



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No. JR2023/19

In the matter between:

OUPA SHABANGU

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

WILLEM KOEKEMOER N.O.

Second Respondent

PEPKOR RETAIL (PTY) LTD t/a PEP SA (PTY) LTD

Third Respondent

Heard: 21 February 2025

Delivered: 27 February 2025

JUDGMENT

MAKHURA, JIntroduction

[1] The applicant was charged and dismissed for sexual harassment. His dismissal was with effect from 5 March 2025. For the purpose of this judgment, the complainant shall be referred to as CM. The incident occurred on 19 February 2018. He subsequently declared an unfair dismissal dispute and referred it to the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA found in its arbitration award dated 26 July 2019 that the applicant's dismissal was substantively fair but procedurally unfair. The commissioner awarded the applicant three months' compensation for the procedural unfairness decision.

[2] Aggrieved by the substantive fairness decision, the applicant approached this Court in terms of section 145 of the Labour Relations Act¹ (LRA) to review and set aside the award. The application is opposed by Pepkor Retail (Pty) t/a Pep SA (Pty) Ltd (company), the third respondent in these proceedings. The review application was accompanied by a condonation application for its late delivery.

Condonation application

[3] The application for condonation is unopposed. The award was issued on 26 July 2019 and received by the applicant on 30 July 2019. The delay was caused by the applicant's attorneys of record.

[4] On 10 September 2019, the last day of the six-week period, the applicant's attorneys applied to the Registrar by fax and email, for a case number. These services, email and fax, had not been working since 9 September 2019, and the attorneys were informed accordingly. The attorneys were provided with an alternative email address to apply for a case number. On 11 September 2019, the attorneys sent an application for a

¹ Act 66 of 1995, as amended.

case number to the alternative address. The case number was issued and allocated on the same day and the attorneys were informed accordingly.

[5] Thereafter, a period of two months elapsed without any action, until 12 November 2019 when the attorneys addressed a letter to the CCMA enquiring whether they complied with the rules by dispatching the record of arbitration proceedings to the Registrar. The CCMA asked the attorneys to re-send a copy of the review application. It was at this moment that the attorneys discovered that the review application was never served and later discovered that it was also not filed. The attorneys attended to the delivery of the application on 29 November 2019. The review application was therefore delivered 11 weeks late.

[6] Having considered the explanation for the delay of 11 weeks, which in my view is reasonable and gives a full account for the delay, and the fact that the application is unopposed, I have decided, in the interest of justice to grant the application for condonation.

Material facts

[7] The genesis of the charge is the email allegedly written by CM's husband. The alleged sexual harassment incident occurred at the company's boardroom in one of the company's stores in Mokopane on 19 February 2018. Subsequent to this complaint, the applicant and CM wrote statements on 28 February 2018 providing their respective accounts of the incident.

[8] The applicant wrote in his statement that he went to meet CM in the boardroom after 15h00. During the arbitration, it became common cause that the applicant went to meet CM between 10h00 and 11h00. On his way to the boardroom, so he explained, he passed other employees hanging stock. In the boardroom, he found CM sitting and eating dumplings. He then "*tapped her upper body and took a seat next to her*". He considered her PowerPoint presentation and shared his advice. They started chatting

about issues that were unrelated to work and “*started fooling around in a playful manner by nudging and pushing*” each other and “*had a nice chuckle*”. He denied touching CM in an uncomfortable way. As they were still in the boardroom, CM complimented the applicant that he had a way of making her laugh and brightening her day. CM then printed reports for him and they walked out of the boardroom and found two employees, Linda and Germinah hanging stock next to the boardroom. They had a brief conversation with them. Thereafter, CM walked the applicant to the car and he drove back to the store where he was doing stock taking.

[9] Back at the store, the applicant met a lady by the name of Mmabatho, who enquired about taking maternity leave. He explained the procedure to Mmabatho and later asked CM, who arrived at the store shortly after 17h00 to explain to Mmabatho the issue relating to maternity leave. The applicant explained to CM that he needed to finish stock counting. The applicant and CM left the store after 20h00. It was raining and dark. CM drove with some employees and he drove off with others. After he dropped off the employees, he contacted CM to enquire if she was home safe and CM informed him that she was busy on the phone with her husband and that they would talk later. The applicant then drove to Pretoria.

[10] On 20 February 2018, CM called him in the evening. She informed him that her husband had sent the email to the company making allegations that he was making advances on her. She allegedly said that she was caught off guard and was shaking and dropping things. Further, that she was very angry with her husband for sending such an email without first checking with her and that her husband was threatened by the fact that she was working with a male colleague.

[11] CM, so the applicant continued, explained to him that when the applicant telephoned her on the evening of 19 February 2019, she was on a WhatsApp call with the husband and the incoming call put the WhatsApp call line with the husband on hold. CM explained further that she informed the husband that she was on a telephone call with the applicant, which made the husband angry and accused her of having an affair

with the applicant. The statement continued that CM *“teased her husband”* on Valentine’s Day that he (the applicant) was taking good care of her but the husband was *“livid and told her that he will divorce her. She tried explaining that she was joking with him but he would hear none of it. That is why he decided to write an email and forced her to choose to either sink her marriage or to side with me”*. He then told CM that this made him uncomfortable and it scared him because it was denting his image, which might result in him losing his job, to which CM said he had nothing to worry about and that she would speak to her husband to retract the allegations.

[12] Before concluding that CM was “coerced” by her husband, the applicant recorded that:

‘I can safely and honestly say that the allegations against me are fabricated. I am not a man who shies away from his actions and responsibilities. If I wronged her, I would have apologised and owned up for my sins.’

[13] CM’s statement provided a materially different account. She stated that on the day of the incident, she was in the boardroom preparing for her Winter Sales meeting. She enquired from the applicant over the telephone how the stock-taking was going and the applicant in turn asked her if she was doing fine with her preparations. The applicant offered to come to CM’s store to check her presentation and she had no problem with that. A moment later, the applicant entered the boardroom and he:

‘found me seated, having coffee, my back facing the entrance. Oupa came in, he closed the door approached me and wrapped his arms around my upper body, and started groping my breasts. Then I responded and asked him, “Now what are you doing? No man Oupa get off me!” He said to me I should relax and it was just going to be quick. He held me so tightly that I could not move. While I was wrestling to set myself free, I finally managed to escape the chair. I was in shock and shaking all over. I then ran to the other side of the boardroom. He followed me and pressed me against the wall. I didn’t say this to Gertrude, but he forced his mouth onto mine and said he wanted me. I said “No Oupa! This is not appropriate, we are at work. I don’t want to do anything of that manner at all”. He

tried to force down my skirt and panties, and forced his hand between my thighs and pushed his fingers inside me. At this point I felt helpless and was getting weaker. He then tried with the one hand to untie his pants. That's when I said to him that I would scream. He then stopped, released me and sat on the chair. I immediately went to the door, and then he stood up, rushed ahead of me and opened it. I stepped out of the boardroom, he followed. And he left to the bathrooms. Then I went back to the room to fetch my car key and phone.'

[14] The applicant was charged with three allegations of misconduct. The first allegation was that he was guilty of sexual harassment in that:

'On 19 February 2018, in the course and scope of business, you sexually harassed a female employee who is an Area Manager. This incident took place in the boardroom at PEP Store Mokopane.

Despite the objection from the employee, you physically touched her in private areas and also attempted to remove her clothes against her will although she tried to stop you.

As she was walking away from you, you followed her she felt unsafe and walked out of the boardroom just to escape from your groping her.'

[15] The second charge was that he was in breach of trust because of an incident that took place in December 2016, where he was allegedly warned of sexual harassment misconduct. This particular incident related to a written apology by the applicant for his behaviour towards one EdP, the Store Manager at Mokopane. In this email apology, the applicant wrote:

'I hereby convey my sincere apologies for my behaviour towards [EdP], the store manager...

I behaved and conducted myself in a way that made her feel uncomfortable and uneasy. The behaviour was unintentional and unconscious but it was uncalled for. I unreservedly and unconditionally, humbly apologise for bringing the name of the company and the division into disrepute.

Going forward, I now know where to draw the line and to always keep my professional integrity in check.

I promise to conduct all my future interactions with the Dynamos in a more professional manner, and will adhere to the code of conduct, which refers to everyone to treat everybody with dignity and respect.'

[16] The third and final charge was that as a leader, he breached the company culture of treating everyone with dignity and respect.

[17] The disciplinary hearing was held on 2 and 5 March 2018. The applicant was dismissed with effect from 5 March 2018, following a finding of guilt on all three charges. He referred an unfair dismissal dispute to the CCMA for conciliation and later arbitration.

The arbitration proceedings

The evidence

[18] The respondent called four witnesses, Cavelle Govender (Govender), Mohamed Peerehai (Peerehai), Vanessa Landman (Landman) and CM.

[19] Govender was employed as the Divisional People Support Manager or Human Resources Manager. He testified that the applicant was a Stock / Risk Controller, a position which was one job grade below that of CM, the Area Manager. The company's staff compliment is made up of 80% female employees.

[20] Govender gave evidence about the incident that led to the applicant's written apology in December 2016. He testified that the information brought to his attention was that one of the Store Managers had reported that she received unwanted physical and verbal comments from the applicant. The harassment incident took the form of physical touching, holding of the hand, putting the hand on EdP's leg and the applicant tickling EdP from behind and asking if she felt ticklish.

[21] EdP was asked to list the incidences in an email which she did. Thereafter, Govender met the applicant where he read the allegations against him. The applicant did not dispute the allegations as read to him including the physical touching. The applicant said that he did not intend to make EdP uncomfortable and then wrote an email tendering his apology. Govender testified further that he was confident that the applicant understood the message and that any type of conduct of that nature was unacceptable.

[22] During cross-examination, the applicant attempted to pursue an inconsistency argument. It was put to Govender that a senior manager had previously received a final written warning for a similar offence in his division and that the company denied the applicant an opportunity or "right" to canvass this issue on appeal. Govender denied that a senior manager in his division charged for sexual harassment was issued with a final written warning. It was also suggested to him that the company was inconsistent in terms of dealing with the allegations by CM and EdP.

[23] The evidence of Peerehai, who was the chairperson of the disciplinary hearing and Landman who initiated the disciplinary hearing, is irrelevant for the purpose of these review proceedings in that the procedural fairness decision is not challenged.

[24] CM testified. She read her statement of 28 February 2018 into the record and elaborated on the allegations made therein. She stated that the applicant had arrived at the store between 10h00 and 11h00 and that she could hear him from outside because he was greeting and talking loud before he entered the boardroom. The applicant came inside the boardroom and approached her from behind because her back was facing the entrance. The applicant then wrapped his arms around her upper body and started groping her breasts. She started wrestling to free herself from the applicant's arms. The applicant, so CM continued her evidence, told her that he was going to be quick and:

'Like suss that kind of a thing and then he was saying to me, "I am going to be quick"... "Okay let me just a little bit"... And then when I stood of (sic) the chair

and he pinned me on the board and that is when now he said, I could feel his hand coming between my thighs... the hand was very warm. Okay then I could hear the (inaudible) and I am like Oupa I am going to scream now. That is when he dropped and then he moved it was like he was sweating...'

[25] CM explained that there were in essence two incidents in that boardroom. The first happened when she was sitting down when the applicant had just entered the boardroom where he wrapped his arms around her upper body and started groping her breasts. She wrestled and managed to free herself from him and went to the other side of the boardroom. The second incident happened after she freed herself from the applicant's arms and he followed her. That is when he held her against the wall where the applicant was even breathing heavily. The applicant tried to kiss her, told her that he wanted her and that it would be quick, touched her private parts and tried to untie his pants. The applicant, so CM testified, only freed her after she threatened to scream.

[26] Later that afternoon, the applicant contacted CM seeking assistance or advice with regard to an enquiry from Mmabatho about maternity leave. She went to the store where the applicant was and explained to Mmabatho the procedure relating to maternity leave. She said that it was around 18h00 and the store had just closed. It was raining and dark. She offered a ride to some of the employees. She later informed her husband about the incident. The husband said that he would address an email to human resources.

[27] The applicant's representative cross-examined CM. Much of his cross-examination was centred on procedural fairness, whether there was a grievance, whether the issue was investigated, why the company did not follow the informal process and why she testified by way of a telephone from a different room than appearing in person during the disciplinary hearing.

[28] The applicant also sought to challenge CM that she did not report the incident immediately and that according to him, this should have been reported the incident to

the company within 24 hours or 48 hours. CM was asked questions such as why she did not scream when the applicant was holding her against the wall.

[29] During cross-examination, CM clarified that the applicant penetrated her using his finger. It was put to CM that a leader or professional who was sexually harassed would have approached the South African Police Service (SAPS) to report the incident and open a case and that her failure to open a case with the SAPS shows that she was not serious.

[30] Regarding CM's enquiry whether the applicant had received an email from her husband, CM testified that she wanted to hear from the applicant if he was aware of what was coming. The applicant's version put to CM was that she enquired about the email because her husband was not happy with CM's relationship with the applicant.

[31] The applicant put to CM that they used to send each other messages at night and early morning and referred to messages exchanged between them in the early morning of 18 February 2018. It was further put to CM that she fabricated the allegations because her husband was threatening to divorce her because of his (husband) own insecurities and the long distance between them. Further, that she fabricated the story to save her marriage. CM disputed these versions.

[32] The applicant put to CM that he had an operation on his genitalia and was not able to make love to CM or to penetrate her, even if he wanted to. The issue of inconsistency was again raised with CM. The applicant's version was that there was a senior manager, known as "Willie" in Centurion who was charged with sexual harassment and was given a final written warning. CM could not comment on this because she did not know.

[33] The applicant testified about his relationship with CM, how they met and how she was introduced to him as a "*new business partner*". He testified that they would telephone each other about 5 times a day and would send each other messages at night and up to the early hours of the morning.

[34] Further, CM had a “*telephone sexual stimulation (sic)*” with him in the early hours of 18 February 2018 because she wanted to release tension. He suggested that his relationship with CM could have reached a stage of intimacy:

‘Her husband was not around. Her husband was in Kenya. And then she had these sexual frustrations whatsoever because she was not getting maybe any action and so forth. Our relationship was in such a way that maybe now where sexual simulation supposed maybe engage maybe intimately (sic)... But because... I was not available I was not around with her she did telephone simulation.’

[35] With regard to the incident, his evidence was that on 19 February 2018, he was doing stock-taking in Mokopane. He drove to Mokopane in the morning and informed CM that he arrived safely. CM responded that she was glad and called him. He missed her call, then sent her a message asking for a callback. They spoke about the progress in stock-taking and CM informed him that she was busy preparing for her meeting on 20 February 2018 and was struggling with the presentation. The applicant offered to come to CM’s store to assist her with the presentation.

[36] Upon arrival at the store, he found CM sitting and working on her PowerPoint presentation. CM offered him the dumplings which she was having with coffee but he declined. He then looked at the presentation and shared his advice. CM then printed the Paxi report when he was about to leave. They discussed the Paxi report. The applicant then asked CM how she would handle a situation where some employees who attended the meeting became unruly, and CM said she would call them to order and issue warnings. The applicant then gave CM advice on how to handle the situation. CM then:

‘pushed me on my shoulder so in a complimentary way. So because we were sitting side by side then I also bumped my shoulder against her. And then we just had a chuckle we just had a laugh. And then so, because she was impressed as to how do I know such things how can I have such skills and then she printed me that Paxi report. And then we left the boardroom. We left the boardroom we

found Linda and [Germinah] still there outside the boardroom hanging stock. We engage[d] them...'

[37] Germinah and Linda told them that there was no water due to maintenance, he went to the bathroom and when he came back, he found that CM had returned to the boardroom and he also went back into the boardroom. He asked for a sanitizer and walked out with CM to his car. CM told him that she was stressed because her husband wanted her to go to the National Convention on 7 March 2018. He said that at one moment CM had pranked the husband that the applicant was taking good care of her, which made the husband angry.

[38] The applicant disputed the evidence that he tried with his one hand to untie his pants. He said that he had an operation and a wound on his genitalia so *he "could not be in a position to try and untie [his] pants and holding somebody with the other arm"*. He was also informed not to lift heavy weights after his operation.

[39] He disputed that he was breathing heavily and that CM threatened to scream. He argued that this scenario was just created to support the sexual harassment case against him. On penetrating CM with her finger, he testified that:

'I could not now go and insert my finger into somebody's private parts not knowing if it is that time of the month for the (sic) or what. That is gross for me to do that.'

[40] with regard to the attempt to kiss CM, he said that *"I never kissed her. I did not want garlic in my mouth"*. With regard to the December 2016 written apology to EdP, he explained the incident that led to the written apology as follows:

'... I wanted to show [Edp] something ... on the computer. And then I was sitting on a chair that was lower than the one she was sitting on. She was sitting on my file (sic) chair. And then now I was resting my arm against her thigh on her upper leg... I was using her thigh as an armrest.'

[41] He persisted with the inconsistency and testified that “Willie” received a final written warning for sexual harassment. He confirmed that he did not have any record of Willie’s case but had it “*on good authority that indeed he was charged...*”.

The award

[42] The commissioner found that CM’s evidence established unwanted conduct of a sexual nature performed by the applicant towards her on 19 February 2018. He rejected the applicant’s argument that the allegations were fabricated as baseless and found that the applicant raised bare denials to the allegations before concluding that the applicant failed to raise any plausible defence to the charge and evidence.

[43] The commissioner observed that the applicant created an impression that CM was to be blamed for her ordeal as “*she seduced him in her interaction with him over the cell phone late nights and early mornings*”. It would, so the commissioner found, be unreasonable to expect the employer to have continued an employment relationship with the applicant. The applicant destroyed the trust relationship and no corrective action would be justified.

Labour Court proceedings

The review grounds

[44] The applicant raised review grounds that are directed at and are relevant to the procedural fairness enquiry. These are inter *alia* challenges relating to CM testifying through a telephone during the disciplinary hearing and the reason for her not facing him in the room where the disciplinary hearing was conducted, whether CM lodged a grievance and whether the company conducted an investigation and the company’s decision to constitute a formal disciplinary enquiry instead of attempting to resolve the matter in an informal process.

[45] On substantive fairness, the applicant contends that the commissioner considered irrelevant facts, ignored relevant facts, misconceived the facts and the nature of the enquiry, committed gross irregularities and misconduct and misdirected himself. As a result, he reached an unreasonable decision.

[46] In support of his contentions above, the applicant argued that the commissioner misconceived the facts when he found that the company proved its case despite the fact that after the alleged incident CM accompanied him to his car. Further, the commissioner disregarded relevant evidence that his friendship with CM continued after the incident and that they were cordial to each other. The commissioner is alleged to have cited an irrelevant case about his seniority when CM was his senior in this case.

[47] The applicant contends that the commissioner failed to assess the credibility and reliability of CM's evidence. Had he conducted this assessment, the applicant contends, he would have found that CM's evidence was improbable. For instance, he submits that CM's evidence was improbable because at the time of the incident, the door was not locked, the junior staff members were outside and they would have overheard when he 'pushed' her against the wall. He submitted further that CM did not scream and that as a senior employee, she did not reprimand him and therefore CM should be blamed if it is found that the incident took place.

[48] Finally, he contends that the sanction of dismissal was inappropriate because he had a clean disciplinary record, and that he was allowed to continue working until 28 February 2018, which shows that the trust relationship has not broken down and that dismissal should have been imposed as a last resort.

Analysis

[49] In terms of the Code of Good Practice on the Handling of Sexual Harassment in the Workplace (Code), sexual harassment is defined as "*unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity*

in the workplace”². The factors relevant to the determination whether there was sexual harassment include whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation, whether the sexual conduct was unwelcome, the nature and extent of the sexual conduct and the impact of the sexual conduct on the employee.³

[50] Item 5.3.1.1 of the Code states that:

‘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.’

[51] In *Campbell Scientific Africa (Pty) Ltd v Simmers and others*⁴, the Labour Appeal Court 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 “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”.

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”.’⁵

² Amended Code of Good Practice on the Handling of Sexual Harassment Cases, Notice 1357 in GG 27865 of 4 August 2005 (Code).

³ See item 4.1 – 4.4 of the Code.

⁴ (2016) 37 ILJ 116 (LAC); [2016] 1 BLLR 1 (LAC).

⁵ Ibid at paras 20 – 21.

[52] The conduct complained is of physical sexual nature that CM expressed that it was unwelcome. The applicant did not dispute the evidence of CM. In particular, the following evidence was not challenged by the applicant during cross examination – that (1) he wrapped his hands around CM's upper body; (2) he groped her breasts; (3) CM started wrestling to free herself from the applicant's grip, which she eventually managed to do; (4) CM went to the other side of the boardroom and the applicant followed her; (5) the applicant held CM against the wall; (6) he tried to kiss her; (7) he told CM that he wanted her; (8) that it would be quick; (9) touched her private parts (and penetrated his finger); (10) tried to untie his pants; and (11) that it was only when CM threatened to scream that the applicant freed her.

[53] The applicant had an opportunity to dispute and challenge CM on these versions during cross-examination. However, he chose to use CM's alleged marital issues with her husband as his trump card. He chose to argue with CM that her marriage was on the brink of collapse, that she was sexually frustrated and therefore she fabricated the allegations to save her marriage. Whilst CM might have been going through some marital issues with her husband, the applicant was charged with a discrete incident of sexual harassment. This incident of sexual harassment was explained by CM with sufficient particularity to give the applicant an opportunity to deny the version. The applicant elected not to challenge CM during cross-examination and only attempted to dispute part of her evidence during his evidence-in-chief. Unfortunately for him, this came a little too late.

[54] Having failed to challenge CM's evidence during cross-examination, the applicant cannot claim that the commissioner failed in his duties as an arbitrator when he did not conduct a credibility and/or reliability assessment of CM's evidence. There were no contradicting versions put to CM and CM's evidence did not contain any contradictions.

[55] The applicant's other defence was that he had a good relationship with CM which is expressed and evinced in the many messages exchanged between them which

would continue until the early hours of the morning. Whilst this could be true, it was however not what the applicant was charged for and called to answer.

[56] CM expressed that she did not welcome the applicant's conduct the moment he wrapped his hands around her upper body. She wrestled herself from the applicant's groping. She stood up from the chair and moved to the other side of the boardroom, clearly to protect herself from the applicant's unwelcome and offensive conduct.

[57] The applicant, empowered and driven by his masculinity, oblivious to the obviously hostile and offensive environment he created for CM in that boardroom and in total disregard for CM's dignity, privacy and integrity, continued to violate CM by pinning her against the wall, telling her that it would be quick and touching and penetrating her private parts. In a case of unwelcome physical conduct, it matters not whether the perpetrator is a junior employee to the complainant.

[58] There was no case of inconsistency made out either during the cross-examination of the company's witnesses or during his evidence-in-chief. There is only a mention of the name "Willie" with no additional particulars. The inconsistency case is dismissed.

[59] On sanction, the applicant relies on three factors why the award should be set aside. First, he alleged that the commissioner failed to consider his clean record. Second, that the commissioner failed to consider that dismissal should be a last resort. Finally, he submitted that he continued to work until 28 February 2018, after the incident which to him shows that the trust relationship has not broken down. None of these grounds have merits. The misconduct committed by the applicant was calculated and serious. His clean disciplinary record cannot outweigh the serious nature of the misconduct. In a company with 80% female employees, having considered that he tendered an apology for a similar act even though he was not disciplined, the commissioner's finding that progressive discipline was not an option was reasonable.

That he worked for a couple of days after the incident and before he gave his written statement is not of any assistance to his case.

[60] In his desperate criticism of the award, the applicant made some preposterous speculative submissions to convince the Court that the incident did not take place. He submitted that if the incident took place, CM, because of her seniority, was at fault because she should have reprimanded him. The incident could not have taken place because he did not lock the boardroom door and in a case of physical sexual harassment the perpetrator *"would normally lock the door"*. The fact that CM accompanied him outside to the car park proves that the incident did not take place because *"a person who has been victimised and traumatised cannot follow the perpetrator voluntarily"*. He clearly confused rape and sexual harassment. Rape is a form of physical sexual harassment but not all sexual harassment conduct are physical that must be reported as rape to the SAPS. Sexual harassment includes all unwanted physical contact, including sexual assault and rape, and verbal and non-verbal. Finally, the applicant submits that under normal circumstances if someone is touched inappropriately, that person would scream or jump *"due to irresistible impulse or tantrum"*.

[61] The applicant's submissions defy logic. They establish a shocking mental state of a man who sees no wrong with touching his female colleague inappropriately, a man who believes that because his female colleague did not scream and shout when he made these inappropriate, unwelcome and offensive advances, therefore, it follows that she welcomed those advances and a man who feels entitled to violate a female colleague's privacy and dignity because she is *"sexually frustrated"* and needs to *"release tension"*. This is a man who should be nowhere near any workplace, especially one with 80% of female employees.

[62] The applicant has failed to make out a case on review⁶ and his application falls to be dismissed.

Costs

[63] Lastly, I have to consider whether costs should be awarded. Mr Biggs argued that the attorneys must be ordered to pay the wasted costs of 22 January 2025 proceedings *de bonis propriis*, which were postponed on account of the attorneys not notifying the Court of the change of their email address. In *Lekhesa: In re Ngwenya v Trustees for the Time being of Sishen Iron Ore Co Community Development Trust and another*⁷, the LAC succinctly summarised the legal position relating to costs *de bonis propriis* as follows:

'Punitive costs convey a court's displeasure at a party's reprehensible conduct and are justified where the conduct concerned is extraordinary and deserving of a court's rebuke. Additionally, an order of costs *de bonis propriis* is made against an attorney, as an officer of the court who owes a court an appropriate level of professionalism and courtesy, as a mark of the court's displeasure for the conduct of that practitioner. This occurs where a court is satisfied that there has been negligence to a serious degree, or a gross disregard for professional responsibilities, where an attorney acted inappropriately and egregiously, or where a legal practitioner misleads the court.'⁸

[64] Whilst I accept that there was negligence on the part of the attorneys for not notifying the Court of their change of email address and that the applicant's legal representative could have prepared and been ready for the hearing after he was notified a few days before the hearing, I am not satisfied that this conduct in itself is so reprehensible and extraordinary that it calls for the Court's rebuke with a costs order *de*

⁶ See: section 145(2)(a) of the LRA; *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 110.

⁷ (2024) 45 ILJ 1220 (LAC); [2024] 6 BLLR 585 (LAC).

⁸ *Ibid* at para 17.

bonis propriis. Accordingly, I am not inclined to award the wasted costs against the attorneys as requested.

[65] The company contends further that the applicant must be ordered to pay the costs of the review application. The reason advanced, in a nutshell, is that this application is a non-starter and should never have been launched. The applicant submitted that he is unemployed and would not be able to pay the costs. I accept that this application should never have been brought because it has no merit whatsoever. The applicant's attorneys of record represented him at the arbitration proceedings. It is reasonable to conclude that he relied on his attorneys' representation at arbitration proceedings and the poor advice from his attorneys to approach this Court on review. Further, I do not believe that a case has been made out in the answering affidavit for this Court to deviate from the principle that costs do not follow the result. I am therefore not persuaded that the requirements of law and fairness dictate for a costs order against the applicant. Accordingly, I decline to award costs.

[66] In the premises, the following order is made:

Order

1. The application for condonation is granted.
2. The review application is dismissed with no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr L.M. Kekana of LMK Attorneys

For the Third Respondent: Mr J. Biggs of Motsoeneng Bill Attorneys