent opposes the application and contends that the Commissioner properly considered the evidence presented at the arbitration proceedings, correctly interpreted the applicable provisions of the Correctional Services Act 111 of 1998 and the relevant disciplinary code, and arrived at a decision within the band of decisions to which a reasonable decision-maker could have come.

Material background

- [5] The Applicant commenced employment with the First Respondent on 7 March 1997. At the time of his dismissal, he occupied the position of Senior Correctional Officer and Head of the Emergency Support Team (EST) at Pollsmoor Correctional Centre in the Western Cape. Following an internal disciplinary hearing, the Applicant was dismissed on 6 November 2019.

- [6] The Applicant faced three disciplinary charges. The first and second charges alleged that, on 6 October 2018 and 1 November 2018, he contravened section 118(2)(b) of the Correctional Services Act 111 of 1998 by depositing R500.00 on each occasion into the account of inmate Janick Adonis. The third charge alleged that, between 4 June 2018 and 14 January 2019, the Applicant unlawfully removed, or caused the removal of, the same inmate from Pollsmoor Medium A Correctional Centre to the Area Commissioner's office and guest house without lawful authority, in contravention of section 116 of the Correctional Services Act.
- [7] Aggrieved by his dismissal, the Applicant referred an unfair dismissal dispute to the Bargaining Council. The dispute concerned only the substantive fairness of the dismissal; procedural fairness was not in issue. The Applicant sought retrospective reinstatement as the primary relief.
- [8] During the arbitration proceedings, the First Respondent led evidence in support of all three charges. The Applicant, in turn, disputed the allegations and, amongst other things, argued that the deposits into the inmate's account did not constitute prohibited pecuniary dealings, that such conduct was common within the Department, and that he had been subjected to inconsistent disciplinary action. The Applicant further denied unlawfully removing the inmate from the correctional facility.
- [9] On 7 March 2021, the Commissioner issued an arbitration award finding the Applicant not guilty of the allegations of unauthorised removal of the inmate from the correctional facility. However, the Commissioner concluded that the Applicant had contravened section 118(2)(b) of the Correctional Services Act by engaging in prohibited pecuniary dealings with an inmate. Having found the remaining misconduct sufficiently serious, the Commissioner held that the Applicant's dismissal was substantively fair and dismissed the unfair dismissal dispute. This arbitration award is the subject of the present review proceedings.

Review grounds submitted by the Applicant

- [10] The Applicant submits that the arbitration award is reviewable under section 145 of the LRA. Although the Applicant accepts that the Commissioner correctly found him not guilty of the allegations relating to the unauthorised removal of inmate Janick Adonis from Pollsmoor Correctional Centre, he submits that the Commissioner committed a reviewable irregularity in finding that his conduct in depositing money into the inmate's account constituted prohibited pecuniary dealings in contravention of section 118(2)(b) of the Correctional Services Act.
- [11] The Applicant submits that the Commissioner failed to properly evaluate the evidence regarding the deposits into the inmate's account. He contends that the deposits were made openly through the Department's cashier, that official receipts were issued in respect of them, and that he never concealed his conduct. According to the Applicant, he was never informed that such conduct constituted misconduct and believed that the deposits were lawful and permissible. He further alleges that the Commissioner failed to appreciate that the deposits were processed through official Departmental procedures and that the evidence did not establish that he derived any personal benefit or acted contrary to the purpose of section 118 of the Correctional Services Act.
- [12] A key aspect of the Applicant's argument is his claim that the First Respondent disciplined him inconsistently. He argues that it was routine for correctional officials to deposit money into inmates' accounts, and many officials did the same without facing disciplinary measures. He cites evidence from the arbitration suggesting no rule prohibited such deposits, his supervisors found the practice acceptable and he presented documentation showing other officials who had also deposited money but were never disciplined. As a result, the Applicant argues he was unfairly singled out for dismissal and that the Commissioner did not properly apply the parity principle in judging the fairness of the punishment.
- [13] The Applicant claims that the Commissioner did not give sufficient weight to witnesses' testimony that depositing money into inmates' accounts was a normal practice at Pollsmoor Correctional Centre and that no official had ever been dismissed or disciplined for this. The Applicant asserts that the Commissioner

either ignored or failed to properly assess this evidence, leading to an unreasonable conclusion about both misconduct and the appropriate sanction.

- [14] Finally, the Applicant argues that although the Commissioner correctly found that the evidence did not prove the most serious charge of unauthorised removal of the inmate, the Commissioner still failed to assess whether dismissal was a fair punishment for the other misconduct. The Applicant claims that, when considering the evidence as a whole, dismissal was not justified and that the Commissioner did not properly evaluate the totality of the evidence, relevant legal principles, and fairness of dismissal. Consequently, the Applicant requests a review and setting aside of the arbitration award and asks for a new order declaring his dismissal substantively unfair, or in the alternative, remitting the case back to the Bargaining Council for reconsideration.

Arguments of the First Respondent

- [15] The First Respondent opposes the review application, arguing that the Commissioner properly assessed the evidence and made a decision within the reasonableness standard of section 145 of the LRA. It asserts that the Applicant's review is essentially an effort to have this Court reevaluate the merits of the case and replace the Commissioner's findings, despite the lack of any reviewable irregularity.
- [16] The First Respondent submits that the Applicant was employed as the Head of the Emergency Support Team at Pollsmoor Correctional Centre and held a position of trust and responsibility. It contends that the Applicant was charged with three counts of misconduct, namely two charges of prohibited pecuniary dealings with an inmate in contravention of section 118(2)(b) of the Correctional Services Act 111 of 1998, and a third charge of the unauthorised removal of a remand detainee from the correctional facility. According to the First Respondent, the disciplinary proceedings were conducted fairly and resulted in the Applicant's dismissal after he was found guilty of the misconduct.
- [17] Regarding the first two charges, the First Respondent contends that section 118(2)(b) expressly prohibits correctional officials from engaging in pecuniary

dealings with inmates or persons connected to inmates, except where such dealings arise in the execution of official duties. It submits that the Applicant admitted depositing money into the inmate's account and that the issue before the Commissioner was not whether the deposits were made openly or through official channels, but whether the conduct itself was prohibited by the Correctional Services Act. The First Respondent argues that the Commissioner correctly interpreted the statutory prohibition and concluded that the Applicant's conduct constituted misconduct, irrespective of whether receipts had been issued or whether the deposits were processed through the Department's cashier.

[18] The First Respondent further disputes the Applicant's allegation of inconsistent discipline. It submits that the Commissioner properly evaluated the evidence relating to consistency and correctly concluded that the Applicant had failed to establish that other officials who were allegedly treated differently were valid comparators. The First Respondent contends that the Commissioner considered the evidence regarding the alleged practice of depositing money into inmates' accounts but was entitled to reject the Applicant's contention that such evidence rendered his dismissal unfair. It further submits that an allegation of inconsistency cannot justify overlooking clear statutory misconduct or compel an employer to perpetuate previous failures to discipline other employees.

[19] Although the Commissioner acquitted the Applicant on the charge relating to the unauthorised removal of the inmate, the First Respondent submits that the remaining misconduct, viewed in the context of the Applicant's senior position, the statutory obligations imposed upon correctional officials and the trust inherent in his employment, was sufficiently serious to justify dismissal. It contends that the Commissioner properly exercised his discretion in determining that dismissal remained an appropriate sanction notwithstanding the Applicant's acquittal on the third charge.

[20] In the premises, the First Respondent submits that the Applicant has failed to establish any reviewable irregularity, error of law or unreasonable outcome

warranting interference by this Court. It accordingly seeks an order dismissing the review application and confirming the arbitration award.

Test for review

[21] The appropriate test for review is now settled. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,¹ the Court held that 'the reasonableness standard should now suffuse section 145 of the LRA'. The Court further held that the threshold test for the reasonableness of an award was: '...Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'²

[22] This means a two-stage review enquiry. Firstly, the review applicant must establish that there is a failure or error on the part of the arbitrator. If this cannot be shown, that is the end of the matter. Secondly, if such a failure or error is shown, the review applicant must further show that the outcome reached by the arbitrator was unreasonable. If the outcome is nonetheless reasonable, despite the error or failure, it is equally the end of the review application. In short, for the review to succeed, the error or failure must affect the reasonableness of the outcome to the point of rendering it unreasonable. In *Herholdt v Nedbank Ltd and Another*³ the Court said:

'... A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of

¹ (2007) 28 ILJ 2405 (CC).

² Id at para 110. See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC) at para 96.

³ (2013) 34 ILJ 2795 (SCA) at para 25.

themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.’

- [23] The reasonableness consideration as articulated in *Herholdt* was then applied by the Labour Appeal Court (LAC) in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*⁴ as follows:

‘... in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material.’

- [24] Against the above principles and test, the Court will now proceed to consider the Applicant’s application to review and set aside the arbitration award of the second respondent.

Analysis of review grounds – Substantive fairness

- [25] The main question is whether the Commissioner made an irregularity that can be reviewed when deciding that the Applicant’s dismissal for contravening section 118(2)(b) of the Correctional Services Act 111 of 1998 was substantively fair. The Applicant mainly disputes the Commissioner’s handling of the evidence concerning inconsistency and whether dismissal was an appropriate penalty.
- [26] It is common cause that the Applicant deposited money into an inmate’s account on two separate occasions. The Applicant’s defence is not that the transactions did not occur, but rather that the deposits were made openly through the Department’s official procedures, that receipts were issued in respect of them,

⁴ (2014) 35 ILJ 943 (LAC) at para 14. The *Gold Fields* judgment was followed by the LAC itself in *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2015) 36 ILJ 2038 (LAC) at para 16.

and that other correctional officials had engaged in similar conduct without being subjected to disciplinary action. In the Court's view, these considerations do not alter the essential nature of the enquiry. The issue is whether the Applicant engaged in prohibited pecuniary dealings with an inmate as contemplated by section 118(2)(b) of the Correctional Services Act.

- [27] The Court is unable to fault the Commissioner's conclusion in this regard. The fact that the deposits were made openly, processed through official channels, or accompanied by official receipts does not alter the nature of the transactions. The Legislature has expressly prohibited correctional officials from engaging in pecuniary dealings with inmates, except where authorised by the Act. The purpose of this prohibition is self-evident. It seeks to maintain the integrity of the correctional environment, prevent inappropriate financial relationships between officials and inmates, and safeguard public confidence in the administration of correctional facilities. The Commissioner's finding that the Applicant's conduct fell within the statutory prohibition is therefore both rational and consistent with the purpose of the legislation, and so is his reasoning for rejecting the Applicant and his witnesses' evidence in this regard.
- [28] The Applicant places considerable reliance on the alleged inconsistent application of discipline. It is well established that consistency is an important consideration in determining the fairness of a dismissal. However, consistency is not an inflexible rule and does not constitute the only consideration.
- [29] In *National Union of Mineworkers on behalf of Botsane v Anglo Platinum Mine* ⁵ it was held that:

'The idea of inconsistency in employee discipline derives from the notion that it is unfair that like and like are not treated alike. The core of this 'factor' in the application of employee discipline (it would be a misconception to call it a principle) is the rejection of capricious or arbitrary conduct by an employer.

⁵ (2014) 35 ILJ 2406 (LAC) at paras 25 – 26. See also *Mtshwene v Glencore Operations SA (Pty) Ltd (Lion Ferrochrome)* (2019) 40 ILJ 507 (LAC) at para 24.

It has application in two respects. Mainly, it is a recognition of the unfairness of the condemnation of one person for genuine misconduct when another indistinguishable case of misconduct by another person is condoned. The second application is the recognition of the unfairness that results when disparate sanctions are meted out for indistinguishable misconduct to different persons.'

- [30] Moreover, in *Bidserv Industrial Products (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁶ the Court specifically warned that where it came to considering issues of inconsistency, saying that:

'This court sounded a warning on approaching the question of inconsistency in the application of discipline willy-nilly without any measure of caution. Inconsistency is a factor to be taken into account in the determination of the fairness of the dismissal but by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss. ...'

- [31] In *Nyathikazi v Public Health and Social Development Sectoral Bargaining Council & Others*⁷ the Labour Appeal Court directed that consistency does not mean that there is a licence for other employees to commit serious offences and in *Buthlezi v MEC Department of Education KwaZulu Natal & Others*⁸ emphasis was placed on the seniority of an employee.

- [32] Even if it is accepted by this Court that other correctional officials were not dismissed for similar conduct, that fact, does not render the Applicant's dismissal unfair. The Commissioner was entitled to take the Applicant's seniority into account. Employees occupying positions of leadership and trust are expected to uphold the highest standards of integrity and to set an example for junior officials. The Commissioner was therefore entitled to distinguish the

⁶ (2017) 38 ILJ 860 (LAC) at para 31. See also *Absa Bank Ltd v Naidu and Others* (2015) 36 ILJ 602 (LAC) at para 36.

⁷ (2021) 42 ILJ 1686 (LAC)

⁸ (2023) 44 ILJ 1891 (LAC)

Applicant's circumstances from those of other employees and to conclude that his senior position justified the sanction imposed.

- [30] The Court is satisfied that the Commissioner did not ignore the evidence relating to consistency. The arbitration award demonstrates that the Commissioner considered the Applicant's evidence concerning the alleged conduct of other officials before concluding that it did not outweigh the seriousness of the misconduct committed by the Applicant.
- [31] Ultimately, the question before this Court is not whether it would have reached the same conclusion as the Commissioner, nor whether another arbitrator may have imposed a lesser sanction. The enquiry is whether the Commissioner's decision is one that a reasonable decision-maker could reach on the evidence before him. Having regard to the Applicant's admitted conduct, the clear statutory prohibition contained in section 118(2)(b) of the Correctional Services Act, the Applicant's senior position within the Department and the limited role played by the parity principle in the overall enquiry into fairness, the Court is satisfied that the Commissioner reached a decision that falls squarely within the band of reasonable decisions. The Applicant has accordingly failed to establish any reviewable irregularity warranting interference by this Court.
- [32] Turning to costs, the Court has a wide discretion in terms of section 162(1) of the LRA. The court is mindful of the *dictum* of the Constitutional Court in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*⁹ when it comes to the issue of costs in employment disputes. Although the Applicant has been unsuccessful, the Court is not convinced that the review application was frivolous, vexatious or pursued in bad faith. The issues raised, particularly those relating to the interpretation of section 118 of the Correctional Services Act and the application of the parity principle, were genuine disputes requiring judicial determination. In the circumstances, the requirements of law and fairness are best served by making no order as to costs.

⁹ (2018) 39 ILJ 523 (CC).

[33] As a result, the following order is made:

Order:

1. The application is dismissed.
2. There is no order as to costs.


Pieter Venter

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Adv Casner (Instructed by Potelwa Attorneys)

For the First Respondent:

Adv Nyman (Instructed by the State Attorney)