



CASE LAW OVERVIEW



2026 CCMA / DEL EEA ROADSHOW



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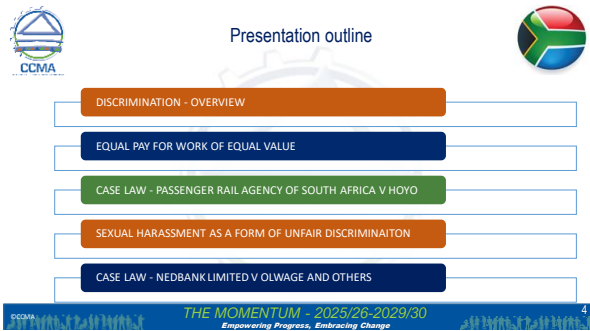


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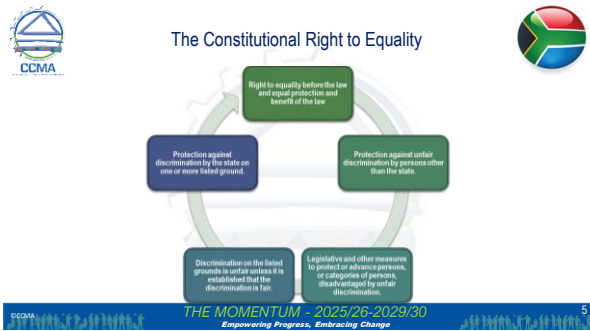
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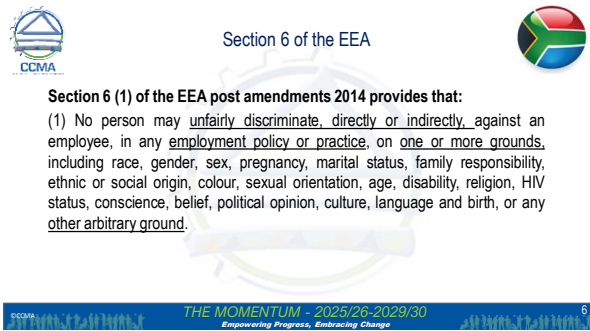
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Unfair Discrimination
Related to Work of Equal Value



Section 6(4) of the EEA

"A difference in terms and conditions of employment between employees of the **same employer** performing the **same** or **substantially the same work** or **work of equal value** that is directly or indirectly **based on any one or more of the grounds** listed in subsection (1), is unfair discrimination".



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Case law



Passenger Rail Agency of South Africa v Hoyo (CA04/2023) [2024] ZALAC 57; [2025] 2 BLLR 160 (LAC) (6 November 2024)



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Passenger Rail Agency of South Africa v Hoyo



THE FACTS:

- Mr. Hoyo joined PRASA in 1999 and became the Production Manager of Mainline Passenger Services in 2012 at Culemborg, Western Cape.
- Soon after, he was asked to act as Maintenance Operations Manager, but did not receive an acting allowance.
- On July 21, 2016, he filed a grievance seeking this payment and highlighted that his salary was lower than that of two subordinates with lesser roles and responsibilities.

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Passenger Rail Agency of South Africa v Hoyo (cont'd)



- ❑ PRASA disputed Mr Hoyo's claim to have been appointed to the Maintenance Operations position, stating that organisational structure changes led to role modifications to align with Metrorail.
- ❑ During the grievance meeting, Mr Hoyo was told that if he submitted his job profile to his line manager, Mr Mahloboqwane, a job evaluation would determine the grading of his position, and PRASA would implement the results.

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Passenger Rail Agency of South Africa v Hoyo (cont'd)



- ❑ Mr Hoyo did not submit his job profile to his line manager and instead continued with an unfair discrimination dispute he had referred to the CCMA before the grievance meeting.
- ❑ He claimed discrimination based on race and/or unequal pay for equal work.
- ❑ After unsuccessful conciliation, he referred his case to the Labour Court for adjudication.

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Passenger Rail Agency of South Africa v Hoyo (cont'd)



AT THE LABOUR COURT:

- ❑ In the pre-trial minute concluded by the parties, it was agreed that Mr Hoyo's two subordinates, Mr Scholtz and Mr Weyers, earned more than him. The issues to be determined by the court were whether:
 - ❑ Mr Hoyo was entitled to an acting allowance, and if so, the amount to which he was entitled;
 - ❑ Mr Hoyo was entitled to any amount on a higher salary scale than that occupied by him, and if so, what amount;
 - ❑ PRASA unfairly discriminated against Mr Hoyo on the grounds of race and/or equal pay for equal work; and
 - ❑ Mr Hoyo was entitled to the damages and compensation claimed.

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Passenger Rail Agency of South Africa v Hoyo (cont'd)



- ☐ The Labour Court dismissed PRASA's claim that the pay disparities between Mr Hoyo and his subordinates were not race-based.
- ☐ No witnesses from the remuneration schedule or PRASA's HR staff testified that pay rates were determined by factors such as age, education, or transfers rather than race.

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Passenger Rail Agency of South Africa v Hoyo (cont'd)



- ☐ The court noted that PRASA failed to take the necessary steps required by section 27(2) of the EEA to reduce income disparities. Consequently, Mr Hoyo's subordinates benefited from collective bargaining.
- ☐ The court concluded that PRASA did not prove that unfair discrimination had not occurred or that any discrimination was justified.
- ☐ It found that Mr Hoyo, as an African man, was adversely affected by PRASA's inaction to address past injustices.

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Passenger Rail Agency of South Africa v Hoyo (cont'd)



AT THE LABOUR APPEAL COURT

- ☐ The Labour Court did not address whether Mr Hoyo held a specific position or was entitled to an acting allowance or a higher salary.
- ☐ As no cross-appeal was filed, the LAC was only required to focus on the Labour Court's finding that PRASA unfairly discriminated against Mr Hoyo based on race and/or equal pay for equal work.

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Passenger Rail Agency of South Africa v Hoyo (cont'd)



- ❑ Under section 11, PRASA had to demonstrate that the alleged discrimination did not occur or was justifiable. PRASA provided evidence that several employees, including Mr Hoyo's two subordinates, were transferred from Transnet following a 2007 salary benchmarking for scarce skills, which led to significant salary increases.
- ❑ After their transfer, these employees continued to receive additional pay increases without limits.
- ❑ Consequently, it was evident that the benchmarking and transfer created clear salary differences between Mr Hoyo and his two subordinates, both of whom had been employed during the apartheid era.

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Passenger Rail Agency of South Africa v Hoyo (cont'd)



- ❑ The LAC found that employees of all races were employed by Transnet over an extended period and had benefited from salary increases effected following the same benchmarking process and, on transfer, retained the benefit of such increased salaries.
- ❑ It was not only white employees who were transferred to PRASA as a result of the benchmarking process.
- ❑ However, in considering this evidence, the court erred by disregarding the objective evidence clearly demonstrating that the pay disparities were neither discriminatory nor based on race.

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Passenger Rail Agency of South Africa v Hoyo (cont'd)



- ❑ The subordinates' positions were not valued equally to Mr Hoyo's.
- ❑ There was no evidence that their responsibilities, skills, qualifications, experience, or working conditions were comparable to his.
- ❑ As a result, Mr Hoyo did not prove that the roles he compared himself to were of equal value or that the pay difference constituted racial discrimination.

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Passenger Rail Agency of South Africa v Hoyo
(cont'd)



- ❑ The LAC found that the employee had failed to prove that the pay disparity amounted to discrimination on a listed ground, and that the Labour Court had erred in disregarding relevant evidence, including the employer's salary schedule.
- ❑ The court stressed that, while income disparities remain a concern, the specific claim of unfair discrimination based on race or equal pay had not been substantiated.
- ❑ The LAC accordingly upheld the employer's appeal, set aside the Labour Court's decision, and dismissed the employee's claim with no order as to costs.

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Sexual Harassment as a Form of Unfair Discrimination



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Sexual Harassment as a Form of Discrimination



Sexual harassment is a form of unfair discrimination prohibited by the Employment Equity Act.

It consists of unwanted conduct of a sexual nature that infringes a person's dignity, creates a hostile, intimidating or offensive work environment, and is linked to sex, gender or sexual orientation.

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Sexual Harassment as a Form of Unfair Discrimination



- ☐ Unwanted conduct of a sexual nature including physical, verbal, or non-verbal conduct, whether or not expressed directly. Conduct amounting to sexual harassment may include –
 - ☐ physical conduct of a sexual nature, ranging from touching, kissing, to sexual assault and rape;
 - ☐ strip searching, including by a person of the same sex in the presence of the opposite sex, or with appropriate privacy;
 - ☐ following, watching, pursuing or accosting of an employee;

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Sexual Harassment as a Form of Unfair Discrimination
(cont'd)



- ☐ sexual attention, advances or proposals; or other behaviour, whether explicit, including suggestions, messages, advances, attention or proposals of a sexual nature;
- ☐ implied or express threats of reprisal or actual reprisal to comply with sexual oriented requests, advances, attention or proposals;
- ☐ verbal conduct such as innuendos, suggestion, hints, sexual advances, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person's body, inappropriate enquiries about a person's sex life, whistling of a sexual nature and the sending by electronic means or otherwise of sexually explicit text; or
- ☐ non-verbal conduct such as unwelcome gesture, indecent exposure and the display or sending by electronic means or means or otherwise of sexually explicit pictures or objects.

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Sexual Harassment as a Form of Unfair Discrimination
(cont'd)



- ☐ Sexual harassment may include, but is not limited to, victimisation, quid pro quo harassment, sexual favouritism, and creating or permitting a hostile working environment (i.e. conduct that creates an intimidating, hostile or humiliating working environment for the recipient).
- ☐ Victimisation occurs when an employee is victimised or intimidated for failing to submit to sexual advances, attention, or proposals or for complaining about gender-insensitive conduct.

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Case Law



Nedbank Limited v Olwage and Others [2025] ZALCJHB 422 (12 September 2025)



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Nedbank Limited v Olwage and Others



PROBLEM STATEMENT:

- What is the proper approach to be followed by commissioners in untangling evidence to determine whether conduct constituted sexual harassment?
- Is there a specific skills set and knowledge at play, when arbitrating a dismissal dispute, where the reason for the dismissal relates to sexual harassment?

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Nedbank Limited v Olwage and Others (cont'd)



BACKGROUND:

- Mr Olwage was summarily dismissed after being found guilty during a disciplinary hearing on two (2) allegations of misconduct.
- The allegations: sexual harassment in that he made sexually inappropriate, unwelcome comments towards Ms. Warren; and harassment in that on two occasions, he deliberately created a loud noise by shutting the metal recycling bin with force knowing that it would frighten Ms. Warren and would affect her wellbeing.
- Mr. Olwage's dismissal was held to have been substantively unfair, and Nedbank was ordered to reinstate him retrospectively and to pay an amount of R 400 424.39 in backpay.

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Nedbank Limited v Olwage and Others (cont'd)



AT THE CCMA:

The commissioner *inter alia* reasoned:

- ☐ Based on what was recorded as undisputed evidence from Mr. Olwage's witnesses, Mr. Olwage complimented everybody else of both sexes, that Ms. Warren appreciated the comments in certain instances and not in others, and that Mr. Olwage always banged the dustbin.
- ☐ Ms. Warren was not regarded as a reliable witness, as it appeared that she was abusing the allegations of sexual harassment to get even.

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Nedbank Limited v Olwage and Others (cont'd)



AT THE CCMA:

- ☐ The commissioner was not satisfied that the allegations mentioned by Ms. Warren contained any sexual overtures, and she appeared to be the only one who did not like the compliments and had a general dislike of men and in general referred to them as pigs or dogs.
- ☐ The commissioner placed great emphasis on the fact that Ms. Warren's own witness gave evidence that upon her informing him of the sexual harassment, she proceeded to tell him that she would handle Mr. Olwage herself.

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Nedbank Limited v Olwage and Others (cont'd)



AT THE CCMA:

- ☐ A negative inference was drawn from the fact that Ms. Warren did not report the alleged sexual harassment immediately on the basis that she had to gather courage, however she was able to yell at Mr. Olwage when he made the noise with the bin.
- ☐ The Commissioner further reasoned, as Ms. Warren did not report to Mr. Olwage, she could not argue that there was a fear of reprisals or possible dismissal.

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Nedbank Limited v Olwage and Others (cont'd)



IN THE LABOUR COURT:

- ☐ The Labour Court criticized the manner in which the commissioner handled the matter and evaluated the evidence in particular.
- ☐ In reviewing the award, the Labour Court held that the commissioner had committed serious irregularities, during the arbitration process and in particular in the evaluation of the evidence.
- ☐ In particular, the commissioner failed to have regard and apply the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace. In so doing, the commissioner misapplied the test when determining disputes of this nature.

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Nedbank Limited v Olwage and Others (cont'd)



IN THE LABOUR COURT:

Key focal points in reviewing the award include the following:

Sexual Harassment in context:

- ☐ Sexual Harassment at its core is concerned with the exercise of power and in the main reflects the power relations that exist both in society generally and specifically within a particular workforce;
- ☐ Sexual Harassment is further the most heinous conduct that plagues the workplace, as it goes to the root of one's being and must therefore be viewed from the victim's point of view, how the victim perceived it and whether or not that perception is reasonable.

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Nedbank Limited v Olwage and Others (cont'd)



IN THE LABOUR COURT:

Evaluation of evidence:

- ☐ In evaluating the evidence, due regard must be had to common cause and unchallenged facts.
- ☐ In this regard it was common cause that Mr. Olwage made comments to Ms. Warren about her hair, her clothing, her appearance and that he would say things to her, for instance: 'you are so beautiful', 'you are so stunning', 'black looks good on you'.
- ☐ There was further no dispute that these comments were upsetting and made Ms. Warren feel uncomfortable.
- ☐ The commissioner did not have regard to the above.

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Nedbank Limited v Olwage and Others (cont'd)



IN THE LABOUR COURT:

- ☐ Despite such, significant weight was attached to the evidence of Ms. Mokwela, the witness for Mr. Olwage, which *inter alia* led to the conclusion that the dismissal was substantively unfair.
- ☐ However, even on this reliance of the evidence of Ms. Mokwela, it was evident that Mr. Olwage made the comments as contained in the main allegation.

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Nedbank Limited v Olwage and Others (cont'd)



IN THE LABOUR COURT:

- ☐ Evaluation of evidence must be conducted from a holistic view as opposed to focusing exclusively on one or the other witness, in this regard, Ms. Mokwela's testimony without evaluating the evidence of Mr. Olwage.
- ☐ In addition to a finding on credibility, and reliability, probabilities must be weighed to determine the most probable/plausible / or most natural version.
- ☐ Having weighed the evidence, the court concluded that the probabilities in this regard favoured Ms. Warren' version.

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Nedbank Limited v Olwage and Others (cont'd)



IN THE LABOUR COURT:

- ☐ Conclusions should not be disconnected from the evidence led during the arbitration.
- ☐ The conclusion that Ms. Warren was an unreliable witness based on the notion that she was trying to get even, was not supported by a reading of the transcript.
- ☐ Contrary to the conclusion reached, the court noted that Ms. Warren's evidence was consistent, open and forthright in all aspects.

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Nedbank Limited v Olowe and Others (cont'd)



IN THE LABOUR COURT:

- The commissioner also took issue with the fact that the Complainant did not report the matter immediately, however this approach failed to appreciate that in some instances, the recipient may be unable to immediately express their revulsion, that it is not uncommon for recipients to process what has occurred and to act on the conduct in question at a later stage.
- In conclusion, it was held that the commissioner conflated sexual harassment with harassment.
- The award was set aside and substituted with a finding that the dismissal of Mr. Olowe was substantively fair.

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Q and A



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Evaluation



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Thank you



Ngizathokoza! **ro livhuwa!**
dankie/ **ke a leboga!** **ENKOSI!**
inkomul **thank you!** **ude livhuwa!**
 ke a leboga! **ngizabonga!**
siyabonga!
