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THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JA 128/24

In the matter between:

SIMON MASHELE

Appellant

and

SOUTH AFRICAN RESERVE BANK

First Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

VUYOKAZI MAY N.O.

Third Respondent

Heard: 18 September 2025

Delivered: 21 October 2025

Coram: Van Niekerk JA, Djaje AJA et Chetty AJA

JUDGMENT

VAN NIEKERK, JAIntroduction

- [1] This is an appeal against a judgment delivered by the Labour Court (per Mabaso AJ) on 15 August 2024, in which the Court dismissed an application to review and set aside an arbitration award issued by the third respondent (the arbitrator). The arbitrator had found that the appellant's dismissal by the first respondent (SARB) was substantively and procedurally fair.

Background

- [2] The appellant was employed by SARB in 2015 as a specialist legal counsel. At the time of his dismissal, the appellant was a divisional head, reporting to the head of the legal department. On 17 December 2019, a co-employee, Ms L[...] S[...] (S[...]), lodged a formal grievance in which she complained about persistent comments of a sexual nature made by the appellant, her direct superior. S[...] testified that she had told a co-employee, Ms Simphiwe Mukhari,¹ a personal assistant in the legal services department, that she intended to file a complaint of sexual harassment against the appellant. Mukhari also levelled accusations of sexual harassment against the appellant. In the result, SARB convened a grievance hearing, chaired by a member of the Johannesburg Bar, the late Adv Afzul Mosam SC.
- [3] Adv Mosam interviewed S[...] and Mukhari and also Ms Demi Matubathuba, a lead legal counsel in the legal services department. Adv Mosam engaged with the appellant and reviewed a written response prepared by him. On 5 May 2020, Adv Mosam issued a report recommending that disciplinary steps be taken against the appellant.

¹ In the Labour Court judgment, reference is made to 'Simphiwe Mokhare'. In the arbitration hearing, the witness spells her name as 'Simphiwe Mukhari'.

[4] On 21 May 2020, SARB convened a disciplinary hearing on two charges of sexual harassment. The charges against the appellant read as follows:

'Charge 1

You are herewith presented with two charges of misconduct, in that you allegedly, over a period of time, engaged in incidents of sexual harassment towards:

- L[...] S[...]; and
- Simphiwe Mokhare,

by acting in a manner described herein below through verbal and physical interactions:

That –

1. With reference to L[...] S[...]-

- 1.1 In January 2019, you requested from L[...] S[...] as part of a greeting and put your hand on her bum(s) during such hug;
- 1.2 On Monday, 7 October 2019, after L[...] S[...] went for a gynecologist appointment, you insisted that she *"had not gone to the doctor but had made other arrangements"* and upon being presented with the gynecologist's script you sent *"you mean were naked. You were naked in the doctor's room"*.
- 1.3 Sometime in 2019 when you encountered L[...] S[...] near your office on the 19th floor at the Head Office building in the Legal Services Department, you made a comment about her *"size"* to the effect that *"it is a good size"*. You said *"unlike some woman, the size of Thabiso and Poppy. When they undress, your manhood refuses to stand because they are so big"*.
- 1.4 At a time when L[...] S[...] was on her way to the ladies' room and encountered you in the foyer area on the 19th Floor of the Head

Office building (apparently on the way to the men's room) you made a comment to the effect that "*she could go in with you*".

Charge 2

with reference to Simphiwe Mokhare-

- 2.1 you from time to time made comments like "*you have a beautiful body*" which made her feel uncomfortable;
- 2.2 during June/July 2017 when she had to attend at your office you asked her to come around the table to where you are sitting "*in order for her to be closer to you*".
- 2.3 at times when she visited to office you made comments such as "*you have a beautiful body*" and "*are these your real legs*".
- 2.4 that you offered for her to go on a vacation trip "*in order to take photographs of herself*".

- [5] The disciplinary enquiry was chaired by Adv Michael van As of the Johannesburg Bar and continued for several days. Adv van As found the appellant guilty on both charges and on 8 September 2020, SARB dismissed the appellant.
- [6] The appellant disputed the fairness of his dismissal, a matter that was ultimately referred to an arbitration hearing before the arbitrator.

Arbitration award

- [7] The arbitration hearing continued over some eleven days. The arbitrator's award summarises the evidence given by S[...] and Mukhari, and also a Mr Lekhooe, a SARB employee and a Ms Phehlukwayo, the senior human resources business partner. The appellant then testified, after which closing arguments were submitted.

- [8] On 7 April 2022, the arbitrator issued a 24-page award in which the appellant's dismissal was found to be substantively and procedurally fair. In her award, the arbitrator dealt with the appellant's submissions regarding what he contended to be the bias of the chairperson of the disciplinary hearing and noted that the appellant had led no evidence to substantiate this allegation. The arbitrator held that the averment of bias had not been established and that the appellant's dismissal was procedurally fair.
- [9] In regard to substantive fairness, the arbitrator recorded that it was not in dispute that SARB had in place workplace rules regarding sexual harassment, and that the appellant was aware of the rule. What was in issue was the existence of the misconduct alleged – put another way, whether the appellant had sexually harassed S[...] and Mukhari. As will appear from the discussion below, the arbitrator was required to determine a dispute of fact. SARB's case was that the appellant had committed the acts of misconduct recorded in the charges and that his dismissal was fair; the appellant denied having committed any of the acts concerned and alleged that S[...] had led a conspiracy to fabricate the charges against him in order to escape performance management processes that he had initiated. After a summary of the evidence, the arbitrator said the following:²

[56] In weighing the two contrasting versions, I took a couple of things into account. Firstly, the evidence lead as to the motive the complainant possibly had in making such an allegation. The Respondent argued that the Applicant had no reason to lie about an allegation as serious as that against her manager. The Applicant on the other side argued that the motive was to sway the Applicant away from continuing with performance assessment which was underway. Evidence was led that the Applicant's performance needed improvement during 2016/2017 period, from the time Jonathan was still her manager. Jonathan even made comments to this effect on page 69 of the Applicant's bundle. The question is, if the complainant was trying to avoid her performance being dealt with; why

² The numbering of the paragraphs in the arbitration award is inaccurate. The reference is to paragraph 56 and following as reflected on page 20 of the award and onwards.

did she not do the same with Jonathan? He was also not happy with her performance in that he went as far as putting her on Needs Assessment Program, just like the Applicant did. The Applicant submitted that it was a norm to hug and greet each other. The Applicant was part of the legal department before he led the team. The inference that can be drawn from such statement is that this custom of hugging each other has been in existence in this department. Why would the Applicant then, out of all the males she shared hugs with as part of the custom; choose to make such a serious allegation against the Applicant only; when Jonathan did the same thing about her performance, but there was no such allegation raised.

[57] Mention was made at some stage, though not interrogated in depth by the parties, that the concern surrounding the complainant's performance were issues that did not only begin in 2016; when the Applicant took up employment with the Respondent; mention was made that the complainant's probation was even extended. She gave evidence in March 2021 that she joined the bank six years earlier. It was also common cause that the Applicant found the complainant already in the employ of the Respondent. In my view, if she was a person who would go to those lengths to avoid being her performance issues being dealt with; she would have done so way before the Applicant joined the bank but she did not. I'm not persuaded by such defence.

[58] Again on the issue of motive; the second witness of the Respondent, Mokhare, did not have any performance issues to avoid; in fact, the evidence from the Applicant was that the only reason she made such allegations was because she was recruited by the complainant to lie. To check the credibility of the evidence of Mokhare; I considered the possibility that she was emotional during the proceedings to try and get sympathy from the Commissioner. I weighed that against the way her defence was tested during cross-examination; and I found that the only contradiction there was, was the fact that she stated during cross-examination that she cried during the disciplinary hearing; and later remembered she was reminded during re-examination that she was not

emotional. All the other evidence she led, in my view, withstood the test of cross-examination in that there were no material contradictions in her evidence.'

- [10] The arbitrator dismissed the appellant's submission that the complainants had delayed reporting the allegations of harassment as indicative of the fact that they were false. The arbitrator noted that both S[...] and Mukhari had testified that they were afraid that they would not be believed, and because they were aware that the experience would be emotionally draining. The arbitrator similarly dismissed the appellant's submission that SARB had failed to call certain witnesses, and that an adverse inference should be drawn from this fact. The arbitrator found that none of the witnesses concerned were in a position to prove or corroborate any relevant fact. The arbitrator came to the following conclusion:

'[66] On the basis of the aforesaid; I hereby find on the balance of probabilities, that the applicant did harass the two employees; L[...] S[...] and Simphiwe Mokhari that the Applicant's conduct in that regard was sexual in nature in that they were directed to people of different gender and the innuendos and conduct were sexual in nature. The Applicant was in a position of authority and his conduct was directed at people who were subordinate to him. Evidence was led that he was reprimanded, told to stop, and that at some stage, the employees would walk away; clearly indicating that the conduct was unwelcome. As a person in a position of authority; the Applicant is reasonably expected to have known better than to use his position of power in an abusive way. His conduct clearly had a negative impact on the complainant and the witness; Mokhari. The Respondent's duty to keep her safe working environment for its employees also weighed heavily in support of the Respondent's case. Owing to the seriousness of the allegations against the Applicant, I am therefore persuaded that the Respondent acted fairly in its attempt to protect its employees. I therefore find that the Respondent has discharged the onus to prove fairness of the dismissal on substantive grounds.'

- [11] On 20 May 2022, the appellant filed an application to review and set aside the arbitrator's award.

Labour Court

- [12] In his notice of motion, the appellant sought to have the arbitrator's award reviewed and set aside and substituted with an order *"to the effect that the Applicant's dismissal is procedurally and substantively unfair, sanction imposed is harsh and ordering the South African Reserve Bank to reinstate him with effect from the date of his dismissal, and without loss of income or benefit thereof"*. The appellant's founding affidavit makes clear that his attack on the award went beyond the severity of sanction – he disputed the arbitrator's assessment of the evidence and her conclusion that no reasonable decision-maker could have reached the conclusion that he had committed the misconduct for which he was dismissed.
- [13] The appellant's case on review was thus that the arbitrator had misdirected herself both by making a decision as to the existence of misconduct that no reasonable decision-maker could have reached on the evidence led, but also that the sanction of dismissal was too harsh in circumstances where the appellant described himself as 'a first-time offender'.
- [14] In his supplementary affidavit, the appellant more closely disputed the arbitrator's assessment of the evidence, and her conclusions that S[...]’s version was more probable. The appellant also disputed the arbitrator's conclusion that SARB had discharged the onus of proving the allegations of sexual harassment, bullying and intimidation brought against him. Similarly, in respect of Mukhari's evidence, the appellant averred that the arbitrator had misdirected herself by not rejecting her evidence.
- [15] The appellant further submitted that there was no evidence on the record of any breakdown in the employment relationship between him and SARB. He stated:

‘In present case, the First Respondent has failed to lead any evidence to demonstrate that the Applicant has committed [a] misconduct which is so intolerable that the relationship between him and the employer is not capable of being restored.’

[16] The Labour Court delivered an *ex-tempore* judgment. The Court made specific reference to the distinction between a review and an appeal, and set out the proper test to be applied on review. In particular, the Court recalled the approach set out by this Court in *Gold Fields Mining South Africa (Kloof Gold Mine) (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*³ an approach that discourages a piecemeal, nit-picking approach to the arbitrator’s assessment of the evidence and requires that the arbitrator appreciate the nature of the dispute, allow the parties a full opportunity to have their say, deal with the substantive merits of the dispute, and arrive at a decision that falls within a band of decision that a reasonable decision maker could reach on the available evidence.

[17] The Labour Court concluded:

‘As much as I have indicated, during oral submissions by the parties, that if one looks at the evidence of Ms S[...] in isolation, there are questions therein. But two things that prevent this court from even interfering with such is that number one, this is a reviewing court, it is not an appeals court. Number two, the Commissioner did deal with this evidence, as I have indicated that she said she accepts the evidence of the First Respondent, and that piggyback point in respect of the second one, is that Ms S[...] was not the only one who testified against the applicant, Ms Mokhare also testified and accused the applicant of sexual assault. The evidence of Ms Mokhare confirms the culture of sexual harassment perpetrated by the Applicant, as concluded by the Commissioner. There also are other witnesses, which I would say are formal witnesses, but the two main witnesses seem to confirm this culture.

³ [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC).

Consequently, this Court has considered all the grounds that have been raised as indicated earlier and with respect to the inference, the inferential reasoning, I must indicate that this matter was not decided on that basis only. There was direct evidence for this misconduct. The inference that the Commission is talking about has to be married with direct evidence of Ms S[...] and Ms Mokhare. Therefore, the point that Mr Mathevula has raised to say that this Court must look at paragraph 5 of *South African Post Office v De Lacy and Another* it is my conclusion that it is not applicable in this matter.'

- [18] The Labour Court was consequently satisfied that the arbitrator had not committed any material irregularity in relation to her assessment of the evidence, the primary basis of the appellant's attack on the award and further, that the award fell within the bounds of reasonableness. The Court accordingly dismissed the application, with no order as to costs.

Grounds of appeal

- [19] In his application for leave to appeal, the appellant contends that the Labour Court erred by finding that the arbitrator considered all the evidence and upholding her conclusion that there was direct evidence to the effect that the appellant had committed acts of sexual harassment. The appellant contended that in the present case, there was no direct evidence of misconduct, given the contradictions in the evidence of SARB's witnesses. This being so, the appellant contends that the arbitrator's findings were unreasonable and that no reasonable arbitrator could have reached the conclusion that she did based on the same evidence. Further, the appellant contends that the Labour Court is in finding that the evidence of S[...] was corroborated by that of Mukhari, and that in the circumstances, SARB was required to present direct evidence in the form of either video or photographic evidence, alternatively an independent witness to the incidents that form the subject of the charges against the appellant. In the absence of such evidence, the court is required to uphold the arbitrator's factual findings. In particular, the appellant disputes that there is any evidence in the record to support the conclusion that the incidents that form the subject of the

charges against him ever took place. The appellant considers that the evidence given by S[...] and Mukhari remained to be confirmed by other SARB employees, who were never called to give evidence, a matter that ought to have been the subject of an adverse inference drawn by the arbitrator, particularly since there was an indication at the outset of the hearing that these witnesses would be called. Finally, the appellant contends that the court erred by upholding the arbitrator's finding that SARB's witnesses were credible, and her rejection of the appellant's evidence, given that there were no contradictions in that evidence.

[20] Distilled to their essence, the appellant's grounds of appeal are his contention that the arbitrator placed the onus on him to prove the fairness of his dismissal, that the arbitrator misdirected herself in relation to her findings that he was guilty of the misconduct for which he was dismissed. Here, the appellant relies on what he contends is an inference drawn by the arbitrator in the face of contradictory evidence by SARB's witnesses. Further, the appellant contends that the arbitrator failed properly to assess the evidence in relation to the delay in reporting the allegations of sexual harassment, that she ignored the complainants' alleged motive for lodging the sexual harassment complaints, and that she erred by failing to draw an adverse inference given SARB's decision not to call witnesses that it had indicated would be called to give evidence. Finally, in the heads of argument submitted on his behalf, the appellant records that SARB failed to lead any evidence of any breakdown in the relationship between him and SARB and makes reference to authorities that concern remedy and in particular, the appellant's desire to be reinstated to his position.

[21] When pressed on the issue of the appellant's contention on review that the arbitration award ought to be set aside on the basis that dismissal was too harsh a penalty, counsel submitted that some form of warning in relation to future misconduct in the form of sexual harassment was appropriate. This submission was made in the face of a concession by the appellant in cross-examination that the charges disclosed serious misconduct that, if proven, would constitute grounds for dismissal. When the incongruity of a defence of a blanket denial of

the charges of misconduct and the pleaded ground for review that dismissal was too harsh a sanction was put to counsel, he abandoned this ground of appeal and pursued those submissions that concern what he contended to be a material irregularity on the part of the arbitrator in her assessment of the evidence.

Evaluation

- [22] The relevant regulatory framework encompasses international labour standards, the Constitution,⁴ the Employment Equity Act,⁵ and the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (Code).⁶ All of these instruments take as their point of departure the values of personal integrity, dignity, equality, and the necessity for the working environment to be free of sexual harassment.
- [23] ILO Convention 2019 (No 190) concerning the Elimination of Violence and Harassment in the World of Work was ratified by South Africa on 29 November 2021. The Convention obliges member states that ratify the Convention to adopt measures to prevent and eliminate violence and harassment (defined to include a range of unacceptable behaviours and practices) in the world of work.
- [24] The Code was adopted in fulfilment of international law obligations consequent on the ratification of Convention 190 and regards all forms of workplace harassment as acts of unfair discrimination. Item 5 of the Code deals specifically with sexual harassment, defined as a form of unfair discrimination on the grounds of sex, gender or sexual orientation. 'Sexual harassment' is broadly defined to

⁴ Constitution of the Republic of South Africa, 1996 (Act 108 of 1996).

⁵ Act 55 of 1998.

⁶ GG No 1890, 18 March 2022. The Code is published in terms of s 54 (1)(b) of the Employment Equity Act, 1998, and replaces the Code issued on 4 August 2005.

encompass a range of behaviour and conduct. The Code provides that conduct amounting to sexual harassment may include:

- '5.2.5.4 sexual attention, advances or proposals; or other behaviour, whether explicit or implicit, including suggestions, messages, advances, attention or proposals of a sexual nature;
- ...
- 5.2.5.6 verbal conduct such as innuendos, suggestions, 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;'

[25] The Code recognises that all forms of harassment in the workplace have their roots in an abuse of power. In *McGregor v Public Health & Social Development Sectoral Bargaining Council & others*⁷, the Constitutional Court noted that "[S]exual harassment occurs at the intersection of gender and power, producing a potent stench of subordination, disempowerment and inequality that so seeps through the fabric of our society that it stains its core". In *Campbell Scientific Africa (Pty) Ltd v Simmers and others*⁸ this Court (per Savage AJA) referred to the role of power dynamics in enabling workplace sexual harassment:

'At its core, sexual harassment 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 workplace. While economic power may underlie many instances of harassment, a sexually hostile working environment is often "... less about the abuse of real economic power and more about the perceived societal power of men over women. This type of power abuse often is exerted by a (typically male) co-worker and not necessarily a supervisor".

⁷ (2021) 42 ILJ 1643 (CC); [2021] 9 BLLR 861 (CC).

⁸ [2016] 1 BLLR 1 (LAC); [2015] ZALAC 51.

And:

'By its nature such harassment creates an offensive and very often intimidating work environment that undermines the dignity, privacy and integrity of the victim and creates a barrier to substantive equality in the workplace. It is for this reason that this Court has characterised it as "the most heinous misconduct that plagues the workplace".'⁹

[26] In the present instance, the arbitrator correctly distilled the dispute to one of fact. In the face of the denial by the appellant that he had sexually harassed either S[...] or Mukhari, the single issue to be decided by the arbitrator was thus whether the appellant had committed the misconduct for which he had been dismissed. In these proceedings, the appellant disputes that the Labour Court was correct to uphold the arbitrator's finding that, on a balance of probabilities, the appellant had harassed both S[...] and Mukhari, and that his innuendoes and conduct had been of a sexual nature, thus warranting the appellant's dismissal.

[27] As the Labour Court correctly observed, the LRA draws a firm distinction between a right of review and a right of appeal. The statutory right of recourse against an arbitration award is confined to the narrower remedy of review on the grounds established by section 145 of the LRA, suffused as that section is by a reasonableness standard.¹⁰ This requires that the review court in *Duncanmec (Pty) Ltd v Gaylard NO & others*,¹¹ the Constitutional Court stated:

⁹ Ibid at paras 20-21.

¹⁰ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC) at para 106.

¹¹ (2018) 39 ILJ 2633 (CC); [2018] 12 BLLR 1137 (CC) at paras 42-43. See also *Quest Flexible Staffing Solutions (A Division of Adcorp Fulfillment Services (Pty) Ltd v Lebogate* (2015) 36 ILJ 968 (LAC), where this Court said the following:

[12] ... Our courts have repeatedly stated that in order to maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is nevertheless capable of justification for reasons other than those given by the arbitrator. The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.

[13] An award will no doubt be considered to be reasonable when there is a material connection between the evidence and the result or, put differently, when the result is

'This test means that the reviewing court should not evaluate the reasons provided by the arbitrator with a view to determine whether it agrees with them. That is not the role played by court and review proceedings. Whether the court disagrees with the reasons is not material.

The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrator decisions which are not justified by rational reasons.'

[28] In the application of the reasonableness threshold, as the Labour Court correctly pointed out, it is not the function of a review court to adopt a piecemeal approach in relation to the award under review; the court must necessarily consider the totality of the available evidence.¹² Put another way, it is not open to an applicant in a review application, nor is it the function of the review court, to microscopically analyse the evidence presented at the arbitration hearing in an attempt to demonstrate that the award under review is incorrect and that it should therefore be set aside. This approach invites an evaluation of the correctness of the award and thus invite an appeal in the guise of a review.¹³ What the reasonableness threshold entails was recently explained by this Court (per Sutherland JA) in *Makuleni v Standard Bank of SA Ltd & others*¹⁴ (*Makuleni*) where the Court warned against a review court yielding "to the seductive power of a lucid argument that the result could be different". The Court went on to state:

'At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are tenable. Only if the conclusion is untenable is a review and setting aside warranted'.¹⁵

reasonably supported by some evidence. Unreasonableness is, thus, the threshold for interference with an arbitrator's award on review.'

¹² *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others (Gold Fields)* [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC).

¹³ See *Cox v CCMA & others* [2001] 2 BLLR 141 (LC); (2001) 22 ILJ 137 (LC).

¹⁴ (2023) 44 ILJ 1005 (LAC); [2023] 4 BLLR 283 (LAC).

¹⁵ *Ibid* at para 4.

[29] This approach finds particular application where the review court is required to evaluate factual findings made by the arbitrator. Where, as in the present instance, the arbitrator is confronted with two competing versions or factual constructions of the evidence, whether an award is susceptible to review is dependent primarily on the plausibility and reasonableness of those constructions. Where both constructions are plausible and reasonable, this Court has held that the arbitrator's choice of one of them cannot give rise to a review - the award will be reasonable provided it is based on "*acceptable evidence upon which the arbitrator could safely rely*". In circumstances such as the present where one of the versions before the arbitrator is obviously implausible (or, to use this Court's words in *Makuleni*, it is simply untenable) and the other version not, the arbitrator is obliged to reject the untenable version. A failure to do so would ordinarily render the award reviewable, since the acceptance of an untenable version of the facts would inevitably result in a conclusion or result that is unreasonable when the totality of the evidence is considered.¹⁶

[30] It follows from this analysis that intervention by a review court to disturb factual findings made by an arbitrator ought to be exceptional, and that the court should be "*extremely hesitant*" to do so.¹⁷ A review court must therefore accord the arbitrator a margin of error in any enquiry into the factual matrix – errors of fact and any assessment of the weight and relevance to be attached to particular facts are not in and of themselves sufficient for an award to be set aside.¹⁸ While the reasonableness of the outcome of the proceedings remains the threshold, as I have indicated above, a factual finding made by an arbitrator that is simply

¹⁶ See *Head of the Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC); (2015) 36 ILJ 2802 (LAC) where this Court adopted a two stage test; the first is to determine any distorting effect that an error of fact may have had on the ultimate outcome, with a material error (one found to have caused the applicant to lose the arbitration) constituting on a *prima facie* basis, an unreasonable result. The second stage is to determine whether the *prima facie* case is confirmed or rebutted by on a consideration that make up the enquiry into reasonableness. (See Myburgh and Bosch *Reviews in the Labour Courts* LexisNexis 2016 at 244-5.)

¹⁷ *Mbeje & others v Department of Health, KwaZulu-Natal & others* (2024) 45 ILJ 2681 (LAC); [2024] 11 BLLR 1111 (LAC) at para 21.

¹⁸ *A J Charnaud & Co v SA Clothing & Textile Workers Union on behalf of Members & others* (2024) 45 ILJ 2257 (LAC); [2024] 10 BLLR 1016 (LAC) at para 24.

untenable having regard to the evidence, will inevitably fail to meet that threshold.

[31] On appeal, the appellant persists with his attack on the arbitrator's assessment of the evidence before him, and submits that the Labour Court was incorrect to conclude both that the arbitrator had committed no material irregularity in her assessment of the evidence and that the outcome of the proceedings under review fell within a band of decisions to which a reasonable decision-maker could come on the evidence. In doing so, the appellant misconceives the nature and limitations of the remedy of review and seeks to adopt the piece-meal approach specifically rejected by this Court in *Gold Fields*.

[32] Turning to the appellant's first ground for appeal, he submits that the Labour Court ought to have concluded that SARB failed to discharge its burden to establish, on a balance of probabilities, that the appellant committed the offences for which he was dismissed. In particular, the appellant submits that the arbitrator drew inferences from the evidence that had the effect of shifting the burden of proof to the appellant. In support of this submission, the appellant submits that the arbitrator drew an inference from the body of evidence that is inconsistent with all the proved facts. In this regard, counsel relied on *South African Post Office v De Lacy and Another*¹⁹ in which the Court held that when a court draws an inference, what is required is an evaluation of all the evidence and not merely selected parts, and that the inference drawn be consistent with all the proved facts.

[33] The appellant's submissions are predicated on the contention that S[...]’s evidence was ‘marred with contradictions’ to the extent that there was no direct evidence that the appellant was guilty of the misconduct for which he was dismissed. As I understand the submission, the appellant contends that in these circumstances, by finding that there was direct evidence against the appellant, the arbitrator placed the onus of proving the fairness of his dismissal on the appellant. There is

¹⁹ (2009) (5) SA 255 (SCA); [2009] 3 All SA 437 (SCA).

no merit in this submission. To the extent that the appellant contends that there was no direct evidence to support the evidence of both S[...] and Mukhari and his submission that their testimony ought to be rejected on that basis, the submission is misconceived. Inferential reasoning is ordinarily relied on in the absence of direct evidence, where inferences are sought to be drawn from such objective facts as are available.²⁰

- [34] S[...] testified that she regarded the appellant's conduct and comments as degrading, and that she felt disempowered as a result. Discussions with the appellant were sexualised "... *the minute you start engaging with him it's like he's, he's seeing a sexual object*". S[...] gave direct evidence regarding the four separate incidents of sexual harassment that formed the subject of the charges against the appellant, in relation to her. She testified that in January 2019, after her return to work following the December holidays, the appellant asked her for a hug. She stated that as she hugged the appellant, he touched her buttocks with his hand. In his evidence, the appellant did not deny that he hugged S [...], but he denied that he touched her buttocks. Under cross-examination, the appellant conceded that he might have touched S[...]’s buttocks while he hugged her but denied that he had any intention to sexually harass her. When pressed during cross-examination on the discrepancy between the version previously proffered (i.e. that he did not touch S[...]’s buttocks) and the version that he may have done so but without any intention to harass, the appellant could not offer an acceptable explanation. S[...] also gave evidence concerning an incident that occurred on 7 October 2019 where after a consultation with her gynaecologist, she met the appellant who inquired as to the whereabouts. The appellant remarked that S[...] was ‘naked in the doctor’s office’ whereupon S[...] told the appellant to stop and walked away. The appellant did not deny that he had met with S[...] on 7 October 2019, or that they discussed her appointment at the gynaecologist. S[...] gave further evidence regarding an incident where the appellant made inappropriate comments regarding her body. In particular, she testified that when she was in

²⁰ *Briers NO and Others v Salmon NO and Others* [2023] ZAWCHC 26.

the appellant's presence, he had said to her that she had a good body unlike Thabiso and Poppy, two employees in the department. The appellant had stated that they were so big that when they undress, "*your manhood just goes down; it refuses to stand*". The appellant denied that this incident ever occurred and contended that it was a fabrication by S[...]. Finally, S[...] referred to an incident that occurred when the appellant was going to the bathroom and suggested to her that she should go with him into the bathroom. Again, the appellant's version was one of a bare denial that the incident took place.

- [35] The second complainant, Mukhari, testified that in April 2017, she went to the appellant's office for him to complete the gift register. When she entered the office, the appellant called her around his desk and stated that she had a beautiful body and that she was 'portable'. Mukhari testified that she felt particularly uncomfortable in the interaction with the appellant as he did not look at her in the eyes but looked at her midsection and down at her legs. In a second instance that formed the subject of Mukhari's evidence, she testified that when she visited his office, the appellant again asked her to come around his desk and after inquiries about the number of children she had, stated that he would make a good father to her children. In June or July 2017, Mukhari stated that when she had occasion to attend at the appellant's office, he again asked her to come around his desk and continued to look at her and speak about her legs, telling her that she had nice legs. On occasion, the appellant inquired whether Mukhari ever wore swimwear to which she replied that she did, but only when alone. Following this, the appellant remarked that he had seen a profile picture when she was wearing sportswear. The appellant inquired whether he could sponsor a holiday for Mukhari in return for her sending him pictures of her. Mukhari testified that the situation made her feel very uncomfortable. Mukhari also gave evidence concerning an incident that occurred in November 2018 when after using the bathroom, she sat outside in pain on account of an injury. The appellant approached her and after inquiring why she was seated there, he stated that he could kill her, that she was 'portable' and that he could carry her into the bathroom. Finally, Mukhari testified that during July or August 2018, when she

was assisting with the processing of payments for international workshop that the appellant was to attend, she went to his office to discuss an instruction not to pay for the workshop until the appellant's visa had been approved. As she was leaving the appellant's office, the appellant told her that he had asked for many things and that he had just been ignored. The appellant explained that he had requested pictures, and she had never provided any. The appellant did not offer any explanation regarding any of these events – his defence was that the incidents complained of had never occurred and that he was the victim of an elaborate conspiracy led by S[...], and extending to Mukhari, to accuse him falsely of sexual harassment, a conspiracy motivated ultimately by performance management processes that he had initiated against S[...]. Other than her conspiring with S[...], there was no version put to Mukhari during the arbitration that she had any motive to falsely accuse the appellant of sexual harassment. The appellant confirmed as much under cross-examination, when he acknowledged that he had proffered a different version in his disciplinary hearing, when he put to Mukhari that the reason that she lodged a complaint of sexual harassment against him was her desire to have a relationship with them, which he had rejected.

- [36] In regard to the appellant's submission that the Labour Court ignored that the arbitrator had no regard to the motive S[...] had in filing a complaint against him (the appellant had contended that S[...] falsely accused him of sexual harassment to secure his dismissal and thus prevent him from disciplining her for poor work performance), there was no evidence that S[...] was facing any imminent poor performance proceedings or even counselling for failing to meet work performance standards. It was also not disputed that S[...] had never been placed on a performance program. This much was confirmed by the evidence of Phehlukwayo.
- [37] There is also no merit in the submission that the arbitrator ought to have drawn an adverse inference from SARB's failure to call certain witnesses, in particular, Mthubathuba, Poppy and Thabiso. The arbitrator found that their evidence

“would not tilt the scale in favour of the Applicant” since none of them had been present during any of the incidents referred to.

- [38] In regard to the appellant’s contention that the charges represented a conspiracy against him, the arbitrator concluded that there was no evidence as to why a group of junior employees would *“gang up against a senior manager to support someone whom it is alleged is evading consequences of poor performance when they themselves had nothing to gain from it”*.
- [39] Contrary to the appellant’s submission, the arbitrator’s award does not disclose an outcome based on inferential reasoning. The appellant’s submission that the award fails to meet the criteria established by *South African Post Office v Delacy and Another* is simply misplaced.²¹ The arbitrator had regard to the direct evidence of SARB’s witnesses on the one hand and the appellant on the other, gave consideration to their respective credibility and found, on a balance of probabilities that the appellant had committed the misconduct for which he had been dismissed. Support for the finding that the probabilities favoured SARB’s version was found in the lack of any motive on the part of either S[...] or Mukhari to proffer false charges of sexual harassment against the appellant, and also in the commonality of their experiences in their separate engagements with the appellant, both in relation to the appellant’s conduct and their responses to it. There is no material irregularity in the manner or form in which the arbitrator assessed the evidence, or her determination of where the balance of probabilities lay.
- [40] To the extent that the appellant takes issue with the delay in lodging the complaints of sexual harassment, the evidence discloses that she decided to file a grievance after realising that the appellant would persist in sexually harassing and bullying her. Mukhari stated that this was not the first time that she had experienced sexual harassment in the workplace, and that consequent on

²¹ Although the arbitrator refers in para 56 of the award to an ‘inference’ that the custom of hugging existed in the legal department, especially after a return to work from a period of leave, this is not strictly an inference, it was a common cause fact.

previous experience with a different employer, she felt ashamed and that she was being victimised for reporting what was happening. Further, Mukhari stated that she was scared and afraid that she would be accused of lying as the appellant was a senior manager and she was a new employee at SARB. She decided to speak out at the grievance hearing convened after S[...]’s complaint.

- [41] The appellant’s submission that the arbitrator ought to have regarded the delay as a factor militating against the probability of the complainant’s version ignores not only the appellant’s concession under cross-examination that it was difficult for women to come forward and report sexual harassment, but also the nature and effect of power dynamics in the workplace. In the comprehensive judgment by Tlhotlhemaje J in *Rustenburg Platinum Mines Limited v UASA obo Pietersen and Others*²², the Labour Court said the following about delays in reporting incidents of sexual harassment:

[50] Common sense however, and a bit of appreciation of the human mind dictates that one must look deeper and objectively into the reasons incidents of sexual harassment are not immediately reported...

[51] In most cases, however, it might take ages for the complainant to finally muster the strength and courage to report the incidents. This could be for a variety of reasons including but not limited to:

- (a) Being ‘frozen’, and disbelieving what they are experiencing, and not having the human tools to respond immediately. The state of paralysis may be accompanied by guilt, confusion, self-anger, self-blame, shame, victimhood, unusual calm, being distraught and incapable of expression, withdrawal, helplessness, or outright terror. (The ‘paralysis mode’ syndrome).
- (b) Many fear a backlash if they complain, especially where the incident took place in a power/subordinate relationship...

²² [2018] ZALCJHB 72; (2018) 39 ILJ 1330 (LC).

- (c) There is a fear of causing a fossil disharmony in the workplace, with allegations that may not be taken seriously or believed, especially in the absence of corroborating evidence. (Most incidents of sexual harassment take place where there are no witnesses.)
- (d) Fear of consequential and negative labelling once an incident is reported...
- (e) Feeling pity for the harasser for whatever reason, irrespective of the reprehensible conduct.
- (f) Enduring the ordeal with the hope that it will go away, or that it was a once off incidents never to be repeated (the 'quit or endure' syndrome), coupled with the carrying of a sense of guilt for not reporting the matter.
- (g) The fear of publicity, and/or having to substantiate the allegations in public proceedings under relentless and unsympathetic cross-examination.

[52] the above list of responses is not exhaustive, and will in most instances obviously require of the complainant/experience to attest to them. What is of significance though is that the inability to recall events with specifics, including the timelines within which events or incidents took place, is not an unusual phenomenon in such cases. Courts and Commissioners ought therefore to bear in mind that the fact that the complainant cannot recall specifics does not imply that the incidents did not take place.'

[42] Mukhari gave evidence as to her reluctance initially to lodge a complaint regarding the appellant's conduct. She also testified as to the circumstances that gave rise to her decision to pursue a complaint against the appellant. She stated the following:

'RESPONDENT'S REPRESENTATIVE: So what is it that made you then decide well, I'm going to have to speak up?

MS SIMPHIWE ESTHER MOKHARI: Because I realised that if it happened to L[...], it might happen to someone else. That's the first thing. Number 2, it was that uhm I realised that by not saying something, he is going to continue because I felt the last incident that happened, for me it felt like he was now bullying me. You know, he's going to force me into what he wants. For as long as I say nothing, it's going to continue and I might... it's either I'm going to have to give in or I'm going to have to leave the job and I could not afford to do either of those. Yes.

RESPONDENT REPRESENTATIVE: Okay.

MS SIMPHIWE ESTHER MOKHARI: I am so sad that I actually felt guilty for something that he does.'

- [43] There is no basis to call the arbitrator's decision into question on the basis of any delay in reporting the incidents of sexual harassment or the filing of the complaint against the appellant.
- [44] What the evidence discloses, viewed as a whole, is direct evidence given by both S[...] and Mukhari as to the acts of harassment that formed the subject of the charges against the appellant, the appellant's bare denial that he committed any of the conduct alleged and significantly, as the arbitrator pointed out, an alleged motive on which the appellant relied (in the form of steps taken to manage S[...]s work performance) that did not withstand cross-examination, a conspiracy theory that made no sense given the nature of the relationship between S[...] and Mukhari, and certainly no evidence of collusion between them to falsely implicate the appellant. What the evidence does disclose is a clear pattern of the appellant objectifying women through explicit sexual language and conduct. That pattern is both recurrent and similar. Both S[...] and Mukhari testified as to intrusive personal enquiries; in S[...]s case, for example, about her visit to the gynaecologist, in Mukhari's case her wearing swimwear and requests for pictures. Both women testified that the appellant had inappropriately used physical proximity and situation control (especially in the form of repeated

requests that they move to his side of the desk) and to place them in positions where they felt uncomfortable.

- [45] In summary: the arbitrator took into account all relevant issues, including the issue of adverse inference and committed no reviewable irregularity in her assessment of the evidence. In sum, there is nothing in the record to suggest that the factual findings to which the arbitrator came were untenable given the evidence that served before her. The arbitrator's decision to uphold the appellant's dismissal is clearly one that falls within the bounds of reasonableness, and the Labour Court was correct not to disturb the arbitrator's value judgment. The Labour Court was thus correct to find that the appellant had failed to make out a case for review, and the order dismissing the application stands to be upheld.

Costs

- [46] Section 179 of the LRA provides that this Court may make an order for costs, according to the requirements of the law and fairness. This formulation, which reflects that which applies to the Labour Court,²³ means that the ordinary rule that applies in civil proceedings, that costs follow the result, does not apply. In *Booi v Amathole District Municipality and others*,²⁴ the Constitutional Court said the following:

'However, this is a labour matter and this Court's jurisprudence is settled: the ordinary rule that costs follow the result does not apply in labour matters. Rather, what emerges from the provisions of the LRA and the jurisprudence is that courts, when awarding costs and labor disputes, must consider what fairness to amounts and on the side of not discouraging parties from approaching the courts for the peaceful resolution of labour disputes. Further, if costs are to be awarded

²³ See section 162 of the LRA.

²⁴ [2022] 1 BLLR 1 (CC); (2022) 43 ILJ 91 (CC). See also *Zungu v Premier of the Province of KwaZulu-Natal & others* (2018) 39 ILJ 523 (CC); [2018] 4 BLLR 323 (CC); *Union for Police Security & Corrections Organisation v SA Custodial Management (Pty) Ltd & others* (2021) 42 ILJ 2371 (CC); 2022 (1) BCLR 118 (CC).

labor matters, there must be reasons to justify the court's decision to depart from the position that the losing party should not be marketed in costs in labor disputes.'

[47] This affirmation of the general rule that costs do not ordinarily follow the result does not preclude the Labour Court, nor this Court, from making an order for costs where an order of that nature is appropriate or put another way, where fairness demands that the losing party should be saddled with the burden to pay the successful party's costs, either in whole or in part. The demands of access to justice, as the Constitutional Court has noted, require that aggrieved employees are not shut out of the statutory dispute resolution system by the prospect of an adverse order for costs. However, to permit aggrieved litigants to move mechanically from one level of the dispute level to the next without pause, undeterred by the potential of an adverse order for costs, can frustrate the right of access to justice by other, more deserving cases. Cases that lack any ostensible merit demand administrative resources, time and attention, with the result that long backlogs continue to plague the Labour Court's rolls. In these circumstances, the right of access to justice by those parties who have genuine cases is compromised, if only because they are forced to wait years for a hearing date on rolls that are littered with cases that border on the hopeless. An order for costs is one mechanism to discourage cases that fall into this category, and they ought to be so discouraged.

[48] The present case is a good example. The complaints against the appellant were lodged more than five years ago. He had the benefit of a comprehensive investigation conducted by a senior counsel before charges were even contemplated by SARB. On counsel's recommendation, charges of sexual harassment were the subject of a hearing before a senior junior counsel. That hearing endured, we are told, for 'several days' before the appellant was dismissed. The appellant's dismissal then became the subject of a lengthy arbitration hearing extending over eleven days, where the same witnesses who had testified during the investigation and the disciplinary hearing gave evidence

as the same factual circumstances. At an early stage, all that was at issue was a narrow factual dispute. After a comprehensive arbitration award was issued, the appellant filed an application for review. Given the narrow grounds for review that are permitted by the LRA, especially in relation to factual findings made by arbitrators, the hopelessness of the appellant's case ought to have been obvious.

- [49] In the result, over a period of some five and a half years, an individual dismissal dispute that turns on a simple factual finding has demanded the attention of two counsel, a CCMA commissioner, a Labour Court judge and three appeal court judges, all of whom concur, without hesitation, that the appellant committed an act of the most serious misconduct that manifestly justified his summary dismissal. In these circumstances, I would ordinarily have dismissed the appeal and ordered the appellant to pay SARB's costs on a punitive scale. With some reluctance, I take cognisance of the fact that the Labour Court granted the appellant's application for leave to appeal. The appellant's (misplaced) optimism in the merits of his case was no doubt fortified when the Labour Court considered that his appeal would have a reasonable prospect of success. In a case that has been the subject of a rigorous disciplinary hearing, a protracted and thorough arbitration hearing and a comprehensive review, recourse to an appeal to this Court ought to be the exception, particularly where the appeal primarily concerns factual findings made by an arbitrator. The Labour Court would do well to heed the words of Davis AJA in *Martin & East (Pty) Ltd v National Union of Mineworkers & others*²⁵ when the Labour Court was urged to exercise caution when considering applications for leave to appeal so as to ensure a balance between the demands of the statutory purpose of expeditious dispute resolution and the rights of the party seeking leave to appeal. It is only for the reason that the appellant was successful in his application for leave to appeal that he escapes an adverse and punitive order for costs.

Order

²⁵ (2014) 35 ILJ 2399 (LAC); [2013] ZALAC 35.

1. The appeal is dismissed.

André van Niekerk
Judge of the Labour Appeal Court

Djaje AJA and Chetty AJA concur.

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