



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 919/23

In the matter between:

**FIRST NATIONAL BANK, A DIVISION OF
FIRSTRAND BANK LIMITED**

Applicant

and

BONGANI HAMILTON NDLAZI

First Respondent

COMMISSIONER XOLANI NYAMEZELE N.O

Second Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Third Respondent

Heard on: 14 August 2025

Delivered: 05 November 2025

JUDGMENT

MAMANYUHA, AJ

Introduction

- [1] This is an application brought in terms of section 145 of the Labour Relations Act¹ (LRA) to review and set aside an arbitration award made by the second respondent (Commissioner) dated 21 April 2023, in terms of which he found that the dismissal of the first respondent was substantively unfair.
- [2] The Commissioner ordered that the first respondent be retrospectively reinstated, with backpay in the amount of R213 649.17.

Background facts

- [3] The first respondent was employed by the applicant on 1 May 2011. At the time of his dismissal, he was working as a supervisor of the cash centre.
- [4] A disciplinary hearing was instituted against the first respondent after the applicant conducted an investigation pertaining to a complaint that was lodged by one of the applicant's employees, who alleged that the first respondent harassed her sexually. The first respondent was subsequently charged with contravention of paragraph 4.2.9 of the Bank's Disciplinary Code and Procedure (disciplinary code) and provided with a notice to attend a disciplinary hearing on 21 September 2022.
- [5] Following the disciplinary hearing the first respondent was found guilty of contravention of the disciplinary code and was subsequently dismissed. The first respondent referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA).
- [6] The Commissioner ordered his retrospective reinstatement with backpay. The applicant launched these proceedings, which are being opposed by the first respondent.

The arbitration award

¹ Act 66 of 1995, as amended.

- [7] The Commissioner approached the matter on the basis that the principal charge was one of sexual harassment.
- [8] The Commissioner remarked on the complainant's credibility, noting concerns given the evidence suggesting she may have had ulterior motives in raising the sexual harassment allegations. In contrast, he found there were no issues of credibility or reliability identified in the testimony of the first respondent's witnesses.
- [9] The Commissioner further expressed concern regarding the manner in which the complainant communicated to the applicant that his conduct was unwelcome. He reasoned that this posed a difficulty in the proceedings, observing that it would have been preferable if there had been an unequivocal verbal indication to the alleged perpetrator to cease the behaviour. The Commissioner found there was compelling evidence that the first respondent was, in fact, the victim of a *vendetta*. This evidence rendered the allegations of sexual harassment improbable.
- [10] The Commissioner concluded that the applicant, sought to shift the focus to the fact that the first respondent, being a senior employee, had breached the sexual harassment code of conduct—a matter that had not been properly tested with the applicant prior to his dismissal.
- [11] The Commissioner ultimately found that the employer had failed to discharge its onus of proving that the dismissal was substantively fair.
- [12] Consequently, he ordered the retrospective reinstatement of the first respondent and directed the applicant to backpay the first respondent an amount of R213,649.17.

[13] The applicant contends that the Commissioner's award falls to be reviewed and set aside on the following grounds:

- 13.1 The Commissioner misconstrued the nature of the inquiry by not enquiring into whether the evidence led by the applicant proved the misconduct that was specifically alleged against the first respondent but instead pre-occupied himself with a narrow enquiry of whether the first respondent had committed sexual harassment.
- 13.2 The Commissioner ignored and/or disregarded critical evidence regarding the inappropriate, immoral, indecent, disgraceful conduct that took place on the Bank premises.
- 13.3 There was no fair trial of the issues.
- 13.4 The Commissioner's finding that the first respondent's dismissal was substantively unfair is a decision that a reasonable commissioner could not reach based on the evidence before him.

Analysis of the matter

[14] It is evident from the record and the award that the Commissioner confined his enquiry to determining whether the first respondent's conduct amounted to *sexual harassment* as defined in the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (the Code). In doing so, the Commissioner disregarded the actual charge levelled against the first respondent in the disciplinary proceedings.

[15] The charge, as framed in paragraph 4.2.9 of the disciplinary code, was broader in scope. It alleged *immoral, indecent, and disgraceful conduct* committed whilst the first respondent was acting in his capacity as a supervisor and while on the bank's premises. The particulars of the charge included that, on 27 July 2022, the first respondent:

- 15.1 slapped the complainant inappropriately on her bottom;
- 15.2 rubbed his shoulder against her breasts;

15.3 was captured on video footage touching her inappropriately on her bottom;

15.4 was seen harassing and pushing her inappropriately; and

15.5 stared at her in an inappropriate manner.

[16] The wording of the charge, which expressly refers to “*immoral, indecent, disgraceful conduct (e.g. sexual harassment)*”, clearly indicates that sexual harassment was cited merely as an *example* of the type of misconduct contemplated — not as the exclusive form of misconduct alleged. The essence of the charge in my view was that the first respondent’s behaviour was *improper and unbecoming of a person* in a supervisory position within the workplace.²

[17] The applicant, in his submissions, contended that the parties had recorded in their pre-arbitration minute that one of the issues to be determined by the Commissioner was whether the first respondent had committed any misconduct as per the charges levelled against him.

[18] The applicant’s Operations Manager testified that, irrespective of whether the conduct was consensual, such behaviour was unacceptable within the bank and that, as a senior employee, the first respondent “*should have known better*” and confined such conduct to his private life. The Commissioner, however, considered that the applicant was attempting to shift the focus by introducing an issue that had not been properly canvassed with the first respondent prior to his dismissal.

² In *EOH Abantu (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2019) 40 ILJ 2477 (LAC) at para 16, Murphy AJA held as follows regarding drafting of a charge:

“Employers embarking on disciplinary proceedings, not being skilled legal practitioners, sometimes define or restrict the alleged misconduct too narrowly or incorrectly. For example, it is not uncommon for an employee to be charged with theft and for the evidence at the disciplinary enquiry or arbitration to establish the offence of unauthorised possession or use of company property. The principle in such cases is that provided a workplace standard has been contravened, which the employee knew (or reasonably should have known) could form the basis for discipline, and no significant prejudice flowed from the incorrect characterisation, an appropriate disciplinary sanction may be imposed. It will be enough if the employee is informed that the disciplinary enquiry arose out of the fact that on a certain date, time and place he is alleged to have acted wrongfully or in breach of applicable rules or standards”. (own emphasis)

- [19] By restricting his enquiry to whether the elements of sexual harassment were satisfied, the Commissioner misconceived the true nature of the enquiry before him. This misdirection is material. It resulted in the Commissioner disregarding significant evidence.³
- [20] The correct question was whether the evidence as a whole established that the first respondent engaged in conduct that was immoral, indecent, or disgraceful, having regard to the standards expected of a supervisor and the values of the workplace.
- [21] The first respondent contended that the charge sheet was prepared pursuant to the sexual harassment complaint and that the Commissioner was therefore correct in treating the matter primarily as one of sexual harassment.
- [22] I do not agree. A careful reading of the charge sheet indicates that the allegation was framed more broadly as a breach of the employer's code of conduct, encompassing conduct unbecoming of a senior employee. While the sexual harassment complaint may have precipitated the disciplinary process, the wording of the charge extended beyond that single issue.
- [23] The applicant further confirmed in its submissions that the disciplinary process was not limited to determining whether sexual harassment, in the strict legal sense, had occurred, but whether the first respondent's conduct amounted to inappropriate behaviour inconsistent with the professional standards expected in the workplace.
- [24] The Commissioner's reasoning appears to have been unduly influenced by the framing of the issue as one of sexual harassment alone. By doing so, he failed to adequately consider whether the first respondent's behaviour, even if falling short of sexual harassment, nonetheless violated the broader standards of professionalism and respect expected in the workplace.

³ In *Herholdt v Nedbank Ltd* (2012) 33 ILJ 1789 (LAC) The Labour Appeal Court held at para 36: *'...Where a commissioner fails to have regard to material facts, this will constitute a gross irregularity in the conduct of the arbitration proceedings because the commissioner would have unreasonably failed to perform his or her mandate and thereby have prevented the aggrieved party from having its case fully and fairly determined. Proper consideration of all the relevant and material facts and issues is indispensable to a reasonable decision and if a decision maker fails to take account of a relevant factor which he or she is bound to consider, the resulting decision will not be reasonable in a dialectical sense. Likewise, where a commissioner does not apply his or her mind to the issues in a case the decision will not be reasonable.'*

- [25] The applicant was therefore correct in submitting that the Commissioner misdirected himself by confining his analysis to the narrower legal test for sexual harassment, without addressing whether the general misconduct charge had been substantiated on the evidence.
- [26] The Commissioner's conclusion that the dismissal was substantively unfair thus cannot stand, as it was based on an incorrect characterisation of the nature of the charge and the scope of the inquiry.⁴ It is a decision that no reasonable decision-maker could have reached on the evidence before him.

Conclusion

- [27] Having found that the Commissioner's decision cannot be sustained, the question arises whether this Court should substitute its own decision for that of the Commissioner or remit the matter for a fresh determination.
- [28] The power of this Court to substitute a commissioner's decision is derived from section 145(4) of the LRA, which provides that the Labour Court may determine the dispute in the manner it considers appropriate. However, that discretion must be exercised with caution and only in exceptional circumstances.⁵
- [29] In the present case, the record demonstrates that the Commissioner made findings heavily dependent on witness credibility—particularly regarding the complainant's motives and the first respondent's version of events. These findings cannot be reliably reassessed on the cold record alone.
- [30] The Court is therefore not in as good a position as the Commissioner to determine the matter finally.

⁴ In *Palluci Home Depot (Pty) Ltd v Herskowitz and Others* (2015) 36 ILJ 1511 (LAC) it was held: "Viewed cumulatively, the Commissioner's failure to apply his mind to issues which, as demonstrated above, were material to the determination of the dispute, led him to misconceive the nature of the enquiry by failing to address the questions raised for determination, namely whether the dismissal of the first respondent was fair for a first transgression of: The failure of the Commissioner to properly apply his mind to the Code of Good Practice, and additionally to the material fact that the first transgressions of insolence and poor work performance are not dismissible offences, reflect not only on the Commissioner's failure to address the questions raised for determination, but also that he made a decision which no reasonable decision-maker could have made, principally because he wholly misconstrued the nature of the enquiry before him and his duties in connection therewith."

⁵ *Littlewood v Minister of Home Affairs* 2006 (3) SA 474 (SCA) at para 18.

- [31] Moreover, the Commissioner's error was not merely an incorrect finding on the facts but a misdirection in the characterisation of the main issue—that is, whether the charge related narrowly to sexual harassment or more broadly to misconduct arising from the same complaint. This misdirection infected the reasoning process, meaning that the evidence has not yet been properly evaluated within the correct legal framework.
- [32] In such circumstances, the appropriate remedy is to remit the matter for a fresh hearing before a different Commissioner, to ensure that the dispute is determined anew on the correct basis and with a proper assessment of credibility and evidence.
- [33] Accordingly, in the interests of fairness and proper adjudication, this Court declines to substitute its own decision and orders that the dispute be remitted to the CCMA for hearing *de novo* before a different Commissioner.
- [34] In the circumstances, the following order is made:

Order

1. The arbitration award issued by the Commissioner on 21 April 2023 under case number GAJB 20045-22 is reviewed and set aside.
2. The matter is remitted to the CCMA for hearing *de novo* before a different Commissioner.
3. There is no order as to costs.

T. Mamanyuha
Acting Judge of the Labour Court of South Africa

Appearances:

For The Applicant : Mr S Dube

Instructed by : Edward Nathan Sonnenbergs Inc.

For The Respondent : Adv K Maponya

Instructed by : Rhulani Baloyi Attorneys

LABOUR COURT