



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, GQEBERHA

Reportable

Case No: PA9/2018

In the matter between:

AMATHOLE DISTRICT MUNICIPALITY

Appellant

and

**THE COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER NOWETHU NDIKI N.O.

Second Respondent

COMMISSIONER PHUMELELE DHLODHLO N.O.

Third Respondent

NOLOYISO PONGOMA

Fourth Respondent

Heard: 23 August 2022

Delivered: 10 November 2022

Coram: Waglay JP, Kathree-Setiloane et Tokota AJJA

JUDGMENT

TOKOTA AJA

Introduction

- [1] This is an appeal from the Labour Court where the appellant was ordered to pay the fourth respondent (employee) a total amount of R150 000.00, consequent upon the finding that the employee had suffered sexual harassment in the form of unfair discrimination. Mr Labeeb Fredericks, an Operations Manager in the employ of the appellant, was said to have sexually harassed the employee at the workplace. After the grievance procedure, which was convened to investigate the allegations, yielded negative results, the employee referred a dispute of unfair discrimination (in the form of sexual harassment) to the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of section 10(6)(aA)(i) of the Employment Equity Act¹ (EEA or Act). The CCMA found that the appellant (appellant or employer) had unfairly discriminated against the employee and made a compensation award of R150 000.00 together with other ancillary relief. Leave to appeal by the appellant to the Labour Court was unsuccessful. This appeal is with leave of this Court.

Factual background

- [2] The employee was employed by the appellant as an Administrative Assistant stationed at Nxuba Municipality. In February 2015, Mr Labeeb Fredericks (Mr Fredericks), who is also an employee of the appellant, was transferred to Nxuba Municipality. Because of the limited office space, Mr Fredericks had to share the same office with the employee for approximately two to three months before moving to his own office. In Mid-April 2015 or so, Mr Fredericks moved to his own office.
- [3] The employee alleged that during the period February to July 2015, she was subjected to sexual harassment by Mr Fredericks in that, at times he would touch her private parts and insert his finger into her tights causing a hole in it. At one stage it is alleged that he demanded that she should perform oral sex to stimulate him.

¹ Act 55 of 1998.

- [4] The employee alleged that even after Mr Fredericks had moved to his own office, he would call her to his office and would touch her private parts, press her breasts hard and ask her for oral sex, which she did. At some point, she vomited after performing oral sex. She did not resist because she feared dismissal or because Mr Fredericks was her boss. She testified that “*maybe because of his authority over me I then would give him some latitude*”.
- [5] Sometime in July 2015, she allegedly reported the conduct of Mr Fredericks to her boyfriend who advised her that she should report the matter to the authorities. Her boyfriend warned her that if she did not report it, he would do so himself. He further advised her to talk to the shop steward about the matter. She then reported the matter to Mr Witbooi, a senior credit control officer and a shop steward. Mr Witbooi advised her to report the matter to the Labour Relations Division.
- [6] On 2 November 2015, some four months after the alleged sexual harassment stopped, the employee registered a grievance in the Labour Relations Division of the employer. Ms Pelele Piti, the Assistant Manager, received the complaint. With a view to investigate the complaint, and after making certain phone calls, Ms Piti sent emails to the affected parties on 20 November 2015, in terms of which she scheduled a date for the hearing of the grievance for 1 December 2015. On that date, the employee sent a message indicating that she was not available to attend the hearing due to ill health and was on sick leave until 11 December 2015. She further stated that from 14 December 2015 she would be taking annual leave until January 2016.
- [7] From July 2015 onwards, the employee received unfavourable reports from Mr Fredericks reflecting poor work performance. She suffered from a stress disorder during this period and was intermittently on sick leave. On 8 March 2016, a psychiatrist confirmed that she had been admitted to St Marks Clinic for two weeks. It is unclear from the evidence whether the stress was caused by the alleged sexual harassment or the unfavourable reports made by Mr Fredericks in respect of her work performance. Some of the medical certificates recorded the following sickness: “*lumps back of the neck [sic] for investigation: neck obsesses and fever*”.

- [8] When the employee came back from leave in January 2016, Ms Piti indicated that she intended to set the grievance down for hearing on 30 January 2016. On 4 January 2016, she emailed various stakeholders enquiring about their availability for the said date. Ms Piti received no responses. On 17 February 2016, Ms Piti once again sent emails enquiring about the availability of the affected parties for a hearing on 3 March 2016. She made a follow-up call to the employee, checking her availability for that date. Although the employee had taken sick leave for the better part of February 2016, she informed Ms Piti that she would be available on 3 March 2016.
- [9] On 23 February 2016, Ms Piti advised the parties by email that the matter would be heard on 3 March 2016. Meanwhile, the employee took leave again from 26 February 2016 to 18 March 2016 and was unavailable for the hearing.
- [10] On 31 March 2016, the employee wrote to the employer stating that she had been discharged from the health centre and that the office would hear from her in due course.
- [11] When the employee failed to revert with a hearing date, Ms Piti enquired from her why she was quiet about the matter. On 4 April 2016, the employee responded by email, stating that she had been advised by a shop steward that it was not her responsibility to facilitate and coordinate a grievance meeting. Ms Piti finally set the matter down for 12 May 2016 and the hearing proceeded on that date.
- [12] The outcome of the grievance hearing was issued on 1 June 2016. Although the presiding officer could not find any basis for the complaint of sexual harassment, she made certain recommendations which included emotional intervention to be arranged for the employee to deal with her stress problems. She recommended training sessions to capacitate the employee to work efficiently. She also recommended that the employee be relocated within the department as her working relationship with Mr Fredericks was “damaged”.
- [13] Dissatisfied with the outcome of the grievance tribunal, on 6 June 2016, the employee referred the dispute to the CCMA.

The CCMA proceedings

- [14] After analysing the evidence, the commissioners at the CCMA (curiously the arbitration was chaired by two commissioners although the award is signed by only one) held that the employee had indeed been subjected to unfair discrimination in the form of sexual harassment. They found no reason that could persuade them that the employee was *"making up the story"*. They also found that Mr Witbooi corroborated the evidence of the employee. They found that the testimony of Mr Frederick was *"flimsy and unbelievable"* and that he could not explain why the employee *"out of all the other managers would 'single out' Mr Fredericks and accuse him of sexual harassment"*. They rejected Mr Frederick's *"attempt to swerve the entire arbitration to the work performance"* of the employee who had received negative appraisals from him. They found that because the emails and SMSs that were presented as evidence to show that the conduct complained of was consensual were selective and unauthenticated, they could have been tampered with. They also found that the emails and SMSs were *"conveniently selected to reflect the [employee] as the actual perpetrator"*. They, therefore, rejected all the email and SMS communications between Mr Fredericks and the employee and concluded that her version was more probable than that of Mr Fredericks.
- [15] The commissioners criticized the procedure followed by the appellant in resolving the complaint. In their view, the appellant put emphasis on the oral sex, which according to them was not the issue to be decided. They found that the grievance was treated as any other grievance and *"no code was applied at all"*. The appellant was criticised further for not knowing how to handle the grievance. They also found that Mr Fredericks was *"dominating and made no sense at all"* at the grievance hearing.
- [16] Consequently, the commissioners found that Mr Fredericks had indeed committed acts of sexual harassment against the employee and concluded that because the employer failed to take appropriate steps to protect the employee against being sexually harassed by Mr Frederick, the appellant's conduct constituted unfair discrimination relating to sexual harassment and ordered,

inter alia, that the appellant was liable to pay the employee compensation in the amount of R150 000.00.

The Labour Court

- [17] The appellant was dissatisfied with the award and it appealed to the Labour Court in terms of section 10(8) of the EEA. The Labour Court dismissed the appeal.
- [18] The appeal to the Labour Court was filed six months late. The arbitration award was issued on 26 September 2016 and the appeal was filed in March 2017. In terms of section 10(8) of the Act “[a] person affected by an award made by a commissioner of the CCMA pursuant to a dispute contemplated in subsection (6) (aA) may appeal to the Labour Court against that award within 14 days of the date of the award, but the Labour Court, on good cause shown, may extend the period within which that person may appeal”.
- [19] There was an application for condonation for the late filing of the appeal. The Labour Court dealt with the application and dismissed it. It reasoned that the explanation proffered for the delay was not convincing. The Learned Judge held that there were unexplained gaps between certain periods and that the explanation was inexcusable.
- [20] The explanation proffered for the late filing of the appeal was that there was confusion as to the appropriate remedy available to the appellant. Instead of noting an appeal, the appellant launched review proceedings on 7 November 2016. Counsel was briefed, and after perusal of the papers, Counsel advised that the appropriate course to follow was to appeal against the commissioners’ award.
- [21] Notwithstanding the dismissal of the condonation application, the Labour Court dealt with the merits of the appeal. The Labour Court summarised the evidence of the witnesses that gave evidence at the CCMA and came to the conclusion that the commissioners “*were steeped in the background and facts of the matter. They were in a position to observe the witnesses and their demeanour as well as the credibilities in their testimony [sic]*”. The Labour Court held that it

could not find any fault with the award and consequently dismissed the appeal with costs.

- [22] The Labour Court adopted the attitude that as a court of appeal, it lacked the ability to judge the credibility of witnesses on appeal and could therefore not interfere with the credibility findings of the commissioners.

The parties' submissions

- [23] Mr le Roux, who appeared for the appellant, submitted that the Court *a quo* erred in holding that it could not interfere with the credibility findings of the commissioners in that the rule is not inflexible. He submitted that where it is clear from the record that the findings are not supported by the record, an appeal court is entitled to make its own findings on credibility. In this regard, reliance was placed on the case of *S v Heslop*². He submitted that the findings of the commissioners were at odds with the evidence on the record and that the commissioners ought to have weighed all the relevant evidence and the probabilities before drawing inferences. For these reasons, Mr le Roux contended that the evidence of the employee ought to have been rejected.
- [24] As to the liability of the employer to compensate the employee, the appellant submitted that section 60 of the Act does not create automatic liability on the part of employers for acts of discrimination against their employees. In terms of this provision, once sexual harassment is committed, it must be brought to the notice of the employer immediately. The employee, however, only reported the matter four months after the alleged harassment had ended, and there was no explanation for the delay. Since the employee did not report any further acts of sexual harassment beyond the date of completion of the grievance process, the employer could not be said to have allowed such acts to perpetuate. Accordingly, so went the argument, there was no basis for holding the employer liable to compensate the employee.
- [25] Ms van Staden, who appeared for the employee, did not make any submissions in relation to the appeal against the dismissal of the condonation application for

² 2007 (4) SA 38 SCA at para 13.

the late filing of the appeal. She left that aspect in the hands of this Court. In support of the judgment of the Court *a quo* on the merits, she contended that the Labour Court was entitled to defer to the credibility findings of the commissioners as they had sight of the witnesses. She was, however, constrained to concede during argument that there was nothing that the employer could have done in the circumstances of this case and that the SMSs sent by the employee, which were presented at the arbitration, could be interpreted as showing consensual conduct on her part, more particularly, by her use of affectionate expressions.

Legal Framework

[26] Section 6 of the Act provides:

- '(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.

...

- (3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).'

[27] Section 48 of the Act provides:

- '(1) A commissioner of the CCMA may, in any arbitration proceedings in terms of this Act, make any appropriate arbitration award that gives effect to a provision of this Act.
- (2) An award made by a commissioner of the CCMA hearing a matter in terms of section 10 (6) (aA) or (b) may include any order referred to in section 50 (2) (a) to (c), read with the changes required by the context, but an award of damages referred to in section 50 (2) (b) may not

exceed the amount stated in the determination made by the Minister in terms of section 6 (3) of the Basic Conditions of Employment Act.'

[28] Section 50(2) (a) to (c) of the Act provides:

- '(2) If the Labour Court decides that an employee has been unfairly discriminated against, the Court may make any appropriate order that is just and equitable in the circumstances, including –
- (a) payment of compensation by the employer to that employee;
 - (b) payment of damages by the employer to that employee;
 - (c) an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees...'

[29] Section 60 provides:

- '(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.
- (2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.
- (3) ...
- (4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.'

Analysis

Appeal against the Condonation Application

- [30] As far as the condonation application is concerned, the Labour Court correctly held that when an application for condonation for the delay is considered, a full explanation that covers the “entire period” must be provided.³ In *Khumalo and Another v MEC for Education, KwaZulu-Natal*⁴, the Constitutional Court emphasised that an important consideration in assessing whether a delay should be overlooked is the nature of the decision. This was said to require, “*analysing the impugned decision within the legal challenge made against it and considering the merits of that challenge*”.
- [31] In *casu*, the employer did not waste time after the outcome of the arbitration. The award was handed down on 26 September 2016. On 5 October 2016, the employer instructed Smith Tabata attorneys to take steps to challenge the award. Instead of noting an appeal, the legal representatives launched a review on 7 November 2016. It was only when counsel was briefed that it was pointed out that a review was not an appropriate remedy regard being had to the nature of this case. It is clear therefore that the delay in noting an appeal was attributable to the employer’s legal representatives.
- [32] An ignorant lay client can, with justification, rely upon its legal advisers to do all that is necessary to safeguard its rights provided that the client constantly monitors the situation. In my view, this is a typical case where the blame for the delay can be attributed squarely to the legal advisers.
- [33] In *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*⁵, the Constitutional Court held that condonation should be granted if it is in the interests of justice to do so. This can be determined with reference to all

³ See: *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at para 22; *Laerskool Generaal Hendrik Schoeman v Bastian Financial Services (Pty) Ltd* 2012 (2) SA 637 (CC) at para 15; *SA Express Ltd v Bagport (Pty) Ltd* 2020 (5) SA 404 (SCA) at para 34.

⁴ 2014 (5) SA 579 (CC) at para 57. See also *Gqwetha v Transkei Development Corporation Ltd and others* 2006 (2) SA 603 (SCA) at para 33.

⁵ 2000 (2) SA 837 (CC) at para 3.

relevant factors, including the nature of the relief sought, the extent and cause of the delay, the effect on the administration of justice, the possibility of prejudice to the other party, and the reasonableness of the explanation for the delay.

- [34] In any event, good administration of justice does not require that the large degree of blame which attaches to the attorney should also be attributed to the litigant, particularly where there is no suggestion of any prejudice to the respondent. Instead, the appellant's relatively small degree of fault must be measured against the prejudice which it would suffer if the award were to be allowed to stand. Furthermore, regard being had to the nature of this case and prospects of success on the merits, I am of the view that condonation should have been granted by the Labour Court.

Appeal on the merits

- [35] In *Mcgregor v Public Health and Social Development Sectoral Bargaining Council and others*,⁶ the Constitutional Court observed 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 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,

⁶ 2021 (5) SA 425 (CC) at para 1.

so the Constitution becomes an idolon, and its promises of equality and dignity equally illusive.’ [Footnotes omitted]

[36] In *Campbell Scientific Africa (Pty) Ltd v Simmers and Others*,⁷ this Court said:

‘The treatment of harassment as a form of unfair discrimination in s 6(3) of the Employment Equity Act 55 of 1998 (EEA) recognises that such conduct poses a barrier to the achievement of substantive equality in the workplace...’

[37] From the record, it does not appear that the employee was completely candid and frank in her testimony. This will be illustrated below, but I will deal first with the reasoning of the Labour Court that it could not interfere by reason of the credibility findings of the commissioners in the arbitration award.

[38] It is correct that as a general rule, a judicial officer who has sight of the witnesses giving evidence and is able to assess their evidence from nearby, is the best person to gauge their demeanour. However, the record of such evidence must speak for itself. The record will always show if a witness’ evidence was contradictory or evasive. The justification for the criticism of a witness will normally appear from the record itself. A credibility finding against a particular witness, which is not justified by the record, cannot prevent a court of appeal from evaluating the evidence afresh.

[39] In *Makate v Vodacom Ltd*⁸, although the Constitutional Court held that a court of appeal will generally be reluctant to interfere with factual findings made by a trial court, more particularly if the factual findings depended upon the credibility of the witnesses who testified at the trial, it cautioned that⁹:

‘But even in the appeal the deference afforded to a trial court’s credibility findings must not be overstated. If it emerges from the record that the trial court misdirected itself on the facts or that it came to a wrong conclusion, the appellate court is duty-bound to overrule factual findings of the trial court so as to do justice to the case¹⁰...’

⁷ (2016) 37 ILJ 116 (LAC) at para 19.

⁸ 2016 (4) SA 121 (CC) at para 37.

⁹ *Ibid* at para 40.

¹⁰ *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC) at para 106.

[40] Consequently, the principle that an appellate court will not ordinarily interfere with a factual finding and credibility of witnesses by a trial court is not an inflexible rule.

[41] In *S v Kelly*¹¹ it was said:

‘In any event, as counsel conceded in a homely metaphor, demeanour is, at best, a tricky horse to ride. There is no doubt that demeanour - "that vague and indefinable factor in estimating a witness's credibility"...- can be most misleading. The hallmark of a truthful witness is not always a confident and courteous manner or an appearance of frankness and candour [traits the magistrate held against the witnesses]. As was stated by Wessels JA in *Estate Kaluza v Braeuer* 1926 AD 243 at 266 more than half a century ago in this Court:

“A crafty witness may simulate an honest demeanour and the Judge had often but little before him to enable him to penetrate the armour of a witness who tells a plausible story.”

On the other hand an honest witness may be shy or nervous by nature, and in the witness-box show such hesitation and discomfort as to lead the court into concluding, wrongly, that he is not a truthful person.’

[42] In *Santam Bpk v Biddulph*,¹² the Learned Judge of Appeal said:

‘...the proper test is not whether a witness is truthful or indeed reliable in all that he says, but whether on a balance of probabilities the essential features of the story which he tells are true (cf *R v Kristusamy* 1945 AD 549 at 556 and H C Nicholas 'Credibility of Witnesses' (1985) 102 SALJ 32 especially at 32 - 5).’

[43] Accordingly, courts engaging in the analysis of evidence adduced in a trial have to be careful not to fall into the trap of evaluating it in a piecemeal fashion; rather, all the pieces of the evidence that were adduced, must be considered as a whole.

¹¹ 1980(3) SA 301 (A) at 308B-D.

¹² 2004 (5) SA 586 (SCA) at para 10.

- [44] When regard is had to the evidence of the employee, her evidence that she was sexually harassed by Mr Fredericks is not only internally contradictory but also externally contradictory.
- [45] During the arbitration, in her evidence in chief she said that Mr Fredericks asked her to perform oral sex and she refused and felt like vomiting at the suggestion. It was put to her under cross-examination that at the grievance hearing she admitted that she performed the oral sex. When she denied this, audio was played to prove that she said so. Ms Piti also gave evidence that the employee had testified at the grievance hearing that she performed oral sex on Mr Fredericks. Ms Piti's evidence on this crucial aspect was not challenged by the employee in the arbitration hearing. Nor was it put to Ms Piti that she was lying. The contradictions between the testimony of the employee at the grievance hearing and that at the arbitration hearing, on this aspect, put the reliability of her evidence into question.
- [46] The veracity of the employee's evidence must also be tested against the documentary evidence presented at the arbitration. Although Mr Fredericks was also not a satisfactory witness, that does not detract from the fact that the employee had to prove that sexual harassment took place. On the probabilities, the employee's testimony that Mr Fredericks took enormous risks by sexually harassing and assaulting her in the vicinity of their colleagues and covering her mouth to stop her from screaming out, and that she resisted his unwelcome conduct from the very outset in February 2015, is implausible when regard is had to the friendly and almost flirtatious text messages which she sent to Mr Fredericks.
- [47] Almost concurrently with these events, the employee wrote to Mr Fredericks, on 24 March 2015, stating that "*U knw what I m hungry for u nw serious sweety, what's ur plans for today*". This text message is impossible to reconcile with the harassment that the employee was supposedly experiencing at the hands of Mr Frederick during this same timeframe. Why would the victim of such conduct communicate with her tormentor at a level seemingly unrelated to work? And, more particularly, why would she use the affectionate term "sweety" when addressing him in a message?

- [48] What's more damning, is that when the employee was confronted with this SMS, she deliberately misread it in the following manner "*You know what I am hungry for ("u" omitted) news, ("nw" interpreted as news) serious, ("sweety" omitted) what is your plan for today?*" She sought to explain that the SMS was about the news of two ladies who were fighting about one of the senior managers. It turned out that, that incident took place in June and therefore, the SMS composed nearly three months earlier in March of that year could not have had a bearing on the incident. This was completely fatal to the employee's credibility as were her attempts to put an innocent slant to her message of 24 March 2015 as it was patently untruthful. Ms van Staden who represented the employee in the appeal, read the contents of the SMS, correctly in my opinion, as follows: "*[y]ou know what I am hungry for you now serious sweetie what's your plans for today*".
- [49] What's even more telling is that in her response to emails from Mr Fredericks the employee used affectionate expressions like "*ok my love*" "*honey*" and "*sweetie*". When confronted with these affectionate words which she used, she stated that she used them because it was the language of Mr Fredericks. These written conversations, in my view, are inconsistent with the response of a party who is being subjected to unwelcome sexual advances by her manager.
- [50] The commissioners decided to exclude any form of documentary evidence on the basis that it was not 'authenticated'. In doing so, they overlooked the fact that the admission of the documentary evidence was never put into issue. In this regard, the authenticity of the documentary evidence was never disputed in the arbitration hearing. The employee in fact admitted that she wrote those SMSs and emails, but sought to explain the circumstances and the reasons under which they were done. The commissioners accordingly erred in concluding that they would "*attach no weight to this form of communication*", when they were vitally important to the determination of credibility and overall probabilities that indicated the consensual nature of the sexual conduct between the employee and Mr Fredericks. The Labour Court, therefore, erred in failing to find that the arbitrator's credibility findings were inconsistent with the

evidence on record and were the product of an inadequate assessment of the probabilities.

[51] The commissioners found that the version of the employee was corroborated by Mr Witbooi and that Mr Witbooi did not stand *“to gain by falsely implicating Labeeb”*. The Labour Court said in this regard: *“[t]hey [commissioners] even explained their reasons for accepting Mr. Witbooi’s evidence as credible and probable”*.

[52] From the record, the evidence of Mr Witbooi was that the employee had reported the complaint of sexual harassment to him. Mr Fredericks told Mr Witbooi to convince the employee to drop the complaint because *“she wasn’t exactly not wanting to get into sexual relations with Noloyiso [the employee] [sic] as he was going to show me a script to actually confirm that this interaction between the two of them was actually something consensual”*. Mr Witbooi remained neutral and did not want to get involved because, as he put it, *“...in my opinion I thought this is [a] case of two people that were doing something together and eventually when they started to have fallouts they started like accusing each other of wrongdoings and that”*.

[53] The finding that Mr Witbooi corroborated the employee’s version is, in my opinion, a far cry. Mr Witbooi’s evidence amounted to nothing more than merely stating that a report was made to him and he gave his advice on the way forward. In light of the evidence recorded, I fail to see how Mr Witbooi’s evidence corroborated that of the employee. The report to him was never an issue.

[54] Furthermore, in my view, the exclusion of the documentary evidence which, I think, was more reliable than human memory, was a misdirection on the part of the commissioners. The SMS and emails written by the employee tend to support Mr Witbooi’s observation that the sexual conduct was consensual. Counsel for the employee correctly conceded during argument in the appeal that these communications could be interpreted as showing consensual conduct on the part of the employee, more particularly by her use of affectionate or seductive expressions. Importantly in this regard, the denial by Mr Fredericks

that he never told Mr Witbooi that the conduct between him and the employee was consensual was correctly rejected by the commissioners.

[55] Clause 4 of the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace¹³ (Code) defines 'harassment' as follows:

‘4.1.1 unwanted conduct, which impairs dignity;

4.1.2 which creates a hostile or intimidating work environment for one or more employees or is calculated to, or has the effect of, inducing submission by actual or threatened adverse consequences; and

4.1.3 is related to one or more grounds in respect of which discrimination is prohibited in terms of section 6 (1) of the EEA.’

[56] The test as to whether or not the conduct is unwelcome is objective. If the conduct is not unwelcome it cannot be sexual harassment.

[57] Furthermore, as to the conduct which may be considered to be “*unwelcome*”, clause 5.2 of the Code provides:

‘5.2.1 There are different ways in which an employee may indicate that sexual conduct is unwanted, including non-verbal conduct such as walking away or not responding to the perpetrator.

...

5.2.3 Where a complainant has difficulty indicating to the perpetrator that the conduct is unwanted, such complainant may seek the assistance and intervention of another person such as a co-worker, superior, counsellor, human resource official, family member or friend.’

[58] In *casu*, the employee did not resist the conduct. She did not walk away but, knowing that this conduct would persist, she kept on responding to the call by Mr Fredericks to his office. She did not immediately seek advice from a friend or a fellow employee. She waited for a period of approximately three months and only raised the complaint with her boyfriend in July and, thereafter with Mr

¹³ GNR 1890 of 18 March 2022.

Witbooi on the suggestion of her boyfriend. Despite being urged by her boyfriend to report the harassment to her employer, she waited for a further four months before lodging a grievance with the employer. An explanation as to why it was not raised earlier was not forthcoming from the employee. She, furthermore, used affectionate and seductive language in her communications with Mr Fredericks which, on the probabilities, indicate that the sexual conduct was not unwelcome.

[59] As far as Mr Fredericks' evidence is concerned, he was not an exemplary witness. In my view, he was just as lacking in frankness as the employee. He baldly denied any conduct suggestive of sexual harassment. The evidence of Mr Witbooi, which was never challenged, was that Mr Fredericks had said to him that this was consensual behaviour. Mr Witbooi was a neutral witness and had no reason to lie.

[60] In my opinion, there was insufficient evidence before the commissioners that the employee was sexually harassed by Mr Fredericks and that such harassment constituted unfair discrimination. On a consideration of the totality of the evidence which served before the commissioners, it cannot be found that the employee was sexually harassed by Mr Fredericks and that the employer was liable for such conduct in terms of section 60 of the Act. Importantly in this regard, section 60 does not create automatic liability on the part of the employer for acts of discrimination including sexual harassment by their employees. Certain requirements must be met. The first being that, the act of harassment must be immediately brought to the attention of the employer. As alluded to above, the employee patently failed to satisfy this requirement.

[61] Moreover, the appellant took steps immediately after the report of the grievance hearing was received. Notwithstanding negative findings of the grievance by the tribunal, it was nevertheless recommended that she be relocated to keep the employee away from the alleged perpetrator. There was even an offer to attend to her stress problems. These are the steps envisaged in section 60 of the Act. Ms van Staden, for the employee, could not suggest any other steps which could and should have been taken by the employer. Thus, even if the employee had proved she had been sexually harassed by Mr Fredericks, there

was no evidentiary basis to conclude that the appellant was liable in terms of section 60 of the Act to compensate the employee in the sum of R150 000.00.

[62] Accordingly, regard being had to the totality of the evidence before them, the decision of the commissioners is not one which a reasonable arbitrator could have arrived at. The Labour Court, therefore, erred in concluding that the award of the commissioners was without fault. In the circumstances, the appeal should have been upheld by the Labour Court.

[63] In my view, the employer should not have been held liable in terms of the Act, as it complied with section 60 of the Act.

Costs

[64] The general rule in Labour matters is that costs do not follow the event. An order of costs is determined in accordance with fairness and law. The employee is still in the employment of the appellant. Awarding costs against her may have a chilling effect and may affect the employment relationship. Accordingly, in my view, there should be no order as to costs in the appeal and in the Labour Court.

Order

[65] In the result, the following order will issue:

1. The appeal is upheld with no order as to costs.
2. The Labour Court's order is set aside and substituted with the following order:
 - “(a) The condonation application is granted.
 - (b) The arbitration award is set aside and replaced with the following:
‘1. The referral to arbitration is dismissed.’
 - (c) There is no order as to costs.”

B R Tokota AJA

Waglay JP and Kathree-Setiloane AJA concurring.

APPEARANCES:

FOR THE APPELLANT:

Adv Le Roux

Instructed by Smith Tabata Attorneys

FOR THE FOURTH RESPONDENT:

Ms Van Staden from the Legal Aid Board