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**REPUBLIC OF SOUTH AFRICA**  
**IN THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION, JOHANNESBURG**

Case Number: A2024-113960

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED: NO  
DATE: 25/02/2025

In the matter between:

**JOHN ROSS SEPHTON**

**Applicant**

And

**ANGLO OPERATIONS (PTY) LTD**

**First Respondent**

**ANGLO AMERICAN PLATINUM LTD**

**Second Respondent**

**M[...] J[...] M[...]**

**Third Respondent**

**PITEAU ASSOCIATES**

**Fourth Respondent**

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**JUDGMENT**

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## **FISHER J**

### **Introduction**

[1] This is an appeal to the Full Court against the whole of the judgment of Senyatsi J handed down on 15 December 2022.

[2] In terms of the judgment the Judge a quo gave reasons for orders granting absolution from the instance in primary and alternative claims against the first, second and third respondents and furthermore, dismissed the claims against the third respondent which were based on her alleged defamation of the plaintiff and interference in his contract with the fourth respondent.

[3] Liability and quantum were separated in terms of rule 33(4) and the judgment and orders under appeal dealt only with liability.

[4] A point was latterly raised by counsel for the respondents that, on a technical reading of the judgment in the application for leave to appeal, leave was granted only in respect of the orders for absolution and not in respect of the dismissals of the claims against the third respondent. This point arose from the fact that Senyatsi J, in handing down judgment in the application for leave to appeal, referred only to the judgment handed down on 18 May 2022 (which was the date on which all the evidence was led and the absolution orders given) and did not include reference to the composite judgment handed down in relation to all the claims on 22 December 2022.

[5] The application for leave to appeal was pertinently sought in relation to that judgment. The failure by Senyatsi J to reference that judgment as well as the orders of 18 May 2022 was patently an oversight.

[6] It would have made no sense for leave to appeal to be given in respect of orders for absolution where no reasons had yet been given.

[7] There is, thus, no merit in the point and all the claims are dealt with herein.

[8] The facts of the case are as follows.

### **Material facts**

[9] The appellant was subcontracted by the fourth respondent to provide professional services as a hydrologist at a mining operation conducted by the first and second respondents, to whom I shall refer as “the Anglo parties”. The fourth respondent was the main contractor to that mining operation.

[10] On 09 September 2019, whilst the third respondent was engaged in conversation with a colleague at the entrance to the shared workspace on the Anglo mine at which the third respondent was employed and the plaintiff worked under the subcontract, an interaction occurred between the appellant and the third respondent which set in motion the series of events which led to this litigation.

[11] On the day in question, the appellant left the workplace with his lunch bag in hand. The lunch bag was of the type that included a strap for ease of carry. He was in a jocular mood. As he walked past the third respondent, the appellant swung the lunch bag towards her. It made contact with her buttocks.

[12] Whilst I accept that the conduct was not intended to cause offence and that it was a playful gesture, it was offensive and distressing from the perspective of the third respondent. She testified that she experienced the act of being struck in this way as disrespectful to her.

[13] Like many workplaces, the Anglo workspace has in place a Harassment Policy to which all workers and service providers on site are subject. It covers prohibition of harassment of all types, including sexual harassment, bullying and victimisation.

[14] The third respondent made a complaint under the Harassment Policy. This resulted in the inevitable investigation of the complaint by the Anglo parties and also in a directive from the Anglo parties that the appellant not attend at the site

pending the outcome of the investigation. All in all, he was barred from attending the site for some two months but with full remuneration.

[15] The complaint was investigated broadly and included an inquiry into whether there was a sexual component to the conduct.

[16] This barring from the site had the obvious consequence to the appellant that the carrying out of his service contract with the fourth respondent, which required attendance at the site, was interrupted.

[17] It is important that it was not in dispute that the incident occurred. It is generally accepted that harassment should be approached from the perspective of the person claiming to be harassed. It seems that the appellant, to his credit, readily accepted this position.

[18] The appellant admitted that the act could, subjectively, have been construed by the third respondent as an affront to her dignity and he duly apologised in writing to the third respondent and to the Anglo parties.

[19] The inquiry found there was no sexual harassment, the apology was accepted by all concerned and the appellant was allowed back onto site on 20 November 2021.

[20] When the third respondent was confronted with the fact that the appellant was back on site she experienced, what she described in her evidence, as a “panic attack”. This manifested as her becoming tearful and hurriedly removing herself from the workplace.

[21] This further complication exacerbated the difficulties already being experienced by the fourth respondent as the contractor on the site to whom the appellant was subcontracted.

[22] There was, a day later, an accusation from management personnel at the Anglo parties that, on his return to site, the appellant continued to behave in a

manner that some staff members felt was inappropriate.

[23] The appellant denies that he misbehaved on his return to the site. Whether he did or did not is irrelevant for the purposes of this appeal, however.

[24] Ultimately, the position of the fourth respondent in relation to its contract with the Anglo parties became unsustainable in that the applicant was not wanted at the site by the Anglo parties and was denied access thereto for a second time.

[25] The fourth respondent had no choice but to abide by the instructions of the Anglo parties as to the attendance of the appellant at the site.

[26] The correspondence placed into evidence and the testimony of the appellant is to the effect that the fourth respondent went to great lengths to attempt to remedy the position so as to avoid having to terminate the subcontract. It is not in dispute that the skills of the appellant were much in demand.

[27] A central dispute in the claims pleaded against the fourth respondent is whether the subcontract was repudiated by the fourth respondent prior to it terminating by effluxion of time or whether the subcontract was ended by mutual agreement.

### **The nature of the claims against the various parties**

[28] The allegation that he has been defamed by being accused of sexual harassment lies at the heart of the appellants respective cases.

[29] The Anglo parties are sued for defamation (on the basis that they acquiesced in the accusation of sexual harassment by the third respondent) and on the basis of a delictual claim that they interfered with his subcontract with the fourth respondent by barring him from site.

[30] The third respondent is sued for her alleged defamation and also on the basis that she caused the interference with the contract by causing the removal of the

appellant from the site.

[31] The fourth respondent is sued for repudiation of the subcontract.

#### The claims based on defamation

[32] The appellant alleged that the third defendant accused him of sexual harassment.

[33] In appellant's evidence, however, it emerged that she did not make the alleged accusation. The third respondent merely reported the facts of the incident and said the appellant's conduct had made her feel disrespected.

[34] The appellant conceded that this was the true extent of the statement relied on by him for his claims based on defamation.

[35] Thus, from a fundamental perspective as to the defamation claims, the appellant conceded that the statement relied on in the pleadings had, in fact, not been made.

[36] This concession puts an end to any claim based on the alleged defamation, including any claims relying on such alleged defamation against the Anglo parties. The appellant concedes that the Anglo parties made no accusation and they merely conducted the investigation under their policy, which included investigating whether the conduct could be said to be sexual harassment. In the end they found that it did not.

#### The interference with the contract

[37] At best for the appellant the cause of action in relation to this alleged interference is that because the Anglo parties would not allow him on site, he could not carry

out his obligations under the contract with the fourth defendant which led to the termination of the contract and thus loss of income which he would have earned under the contract.

[38] The difficulties with this case start with the pleadings.

[39] In a claim for pure economic loss, the defendant's legal duty to the plaintiff must be defined. Wrongfulness must be pleaded and established and the breach alleged.<sup>1</sup>

[40] Wrongfulness vis-à-vis the appellant based on their interference with the subcontract was neither pleaded nor established by way of the appellant's evidence.

[41] The appellant's counsel was unable to indicate, in argument, which of the legal rights or interests owed to him by the respondents were harmed. The pleadings were simply couched along the lines that the appellant had been unfairly treated. This may be so, but this does not ground a claim in delict.

[42] Most importantly, the appellant neither pleaded nor proved a duty on the Anglo parties to allow him access to the site.

[43] The default position as to permission to access property is a general acceptance that persons in lawful control of a property have the right to determine who may come onto the property. In order to plead a cause of action it was necessary to plead and prove the reasons why there was a legal duty to allow the appellant on site.

[44] There was, furthermore, no indication that any of the respondents acted on the basis that they abused their position with the sole or predominant intention of harming the appellant and neither was this pleaded.

[45] Indeed, it was neither pleaded nor shown that the Anglo parties' conduct was,

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<sup>1</sup> *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A); *Loureiro and Others v Imvula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC)

in any way, unlawful.

[46] This, then puts an end to the claims based on interference with the subcontract.

#### The repudiation claim

[47] Implicit in any subcontract that must be carried out on the premises of another is that the person so sub-contracted will be permitted access to such premises.

[48] The fourth respondent had no control over the suspension of the appellant from the site. This much was made clear in the appellant's evidence. As I have said, no basis is pleaded for an obligation to allow the appellant on site.

[49] In the circumstances, the contract, through no fault of the fourth respondent, was not capable of performance by either party.

[50] As a general rule, if performance of a contract becomes impossible through no fault of the debtor, the reciprocal obligations under the contract are extinguished.

[51] Although impossibility of performance is not pleaded, it is a complete defence which, to my mind, would recommend itself if the respondents were put to their defences.

[52] Such a defence was, however, not part of the pleadings and thus was not the case which the appellant came to meet in his evidence. It would, thus, not be proper for this aspect of the appeal to be determined on an unpleaded defence.

[53] There is, however, a more fundamental difficulty with the plaintiff's case. The plaintiff pleaded and testified that the fourth respondent had sought to pressurize him to agree to sign a written cancellation of the subcontract in the circumstances of him not being allowed onto site.

[54] The appellant testified that this proffered agreed cancellation was refused by



him. He argued, however, that the mere conduct of the fourth respondent in asking him to agree to cancel the contract was a repudiation which allowed him to cancel the contract and claim damages.

[55] A party claiming repudiation must establish conduct that exhibits objectively a party's deliberate and unequivocal intention not to be bound by the contract <sup>2</sup>

[56] The appellants cause of action is thus a repudiation before expiry of the contract and thus damages are claimed.

[57] In fact, this cause of action contains its own inherent flaw. Asking that someone agree to an early cancellation of a contract, far from being a repudiation of the obligations under the contract, is indicative of an acceptance that the contract is in force.

[58] In this instance the contract had a matter of days still to run when the proffered cancellation was offered.

## **Conclusion**

[59] There can be no doubt that the harassment complained of was not of a sexual nature and it was not found to be such by the Anglo parties after extensive inquiry.

[60] It seems also that it was not experienced by the third respondent as having a sexual dimension and it was not complained of as being sexual in nature.

[61] Having said this, the sense of aggrievement suffered by the appellant at being investigated for sexual harassment is understandable. It is understandable also that he should want to be heard on whether such an investigation was appropriate and whether the subsequent barring from the site, even after his apology and a finding that there was no sexual misconduct, was fair.

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<sup>2</sup> *Datacolor International (Pty) Ltd v Intamarket (Pty.) Ltd 2001 (2) SA 248 (SCA)*

[62] There are however fundamental difficulties with the case in law. Because of these fundamental difficulties the claims were not established against any of the respondents and Senyatsi J was correct in his granting of absolution against the Anglo parties and the fourth respondent and in his dismissal of the claims against the third respondent.

[63] This case presents a cautionary tale as to the fragility of workplace relationships. People come together in diversity. Their differing backgrounds often lead them to differ in their appreciation of jokes and banter. One person's playful act may be interpreted by another as deeply insensitive or disrespectful.

[64] This diversity calls for the utmost restraint and the observing of all protocols and courtesy at all time when working with others.

### **Costs**

[65] The appeal fails and there is no reason why the costs should not follow the result.

### **Order**

[66] The following order is made: The appeal is dismissed with costs

I agree.

**FISHER J**  
**JUDGE OF THE HIGH COURT**  
**JOHANNESBURG**

**ADAMS J**  
**JUDGE OF THE HIGH COURT**  
**JOHANNESBURG**

I agree.

**BOTSI-THULARE AJ  
ACTING-JUDGE OF THE HIGH COURT  
JOHANNESBURG**

**This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 25 February 2025.**

**Heard:** 19 February 2025

**Delivered:** 25 February 2025

**APPEARANCES:**

Applicant's counsel: Adv. C B Garvey

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