



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR 1525/22

In the matter between:

NEDBANK LIMITED

Applicant

and

MARIUS OLWAGE

First Respondent

COMMISSIONER JOHNNY MATHEBULA N.O.

Second Respondent

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

Third Respondent

Heard: 20 May 2025

Delivered: 12 September 2025

The judgment was handed down electronically by emailing a copy to the parties.

The 12th of September 2025 is deemed to be the date of delivery of this judgment.

JUDGMENT

NAVSA, AJ

Introduction

- [1] The applicant (Nedbank) seeks an order reviewing and setting aside an arbitration award issued on 27 June 2022 wherein the second respondent (arbitrator) found the first respondent's (Mr Olwage's) dismissal to be substantively unfair and ordered Nedbank to pay Mr Olwage backpay amounting to R 400 424.39.
- [2] Mr Olwage opposed the application.
- [3] Mr Olwage brought a condonation application for the late filing of his answering affidavit in the review application, which was opposed by Nedbank. At the hearing of this matter on 20 May 2025, Mr Aadil Patel (Mr Patel), who appeared on behalf of Nedbank, indicated that his client no longer persisted with its opposition to the condonation application. It is accordingly in the interests of justice that such condonation be granted.

Background

- [4] Mr Olwage was employed by Nedbank as the Manager – Field Agents, working in RRB Recoveries.
- [5] Ms Warren is employed by Nedbank in the Specialised Recoveries Department and raised allegations of sexual harassment and harassment against Mr Olwage.
- [6] Mr Olwage was charged with the following misconduct:

'1. Gross Misconduct: Sexual Harassment

In that between the period September 2020 to April 2021, you made sexually inappropriate, unwelcome comments towards Ms Candice Warren. You continued making these comments even after you have had (sic) been requested by Ms Candice Warren to refrain.

2. Gross Misconduct: Harassment

In that during April 2021, on two occasions, you deliberately created a loud noise by shutting the metal recycling bin with force knowingly (sic) that it would frighten Ms Candice Warren and would affect her wellbeing.'

- [7] A disciplinary hearing was held on 13 September 2021, 26 November 2021 and 27 November 2021. Mr Olwage was found guilty of the two charges and was summarily dismissed.
- [8] The South African Society of Bank Officials (SASBO) referred an unfair dismissal dispute, on behalf of Mr Olwage, to the third respondent (CCMA) and the matter was arbitrated on 07 June 2022.
- [9] The arbitrator had to determine whether or not misconduct was committed on which the employer's decision to dismiss was based, namely sexual harassment and harassment. The arbitrator, after such determination, was then required to assess the fairness of the dismissal.

The arbitrator's findings

- [10] In the arbitration award the arbitrator understood the issue as being whether Mr Olwage's dismissal was substantively fair, and, if not the appropriate relief to be awarded.
- [11] The arbitrator, in his analysis of the evidence and argument, recorded that sexual harassment is unwanted sexual attention and can take many forms including, but not limited to, unwanted comments of a sexual nature and that it could constitute a barrier in the workplace. The arbitrator was also seemingly mindful that sexual harassment involves power dynamics within the workplace.
- [12] The arbitrator categorised the dispute before him as one concerning unwanted comments of a sexual nature.
- [13] The arbitrator placed much emphasis on what he recorded as the undisputed evidence from Mr Olwage's witnesses, namely that 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.

- [14] The arbitrator held it against Ms Warren that her own witness, Mr Andre Spies (Mr Spies), gave evidence that upon her informing him of the sexual harassment, she proceeded to tell him that she would handle Mr. Olwage herself.
- [15] On the unwanted comments of a sexual nature, the arbitrator focused on the evidence given by Ms Abigail Mokwele (Ms Mokwele), one of Mr Olwage's witnesses. Ms Mokwele's version of the incident was that Ms Warren had gone hiking and had severe sunburn, and that Mr Olwage had said that Ms Warren could sit on his lap when she was feeling tired.
- [16] The arbitrator did not find Ms Warren to be a reliable witness. The arbitrator recorded that Ms Warren appeared to be abusing the allegations of sexual harassment to get even, and that there was no allegation mentioned by her that had any sexual overtures. Ms Warren appeared to be the only one who did not like the compliments and had a general dislike of men in general referring to them as pigs or dogs.
- [17] The arbitrator further recorded that Ms Warren could not decide what constituted sexual harassment and what did not.
- [18] The arbitrator, on the harassment charge, found that there was no evidence that Mr Olwage made the noise with the bin to target and scare Ms Warren.
- [19] Ms Warren did not create a favourable impression on the arbitrator, and he found that she was not a credible witness.
- [20] This credibility finding was based on, amongst others, that she denied everything that supposedly happened between her and Mr Olwage, that the trigger for the claims was not that Mr Olwage was pursuing her for sex, that she made claims of sexual harassment after the bin incident, and that when she referred to the lap incident, she deliberately placed it out of context as if it was an isolated incident stated by Mr Olwage in pursuit of sex.

- [21] The context, according to the arbitrator, was Ms Warren's hiking trip and the sunburn she had upon her return. This was not an acrimonious setting and after Mr Olwage asked her to sit on his lap, she allegedly walked away.
- [22] The arbitrator's view of Ms Warren and his impression of her as a witness was also informed by her inability to recall certain discussions, interactions and comments with Mr Olwage concerning his wife's beauty, illicit cigarettes, his complimenting of other people and management style.
- [23] The arbitrator held it against Ms Warren that she did not report the alleged sexual harassment immediately on the basis that she had to gather courage, as she was able to yell at Mr Olwage when he made the noise with the bin. He found that as she did not report to Mr Olwage, she could not argue that there was a fear of reprisals or possible dismissal.
- [24] The arbitrator also attributed to Ms Warren a history of accusing her manager as well, and that he was left with the impression that Ms Warren had a hold over Mr Spies.
- [25] The arbitrator ultimately found Ms Warren to be untruthful and concluded that no sexual harassment took place.

Nedbank's review grounds

- [26] Nedbank seeks a review of the arbitration award dated 27 June 2022, in terms of section 145 of the Labour Relations Act¹ (the LRA) on the basis of the *Sidumo and another v Rustenburg Platinum Mines Ltd and others*² test.
- [27] Nedbank asserts that the arbitrator committed gross irregularities and errors of law which led to him making a decision that a reasonable decision maker could not have come to.

¹ No. 66 of 1995, as amended.

² (2008) 28 ILJ 2405 (CC); (2007) 28 ILJ 2405 (CC).

- [28] Nedbank's point of departure is that it was common cause that Mr Olwage had made comments about Ms Warren's appearance and that these comments were unwanted or unwelcome. Ms Warren had communicated this much to Mr Olwage, and he was in no doubt about her stance in relation to them.
- [29] Nedbank contends that the arbitrator's decision was not based on whether the criteria for sexual harassment had been met, but rather on his perception that these comments were innocuous and thus could not constitute sexual harassment.
- [30] Nedbank further contends that the arbitrator failed to adopt a reasonable approach to evaluating whether sexual harassment had taken place, failed to consider the Code of Good Practice on Sexual Harassment³, and imposed his own self-created standard to assess Mr Olwage's conduct.
- [31] Nedbank additionally contends that the arbitrator, incorrectly and unreasonably asserted that the test to be applied is whether the conduct was the trigger for reporting sexual harassment and that the conduct would only constitute sexual harassment if sex was being pursued.
- [32] Nedbank also takes issue with the significant weight placed by the arbitrator on whether Ms Warren had an improper motive for accusing Mr Olwage of sexual harassment, and the lack of a victim centred approach taken by the arbitrator.
- [33] Nedbank ultimately asserts that the arbitrator failed to properly apply the established law and tests for sexual harassment.
- [34] Nedbank specifically takes issue with the arbitrator's findings on Ms Warren's credibility and states that such findings are immaterial as to whether sexual harassment had taken place.
- [35] Nedbank lastly contends that the arbitrator's failure to assess the evidence properly and his heavy reliance on credibility findings had the distorting effect of rendering the overall findings based on the evidence that was before him

³ GNR1890 in GG 46056 of 18 March 2022.

unreasonable. The arbitrator ought, on the evidence, to have found that Mr Olwage was guilty of sexual harassment.

Relevant legal principles

- [36] I have to deal with the grounds of review within the context of the test this Court must apply in deciding whether the arbitrator's decision is reviewable.
- [37] *Sidumo*⁴ is the prevailing authority on when a decision of an arbitrator is reviewable in terms of section 145 of the LRA. The question to be asked being: Is the decision reached by the Commissioner one that a reasonable decision maker could not reach?
- [38] The Supreme Court of Appeal, Labour Appeal Court, and Labour Court, in its subsequent jurisprudence has clarified the review test.⁵
- [39] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity, but before such an irregularity will result in the setting aside of the award, it must in addition reveal either a misconception of the true enquiry or result in an unreasonable outcome.⁶
- [40] The Labour Appeal Court⁷ has emphasised that an arbitration award will be considered to be reasonable when there is a material connection between the evidence and the result. Conversely, an arbitration award will be deemed to be

⁴ (2008) 28 ILJ 2405 (CC) at page 59, paragraph 110.

⁵ *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA) page 2803 where the SCA clarified that a result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was placed before the arbitrator; See also *Gold Fields Mining SA (Pty) Ltd v CCMA* [2014] 1 BLLR 20 (LAC) at page 26 paragraph [20] which sets out the proper questions to be asked in terms of a review under section 145(2)(a)(i) and (ii) of the LRA; See also *Head of Department of Education v Mofokeng & Others* (2015) 36 ILJ 2802 (LAC) at paragraphs [30] to [33]; See also *Shoprite Checkers v Commission for Conciliation, Mediation and Arbitration & Others* [2015] 10 BLLR 1052 (LC) at paragraphs [9] and [10] which dealt with determining when a failure by a Commissioner to consider facts will be reviewable; See also *Democratic Nursing Organisation of SA on behalf of Du Toit & another v Western Cape Department of Health & Others* (2016) 37 ILJ 1819 (LAC) at paragraph [15]; See also *Makuleni v Standard Bank of South Africa* (2023) 44 ILJ 1005 (LAC) at paragraphs 2 and 3.

⁶ *Head of Department of Education v Mofokeng & Others* (2015) 36 ILJ 2802 (LAC) at paragraphs [30] to [33].

⁷ *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Lebogate* (2015) 36 ILJ 968 (LAC); See also *Bestel v Astral Operations Ltd & others* [2011] 2 BLLR 129 (LAC)

unreasonable if it is entirely disconnected from the evidence, unsupported by any evidence and involves speculation by the arbitrator.

Evaluation: Sexual harassment and harassment

- [41] The Labour Appeal Court in *Campbell Scientific Africa (Pty) Ltd v Simmers & others*⁸, reminded us that central to the transformative mission of our Constitution is the hope that it will have us re-imagine power relations within society in order to achieve substantive equality especially for those who were disadvantaged by past discrimination.
- [42] The term harassment is generally understood to be unwanted conduct which impairs dignity, which creates a hostile or intimidating work environment for one or more employees, and is related to one or more grounds in respect of which discrimination is prohibited in terms of section 6(1) of the Employment Equity Act 55 of 1998 ('the EEA').⁹
- [43] Sexual harassment may be described as persistent, unsolicited, and unwanted sexual advances or suggestions by one person to another.¹⁰
- [44] The Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace ('the Code') gives specific guidance on how to handle sexual harassment cases.¹¹
- [45] Item 5 of the Code provides as follows:

'5. Sexual harassment

5.1 Sexual harassment of an employee is a form of unfair discrimination and is prohibited on the grounds of sex, gender, or sexual orientation. Same sex harassment can amount to discrimination on the basis of sex, gender, sexual orientation and gender-based harassment.

5.2 Factors to establish sexual harassment

⁸ (2016) 37 ILJ 116 (LAC).

⁹ See the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace.

¹⁰ See Grogan *Workplace Law* (13th edition) Chapter 12, 3.9 *Sexual harassment*.

¹¹ GNR1890 in GG 46056 of 18 March 2022.

Unwanted conduct

- 5.2.1 *There are different ways in which an employee may indicate that sexual conduct is unwanted, including non-verbal conduct such as walking away or not responding to the perpetrator.*
- 5.2.2 *Previous consensual participation in sexual conduct does not necessarily mean that the conduct continues to be acceptable to the employee.*
- 5.2.3 *Where a complainant has difficulty indicating to the perpetrator that the conduct is unwanted such complainant may seek the assistance and intervention of another person such as a co-worker, superior, counsellor, human resource official, family member or friend.*
- 5.2.4 *The fact that the complainant does not indicate that the conduct is unwanted does not entail that there has not been sexual harassment, if the conduct is such that the harasser/perpetrator ought to have known it could be regarded as unwanted.*

Nature and extent of conduct

- 5.2.5 *The unwanted conduct must be of a sexual nature and includes physical, verbal or non-verbal conduct, whether expressed directly or indirectly. Conduct amounting to sexual harassment may include -*

Impact of the conduct

- 5.2.8 *The conduct should constitute an impairment of the employee's dignity, taking into account.*
 - 5.2.8.1 *the circumstances of the employee; and*
 - 5.2.8.2 *the respective positions of the employee and the perpetrator in the workplace.*

5.3 Test for sexual harassment

- 5.3.1 *Sexual harassment is unwelcome conduct of a sexual nature, whether direct or indirect, that the perpetrator knows or ought to know is not welcome. Sexual harassment may be offensive to the complainant, make the complainant feel uncomfortable or cause harm or inspire the reasonable belief that the complainant may be harmed. Sexual harassment may interfere with the work*

of the complainant although it need not necessarily do so. Sexual harassment violates the rights of an employee and constitutes a barrier to equality in the workplace.

5.3.2 *The test for establishing whether there has been sexual harassment takes into account the following factors:*

- 5.3.2.1 *whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;*
- 5.3.2.2 *whether the sexual conduct was unwanted or unacceptable;*
- 5.3.2.3 *the nature and extent of the sexual conduct; and*
- 5.3.2.4 *the impact of the sexual conduct on the employee.'*

[46] The Labour Appeal Court in *Motsamai v Everite Building Products*¹² highlighted that sexual harassment is the most heinous conduct that plagues the workplace, and that as it goes to the root of one's being it must therefore be viewed from the victim's point of view, how the victim perceived it and whether or not that perception is reasonable.

[47] The Labour Appeal Court has also stressed that 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.¹³

[48] The test as to whether the conduct is unwelcome both for harassment and sexual harassment is objective. If the conduct is not unwelcome it cannot be harassment or sexual harassment.¹⁴

¹² [2011] 2 BLLR 144 (LAC).

¹³ See *Campbell Scientific Africa (Pty) Ltd v Simmers & others* (2016) 37 ILJ 116 (LAC) at paragraph 20.

¹⁴ See *Amathole District Municipality v CCMA & Others* (2023) 44 ILJ 109 (LC).

- [49] Arbitrators, in dealing with cases of sexual harassment, are required to avoid latent gender bias and to treat such cases with special sensitivity.¹⁵
- [50] Once the arbitrator acknowledged that Mr Olwage's alleged misconduct concerned sexual harassment, it became imperative for the arbitrator to have specifically considered and applied the Code.
- [51] A reading of the arbitration award clearly demonstrates that the arbitrator did not do so. This, on its own, is a gross irregularity committed by the arbitrator as he failed to consider and apply principles that he was meant to. However, the existence of the gross irregularity, under the review test, does not necessarily mean that the award is reviewable. It must be considered if the outcome arrived at by the arbitrator was nonetheless reasonable.
- [52] This entails a consideration of the actual provisions of the Code and in particular Item 5, which deals with sexual harassment, factors to establish sexual harassment, the nature and extent of the conduct, the impact of the conduct and the test for sexual harassment.
- [53] The transcript reveals that Mr Olwage made comments to Ms Warren in December 2020 about her hair, her clothing, her appearance and that he would say things to her like, 'you are so beautiful', 'you are so stunning', 'black looks good on you'.
- [54] These comments were upsetting and made her feel uncomfortable. She had hoped that this behaviour by Mr Olwage would stop, but upon his return from leave in January 2021 it continued unabated.
- [55] On 12 January 2021, Ms Warren took temperatures of employees in the office as part of Covid screening. When she approached Mr Olwage for this purpose, he said to her, 'Canny why do you not sit in my lap'. She was upset and offended by this but did not want to cause conflict in the office, so she walked away. Later that evening she resolved upon confronting him in front of witnesses so that he would desist from such behaviour.

¹⁵ *Old Mutual Life Assurance SA v Makanda* (2020) 41 ILJ 444 (LC).

- [56] On 14 January 2021 she put her resolution into action and confronted him. She told him that his behaviour was inappropriate, unwanted and made her feel uncomfortable. She asked him to stop immediately.
- [57] The transcript shows that Mr Olwage's recollection of the incident was vastly different. Mr Olwage throughout the transcript was non-committal on dates when alleged incidents took place. He could not recall a lap sitting incident in January 2021 but places the incident as having occurred in April/May 2021.
- [58] Mr Olwage's recollection, as evidenced from the transcript, was that Ms Warren had just returned to work from a trip to the Drakensberg and had taken his temperature that morning as part of Covid testing.
- [59] Ms Warren was badly sunburned, and after telling her this she told him that he should see her legs. As Ms Warren was trying to lift up the part of her pants to show him her badly sunburned leg, she stumbled with the thermometer in her hand. It was at this point that he told her if she stumbled, he would not be able to catch her, and she was going to end up falling on his lap. He did not ask her to come and sit on his lap.
- [60] From the transcript, Ms Mokwele recalled the incident but could not provide a definitive date as to when it occurred. Her recollection was that Ms Warren was badly sunburned from hiking and had expressed the feeling of being tired. She was unable to recall much but remembered Mr Olwage saying to Ms Warren to come and sit on his lap if she was not feeling okay, or if she was not feeling well to come and sit on his lap. That is what Ms Mokwele thought Mr Olwage had said to Ms Warren.
- [61] Even after this incident, and despite knowing that these attentions were unwelcome Mr Olwage would make comments to Ms Warren such as, 'I don't want to tell you, you look stunning, just now I am going to get in trouble with you.'

- [62] The arbitrator on the unwanted comments of a sexual nature focused on the evidence given by Ms Mokwele and did not engage and analyse Ms Warren and Mr Olwage's versions. Even on Ms Mokwele's version, upon which the arbitrator placed heavy reliance, Mr Olwage had said to Ms Warren to come and sit on his lap.
- [63] When Ms Warren and Mr Olwage's versions are compared and contrasted the probabilities favour Ms Warren's version that Mr Olwage said to her, 'Canny why do you not sit in my lap'.
- [64] This certainly qualifies as being unwanted conduct contemplated by the Code. The arbitrator attempted to contextualise Mr Olwage asking Ms Warren to sit on his lap and held it against Ms Warren that she then allegedly walked away.
- [65] Had the arbitrator properly understood and applied the Code relating to unwelcome conduct he would have appreciated that the walking away (non-verbal conduct) by Ms Warren was a clear indicator that the conduct by Mr Olwage was unwanted.
- [66] The arbitrator did not find Ms Warren to be a reliable witness on the basis that Ms Warren was trying to get even. This finding is certainly not supported by a reading of the transcript.
- [67] Moreover, when Mr Olwage asked Mr Warren to sit in his lap it was unwanted conducted that had clear sexual overtures. These were not compliments as the arbitrator would seem to suggest but constituted unwanted conduct in terms of the Code. The finding by the arbitrator that Ms Warren disliked men in general referring to them as pigs or dogs is also not supported by the record.
- [68] The record reflects alleged comments made by Ms Warren during a conversation around gender-based violence, which Ms Warren could not recall. It certainly did not support a finding that Ms Warren was pre-disposed against men or that she would fabricate an allegation of sexual harassment.

- [69] The arbitrator seemingly ignored the point of view of Ms Warren as the victim concerning the alleged sexual harassment, how Ms Warren perceived it, and whether or not that perception was reasonable.
- [70] The credibility findings made by the arbitrator against Ms Warren are also not supported by the transcript. Ms Warren's versions remained consistent and the manner in which she testified, as apparent from the transcript, appears to be open and forthright. I could find nothing material in the transcript that detracted from the credibility of her evidence.
- [71] The record of the evidence speaks for itself, and the credibility findings made by the arbitrator against Ms Warren is not justified by the record.
- [72] A proper consideration of the evidence makes it clear that the evidence of Ms Warren is to be preferred over that of Mr Olwage as being more credible, and that the probabilities also favour it.
- [73] The arbitrator also took issue with Ms Warren having not reported the incident immediately because she had to gather courage. The arbitrator 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.¹⁶
- [74] There is also no support in the transcript for the arbitrator's finding that Ms Warren had a history of accusing her manager, Mr Spies, or that there was any impression created that Ms Warren had a hold over him.
- [75] From the transcript Mr Spies himself ultimately denied that Ms Warren had any vendetta against him and confirmed that she merely assisted someone else who had brought a case against him.
- [76] It is in my view clear that the conduct of Mr Olwage towards Ms Warren constitutes sexual harassment. The arbitrator's finding that no sexual harassment took place is irregular and equally not a reasonable outcome.

¹⁶ *U v Commission for Conciliation, Mediation & Arbitration & Others* (2021) 42 ILJ 1778 (LC).

[77] It is strictly speaking not necessary to consider the reasoning of the arbitrator when it comes to the charge of harassment considering that the misconduct of sexual harassment would justify Mr Olwage's dismissal.

[78] However, for the sake of completeness it is clear from a reading of the arbitration award that the arbitrator conflated the sexual harassment charge and the harassment charge.

[79] The evidence from the transcript reveals that Mr Olwage on two occasions in April 2021 deliberately created a loud noise by shutting a metal recycling bin with force, and that he was aware in doing so, that this would frighten Ms Warren and affect her wellbeing.

[80] Ms Warren's evidence from the transcript is that Mr Olwage did this to get a reaction from her, and he was aware that this conduct would frighten her. Mr Olwage also accepted that he knew that this would frighten Ms Warren.

[81] This conduct by Mr Olwage, in the context of what preceded it, clearly constitutes harassment.

[82] It is my view that the arbitrator committed gross irregularities, errors of law and incorrectly evaluated the evidence, which resulted in him coming to an unreasonable finding.

[83] Considering the evidence before the arbitrator holistically, the arbitrator's findings are disconnected from the evidence, involves speculation by the arbitrator, and the decision reached by the arbitrator is one that no reasonable decision maker could have reached. There is a clear basis for this court to interfere with the award on review.

[84] Nedbank could not fairly have been expected to continue the employment relationship with Mr Olwage.

[85] The arbitration award must be reviewed and set aside. In exercising my discretion and given that the complete record of the arbitration proceedings is before me, I have decided to substitute the arbitration award rather than remit the matter for a fresh hearing.

Costs

[86] With reference to the issue of costs, this Court has a broad discretion to make costs orders in accordance with the requirements of law and fairness.

[87] In my view, the interests of justice will best be served by making no order as to costs.

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

Order

1. The arbitration award issued by the second respondent under case number GAJB 21564 – 21 dated 27 June 2022 is reviewed and set aside, and is substituted with an award in the following terms:

'The first respondent's dismissal is substantively fair'

2. There is no order as to costs.

ZM Navsa

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr. Aadil Patel of Cliffe Dekker Hofmeyr
Incorporated

For the First Respondent: Advocate B Brammer

Instructed by: JVK Attorneys

LABOUR COURT