IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Of Interest to other Judges

Case no: JR 641/2016

In the matter between:

RUSTENBURG PLATINUM MINES LIMITED **Applicant**

and

UASA OBO STEVE PIETERSEN **First Respondent**

COMMISSIONER JOSIAS SELLO MAAKE *N.O* **Second Respondent**

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **Third Respondent**

Heard: **21 February 2018**

Delivered: **27 February 2018**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

[1] The ex-employee, Steve Pietersen, was dismissed by Rustenburg Platinum Mines Limited (The applicant) for misconduct related to sexual harassment. In finding that the dismissal was unfair, the second respondent (Commissioner) concluded that;

> '…, I am persuaded that the Applicant had made sexual advances towards the victim, but that however, he was encouraged to continue doing so, by the docile conduct of the victim and consequently that, such conduct did not amount to unwanted sexual harassment'. (*Sic*)

[2] For its troubles, the applicant was ordered to retrospectively reinstate Pietersen, and to grant him back-payment in the amount of R575 770.00. As shall be clearer in this judgment, the clearly misogynistic, patriarchal and insensitive approach to the allegations at hand is ubiquitous throughout the award.

[3] In the face and growth of global movements such as *'#MeToo'*; *'The Silence Breakers'*; *'#NotInMyName',* and #*BalanceTonPorc* or *"out your pig*", there is an even greater need for more sensitization to the scourge of sexual harassment in the workplace. Equally so, there is an even greater need for the Commission for Conciliation Mediation and Arbitration (CCMA) and Bargaining Councils to place more emphasis on specialised training to deal with such cases as called upon by the provisions of Item 11.4 of Amended Code of Good Practice[1]. The review application in this case and the manner with which the Commissioner approached the allegations of sexual harassment is a reminder of the need for the urgency and seriousness with which such training is necessary, and for it to be provided on an on-going basis.

Background:

[4] The applicant, as its name suggests carries on business in the platinum mining industry. Pietersen was employed with effect from 2004, and as at the date of his dismissal, he held a senior position of Engineering Specialist. In 2015, the applicant had cause to investigate allegations of sexual harassment made against Pietersen by Ms. Jane Kgole (The Complainant) (She is mentioned by name as this is now on record). At the time of the allegations, she was employed as a Boiler-Maker. Flowing from the investigations

[1] On the Handling of Sexual Harassment Cases In The Workplace (Published under GN 1357 in GG27865 of 4 August 2005

conducted, Pietersen was suspended and charged with misconduct as follows;

> *'It is alleged that you between 2007 and 20 August 2014 (specific dates unknown), at the Mogalekwena South Concentrator, committed sexual harassment by;*
>
> - *Suggesting that you go and stay with Ms Jane Kgole to help her with her expenses, and*
> - *Proposing (on several occasions) to Ms Kgole that you should sleep together/have sex, while she found your actions unwelcome and uninvited'*

[5] A disciplinary enquiry convened resulted in the dismissal of Pietersen, who aggrieved by the sanction, approached the CCMA through his union, UASA. The matter ultimately came before the Commissioner, whose award is the subject of this review application.

The arbitration proceedings and the award:

[6] Five witnesses, including the complainant were called upon to testify on behalf of the applicant, whilst Pietersen was the sole witness in his case. Statements made by witnesses as part of the investigations leading to the disciplinary enquiry were relied upon by the applicant and read into the record. I do not deem it necessary to deal with the evidence of the chairperson of the enquiry leading to the dismissal, and that of the investigator.

Kgole's testimony:

[7] She had been employed since 2002. Her ordeal started in 2007 when Pietersen, who was then an acting Foreman laid charges of misconduct against her. Despite Pietersen having called for her dismissal at a disciplinary enquiry, Kgole was issued with a final written warning.

[8] On the same date that she was subjected to discipline, a braai event was hosted by the applicant's Safety Department. At the event, Pietersen

approached her, and asked her how she managed to survive on her salary. When her response was that managed as she lived on a budget, Pietersen had then suggested to her that he could stay with her and help with payment of her expenses. The suggestion was that he could then be able to meet up and sleep with her. She rebuffed these suggestions.

[9] Since that incident, Pietersen had constantly asked her to meet and sleep with him. Pietersen had even suggested that they should both attend a work organised course in Randfontein Training Centre so that he could get an opportunity to sleep with her. Despite frequent advances by Pietersen, which made her uncomfortable *('not free'* as she put it) Kgole failed to complain as she thought it would not assist her. She also took into account that Pietersen's life may be ruined if she reported the harassment. She had nonetheless informed her husband and some of her colleagues/friends about Pietersen's conduct.

[10] At some point, Pietersen had again approached her and informed her that she could help her get promoted if she slept with him. Her response was that she was not interested. In August 2014, Pietersen gave her a test memorandum to assist her in applying for a Salvage Yard Officer position which was advertised. He had encouraged her to apply. Kgole had every intention to apply for the vacancy in any event, and the test memorandum contained questions she would have been asked in the process of selection for the post. Despite Pietersen asking her not to show the memorandum to anyone, she nonetheless shared it with her friends/colleagues.

[11] A further incident took place in August 2014 when Pietersen instructed Kgole to perform some tasks in an area that fell outside the scope of her responsibilities. When Kgole informed him that he needed to speak to her Foreman first, Pietersen got angry, shouted at her and called the Engineering Manager, who had equally accused her of refusing to obey instructions. At the time, she was an acting Foreman, and was threatened by the Engineering Manager that he would stop her from acting in the position if she did not want to work.

[12] Having completed the task over the 'fatigue'/night shift, the next morning she sent Pietersen two WhatsApp messages informing him that she intended to report the harassment to the Production Manager (Ashina Buddu) if he did not stop. Before she could report the matter, she was placed on suspension because of the messages sent to Pietersen.

[13] Before a disciplinary enquiry could be convened and whilst on suspension, her husband, who is also employed by the applicant laid a complaint of sexual harassment on her behalf. It was thereafter that she was asked to come in to give a statement by the investigator. She denied that she had reported the harassment in retaliation to the charges of misconduct laid against her.

[14] Despite the constant advances by Pietersen, she had also not immediately reported the matter as she thought of his wife who was also employed by the applicant, who she considered to be a 'good person'. She had however informed her colleagues about the matter as it was '*heavy' and a burden* on her, to seek advice. One of her colleague gave her a copy of the applicant's Sexual Harassment Policy and told her to study it and report the matter.

[15] Under cross-examination, Kgole testified that Pietersen used to ask her to meet and sleep with him on no less than twice a month, and she had during the seven years' period, informed her colleagues about it and tolerated it for too long. She had constantly told Pietersen to stop, hoping that he would do so. She confirmed that no other person was present when the advances were made, but that she felt that she had to report the matter at the time she did because she could no longer bear it as it was turning into victimisation.

The evidence of Hendrica Matsuang:

[16] She is employed by the applicant as a 'fitter repairman'/fitter assistant. Kgole is her friend and colleague. She confirmed that Kgole had since 2013, complained that Pietersen had proposed to her. When she asked her why she had not reported the matter, her response was that Pietersen was a manager and was afraid that she might not be believed, or she could be victimised. Kgole further said that she felt sorry for Pietersen and his family. Matsaung

also confirmed that Kgole reported to her that Pietersen had suggested that they should attend a course together so that he could sleep with her.

The evidence of Peter Maaka:

[17] Maaka is the applicant's Full-Time Health and Safety representative and is employed in the Engineering Department with Kgole. He confirmed that Kgole confided in him on no less than three times that Pietersen had proposed to her and asked to her to be his girlfriend and she had turned down the proposal.

[18] The incidents as far as he knew dated back to 2008. She was upset and had spent about four hours in his office crying. This incident took place after Kgole was issued with a final written warning in a matter he had represented her. Maaka's advice to Kgole was to confront Pietersen instead of reporting the matter to HR. When the matter persisted, he had advised her to report the matter to HR and her response was she was concerned about Pietersen's wife who was a kind person, who had comforted her during her time of family bereavement. She did not want to hurt Pietersen's wife.

[19] In August 2014, Kgole approached him and informed him that Pietersen was again at it and wanted to charge her. He confirmed that Kgole had showed her a test memorandum given to her by Pietersen, which was to assist her in applying for a vacancy. Kgole informed him that Pietersen had given her the memorandum as proof of how serious he was about having sex with her. Maaka further confirmed that at some point he had given Kgole a copy of the company's Sexual Harassment Policy.

Pietersen's evidence:

[20] He confirmed that Kgole reported to him in 2007 when he was Foreman in the boilermaker section. He confirmed an incident when Kgole was charged in 2007 and issued with a final written warning. He denied having proposed to Kgole at the braai event after she was issued with a warning, or ever having said anything to her that could be construed as sexual advances. He nonetheless testified that even if Kgole was to be believed that he made the

statements attributed to him at the braai event, he did not see any sexual harassment in him making an offer to her to pay for her expenses.

[21] Pietersen confirmed that he had received WhatsApp messages from Kgole, which were threatening to him and his family, and had reported the matter to his manager and HR. When he was informed of the sexual allegations against him, he had anticipated it, together with allegations of him either being dishonest or racist, in view of the events that led to Kgole having been suspended for misconduct and for her previous incidents of discipline.

[22] Pietersen further denied having given Kgole the test memorandum in expectation of sexual favours. He denied ever having made any sexual advances to Kgole at any point since 2007. He contended that she held a grudge against him since she was disciplined in 2007, and for her suspension prior to making the allegations of sexual harassment. He accused her of *fabrication*, and of *'planning and plotting the whole thing'*.

The grounds for review and evaluation:

[23] The applicant contends that the award falls to be reviewed and set aside on the grounds that;

a) The Commissioner committed misconduct by committing a material error of law; and/or

b) Committed gross irregularities in relation to his duties as an arbitrator; and/or

c) Came to a decision that a reasonable Commissioner, could not reach in the light of the evidence that was before him

[24] Prior to dealing with the above grounds of review, it would be useful to deal with basic principles related to a determination of sexual harassment disputes. In terms of section 203(3) of the Labour Relations Act (LRA), any person interpreting or applying that Act must take into account *any relevant code of good practice.*

[25] The starting point therefore in a determination of sexual harassment disputes is the 1998 Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace[2], as well as the 2005 Amended Code[3]. Savage AJA in *Campbell Scientific Africa (Pty) Ltd v Simmers and Others*[4] confirmed that despite the 2005 Code being termed the "Amended" Code, it did not replace or supersede the 1998 Code. The result is that in terms of section 203(3) of the LRA, both Codes are "relevant codes of good practice" to guide commissioners in the interpretation and application of the LRA.

[26] Section 138(6) of the LRA equally places an obligation on Commissioners to take into account any code of good practice that has been issued by NEDLAC or the guidelines published by the CCMA that is relevant to a matter being considered in the arbitration proceedings.

[27] In terms of Item 3 of the 1998 Code, 'Sexual Harassment' is defined as;

(1) '…unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.

(2) Sexual attention becomes sexual harassment if:

a. The behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or

b. The recipient has made it clear that the behaviour is considered offensive; and/or

c. The perpetrator should have known that the behaviour is regarded as unacceptable.'

[28] Under Item 4 of the same Code, Forms of sexual harassment include;

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[2] Notice 1367 Of 1998 Issued by NEDLAC under section 203(1) of the Labour Relations Act 66 of 1995 (LRA)

[3] See *SA Metal Group (Pty) Ltd v CCMA* (2014) 35 ILJ (LC) at para 11, where Rabkin-Naicker J held that;

> "It is peremptory then for a commissioner to apply the 2005 Code when they preside over arbitrations dealing with dismissals for alleged misconduct, in which alleged acts of sexual harassment constitute the said misconduct…"

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

(1) Any unwelcome physical, verbal or non-verbal conduct, but is not limited to the examples listed as follows:

a. Physical conduct of a sexual nature includes all unwanted physical contact, ranging from touching to sexual assault and rape, and includes a strip search by or in the presence of the opposite sex.

b. Verbal forms of sexual harassment include unwelcome innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults or unwelcome graphic comments about a person's body made in their presence or directed toward them, unwelcome and inappropriate enquiries about a person's sex life, and unwelcome whistling directed at a person or group of persons.

c. Non-verbal forms of sexual harassment include unwelcome gestures, indecent exposure, and the unwelcome display of sexually explicit pictures and objects.

d. Quid pro quo harassment occurs where an owner, employer, supervisor, member of management or co-employee, undertakes or attempts to influence the process of employment, promotion, training, discipline, dismissal, salary increment or other benefit of an employee or job applicant, in exchange for sexual favours.

(2) Sexual favouritism exists where a person who is in a position of authority rewards only those who respond to his/her sexual advances, whilst other deserving employees who do not submit themselves to any sexual advances are denied promotions, merit rating or salary increases.

[29] Item 3 of the 2005 Code deems sexual harassment as a form of unfair discrimination within the ambit of Section 6 of the Employment Equity Act 55 of 1998. Item 4 sets out the test for sexual harassment[5], whilst Item 5 outlines the factors to establish sexual harassment[6].

[5] '**Test for sexual harassment**

Sexual harassment is unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:

[30] In *Campbell*, Savage AJA further held that;

> "At its core, sexual harassment is concerned with the exercise of power and in the main reflects the power relations that exist both in society generally and specifically within a particular workplace. While economic power may underlie many instances of harassment, a sexually hostile working environment is often

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4.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
4.2 whether the sexual conduct was unwelcome;
4.3 the nature and extent of the sexual conduct; and
4.4 the impact of the sexual conduct of the employee'

[6] **Factors to establish sexual harassment**

5.1 Harassment on a prohibited ground
5.1.1 The grounds of discrimination to establish sexual harassment are sex, gender and sexual orientation.
5.1.2 Same-sex harassment can amount to discrimination on the basis of sex, gender and sexual orientation.

5.2 Unwelcome conduct
5.2.1 There are different ways in which an employee may indicate that sexual conduct is unwelcome, including non-verbal conduct such as walking away or not responding to the perpetrator.
5.2.2 Previous consensual participation in sexual conduct does not necessarily mean that the conduct continues to be welcome.
5.2.3 Where a complainant has difficulty indicating to the perpetrator that the conduct is unwelcome, 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.

5.3 Nature and extent of the conduct
5.3.1 The unwelcome conduct must be of a sexual nature, and includes physical, verbal or non-verbal conduct.
5.3.1.1 Physical conduct of a sexual nature includes all unwelcome physical contact, ranging from touching to sexual assault and rape, as well as strip search by or in the presence of the opposite sex.
5.3.1.2 Verbal conduct includes unwelcome innuendos, suggestions, hints, sexual advances, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person's body made in their presence or to them, inappropriate enquiries about a person's sex life, whistling of a sexual nature and the sending by electronic means or otherwise of sexually explicit text.
5.3.1.3 Non-verbal conduct includes unwelcome gestures, indecent exposure and the display or sending by electronic means or otherwise of sexually explicit pictures or objects.
5.3.2 Sexual harassment may include, but is not limited to, victimization, quid pro quo harassment and sexual favouritism.
5.3.2.1 Victimisation occurs where an employee is victimised or intimidated for failing to submit to sexual advances.
5.3.2.2 Quid pro quo harassment occurs where a person such as an owner, employer, supervisor, member of management or co-employee, influences or attempts to influence an employee's employment circumstances (for example engagement, promotion, training, discipline, dismissal, salary increments or other benefits) by coercing or attempting to coerce an employee to surrender to sexual advances. This could include favouritism, which occurs where a person in authority in the workplace rewards only those who respond to his or her sexual advances.
5.3.3 A single incident of unwelcome sexual conduct may constitute sexual harassment.

> "…less about the abuse of real economic power, and more about the perceived societal power of men over women. This type of power abuse often is exerted by a (typically male) co-worker and not necessarily a supervisor."

And,

> "By its nature such harassment creates an offensive and very often intimidating work environment that undermines the dignity, privacy and integrity of the victim and creates a barrier to substantive equality in the workplace. It is for this reason that this Court has characterised it as "the most heinous misconduct that plagues a workplace" (Authorities omitted)[7]

[31] The above sentiments flow from those similarly echoed in *Motsamai v Everite Building Products (Pty) Ltd*[8] , where it was held that;

> Sexual harassment is the most heinous misconduct that plagues a workplace; not only is it demeaning to the victim, it undermines the dignity, integrity and self-worth of the employee harassed. The harshness of the wrong is compounded when the victim suffers it at the hands of his/her supervisor. Sexual harassment goes to the root of one's being and must therefore be viewed from the point of view of a victim: how does he/she perceive it, and whether or not the perception is reasonable…"

[32] The significance of the 1998 and 2005 Codes is that they essentially spoon-feed Commissioners in terms of what they must look for in determining such disputes, and it is in this regard that the Commissioner in this case was found lacking. His starting point was to refer to John Grogan's[9] exposition of the 'Code of Good Practice on Sexual Harassment' and 'case law and the elements of the offence'. It is apparent that the Commissioner only looked at the 1998 Code in this regard. The Commissioner then found that the implications of the elements identified was that should any of them be 'lacking', then no sexual harassment would have occurred, with special emphasis being placed on whether the accused employee must have been aware or should have reasonably been aware that his or her conduct was unwanted by and deemed offensive to the complainant.

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[7] At paragraphs [20] – [21]
[8] [2011] 2 BLLR 144 (LAC) at para [20]
[9] Dismissal: Discrimination and Unfair Labour Practices

[33] As shall be more evident in the reasoning of the Commissioner, he had placed too much emphasis on the provisions of Item 2(a), (b) and (c) of the 1998 Code to the exclusion of the test set out in Item 4 of the 2005 Code. This was the first material error of law committed by the Commissioner. There is nothing in both the Codes that states that all elements of sexual harassment *must* be established. Sexual harassment, as per the test formulated in the 2005 Code requires unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account a variety of factors. On the plain reading of Item 4 of the 2005 Code, there is no requirement that the accused employee must have been aware or should have reasonably been aware that his or her conduct was unwanted, or that the recipient must have made it clear that the behaviour is considered offensive. These requirements in the 1998 Code had an element of subjectivity, which placed an onerous burden on the complainant to prove the harasser's state of mind, and to also prove that he or she had at all material times in unequivocal terms, made the harasser aware that the conduct was not welcomed.

[34] It could not have been the intention of the drafters of the Codes, as further evident from Items 4 and 5 of the amended 2005 Code, to require any one singular factor to take precedence over others. To do so would have the result of the test being pigeon-holed, which would have led to absurdity. The factors outlined in Item 4 and 5 of the 2005 Code appear to be less onerous and more objective, and sadly, the Commissioner failed to take them into account as shall be made clearer below.

[35] The Commissioner acknowledged that there were disputes of fact and found that neither party's version had been corroborated by direct evidence. Again, the Commissioner floundered and required a high standard of proof from the applicant and the complainant, when he should have been guided by the principles enunciated in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Kie SA and Others*[10] in resolving those disputed facts.

[10] 2003 (1) SA 11 (SCA) para 14I–15E, where it was held that;

[36] In any event, the standard of proof in labour disputes is that of a balance of probabilities, and to require direct evidence in such cases as the Commissioner sought to do, is to set the standard of proof too high and insurmountable, which would constitute a reviewable irregularity on the part of the Commissioner.

[37] The nature of the offence of sexual harassment is such that any direct evidence will be hard to come by, especially in this case where each allegation of the complainant is denied. Furthermore, the provisions of Item 5.3.1.2 of the 2005 Code makes it clear that verbal conduct includes unwelcome innuendos, suggestions, hints, sexual advances, or comments with sexual overtones. This requires an objective assessment of the conduct complained of. A suggestion by Pietersen that he would pay for the complainant's expenses so that they could sleep together is on its own, sufficient to constitute more than a hint or innuendo. Other acts and allegations of unwanted advances made by Pietersen which he had merely met with a bare denial are sufficient for a finding of sexual harassment to have been made.

[38] The Commissioner nonetheless had regard to Maaka's and Matsaung's evidence and concluded that Pietersen *'had made the alleged sexual advances towards the purported victim' (Sic).* He nevertheless inexplicably

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'To come to a conclusion on the disputed issues a court makes findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probabilities and improbabilities of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when the court's credibility findings compel it in one direction and evaluation of the general probabilities in another. The more convincing the former, the less convincing will be latter. But when all factors are equipoised probabilities prevail.'

stated that these finding did not put an end to the matter and proceeded to ask whether the conduct in question constituted sexual harassment.

[39] In answering the question, the Commissioner traced the matter to 2007 with the braai incident and concluded that;

> 'The initial sexual advance was made way back in 2007, a period of about eight years now, at a safety braai. It does not occur to me that the words uttered by the Applicant towards the victim there at the safety braai, had, by any stretch of the imagination, amounted to sexual harassment. At best, they appear to depict a love proposal. Surely there can never be anything untoward for an employee to be attracted to a co-employee, irrespective of the juniority or seniority status of the parties and for such an employee to accordingly propose love towards such co-employee. The problem only arises when the unwelcomeness of such a love proposal is communicated to the proposer and the proposer nevertheless, persists in his/her conduct. Accordingly, I find nothing untoward with the Applicant's amorous conduct towards the victim on the safety braai day, in particular because even then, the victim did not clearly and unambiguously, express to him/her unhappiness at his proposal, a fact which is eminently relevant and material to the Applicant's future conduct towards the victim, as unfolds immediately have-under' (Sic)

[40] One can only express shock and horror at the above findings in the light of the evidence that was before the Commissioner, and his failure to appreciate the provisions of Items 4 and 5 of the 2005 Code. A workplace is exactly that and should not ordinarily be confused with a *'find me love'* sanctuary or lonely hearts' club for love-sick employees. I agree with the Commissioner's observations that there is nothing wrong with employees being attracted to each other at the workplace. After-all, we are all part of *Homo sapiens* with feelings and emotions, and it is possible for the office affair to turn into a 'happily thereafter union'.

[41] There is a school of thought that holds the view that human beings can be slaves to their urges. That being so, it does not imply that employees are incapable of controlling those urges in the workplace. A workplace should be free from 'amorous' and testosterone filled employees looking for love and

gratification at every available opportunity. There is everything wrong when employees express their affection in the workplace to each other, to the point where the conduct in question is frowned upon, as it crosses that fine line between innocent attraction and sexual harassment. Where such conduct creates a sexually hostile and intimidating work environment that undermines the dignity, privacy and integrity of the harassed, this is where Item 4.4 of the 2005 Code becomes relevant, insofar as Commissioners are obliged to assess and determine the impact of the sexual conduct of the employee.

[42] There is therefore everything wrong where the affectionate advances were rebuffed at every turn and opportunity, to the point where the complainant felt helpless, '*not free'* and *burdened* as in this case. It is not even necessary to dwell into the effect of such conduct on the working relationship between the harasser and complainant, or the manager/subordinate relationship. For the Commissioner therefore to not to have found anything wrong in the inappropriate advances made by Pietersen at the braai event or even thereafter, and to merely treat them as actions of someone love-struck, or 'proposing love' is worrying in the extreme.

[43] To conclude on this point, even if one were to be sympathetic and accommodated employees' urges in the workplace, there is nothing that prevents them from expressing their love and affection outside of the work environment. Even then, what two consenting adults who are co-employees do in their private lives remains private. However, any concomitant conduct in that regard should not fall within the four corners of the elements of sexual harassment, or negatively impact the working relationship in the sense of creating a hostile unpleasant environment.

[44] The Commissioner proceeded to take issue with the fact that the complainant did not clearly and unambiguously say no to Pietersen. Had the Commissioner bothered to have regard to the provisions of *5.4 (Impact of the conduct)* of the 2005 Code, he would have appreciated that the conduct complained of constituted an impairment of the complainant's dignity, taking into account her circumstances and her junior position *vis-à-vis* Pietersen, and that in the absence of reciprocation, there was no requirement for the

complainant to say no in unambiguous terms as suggested. Despite what appears to be the Commissioner's strict interpretation of Item 2 of the 1998 Code that the recipient must have made it clear that the behaviour is considered offensive, and/or that the perpetrator should have known that the behaviour was regarded as unacceptable, silence in the face of harassment as shall further be illustrated in this judgment, can never be a hint for acquiescence.

[45] Had the Commissioner further looked at the provisions of Item 5.2.1 of the 2005 Code, he would have also acknowledged that there are different ways with which a complainant may indicate that sexual conduct is unwelcome, including non-verbal conduct such as walking away or not responding to the perpetrator. In this case, the Commissioner failed to appreciate that in the seven years that the sexual advances had persisted, not once had the complainant reciprocated Pietersen's advances, and how that reaction or non-reaction could have been interpreted as being docile and inviting is beyond comprehension.

[46] Nothing can be clearer and unambiguous than the complainant's responses to the advances in this case. She had said no to Pietersen on countless occasions the advances were made, and I am uncertain whether it was expected of her, other than to report the matter, to stand and shout from the top of the applicant's mine dump to express her displeasure at Pietersen's conduct.

[47] The Commissioner proceeded to deal with Kgole's testimony to the effect that Pietersen used to suggest that she sleeps with him and when he turned him down, he had used to charge her (with misconduct). He nonetheless poked holes in that testimony due to her failure to furnish particulars of the occasions when those suggestions had occurred, and the circumstances under which they had occurred. He essentially found that her testimony was vague. The Commissioner added the following to his conclusions in this regard;

> 'This could perhaps be ascribed to forgetfulness on her part, which is blamable upon her having waited for a period of about eight years to lay a sexual

> harassment complaint against him, on the spurious grounds that she did not want to jeopardise his employment and/or on the basis of the decency of his wife who, according to her, was a good person. I fail to understand why a sex pest should be protected against loss of employment and/or on the basis of the decency of his spouse. It would have been a different kettle of fish if the failure to lay a sexual harassment complaint against the Applicant, was inspired by a fear of possible occupational victimization or detriment, a fact she never raised at these proceedings…..It is quite apparent that had it not been for the said suspension, she would have to date, not laid a sexual harassment complaint against him and accordingly, the Applicant is correct to ascribe bad motive to her in this regard, which, according to him, was actuated by the disciplinary actions instituted against her' (Sic)

[48] The above findings need to be assessed within the context of the principal finding made already that there were indeed advances of a sexual nature made by Pietersen. In finding that sexual harassment had not however been established, the Commissioner concluded by stating that, *'in order to maintain credibility', the purported victim ought to act within a reasonable time period'*, and that in this case Kgole had let the problem to persist without expressing her unhappiness *'at the alleged conduct and to accordingly keep alive his hope that she would eventually agree to his sexual advances'* (Sic)

[49] The lessons coming out of the global anti-sexual harassment movements mentioned elsewhere in this judgment are that the so-called 'victims' of sexual harassment react to their own ordeals and circumstances differently, and in most instances, long after the fact. Astute lawyers will always attack the credibility of complainants because of the time lapses between the incidents and when they get reported, and the inability to proffer specifics or corroborating evidence. There is of course always a danger in accepting at face value that an incident took place simply because it was reported immediately thereafter. The consequences could be dire for both the accuser and accused if the allegations are found to be without merit. The stigma of being a sex pest remains forever even if in the end, the allegations are found to be unsubstantiated. There is however an even greater danger when it is not accepted that the incident took place because the complainant took long to

report it, or that he or she cannot recall details with clarity. Without vindication because of such technicalities, the trauma persists indefinitely for the complainant.

[50] Common sense however, and a bit of appreciation of the human mind dictates that one must look deeper and objectively into the reasons incidents of sexual harassment are not immediately reported. This examination again has to do with how human beings react differently to the same or similar set of circumstances. Depending on the nature and character of the individual complainant, in some instances, and immediately when an incident takes place, the harasser may be told in unequivocal and impolite terms to cease and desist the conduct, and to find the nearest cold shower. At best, the incident may even be reported immediately. Of course, this would be the ideal scenario, and the workplace would be free from sex pests and harassers, if every incident was to be dealt with in that manner.

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

a) Being 'frozen', and disbelieving what they are experiencing, and not having the human tools to respond immediately. This state of paralysis may be accompanied by guilt, confusion, self-anger, self-blame, shame, victimhood, unusual calm, being distraught and incapable of expression, withdrawal, helplessness, or outright terror. (The 'paralysis mode' syndrome)

b) Many fear a backlash if they complain, especially where the incident took place in a power/subordinate relationship. There is a fear of being hounded out of a job or being victimised at various levels. Thus, a complaint of sexual harassment against that 'bright blue-eyed boy/girl' in the office; or a senior employee/executive, may be a career ending or career limiting move, to be regretted dearly.

c) There is a fear of causing a fuss or disharmony in the workplace, with allegations that may not be taken seriously or believed, especially in

the absence of corroborating evidence. (Most incidents of sexual harassment take place where there are no witnesses)

d) Fear of consequential and negative labelling once an incident is reported. Aligned to the fear that the complainant might be perceived to have 'asked for it', (either because there is a view that she was flirtatious etc.), the possibility of being labelled by colleagues as a person with loose or low morals and being named and shamed is not remote.

e) Feeling pity for the harasser for whatever reason, irrespective of the reprehensible conduct;

f) Enduring the ordeal with the hope that it will go away, or that it was a once off incident never to be repeated (The 'quit or endure' syndrome), coupled with the carrying of a sense of guilt for not reporting the matter.

g) The fear of publicity, and/or having to substantiate the allegations in public proceedings under relentless and unsympathetic cross-examination.

[52] The above list of responses is not exhaustive, and will in most instances, obviously require of the complainant/experts to attest to them. What is of significant though is that the inability to recall events with specifics, including the timelines within which events or incidents took place, is not an unusual phenomenon in such cases. Courts and Commissioner ought therefore to bear in mind that the fact that a complainant cannot recall specifics does not imply that the incidents did not take place. There should therefore be an ability to distinguish between an 'attention-seeker', a 'trouble-maker', 'a scorned employee retaliating in the aftermath of a failed office affair'; and a genuine complaint of sexual harassment.

[53] In arriving at the conclusion that indeed there were advances of a sexual nature made towards the complainant, the Commissioner nonetheless disabused his mind to the above considerations, and effectively failed to appreciate that the conduct complained of was also unwelcome. In the face of

evidence by the complainant, as corroborated by two other witnesses that the incidents were reported, it is inexplicable that the Commissioner would find that Pietersen was merely amorous and love-struck.

[54] Of course, the complainant's testimony had to have holes in it in respect of specifics and timelines of the incidents as they took place over a period. She had failed to report the incidents for reasons that in my view should have persuaded the Commissioner in the face of a bare denial by Pietersen. Her reasons were that she had hoped that the conduct would stop as she was not reciprocating it; she did not think it would help in reporting it; since Pietersen was a manager, she thought she might be victimised; she had consistently told Pietersen to stop the conduct; and that she felt sorry for Pietersen and his wife whom she considered a good person. Other than these reasons, she had also reported the incidents to her friends and colleagues, and to her husband who was also employed by the applicant

[55] The Commissioner does not state the reason he had not found the sexual advances unwelcome, or the reason he had placed little or no weight to the explanation proffered by the complainant as to why she had taken long to report the matter. He merely found comfort in casting aspersions on her credibility without just cause. He criticised the complainant for feeling pity for Pietersen and his wife and failed to appreciate that as a consequence of rebuffing the advances, she had been subjected to victimization and occupational detriment, including what she considered to be unfair disciplinary processes. He failed to appreciate that by becoming a target or 'victim' of sexual harassment, it did not necessarily make the complainant less of a human being, incapable of feeling pity for her assailant/harasser or his spouse.

[56] The Commissioner essentially viewed the complainant as an aggrieved/begrudged employee as a result of the disciplinary processes against her, when in fact there was a basis for a conclusion to be made that Pietersen's conduct amounted to sustained sexual harassment, which deserved serious censure by the applicant. All that Pietersen had offered was conspiracy theories and denials. How the Commissioner was persuaded by

mere denials in the face of the evidence by the complainant and other witnesses is beyond comprehension.

[57] The Commissioner concluded that the failure to report the incident timeously was an indication that the complainant had encouraged and '*inspired*' Pietersen to conclude that she was not averse to his conduct, and to accordingly keep alive his hopes that she would eventually agree to sleep. This conclusion is patriarchal and misogynistic in the extreme. It denotes a right or entitlement. The message is that that harassers can persist with the unbecoming conduct, with the hope that they will get lucky at some point, as long as the complainant does not report the matter. It is further indicative of the Commissioner's failure to appreciate the importance of the two Codes referred to.

[58] Silence, no matter how prolonged it may be, as the Commissioner ought to have known, does not amount to consent. A 'docile' response to sustained sexual harassment cannot be equated with an invitation[11]. There is nothing that was presented before the Commissioner, that indicated that the complainant 'inspired' Pietersen to continue with his deplorable conduct, and clearly the Commissioner misconceived the nature of the enquiry or went about the enquiry in a wrong manner.

[59] The Commissioner capped his conclusions by stating that no evidence had been led to demonstrate that the employment relationship had irretrievably broken down. The legal position as enunciated in *Edcon Limited v Pillemer NO and Others*[12] regarding the need for evidence demonstrating a breakdown in a trust relationship has since been clarified in *Impala Platinum Limited v*

[11] See Gaga v Anglo Platinum Ltd and others [2012] 3 BLLR 285 (LAC) (Referred to in SA Metal Group (Pty) Ltd), where Murphy AJA at para 41 held as follows:

> "The rule against sexual harassment targets, amongst other things, reprehensible expressions of misplaced authority by superiors towards their subordinates. The fact that the subordinate may present as ambivalent, or even momentarily be flattered by the attention, is no excuse; particularly where at some stage in an ongoing situation she signals her discomfort. If not the initial behaviour, then, at the very least, the persistence therein is unacceptable. By applying too narrow a definition of sexual harassment, the commissioner overlooked these considerations and made a material error that denied the first respondent a full and fair determination of the issues; thereby committing an irregularity or misconduct"

[12] [2010] 1 BLLR 1 (SCA).

Zirk Bernardus Jansen & Others[13]. The Labour Appeal Court held that it is not correct that an employer must always lead evidence to establish a breakdown in the trust relationship for a sanction of dismissal to be appropriate, as that rule was not immutable[14]. It was held that it must be implied from the gravity of the misconduct that the trust relationship had broken down and that a dismissal is the appropriate sanction[15] . Furthermore, it has been held that the breakdown of the trust relationship is not solely dependent on what the employer says, and that irrespective of the employer's testimony in this regard, the Commissioner is still enjoined to enquire whether that is indeed so[16].

[60] In this case, there was evidence of incidents of persistent unwelcome conduct on the part of Pietersen, five of which should have been apparent to the Commissioner and dispositive of the matter. These were;

a) The incident at the safety braai event;

b) The persistent requests to meet and engage in sexual activity, and the complainant's consistent lack of reciprocation

c) The suggestion by Pietersen that he and the complainant should attend a training course in Randfontein so that that they can sleep together

d) The promise of a promotion if the complainant agreed to sleep with Pietersen (quid pro quo harassment)

e) Pietersen gave the complainant a test memorandum to assist her with applying for a vacancy, with the expectation that she would agree to sleep with him

[61] These incidents, in the face of a bare denial, were serious enough to demonstrate that sexual harassment had taken place, which had the consequences of irretrievably breaking down a trust and employment

[13] (JA100/14)
[14] At para 10
[15] at para 15
[16] Barloworld Logistics v Ledwaba NO (JA119/14) [2016] ZALAC 17 (11 May 2016) at para 20

relationship between Pietersen and the applicant. No amount of evidence on the part of the applicant would have made the seriousness of the misconduct in question any less. Pietersen had failed to own up to his actions and had instead conjured up conspiracy theories. Not once had he shown any contrition, and in the light of the seriousness of the misconduct, there was no basis in law or fact, for the Commissioner to interfere with the sanction of dismissal[17].

[62] To conclude then, having made a finding that Pietersen had made sexual advances to the complainant, the Commissioner nonetheless committed material error of law by failing to take full account and applying the provisions of the 2005 Code; committed gross irregularities in the conduct of proceedings as he clearly misconstrued the nature of the enquiry in such cases, and failed to take into account or ignored material evidence. Ultimately, the decision arrived at by the Commissioner in the light of the material before him, is one which a reasonable decision maker would not have come to.

[63] It was further pointed out on behalf of the applicant that all the material necessary for a substitution of the award rather than remitting the matter back to the CCMA are before the Court. I fully agree with this submission.

[64] What remains is the issue of costs. It is trite that this court is required to take into account the considerations of law and fairness in making an order of costs. In this case, it was or should have been apparent to UASA that the

[17] See Gaga at para 48, where it was held that;

> "By and large employers are entitled (indeed obliged) to regard sexual harassment by an older superior on a younger subordinate as serious misconduct, normally justifying dismissal. In *SA Broadcasting Corporation Ltd v Grogan NO and Another,* Steenkamp AJ (as he then was) observed that sexual harassment by older men in positions of power has become a scourge in the workplace. Its insidious presence is corrosive of a congenial work environment and productive work relations. Harassment by its nature will steadily undermine the supervisory authority vested in the superior, upon which the employer perforce must rely, and hence will diminish or even destroy the trust requisite in the employment relationship; ultimately justifying the imposition of the sanction of dismissal. It is appropriate then for this court and employers to send out an unequivocal message: senior managers who perpetrate sexual harassment do so at their peril and should more often than not expect to face the harshest penalty. Much will depend on the circumstances, with the court or commissioner being obliged to have regard to the nature and gravity of the infringement; the impact on the victim; the relationship between the perpetrator and victim; the position and responsibilities of the perpetrator; and whether or not there is a pattern of behaviour evidenced by prior misconduct"

Commissioner's award was indefensible. It had nonetheless persisted in opposing this application in circumstances where it should have reflected on the merits of the matter and made an informed decision. It failed in that regard, and I can see no reason why it should not be burdened with the costs of this application. It is accepted that the court should be slow in awarding costs in circumstances where there is an on-going relationship between the Union and the employer. This is only but one of the factors to be considered in the overall determination of whether law and fairness requires that a cost order should be made and is indeed not a bar to such an order.

Order:

[65] In the premises, the following order is made;

1. The arbitration award issued by the Second Respondent under case number LP3530/15 dated 14 March 2016 is reviewed, set aside and substituted with an order that;

   'The dismissal of Steve Pietersen by Rustenburg Platinum Mines Limited on 20 April 2015 was substantively fair'.

2. UASA is ordered to pay the costs of this application.

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E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Mr. I Gwaunza of Edward Nathan Sonnenberg INC
For the First Respondent:	Adv. HG Strydom (Union Official)