(1) Reportable: Yes/NO
(2) Of interest to other Judges: Yes/No
(3) Revised

Signature Date

IN THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable
Case no: PR305/22

S LOUW Applicant

and

DEPARTMENT OF CORRECTIONAL SERVICES,
NORTHERN CAPE PROVINCE **First Respondent**

THABO MARUPING, *N.O.* **Second Respondent**

GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL **Third Respondent**

Heard: **13 May 2026.**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for the hand-down is deemed to be on 25 May 2026.**

JUDGMENT

TLHOTLHALEMAJE, J.

Introduction:

[1] In this opposed application, the Applicant seeks an order to review and set aside the arbitration award issued by the Second Respondent (Arbitrator), acting under the auspices of the Third Respondent (GPSSBC). The Arbitrator had confirmed the dismissal of the Applicant in circumstances where the latter

had challenged the fairness of his dismissal on account of allegations of sexual harassment

The factual background:

[2] The Applicant was employed by the First Respondent, the Department of Correctional Services (DCS), as a Grade 2 Correctional Officer, with effect from July 2008, at its De Aar Correctional Centre, a medium-security facility in the Northern Cape Province. He was dismissed on 25 March 2022 following a complaint of sexual harassment lodged by a fellow employee (Complainant), who was also a Correctional Officer in the facility's female section.

[3] Following his dismissal, the Applicant referred an alleged unfair dismissal dispute to the GPSSBC. When attempts at conciliation failed, a certificate of outcome was issued on 20 April 2022, and the dispute was referred for arbitration. The dispute came before the Arbitrator, who had issued the impugned award.

The evidence at arbitration proceedings:

[4] At the arbitration proceedings, the Complainant did not testify in view of the misconduct of sexual harassment not having been disputed. Reliance was placed on her affidavit in which she averred that the incident took place after she had finished her shift (First watch) from 15h00 to 23h00 on 15 February 2021. After her shift, she proceeded to the control gate and discovered that all her colleagues who were on the late shift had already left. The CDS's Mr Mouton had then instructed the Applicant to drive the Complainant home.

[5] On the way to her house, the Complainant noticed that the Applicant had deviated from the route and was instead driving in the opposite direction. When the Complainant enquired of the Applicant why he had deviated from her route to her house and whether he was going to fetch another official, the latter initially denied having deviated from the route. When the Complainant continued to ask where the Applicant was going, he gave no direct response.

[6] At some point, the Applicant turned onto a dark gravel road and stopped the vehicle in a secluded area behind a High School's premises. When the Complainant enquired why he had stopped instead of taking her home, his blunt response was that he was going to have sexual intercourse with her. The Complainant responded that she would not do such a thing with him.

[7] As the Complainant protested, the Applicant attempted to remove items she had on her thighs. He further attempted to touch her private parts and ignored her protests and resistance. She kept telling him to stop whatever he was doing. The Applicant, in the process, also attempted to pull the Complainant over to his car seat to kiss her. He further told her that they should both get out of the vehicle, as he wanted to 'hold and squeeze' her. The Complainant had refused to get out of the vehicle.

[8] Throughout the episode, the Complainant was resisting. The Applicant ultimately gave up and drove her home. As she alighted from the vehicle, she attempted to retrieve her possessions when the Applicant again attempted to grab her but without success. Even after he had left, the Applicant had continued to send the Complainant WhatsApp messages into the night. Copies of those text messages were also placed before the Arbitrator.

[9] The following morning after the incident, the Complainant had first sent a text message to the Applicant, informing him that he was going to report the incident to a management official, Mr Xolela Cube. She then requested a meeting with Cube and was accompanied by shop stewards, Messrs. Ndumelo and Qondani. Cube had brought the matter to the attention of the then Head of Correctional Centre, Mr Michael Mtantsi.

[10] At a meeting convened with Cube and Mtantsi as requested by the Complainant, she had relayed the events of the previous night after her shift. Mtantsi decided that the Applicant should also be called to the meeting so that his side of the story can be heard. The Applicant was however off duty at the time and was nonetheless called to come to the DCS's premises for a meeting. When the Applicant arrived, and after initially speaking to Cube, Mtantsi, and Qondani, the Complainant was called. At that stage the

Complainant only sought an apology from the Applicant, as she felt sorry for him and his family.

[11] In her affidavit, the Complainant averred that at the end of her shift, a day after the incident, she had requested that another official, Mr Venter, should take her home instead of the Applicant. Venter took her home, and on the way, he informed her that the Applicant was displeased that she had asked him (Venter) to take her home instead of him.

[12] On 17 February 2021, the Complainant confronted the Applicant about what Venter had said and told him that she was no longer comfortable with being taken home by him after her shift. The Complainant averred that the Applicant, however, told her that it was his responsibility to take her home. It was at that stage that the Complainant had formed the view that the Applicant would not change his behaviour and had not shown genuine remorse when he apologised the previous day.

[13] The Complainant then approached Cube and Mtantsi and indicated that she had changed her mind in that in her view, the Applicant's apology was not genuine and she therefore wanted to pursue the matter. The Complainant further averred that, because of the incident, she had to consult with a Psychologist and was subsequently admitted for treatment for two weeks. Upon her discharge, she was booked off sick for a further week.

[14] It is common cause that the Applicant was subsequently suspended following intervention by the DCS's area management. The documents before the Commissioner indicate that an investigation was conducted and concluded between 23 February and 15 April 2021. On 11 June 2021, the Applicant was issued with a notice to attend a disciplinary enquiry scheduled for 24 June 2021. After the outcome, a termination notice was served on the Applicant on 16 February 2022.

[15] The Applicant had appealed on 23 February 2022. It is a further common cause that at some point before the outcome of the disciplinary enquiry was issued, the Applicant's suspension was uplifted. During that period, the Applicant had continued to render his services.

[16] The oral evidence of Mtantsi was that after the Applicant was called to a meeting and had heard the Complainant's complaint and her version of events, he initially disputed the allegations. This was until Cube told him to stop playing games and tell the truth instead of wasting their time. The Applicant had ultimately admitted that the misconduct took place. He had apologised to the Complainant after being told that she had indicated that she did not intend to take the matter further. However, Cube and Mtantsi were not pleased with her decision. It appears that it was the Applicant's understanding that his apology would put an end to the matter.

[17] In regards to whether the Applicant's apology that was made at the meeting of 17 February 2021 effectively constituted a disciplinary process that brought the matter to an end, Mtantsi had testified that because of the informal nature of the meeting, it could not have been a formal progressive disciplinary hearing as contemplated in the DCS's formal disciplinary code and procedure. He had further disputed that there was any formal process, as that meeting where the Applicant had apologised, was called at the behest of the Complainant. Mtantsi further denied ever meeting the Applicant or discussing the incident with him until he was called to a meeting.

[18] Mr Venter's testimony was essentially that he took the Complainant home at the end of her shift on the day after the incident. She had confided to him that she felt uncomfortable about being taken home by the Applicant, and Venter had indicated that the Applicant was not pleased that it was not he who was taking the Complainant home. Flowing from her discussions with Venter, the Complainant had formed the view that the Applicant's apology earlier on had not been a genuine show of remorse.

[19] The Applicant's testimony was that Qondani and Cube informed him that, according to the Complainant, who had requested a meeting, if he (Applicant) apologised to her, the matter would be closed. This was also repeated at the meeting by Cube and Qondani in the presence of Mtantsi. The Complainant was then called and met by the Applicant, Mtantsi and Qondani. They met outside an office near the front gate of the premises.

[20] When they met the Complainant, the Applicant had apologised to her as requested by Cube and Mtantsi, and she had accepted his apology. This was also in the presence of Mr Ndumela, who was a security guard at the front gate. The Applicant also agreed that he should not approach the Complainant and, in his view, the matter was resolved.

[21] The Applicant further disputed the appropriateness of the sanction, contending that, since his suspension was lifted and he was allowed to resume his duties among female employees, this indicated that the employment relationship with the employer had not broken down.

[22] Under cross-examination, the Applicant had confirmed that after his suspension, he had submitted a statement to the investigating officer in response to allegations of sexual assault and attempted rape, and not sexual harassment. It was based on that distinction that he continued to hold the view that the issue of sexual harassment had been resolved with his apology. He further testified that he had no knowledge of workplace sexual harassment (or understood what it entailed), as no other employee was ever dismissed for that type of misconduct at the workplace.

The Arbitrator's award and findings:

[23] The Arbitrator in coming to his findings took into account that the misconduct was not in dispute. He considered whether a defence of double jeopardy, as raised by the Applicant, was sustainable in circumstances where the Complainant had accepted his apology, yet the DCS had instituted a disciplinary enquiry against him in respect of the same misconduct.

[24] The Arbitrator took into account the nature of the misconduct in reference to *Campbell Scientific Africa (Pty) Ltd v Simmers and Others*[1]. He also had regard to the Code of Good Practice on Handling of Sexual Harassment in the Workplace. He concluded that the DCS was compelled to apply it notwithstanding the Applicant's apology.

[1] (CA 14/2014) [2015] ZALCCT 62 (23 October 2015)

[25] Concerning the defence of double jeopardy, the Arbitrator concluded that there was no record of the Applicant having been punished twice for the same offence He further found that the Applicant had shown no remorse, that his evidence was confusing and contradictory, and that a sanction of dismissal was fair. The Arbitrator concluded that the conduct of the Applicant towards the Complainant was reprehensible, taking into account his age relative to the Complainant's and that given his position as someone responsible for transporting other officials, he could no longer be trusted in that role.

The grounds of review:

[26] The Applicant contends that the award is reviewable and unreasonable, alternatively that it was vitiated by material errors of law and fact. It was submitted that the award fell outside the band of decisions that a reasonable decision-maker could reach. In this regard, it was submitted that the Arbitrator failed to apply the principle of progressive discipline properly, and failed to consider whether the dismissal was an appropriate sanction in circumstances where the Applicant had 14 years of service with no disciplinary record, and where the DCS had not initially regarded the misconduct as warranting immediate dismissal at the time.

[27] It was further submitted that the Arbitrator incorrectly rejected the defence of double jeopardy, in circumstances where management had convened a meeting and where the Applicant had apologised upon being called to answer to the allegations.

The Legal framework and evaluation.

[28] The legal position in reviews of this nature is settled. The enquiry is whether, based on the totality of the evidence before him/her, the Arbitrator's decision is one that a reasonable arbitrator could not have reached. In *Mashele v South African Reserve Bank and Others(Mashele)*[2], the Labour Appeal Court recently reiterated the threshold of reasonableness in reference to other authorities by stating that;

[2] (JA128/24) [2025] ZALAC 51; [2026] 1 BLLR 57 (LAC); (2026) 47 ILJ 168 (LAC)

> '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. 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 invites an appeal in the guise of a review. What the reasonableness threshold entails was recently explained by this Court (per Sutherland JA) in *Makuleni v Standard Bank of SA Ltd & others (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'' (Internal citations omitted)[3]

[29] In defining the scope and impact of sexual harassment as an offence, the Constitutional Court in *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others*[4] held that:

> '"Sexual harassment is the most heinous misconduct that plagues a workplace." Although prohibited under the labour laws of this country, it persists. Its persistence and prevalence "pose a barrier to the achievement of substantive equality in the workplace and is inimical to the constitutional dream of a society founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms…and non-sexism". Not only is it demeaning to the victim, but it undermines their dignity, integrity and self-worth, striking at the root of that person's being. Writing in 1989, in its first reported case of sexual harassment, the erstwhile Industrial Court, sounding the alarm that sexual

[3] At para 28
[4] (CCT 270/20) [2021] ZACC 14; (2021) 42 ILJ 1643 (CC); [2021] 9 BLLR 861 (CC); 2021 (5) SA 425 (CC); 2021 (10) BCLR 1131 (CC) at para 1

> harassment cannot be tolerated, highlighted that "[u]nwanted sexual advances in the employment sphere are not a rare occurrence" and it is "by no means uncommon". Unfortunately, that truth rings as loudly today as it did then. The only difference between now and then is that today we hold in our hands a Constitution that equips us with the tools needed to protect the rights that are violated when sexual harassment occurs. Yet, what this means is that for as long as sexual harassment persists, so the Constitution becomes an eidolon, and its promises of equality and dignity, equally illusive.'

[30] Against the above principles, it can only be reiterated that the Applicant, notwithstanding his initial hesitation until rebuked by Cube, did ultimately concede that he indeed sexually harassed the Complainant. Even then, it is apparent that the admission did not come about on his own volition. On his own version, he apologised because the Complainant, Cube and Mtantsi told him to. There is no indication that he would have done so of his own volition.

[31] The point being made is that the incident of sexual harassment in this case and the manner with which it took place cannot be disposed of through a mere apology, or be reduced to a mere footnote in the overall consideration of the appropriateness of the sanction of dismissal, and the ground of review relied upon. The misconduct is indeed serious.

[32] To recap, when the Applicant agreed to take the Complainant home, it was late at night after her shift. Evidence demonstrated that taking other employees home after their shifts was also part of the Applicant's functions. He was entrusted with the Complainant's safety. He broke that trust in the most heinous ways, by diverting off her route to her house, not being forthright about where he was taking her, and stopping in a secluded dark area in the middle of the night. Not only did he endanger the Complainant's life in the course of his duties, but he had proceeded to invade the Complainant's bodily integrity and sought to impose himself upon her by attempting to touch her private parts and forcefully kiss her. At some point, he had even told her to get out of the vehicle in the middle of the night and in a secluded dark place, so that he could 'hold and squeeze' her.

[33] Unsurprisingly, the Applicant had, at some point, when making a statement after his suspension, become confused as to whether he should answer to allegations of sexual assault and attempted rape, when the issue was that of sexual harassment. Indeed, his conduct towards the Complainant went beyond mere sexual harassment. Throughout her harassment and invasion of her bodily integrity by the Applicant who was clearly driven by his hormonal instincts, the latter completely disregarded his duty of care towards her. He abused his position of trust towards her and the DCS.

[34] Arising from the above, it further needs to be said that the Complainant was not only failed by the Applicant, but also by the Department. After her ordeal, the Applicant was only dismissed a year later. It is not clear from the evidence why it took a year between the initial suspension, investigations, the internal hearing, the lifting of his suspension, and the outcome. Irrespective of the fact that the Applicant was during the lifting of his suspension deployed to another section, the fact remains that following his confession and the manner with which he had sexually harassed the Complainant, the Department had allowed him to perform his duties together with other female employees as if nothing had happened, instead of expeditiously but fairly finalising the matter in order to bring some measure of closure and comfort to the Complainant.

[35] In *Mashele*, the Labour Appeal Court had pointed out that international labour standards, the Constitution, the Employment Equity Act, and the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (Code) 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[5]. It is further common cause that the DCS has in place, the *Prevention and Management of Sexual Harassment in the DCS: Policy and Procedures*. It is against these instruments at its disposal, that it is reiterated that the DCS miserably failed the Complainant.

[36] Against the very same instruments, it is perplexing that at some point after his apology, the DCS was prepared to let the matter rest, even if it were the wishes of the Complainant. The issue remains that, in circumstances where

[5] At para 22

such allegations arose, it was irrelevant whether the Complainant accepted the apology. The misconduct in question, as correctly found by the Arbitrator, obliged the DCS to act against the Applicant in accordance with those prescripts and its own disciplinary code and procedure. This was to ensure that female employees were protected from sexual harassment and/or any form of discrimination by fellow employees who could not keep their urges in check, such as the Applicant.

[37] The obligations of the employer in such instances were succinctly set out in *MEC for Education (North West Provincial Government) v Makubalo (Makubalo)*[6] **,** where the Labour Appeal Court held that;

> 'It stands to be noted that even had there been a resolution of the issue between the respondent and Ms Monegi, workplace rules regulate the standard of conduct required within the context of the employment relationship. An employer is therefore entitled to take disciplinary action against an employee whose conduct falls short of such rules or standards. An amicable resolution of a dispute between two employees does not in itself resolve the workplace misconduct from the perspective of an employer, nor does it prevent the employer from taking disciplinary action against the employee for such misconduct.'[7]

[38] It follows that, in this case, it was not for the Complainant to forgive and forget about the incident simply because she felt sorry for the Applicant. It was not her call that the Applicant should be exonerated, as the misconduct in question negatively impacted the workplace environment, and thus called for severe disciplinary measures.

[39] The above conclusions equally dispose of the Applicant's contentions regarding double jeopardy, without the need to refer to authorities on that topic. It follows that the Applicant cannot, based on what was said in *Makubalo*, contend that the informal meeting, where he apologised for his conduct, could have been in the form of any disciplinary step to sustain a defence of double jeopardy. In any event, that meeting was called at the

[6] (JA37/2012) [2017] ZALAC 13 (3 February 2017)
[7] At para 20

behest of the Complainant, and was held in circumstances where were no formal charges were preferred against the Applicant, or where any formal hearing as envisaged in the DCS's disciplinary code and procedure was held.

[40] I further fail to appreciate how it can be said that any formalised process could have been held outside an office and at the entrance of the control gate of the DCS's premises. The Applicant sought to downplay the significance and consequences of his conduct. To the extent that he had persisted with his contentions in this regard, it can only demonstrate his lack of appreciation of the harm he caused as a result of his misconduct.

[41] This brings me to the issue of the appropriateness of the sanction. The Applicant contended that the Arbitrator ignored his long, unblemished service record, the fact that the DCS did not initially seek to take disciplinary action against him, and his admission of the misconduct. It was contended that in accordance with the DCS's procedures and paragraph 5.1 of Resolution 1 of 2006[8], corrective counselling ought to have been considered, rather than a dismissal.

[42] Flowing from *Sidumo*[9], the approach to a determination of the appropriateness of a sanction of a dismissal could not have been clearer. In this exercise, the arbitrator is not empowered to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In this regard, the arbitrator without deference to the decision of the employer, is required to consider all the relevant facts and circumstances before him or her, taking into account *inter alia*, the nature and seriousness of the misconduct, the importance of the rule, the harm caused by the employee's

[8] Which provide;

> "Collective counselling, in cases where the seriousness of the misconduct warrants counselling, the manager of the employee must:
>
> Bring the misconduct to the employee's attention;
>
> Determine the reasons for the misconduct and give the employee an opportunity to respond to the allegations through himself/herself or by a Union representative;
>
> Seek to get agreement on how to remedy the conduct; and
>
> Take steps to implement the agreed course of action."

[9] At paragraphs 78 and 79

conduct, the reason the employer imposed a sanction of dismissal, the basis of the challenge to the dismissal, the employee's disciplinary record, and all relevant mitigating factors.

[43] Regarding mitigating factors, it can only be reiterated that an employee's long, unblemished service is not, on its own, sufficient to exonerate an employee of misconduct[10]. This approach is even more apposite in circumstances where the misconduct in question is so gross as to have a negative impact on the employment relationship any form of trust relationship between the employer and employee.

[44] There can be no doubt that the sexual harassment as described by the Complainant in her affidavit was egregious in the extreme. In *Ekurhuleni Metropolitan Municipality v South African Local Government Bargaining Council and Others*[11], the LAC reiterated that sexual harassment is, at its core, concerned with the exercise of power and reflects the power relations that exist both in society generally and, specifically, within a particular workplace.

[45] In this case, by virtue of being tasked with taking the Complainant home in the middle of the night, the Applicant effectively exercised power over her, as she was vulnerable and at his mercy, to ensure that she arrived home safely. In this instance, the Applicant, like a predator, saw an opportunity and sexually harassed the Complainant and betrayed her trust in the most deplorable manner. As a side issue, the Arbitrator's incorrect conclusion that the Applicant had denied the misconduct is neither here nor there. This misdirection and misconstruction of the evidence did not distort the ultimate outcome he arrived at.

[46] On the undisputed facts, the Complainant had landed in hospital after her ordeal. This indeed makes the misconduct and its impact even more gross, something which the Applicant refused to acknowledge even in these proceedings. Contrary to the submissions made on behalf of the Applicant,

[10] *Mgaga v Minister of Justice and Correctional Services and Others* (DA 17/21) [2024] ZALAC 8; [2024] 7 BLLR 699 (LAC); (2024) 45 ILJ 1576 (LAC) at para 29
[11] (JA17/2021) [2022] ZALAC 2; [2022] 4 BLLR 324 (LAC); (2022) 43 ILJ 825 (LAC) at para 2

the Complainant's medical admission and sick leave were not disputed. I therefore fail to appreciate how these issues could have been irrelevant for the determination of the sanction. Effectively, the misconduct was serious enough to warrant the Applicant's dismissal, and any form of counselling under clause 5.1 of the Resolution, as the Applicant contended, would have been an injustice to the Complainant. Equally, it would have been a failure on the part of the DCS to properly implement the necessary instruments, to ensure that the workplace was free from predatory behaviour.

[47] I have already indicated that the DCS was found wanting to the extent that it did not act immediately in accordance with the prescripts. Clearly, the DCS needs to be rebuked not only for taking too long to finalise the disciplinary process, but also for permitting the Applicant to remain at the workplace for such a protracted period, and work amongst female employees. Throughout the period whilst the Applicant was at the workplace, the DCS was clearly oblivious to the harm he had caused and continued to cause to the Complainant by his presence.

[48] The ineptitude of the DCS does not however imply that the Applicant could still be trusted or that he should get a free pass. Considering the egregious nature of the misconduct, there was clearly a basis for imposing a sanction of dismissal. It follows that the basis for challenging the sanction was meritless.

[49] Against the above considerations, it is concluded that there is no basis for any finding to be made that the Arbitrator's award is susceptible to any review or any interference by this Court. There is no basis to conclude that the Arbitrator committed any error of law and the like. The overall evidence that was served before him does not suggest that the decision which he came to fell outside of the band of decisions to which a reasonable arbitrator could come. On the contrary, the reasoning of the Arbitrator was by all accounts sound and his decision was reasonable in the circumstances. It follows that the review application ought to be dismissed.

[50] Regarding costs, the contentions made on behalf of the DCS were that it was unreasonable for the Applicant to persist with the review application where

there was no basis to interfere with the Arbitrator's award. Even though I agree that the review application ought not to have been before the Court, considering the conclusions reached in this judgment, I also agree that it was neither frivolous nor vexatious to deserve a cost order. Against these considerations, the requirements of law and fairness dictate that each party bear its own costs.

[51] Accordingly, the following order is made;

Order:

1. The Applicant's application to review and set aside the arbitration award issued by the Second Respondent under Case No: GPBC406/2022 is dismissed.

2. There is no order as to costs.

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Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Mr. C. Unwin of Lovius Block Attorneys
For the Respondent:	Ms. K. Sassin-Schaaf of State Attorney, Kimberley