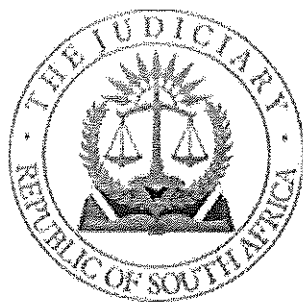




Not reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case no: C316/2024

In the matter between:

**BERGRIVIER
MUNICIPALITY**

LOCAL

Applicant

and

MR R SWARTZ

First Respondent

DR JCP TESSELAAR

Second Respondent

Date of Hearing: 9 September 2025

Date of Judgment: 22 September 2025

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 22 September 2025.

Summary: (Review in terms of section 158(1)(h) of the LRA – review of sanction short of dismissal imposed by chairperson under the South African Local Government Bargaining Council's Disciplinary Procedure Collective Agreement – serious, repeated sexual harassment of a colleague – no rule requiring employer to lead evidence of zero-tolerance or breakdown in trust relationship – sanction short of dismissal reviewed and substituted with summary dismissal).

JUDGMENT

LESLIE AJ

- [1] The first respondent, Mr Swartz, is currently employed by the applicant ("the Municipality"). Following a disciplinary hearing convened in terms of the South African Local Government Bargaining Council's Disciplinary Procedure Collective Agreement ("the DPCA"), in a ruling dated 18 April 2024 the second respondent found Mr Swartz guilty of serious allegations of sexual harassment of a fellow employee.
- [2] In a separate ruling on sanction dated 22 May 2024, the second respondent imposed a sanction short of dismissal. The sanction imposed was a 10-day unpaid suspension together with a final written warning valid for 12 months.
- [3] In making his findings, the second respondent was exercising a mandate, under the DPCA, to make final decisions on behalf of the Municipality. His decisions bind the Municipality *qua* employer.
- [4] This is an application, brought in terms of section 158(1)(h) of the Labour Relations Act 66 of 1995 ("the LRA"), to review and set aside the second respondent's finding on sanction and to substitute it with a sanction of summary dismissal.
- [5] In *Hendricks v Overstrand Municipality* (2015) 36 ILJ 163 (LAC) it was established that this court has jurisdiction to review decisions of this nature on the grounds contained in the Promotion of Administrative Justice Act 3

of 2000 ("PAJA"), alternatively on grounds of legality. In the present matter the applicant argues that the decision on sanction is reviewably unreasonable and irrational.

- [6] The application is opposed by the second respondent.
- [7] When the matter was called on 9 September 2025, Mr Swartz requested a postponement on the basis that he wished to be represented by new legal representatives. The postponement application was was opposed by the applicant. After hearing oral submissions from both parties, I exercised my discretion to refuse the postponement. It appears that Mr Swartz's previous attorneys withdrew on or about 22 August 2025. Mr Swartz stated that he had been in contact with new attorneys from that date. However, his new attorneys had not come on record. Nor had they formally applied for a postponement. They had had ample time, since 22 August, to do so. There was no clear explanation for this laxity. There is no reason why the new legal representatives, acting diligently, could not have adequately prepared to argue the matter¹ within the time available since 22 August. Given that Mr Swartz remains employed by the Municipality, there would have been ongoing prejudice to the Municipality if the matter was delayed any further – bearing in mind that the misconduct in question took place in November 2023. There was also no tender of the Municipality's wasted costs. In short, Mr Swartz did not make out a cogent case for postponement.
- [8] Turning to the merits of the review application, Mr Swartz was originally charged with four counts of misconduct. The first two counts were subsequently abandoned by the Municipality. Mr Swartz pleaded not guilty to all four counts. The second respondent rejected Mr Swartz's version and found him guilty of counts 3 and 4, namely:

"Klagte 3

Dat u op 4 November 2023 gedurende die dag vir Me Emmerende Boois met die raadsvoertuig vervoer het vanuit Porterville na Piketberg, u hand verskeie kere op haar borste en vagina (privaat liggaamsdele) sonder haar

¹ Mr Swartz, assisted by his erstwhile attorneys, had delivered an answering affidavit opposing the review application.

toestemming geplaas en / of haar betas het. U het dit keer op keer gedoen nadat sy u versoek net om dit nie te doen nie. U het egter nie daar gestop nie en liewer haar hand geneem en op u penis geplaas. U genoemde aksies kom neer op seksuele teistering en / of betasting en / of woorde tot die effek.

....

Klagte 4

Dat u op 4 November gedurende die aand vir Me Emmerencia Boois met the raadsvoertuig vervoer het vanuit Piketberg na Porterville, weer haar begin vat, o.a. haar vagina (privaat ligaamsdele) en borste. Nadat sy nee gese en u hand van haar verwyder het, het u weer haar hand op u penis geplaas sodat sy kon voel hoe styf u raak terwyl u vir haar vra "kan jy voel hoe lus ek vir jou?". U genoemde aksies het tot gevolg gehad dat u vir Me Boois seksueel geteister en / of betas het. ..."

- [9] The misconduct committed by Mr Swartz was of an exceedingly serious nature. It was repeated on two occasions on 4 November 2023. Mr Swartz showed no remorse for his conduct. On the contrary, he dishonestly denied it at the disciplinary hearing.
- [10] There is no challenge to the second respondent's findings that Mr Swartz committed the misconduct set out in counts 3 and 4 above.
- [11] The second respondent appears to have appreciated the seriousness of the misconduct in his sanction ruling. However, he declined to impose a sanction of dismissal because the Municipality had not pertinently led evidence on its policy on sexual harassment and the breakdown of the trust relationship between employer and employee. He reasoned as follows:
"No testimony was offered by any level of management as to 'unfair discrimination' view (sic) or 'zero tolerance' view (sic) or 'intolerant position'."
- [12] The second respondent went so far as to find that Mr Swartz deserved to be dismissed and that management had let Ms Boois down, *"but in the absence of guiding testimony by management as highlighted in my*

analyses, I therefore must give you the benefit of doubt and opted (sic) for a strong sanction other than dismissal."

- [13] The second respondent accordingly imposed a sanction of suspension without pay for 10 days, coupled with a final written warning.
- [14] The second respondent clearly erred in finding, on the facts of this case, that the Municipality was under an obligation to lead evidence on its sexual harassment policy and the breakdown of the trust relationship between employer and employee.
- [15] Although the second respondent did not cite any authority for this finding, he may have had in mind the decision of the Supreme Court of Appeal in *Edcon v Pillemer* (2009) 30 ILJ 2642 (SCA), in which the employer was faulted for failing to lead specific evidence on the breakdown the trust relationship.
- [16] Since 2009, however, a number of subsequent authorities have made it clear that there is no immutable rule requiring an employer to lead evidence of a breakdown of trust. There is no such requirement where it is self-evident from the seriousness of the misconduct that the necessary trust relationship between employer and employee has been destroyed.²
- [17] Nor was there a requirement, in this case, for the Municipality to have led evidence that it had a zero-tolerance policy towards sexual harassment. To require this of the Municipality was to place form over substance. As the Labour Appeal Court has held, sexual harassment is *"the most heinous misconduct that plagues a workplace"*.³
- [18] In *Tlou v Commission for Conciliation, Mediation and Arbitration*,⁴ with reference to the above authority, the Labour Court (per Prinsloo J) held as follows:

"The LAC characterised sexual harassment as the most heinous misconduct in a workplace. It is certainly conduct that an employer cannot

² See for example, *Anglo Platinum v De Beer* (2015) 36 ILJ 1453 (LAC) para 19; *Absa Bank Ltd v Naidu* (2015) 36 ILJ 602 (LAC) para 52 and *Impala Platinum Ltd v Jansen* (2017) 38 ILJ 896 (LAC).

³ *Campbell Scientific Africa (Pty) Ltd v Simmers* (2016) 37 ILJ 116 (LAC) paras 18-21.

⁴ (2020) 41 ILJ 1445 (LC) para 46.

tolerate and which arbitrators and this court should not condone or reward. Sexual 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. I find it difficult to accept that there is a need to adduce specific evidence to show that the trust relationship was destroyed in the event where an employee is found guilty of sexual harassment. The destruction of the trust relationship is implied by the seriousness and heinousness of the misconduct." (emphasis added)

- [19] The present case involves persistent, unwanted physical molestation of a colleague. Ms Boois was in a vulnerable position as she was dependent on Mr Swartz for transport to and from the workplace. The record shows that it was not easy for her to testify about the events of 4 November 2023. Despite robust cross-examination calling her version into question, the second respondent ultimately accepted that the sexual harassment had taken place exactly as described by Ms Boois. By corollary, Mr Swartz had been dishonest in his testimony. He showed no remorse. Mr Swartz's personal circumstances could not ever outweigh the above factors, such that a sanction short of dismissal could be justified.
- [20] The sanction imposed by the second respondent (a 10-day suspension, coupled with a final warning) induces a sense of shock.⁵ The sanction ruling was wholly irrational in relation to the evidence before him. It was so unreasonable that no reasonable decision-maker could have arrived at it. As such, the sanction ruling falls to be reviewed and set aside.
- [21] By way of relief, I see no reason why substitution should not be granted. I have the full record of proceedings before me. Once the second respondent's "bad reason"⁶ is dispensed with the outcome is a foregone conclusion. The only reasonable sanction in the circumstances of this case is summary dismissal.

⁵ In the sense described in *Toyota South Africa Motors (Pty) Ltd v Radebe* [2000] 3 BLLR 243 (LAC) para 53.

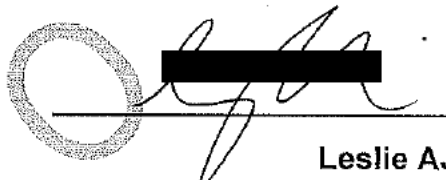
⁶ Namely, his finding that the Municipality was under a duty to lead evidence on its attitude towards sexual harassment and the breakdown in the trust relationship.

[22] The applicant did not press for costs against Mr Swartz and I do not propose to make any order of costs.

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

Order

- [1] The second respondent's finding on sanction ("the sanction finding"), dated 22 May 2024, is reviewed and set aside.
- [2] The sanction finding is substituted with a finding that the first respondent is summarily dismissed.
- [3] There is no order as to costs.



Leslie AJ

Acting Judge of the Labour Court of South Africa

Representatives –

For the applicant:

**T du Preez, instructed by Van Der Spuy &
Partners**

For the first respondent:

In person