



- (1) Reportable: Yes/No
(2) Of interest to other Judges: Yes/No

Signature

23 March 2026
Date

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no: C424/2022

In the matter between:

ERARITE (PTY) LTD T/A

KHAYELITSHA SUPERSPAR

Applicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

C.M BENNETT NO

Second Respondent

CLOUDIOUS GOGO

Third Respondent

Heard: 16 October 2025

Delivered: 23 March 2026

Summary: A review application to set aside an award which found the dismissal of a foreign national for a WhatsApp status based on a bible verse to be too harsh. Post made at a time of tension amongst employees following a Facebook post calling for protests against an employer for employing foreign nationals.

JUDGMENT

GANDIDZE, J

Introduction

- [1] Mr Gogo, the third respondent, was employed as the Bakery Manager at Khayelitsha SuperSpar, the applicant, which is part of the Erarite Group. He was dismissed in July 2022 after it was alleged that, on 24 June 2022, he posted content on the WhatsApp status for the Management Group that was provocative and harmful, quoting the Bible verse of Deuteronomy that:

‘Foreigners who live in your land will gain more and more power while you gradually lose yours. They will have money to lend you, but you will have none to lend them. In the end, they will be your rulers.’

- [2] The above message was also shared on Gogo’s personal WhatsApp status. Gogo is Zimbabwean.
- [3] The events leading up to Gogo’s posts involved the creation of a Facebook group that accused the applicant of employing foreign nationals for jobs that could have been offered to local residents. The Facebook post listed the names of 23 foreigners employed by the applicant and called for protest action on 16 June 2022 to shut down the applicant.
- [4] In response to the Facebook post, the applicant met with the workers’ forums and informed them that the Facebook group was under investigation, and those involved would be disciplined. There was also a separate meeting with the foreign nationals, during which they were asked not to exacerbate the situation. At that time, relations in the store were polarised and tense.
- [5] The Facebook post caught the attention of the Departments of Labour and Home Affairs. Both departments requested documentation from the applicant for the foreign nationals, which was subsequently supplied. Nothing further was heard from them. Ahead of the planned protest, the applicant sought the involvement of the South African Police Service (SAPS).
- [6] Approximately six employees involved in the Facebook group were identified and either dismissed or transferred to other stores.

- [7] It was during all the above that Gogo posted the WhatsApp statuses mentioned. When asked about it, Gogo explained that the Management WhatsApp group status was a mistake, blaming his phone, which he said would freeze occasionally. He apologised for the status, which was removed within 10 to 12 minutes, and afterwards, measures were introduced to ensure only two people could change the status of the Management WhatsApp group. Gogo defended his personal WhatsApp status.
- [8] At a subsequent disciplinary hearing, Gogo was found guilty and dismissed. He referred an alleged unfair dismissal dispute to the CCMA.

The arbitration proceedings

- [9] Only substantive fairness was in dispute, as Gogo admitted his wrongdoing but argued that a final written warning would have sufficed.
- [10] Three witnesses testified for the applicant, and Gogo provided evidence in his own defence. Since there were little to no disputes of fact, I do not find it necessary to detail the witnesses' evidence, except to record the commissioner's summary of the parties' versions.
- [11] The applicant contended that Gogo's actions were intended to incite unrest as retaliation against the Facebook group. The post was seen by Gogo's Store Manager and Gogo's subordinates. Although the post was removed shortly after publication, management at other stores became aware of it.
- [12] Gogo's version was that he was informed of the posting to the management WhatsApp group by the store manager. He was unaware that the post had exceeded its intended audience. At the time, he was experiencing problems with his mobile phone and did not do this intentionally. He apologised to the store manager and all the managers in the management WhatsApp group. He also argued that his post was not comparable to the Facebook post, but he understood the applicant's unhappiness with the post. The commissioner noted that, under cross-examination, Gogo testified that he could post whatever he wanted on his personal WhatsApp status.

- [13] The commissioner found that Gogo had committed misconduct, but could have been issued a final written warning. Since Gogo did not wish to be reinstated and only sought compensation, the commissioner granted him three months' pay. To avoid repetition, the commissioner's analysis of the evidence and the parties' arguments will be discussed when the grounds of review are addressed.

Grounds of review

- [14] The review application, in terms of section 145 of the Labour Relations Act¹ (LRA), seeks to set aside the award, which is dated 8 August 2022, issued under case number WECT9454-22, and to substitute it with an order that the dismissal was fair.
- [15] In general, it was submitted that the commissioner failed to consider the material issues fairly; that the commissioner took into account irrelevant matters or failed to consider relevant ones; that the commissioner made errors of fact and law; and that the commissioner reached conclusions that no reasonable decision-maker could have arrived at.
- [16] More specifically, the submission was that the commissioner's assessment of the facts was unreasonable. This relates to the finding that the xenophobic comments were not hate speech, despite Gogo admitting that he intended to post the message on his status to reach all his contacts, most of whom were fellow employees. The submission was that the aim was to upset these fellow employees. It was also submitted that the commissioner's reasoning demonstrated a lack of understanding of the facts, the social and legal realities of xenophobia, and the relevant legal principles, making the decision clearly incorrect, and that the commissioner's mistake of fact or law distorted the result, as set out in *Head of Department of Education v Mofokeng and Others*².

¹ Act 66 of 1995.

² [2015] 1 BLLR 50 (LAC).

- [17] It was also submitted that all employees were warned about the sensitivity and seriousness of the situation involving xenophobic comments, and that they would face disciplinary action for such conduct. Foreign national employees were advised not to worsen the volatile situation, and that Gogo ignored the employer's guidance on what to do and what not to do. The submission was also that the need to combat the scourge of xenophobia, a social issue as serious as racism or gender-based violence, rests equally with foreigners and South Africans.
- [18] Regarding the sanction, and with reference to *PSA obo Rae v General Public Services Sectoral Bargaining Council and Others*³ (*PSA obo Rae*), it was submitted that dismissal was an appropriate operational response to the misconduct at the time.
- [19] The commissioner is also said to have failed to consider the widespread xenophobia at the time, the need for SAPS intervention, the impact on the applicant's business, the false reports made to the Department of Labour and Home Affairs, and Gogo's responsibilities as a manager. The submission was that if the commissioner had recognised these factors, he would have concluded that dismissal was fair. It was also argued that no reasonable decision-maker could conclude that a manager who was aware of the sensitivities but still posted xenophobic comments on social media did not deserve to be dismissed. Furthermore, it was submitted that the conduct significantly eroded management's trust or confidence and made continued employment intolerable.
- [20] The further submission was that an arbitrator must decide whether the sanction imposed by the employer was fair, rather than impose a new sanction, and that determining whether an employer acted fairly cannot be equated with simply deferring to the employer's decision.
- [21] The submission was also that a commissioner must determine the fairness of the dismissal based on the reasons given at the time of the dismissal.

³ (JR755/14) [2017] ZALCJHB 410 (6 April 2017).

[22] Ultimately, it was submitted that because the commissioner did not properly consider the issues, the decision was unreasonable.

[23] Gogo opposed the review application, arguing that the award was reasonable.

The award

[24] The court must assess whether the applicant's grounds of review are valid, taking into account the Commissioner's analysis of the evidence and findings. Furthermore, since the award is contested on the basis that it is one no reasonable decision-maker could have made, the court must consider all the material and submissions provided to the Commissioner, including those the Commissioner may not have relied upon, to establish whether the outcome was one that no reasonable decision-maker could have reached.⁴

[25] The commissioner began by assessing whether Gogo's claim—that his malfunctioning phone posted the status on the management group—was likely. He dismissed this version as improbable and untrue, concluding that Gogo had deliberately shared the biblical verse out of context. He found that Gogo's intention was to post the message, supported by the fact that he had the same status on his personal WhatsApp, which he justified by saying he could do as he pleased with his phone.

[26] Regarding why Gogo behaved as he did, the Commissioner expressed sympathy. He explained that Gogo was tired of being a whipping boy for xenophobes and decided to give them the metaphorical middle finger. While the Commissioner understood Gogo's actions, he described his response as ill-considered and a grave error of judgment, in that Gogo effectively told the xenophobes, '*yes we are taking your jobs and we are going to dominate you as well.*' According to the Commissioner, that message was bad but not very bad, not threatening, and Gogo was simply stirring the pot.

[27] Regarding whether Gogo's actions were comparable to those of the Facebook group (the xenophobes), the Commissioner found that this was true, to some

⁴ *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC).

extent. He stated that the Facebook group moved from mere speech to inciting violence and physical confrontation with the foreign nationals targeted at the protest planned for 16 June 2022. He also concluded that the applicant had reason to be concerned about the protest, which is why they requested SAP's intervention.

- [28] Turning to Gogo's conduct, he found that, unlike the Facebook group, he did not express dislike for locals or threaten locals; the Bible verse was not hate speech; and he was not attempting to incite a counterforce of foreign nationals but rather aimed to upset the locals.
- [29] Thereafter, the Commissioner proceeded to assess whether dismissal was an appropriate penalty for what he had already determined to be Gogo's deliberate conduct. He concluded that a final written warning was justified for a less serious offence. He also found that Gogo disobeyed the instruction to maintain a low profile and that his post was not comparable to what was described as having been posted by the xenophobic grouping.
- [30] As Gogo did not wish to be reinstated, the commissioner awarded three months' salary as compensation, considering Gogo's 23 months of service, his failure to secure other employment, and his responsibility for his own misfortune.

Analysis

(a) Gravity of the misconduct

- [31] I begin the analysis by quoting the exchange between the commissioner and Gogo during the arbitration proceedings, which clearly demonstrates that the Commissioner understood the exact nature of the applicant's gripe with Gogo's conduct:

'Commissioner: His question is. If I can elaborate? Given the volatile situation prevailing in the store at that time, why even if only on your private status did you want to post to that message? It does not matter whether you intended footage to go anywhere else. He is asking why would want to post what was going on, why would you want to post that it all? That is what he is asking you.

....

Commissioner: Anybody can see it. You posted a post from Deuteronomy specially selected verses 43 and 44 that is telling the Israelites of the dominance the coming dominance – the coming dominance of foreigners. Right

Applicant: H'm.

Commissioner: Now, you are in the middle of the situation where there is a Facebook group that is xenophobic and it is singling out for the nationals working for Erarite particularly at Khayelitsha where you worked. Why in that context were you posting that on your status instead of Mickey Mouse or Hello Kitty or some picture of Brad Pitt or - I do not know, whoever you want? Why did you pick a potentially volatile status even if it was going on your private status. Why did you pick that. That is what he is asking. Correct?

Mr. Du Toit: Correct commissioner'.

- [32] From that brief exchange, the applicant's complaint that the commissioner failed to fairly address the material issues must be rejected. Other than Gogo's denial that the status on the management group was inadvertent, there were no material disputes of fact that the commissioner was required to resolve. That being the case, it is difficult to see what material evidence the Commissioner overlooked, what irrelevant facts the commissioner considered, and what relevant facts he ignored.
- [33] The starting point was Gogo's admission of guilt. The commissioner rejected certain aspects of Gogo's version, which he found improbable. He also acknowledged that Gogo intentionally posted the message, conduct which the commissioner regarded as ill-conceived and a grave error of judgment, as Gogo was showing the xenophobes the 'proverbial middle finger'.
- [34] Additionally, the commissioner observed that, to some extent, Gogo's behaviour could be compared to that of the Facebook group. Therefore, the commissioner was aware that Gogo had committed misconduct, but he also distinguished Gogo's conduct from that of the Facebook group. He found that, unlike the Facebook group, Gogo did not show hostility towards locals or threaten them; the Bible verse was not hate speech; and Gogo was not

attempting to incite a coalition of foreign nationals but was instead trying to upset the locals.

- [35] I see no error of fact or law in the Commissioner's approach. In reaching that conclusion, I have also considered that Gogo was not charged with hate speech. Instead, the charge was that of posting harmful and provocative material. The case was that Gogo was meant to keep his head down, as instructed, but instead he sought to stir things up by posting a provocative and harmful message. This is what the applicant's representative presented to the Commissioner.

Ms. Brink: So one of the questions that I had to ask Claudius and what, you know that we needed to make the decision on is- firstly how is your store manager who is also a foreign national, going to be able to support you as a departmental manager if this is your view of the people, your colleagues that you are working with in the store.

And secondly. Claudius, how you as a departmental manager of the bakery department is going to be able to have the respect of your colleagues who might not be foreign nationals and even foreign nationals knowing that this is your view- well you perceived view of them? Because that is the only thing that they can take it from that is that that might be your view.

So that made it- the question come up to say that: You know, how are you going to manage the department? And we felt that in light of what has happened in the store and in light of what is going, you know the - everything that has happened that you will not be able to manage the department. You will not have to trust or the respect of your subordinates or even of your superiors. And you will probably make it very difficult for your store manager to run his store also is a foreign national.

So not to say that, you know it is a because you are a foreign national, it is because you made your job so difficult - or you made the job as a bakery department manager almost impossible. So that was the considering factor because, you know how are you going to continue from here and can we continue from here. And we thought, you know, that unfortunately there is no way for us in light of what is happening to continue.

- [36] When Gogo explained that he made a mistake, which he apologised for, Ms Brink stated the following:

Ja, Claudius, I understand what you are saying and mean, we have gone through this in the disciplinary inquiry as well. The fact is that even if it was not your intention to put it on the group, it was your intention to put it on your status. The fact is, everybody that goes and sends you Whatsapp will be able to see your status.

We did not do all of this because of xenophobia. We did all of this to get our store operational again. To alleviate the fears, to follow - to make sure that everybody is treated fairly and correctly.

So xenophobia is maybe a heading that you want to put over all of this but what happened to you is not because of xenophobia. What happened to you is because of the situation that was in our store and we told you not to aggravate it.

[37] The Store Manager, also a foreign national, being the person who brought the matter to HR's attention, testified as follows:

Mr Mborera: So, while I did actually bring this matter to the HR is because I understood when Mr Gogo said it was a mistake and that was on our Management Group but still when he said he meant to put it on his status for sure, I went and I saw it was on his status in this message directly to the locals, it is not a good message.

Mr Du Toit: H'm.

Mr Mborera: So that is when he was asked to go for an inquiry. And the inquiry has been going on also with the locals who did whatever they did and whatever they said to the - against the foreign nationals. So, it was going to be unfair for us not to, you know, bring him to the inquiry.

[38] Therefore, the applicant charged Gogo because those involved in the Facebook group were also charged.

[39] The submission that Gogo engaged in egregious conduct comparable to racism and gender-based violence, which is sought to be raised in the review proceedings, is not a submission made before the Commissioner. Above, I quoted the exchange between Ms Brink and Gogo. Nowhere in that exchange was it ever suggested to Gogo that he had engaged in conduct comparable to racism and gender-based violence. It is impermissible for parties, after an award has been issued, to seek review based on a case not presented during

the arbitration proceedings. Reviews are restricted to the material and evidence submitted to the commissioner.

- [40] Regarding the submission that Gogo engaged in xenophobic conduct, the commissioner addressed it but did not exonerate Gogo. However, the commissioner also showed sympathy towards Gogo regarding his reasons for posting the message. After determining that Gogo's behaviour was somewhat comparable to the xenophobic conduct of the Facebook group, he went on to outline the differences between Gogo's conduct and that of the group. It cannot be said that the outcome ignores the social and legal realities of xenophobia. This is an issue on which reasonable people may disagree, but, on review, this Court must remember the test for interfering with an award in matters such as the present matter. The question is whether the commissioner's decision falls outside the range of what a reasonable decision-maker could reach. This is a high threshold, and the applicant's case, on review, does not meet it.

(b) Sanction

- [41] The applicant's complaint regarding how the commissioner should have treated the sanction is based on a misunderstanding of what *Sidumo and Another v Rustenburg Platinum Mines Ltd & Others*⁵ prescribes, which is this:

[61] There is nothing in the constitutional and statutory scheme that suggests that, in determining the fairness of a dismissal, a commissioner must approach the matter from the perspective of the employer. All the indications are to the contrary. A plain reading of all the relevant provisions compels the conclusion that the commissioner is to determine the dismissal dispute as an impartial adjudicator.'

- [42] Later on, in the same judgment, the Court stated this:

[74] Neither the Constitution nor the LRA affords any preferential status to the employer's view on the fairness of a dismissal.

⁵ (2007) 28 ILJ 2405 (CC).

[75] It is a practical reality that in the first place it is the employer who hires and fires. The act of dismissal forms the jurisdictional basis for a commissioner, in the event of an unresolved dismissal dispute, to conduct an arbitration in terms of the LRA. The commissioner determines whether the dismissal is fair. There are therefore no competing 'discretions'. Employer and commissioner each play a different part. The CCMA correctly submitted that the decision to dismiss belongs to the employer but the determination of its fairness does not. Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view. An impartial third party determination on whether or not a dismissal was fair is likely to promote labour peace.'

[43] Therefore, it is the commissioner's sense of fairness that prevails, and there is no room to defer to the decision of the employer to dismiss. This was made clearer in this paragraph:

'[177] Equally true is that when an employer determines what is an appropriate sanction in a particular case, the employer may have to choose among possible sanctions ranging from a warning to dismissal. It does not follow that all transgressions of a particular rule must attract the same sanction. The employer must apply his or her mind to the facts and determine the appropriate response. It is in this sense that the employer may be said to have discretion.

[178] But recognizing that the employer has such discretion does not mean that in determining whether the sanction imposed by the employer is fair, the commissioner must defer to the employer. Nor does it mean that the commissioner must start with bias in favour of the employer. What this means is that the commissioner, as the CCMA submitted, does not start with a blank page and determine afresh what the appropriate sanction is. The commissioner's starting-point is the employer's decision to dismiss. The commissioner's task is not to ask what the appropriate sanction is but whether the employer's decision to dismiss is fair.

[179] In answering this question, which will not always be easy, the commissioner must pass a value judgment. However objective the determination of the fairness of a dismissal might be, it is a

determination based upon a value judgment. Indeed, the exercise of a value judgment is something about which reasonable people may readily differ.

- [44] The commissioner made a value judgment. He considered both the applicant's interests. He accepted that Gogo committed the misconduct but also expressed sympathy for Gogo, finding that the post was a serious error of judgment. He also accepted that the applicant's decision to take action against Gogo was justified, which is why he found that Gogo's dismissal was because Gogo was the author of his own misfortune.
- [45] The applicant's disagreement with the commissioner's value judgment is not a ground for reviewing the award. The outcome may well be one on which reasonable persons may differ, and that is not a justification for interfering with the award on review. To reiterate, interference on review is only justified if the conclusion is one that no reasonable decision-maker could reach. The commissioner's finding cannot be said to be one that falls outside a range of reasonable decisions.
- [46] Ironically, in the *PSA obo Rae* judgment relied upon by the applicant, this Court reviewed and set aside an award that found a dismissal for a once-off incident to be substantively unfair. The Court reasoned thus:

[45] In my view, a conspectus of the evidence shows that the individual applicant had a singular lapse of judgment, considering that his conduct on the day was uncharacteristic. He should have known better than to continue to revel the night away when he was already approaching intoxication much earlier in the evening. But there was no evidence or indication that he was a habitual miscreant where it came to these kind of situations. This kind of singular error in judgment cries out for progressive discipline, which would more than likely make the individual applicant a very cautious employee where it comes to possible excessive alcohol consumption in the future. That kind of result is what progressive discipline is all about.

[46] A final written warning to the individual applicant for his breach of the Code in respect of his conduct on 31 August and 1 September 2012 would have impressed upon him the error of his ways, and would have made it clear that any such future transgression would result in the loss of

his job. In *Gcwensha v Commission for Conciliation, Mediation and Arbitration and Others* the Court held:

'I accept that the purpose of a warning is to impress upon the employee the seriousness of his actions as well as the possible future consequences which might ensue if he misbehaves again, namely that a repetition of misconduct could lead to his dismissal.'

[47] Therefore, *PSA obo Rae* does not assist the applicant's case on review, and the submission that there was a finding that dismissal was an appropriate operational response must be based on what the award found, which this Court overturned.

[48] In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*,⁶ the Court stated this:

[98] It will often happen that, in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the court will need to remind itself that the task of determining the fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the court would interfere with every decision or arbitration award of the CCMA simply because it, that is the court, would have dealt with the matter differently. Obviously, this does not in any way mean that decisions or arbitration awards of the CCMA are shielded from the legitimate scrutiny of the Labour Court on review.

[99] In my view *Sidumo* attempts to strike a balance between two extremes, namely, between, on the one hand, interfering too much or too easily with decisions or arbitration awards of the CCMA and, on the other, refraining too much from interfering with CCMA's awards or decisions. That is not a balance that is easy to strike. Indeed, articulating it may be difficult in itself but applying it in a particular case may tend to be even more difficult. In support of the statement that *Sidumo* seeks to strike the aforesaid balance, it may be said that, while on the one hand, *Sidumo* does not allow that a CCMA arbitration award or decision be set aside simply because the court

⁶ (2008) 29 ILJ 964 (LAC).

would have arrived at a different decision to that of the commissioner, it also does not require that a CCMA commissioner's arbitration award or decision be grossly unreasonable before it can be interfered with on review - it only requires it to be unreasonable. This demonstrates the balance that is sought to be made. The court will need to remind itself that it is dealing with the matter on review and the test on review is not whether or not the dismissal is fair or unfair but whether or not the commissioner's decision one way or another is one that a reasonable decision maker could not reach in all of the circumstances.

[100] The test enunciated by the Constitutional Court in *Sidumo* for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision maker could not have made in the circumstances of the case. It will not be often that an arbitration award is found to be one which a reasonable decision maker could not have made but I also do not think that it will be rare that an arbitration award of the CCMA is found to be one that a reasonable decision maker could not, in all the circumstances, have reached.

[49] It is evident from the compensation awarded to Gogo that the commissioner recognised the gravity of Gogo's misconduct. He granted only three months' compensation, underscoring that Gogo must accept responsibility for losing his job. This is because he ignored the plea for foreigners to keep their heads down and the fact that, as a manager, he was expected to set an example. Had Gogo wished to be reinstated, the commissioner would have issued a final written warning. The alleged unfairness to the employer is not at all apparent.

[50] Not all employees involved in the Facebook group were dismissed. Some were transferred to other stores. Therefore, not all engagement in xenophobic conduct was grounds for dismissal. I reproduced the applicant's submissions to the commissioner regarding Gogo's wrongful conduct. Those submissions do not mention that continued employment was intolerable. They only state

that Gogo needed to be disciplined, like all those involved in the Facebook group post.

[51] I was unable to understand the submission that the fairness of a dismissal must be judged based on the reasons for the dismissal. The commissioner did not present a different reason for Gogo's dismissal. He understood that Gogo was dismissed because of the status he posted on his personal profile and in the Management WhatsApp group, which the applicant considered harmful and provocative. Regarding Gogo's disciplinary record, it was the applicant's case that it was not taken into account when Gogo was dismissed. The commissioner correctly determined that he was not required to consider previous warnings.

[52] The commissioner's decision that dismissal was not a fair sanction is not a decision that no reasonable decision maker could reach. This ground of review must also fail.

Costs

[53] The applicant sought costs in the event of opposition, and Gogo prayed for the dismissal of the review application with costs. However, conspicuously absent from the parties' heads of argument are submissions regarding costs. This was an acknowledgement that the Court must exercise its discretion on the issue. An order in accordance with the requirements of law and fairness, in terms of section 162 of the LRA, is for each party to pay its own costs.

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

Order

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

Judge of the Labour Court of South Africa

Appearances:

For the Applicant : W Jacobs
Instructed by : Willem Jacobs & Associates

For the Respondent : Mr K Cato
Instructed by: : Cato Attorneys