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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J1033/24

In the matter between:

EASYBRANCH (PTY) LTD

Appellant

and

SIBIYA, Z N.O.

First Respondent

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

Second Respondent

M[...], J[...]

Third Respondent

Heard: 10 December 2025

Delivered: 02 June 2026

JUDGMENT

SASS AJ

Introduction

- [1] This application concerns an appeal in terms of section 10(8) of the Employment Equity Act No. 55 of 1998 (the EEA) against the Arbitration Award dated 12 October 2025 made by the First Respondent under the auspices of the Second Respondent (the Arbitration Award).
- [2] The First Respondent ultimately made the following findings in the Arbitration Award, that: (i) the Third Respondent was subjected to unfair discrimination on the grounds of sexual harassment; (ii) the Appellant was found to be vicariously liable in terms of section 60(4) of the EEA; (iii) the Appellant pays the Third Respondent the sum of R100 000.00 (one hundred thousand rand); and (iv) the Appellant is to provide proper and thorough training on harassment to all its employees.

Grounds of appeal

- [3] The Third Respondent submitted in his heads of argument that the Appellant does not appeal the sexual harassment finding (or the vicarious liability finding for that matter) and that it only appeals the amount of R100 000.00 awarded to the Third Respondent (the Relief).
- [4] This submission is not correct. It is apparent from the Appellant's notice of appeal and heads of argument that it has appealed against each of the following findings by the First Respondent, that:
- 4.1 the Third Respondent was subjected to unfair discrimination on the grounds of sexual harassment;
 - 4.2 the Appellant is vicariously liable for the abovementioned sexual harassment in terms of section 60 of the EEA; and
 - 4.3 the Appellant pays the Third Respondent the sum of R100 000.00 as a result of such vicarious liability.
- [5] Consequentially, the Appellant's appeal has three legs. I address each of these below in turn having regard to the grounds of appeal raised by the Appellant in respect of each, after setting out the legal principles which are applicable to an appeal of this nature and providing a synopsis of the material background facts/evidence which served before the First Respondent.

The applicable legal principles

Appeal versus review

- [6] This is an appeal against the Arbitration Award and not a review. It is trite that appeals and reviews are determined by different tests applicable to each type of application.
- [7] In essence, an appeal concerns the substantive correctness of the Arbitration Award (i.e., the findings made by the First Respondent therein) whereas a review would concern whether the Arbitration Award is one that no reasonable commissioner could reach.
- [8] The Appellant's grounds of appeal relate to both findings of fact made by the First Respondent as well findings of law made by the First Respondent. The aim of the Appellant's appeal is to set aside the Arbitration Award.
- [9] It is trite that a Court exercising appeal jurisdiction may confirm, amend or set aside the decision that is the subject of the appeal and render any decision that the circumstances may require.
- [10] Insofar as an appeal calls for an interference with the exercise of any discretionary power, as this one does in relation to the amount of compensation which was awarded, it is trite that a Court exercising appeal jurisdiction is not entitled to interfere unless that power was not properly exercised and that any discretionary power is regarded as having not been exercised judicially if the decision-maker: (i) applied it capriciously; (ii) was moved by a wrong principle of law or an incorrect appreciation of the facts; (iii) did not bring their unbiased judgment to bear on the issues; and (iv) did not act for substantial reasons¹.

Characterisation of sexual harassment

- [11] Section 3 of the EEA states:

'This Act must be interpreted-

(a) in compliance with the Constitution;

¹ *Trencon Construction (Pty) Ltd v Industrial Corporation of South Africa Ltd and Another* 2015 (10) BCLR 1199 (CC) (26 June 2015) at paras 82-92

(b) *so as to give effect to its purpose;*

(c) *taking into account any relevant code of good practice issued in terms of this Act or any other employment law; and*

(d) *in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (111) concerning Discrimination in Respect of Employment and Occupation.'*

[12] The Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace² (the Code) was issued in terms of the EEA (effective 18 March 2022) and must therefore be taken into account when the EEA is interpreted.

[13] The Code recognises various forms of harassment, including sexual harassment, that may amount to unfair discrimination.

[14] Section 4 of the Code provides a definition of harassment and reads as follows:

4. WHAT IS HARASSMENT?

4.1 *The term "harassment" is not defined in the EEA. Harassment is generally understood to be –*

4.1.1 *unwanted conduct, which impairs dignity;*

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

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

4.2 *Harassment includes violence, physical abuse, psychological abuse, emotional abuse, sexual abuse, gender-based abuse and racial abuse. It includes the use of physical force or power, whether threatened or actual, against another person or against a group or community.*

4.3 *Harassment against all employees in the workplace is an abuse of power. This Code recognises that harassment particularly affects employees in vulnerable employment who, while covered by labour legislation, may have in practice poor access to the*

2 GN 1890 in GG 46056 of 18 March 2022 issued in terms of Section 54(1)(b) of the Employment Equity

exercise of labour rights such as freedom of association, collective bargaining, decent work, protection from discriminatory practices and access to dispute resolution forums.

Moreover, the intersection of factors such as race, religion, gender, or disability increases the risk of harassment.

4.4 Unwanted conduct

4.4.1 *The criterion that harassment involves unwanted conduct distinguishes acts of harassment from acceptable conduct in the workplace. Two primary issues arise in evaluating whether the harasser/perpetrator knew or should have known that the conduct was unwanted.*

4.4.2 *Firstly, the issue arises as to whether the complainant communicated to the harasser/perpetrator that the conduct was unwelcome. Secondly, this may have occurred verbally or nonverbally and may have been communicated directly or indirectly to the harasser/perpetrator.*

4.4.3 *If there is no such communication, it will still be necessary to examine whether the conduct was of such a nature that the harasser/perpetrator knew or should have known that conduct of the type engaged in, is generally considered to be unacceptable.*

4.4.4 *While violent conduct may amount to harassment, harassment may occur as a result of non-violent conduct. Accordingly, an act or threat of violence is not an essential element of harassment. Likewise, certain acts of harassment may involve a criminal offence and the employer may be under a duty to report certain acts of harassment to the police.*

4.4.5 *Whether or not conduct constitutes harassment, should be assessed on an objective basis from the perspective of the employee who alleges harassment. The primary focus of the inquiry as to whether there has been harassment, is on the impact of the conduct on the employee. However, there may be circumstances in which the perceptions of the person harassed are not consistent with the views of a "reasonable person" in the situation of the complainant. In such circumstances, a person or employer charged with harassment, may seek to establish that the complainant's perceptions are not consistent with societal values reflective of our constitutional ethos.*

4.5 Repeated or serious conduct

4.5.1 *Harassment may occur as a result of a pattern of persistent conduct or a single instance or event. In the case of a single instance, harassment will be present if the*

conduct is of a serious nature. Whether a single instance of conduct will be sufficiently serious to constitute harassment must be determined in light of the event that is the subject of the complaint.

4.5.2 *Harassment, in particular bullying, may be an escalating process in the course of employment in which the complainant ends up in an inferior position and becomes the target of systematic negative social acts.*

4.5.3 *It is not necessary to establish the intention or state of mind of the harasser/perpetrator in order to prove harassment for the purposes of the EEA. The fact that the conduct was calculated or intended to offend the complainant(s) may be an aggravating factor relevant to determining a remedy for the complainant. The intention of a harasser/perpetrator may also be relevant to disciplinary proceedings.*

4.5.4 *The following factors may be relevant to the issue of whether harassment has occurred –*

4.5.4.1 *the context of the harassment;*

4.5.4.2 *the circumstances of the complainant and the impact that the conduct has had on an employee; and*

4.5.4.3 *the respective positions of the harasser/perpetrator and complainant.*

4.6 **Hostile work environment**

4.6.1 *A hostile work environment will be present where conduct related to a prohibited ground impacts on the dignity of one or more employees. This will be present if the conduct has a negative impact on the employee's ability to work and/ or on their personal well-being. This may be the result of conduct of persons in authority such as managers and supervisors or the conduct of other employees.*

4.6.2 *A hostile environment may also be present where an employer should anticipate that employees will be subject to abusive conduct related to a prohibited ground by members of the public, customers or clients and fails to take reasonable steps to protect employees from such conduct.*

4.6.3 *In order to establish the existence of a hostile work environment, it is not necessary to show that the complainants have not received a particular benefit.*

4.6.4 *Harassment is considered to be direct where it is aimed at the complainant for example, violent conduct or abusive language which is directed at the complainant. Harassment may occur indirectly where the conduct, even though not directed at the complainant, has the effect of undermining dignity or threatening safety.*

4.7 **Types of harassment**

- 4.7.1 *Harassment may be the result of physical, verbal, or psychological conduct.*
- 4.7.2 *Physical harassment includes physical attacks, simulated or threatened violence, or gestures (such as raising a fist as if to strike a person or throwing objects near a person).*
- 4.7.3 *Verbal bullying may include threats, shaming, hostile teasing, insults, constant negative judgment, and criticism, or racist, sexist, or LGBTQIA+ phobic language.*
- 4.7.4 *Psychological harassment in the workplace may be associated with emotional abuse and involves behaviour that has serious negative psychological consequences for the complainant(s) such as is often the case with verbal abuse, bullying and mobbing.*
- 4.7.5 *A wide range of conduct in the workplace may constitute harassment. Examples of harassment include, but are not limited to:*
 - 4.7.5.1 *slandering or maligning an employee or spreading rumours maliciously;*
 - 4.7.5.2 *conduct which humiliates, insults or demeans an employee;*
 - 4.7.5.3 *withholding work-related information or supplying incorrect information;*
 - 4.7.5.4 *sabotaging or impeding the performance of work;*
 - 4.7.5.5 *ostracising, boycotting, or excluding the employee from work or work-related activities;*
 - 4.7.5.6 *persecution such as threats, and the inspiration of fear and degradation;*
 - 4.7.5.7 *intolerance of psychological, medical, disability or personal circumstances;*
 - 4.7.5.8 *surveillance of an employee without their knowledge and with harmful intent;*
 - 4.7.5.9 *use of disciplinary or administrative sanctions without objective cause, explanation, or efforts to problem solving;*
 - 4.7.5.10 *demotion without justification;*
 - 4.7.5.11 *abuse, or selective use of, disciplinary proceedings;*
 - 4.7.5.12 *pressuring an employee to engage in illegal activities or not to exercise legal rights; or*
 - 4.7.5.13 *pressuring an employee to resign.*

- 4.7.6 *In practice, a number of different terms are used to describe conduct in the workplace that amounts to harassment. While these terms are not used in legislation, they provide a useful basis for understanding and preventing harassment in the workplace.*
- 4.7.7 *Bullying - where harassment involves the abuse of coercive power by an individual or group of individuals in the workplace. Intimidation - this is intentional behaviour that would cause a person of ordinary sensibilities to fear injury or harm. Workplace bullying may involve aggressive behaviour in which someone repeatedly causes another person injury or discomfort.*
- 4.7.8 *Harassment may be referred to as being "vertical" or "horizontal". Vertical harassment (also known as "tangible or material") involves the use of formal power (i.e. title, position, or supervisory control) or material leverage (i.e. financial, informational, resource or legal) to intimidate, threaten, harass, or harm an employee or to dominate and control the complainant. Vertical harassment refers to harassment between the employer/manager and employee. Horizontal harassment refers to harassment between employees in the same position or on the same level.*
- 4.7.9 *Passive-aggressive or covert harassment may include negative gossip, negative joking at someone's expense, sarcasm, condescending eye contact, facial expression, or gestures, mimicking to ridicule, deliberately causing embarrassment and insecurity, invisible treatment, marginalisation, social exclusion, professional isolation, and deliberately sabotaging someone's dignity, well-being, happiness, success, and career performance.*
- 4.7.10 *Mobbing is a form of harassment by a group of people targeted at one or more individuals.*
- 4.7.11 *Online harassment is harassment which is committed, assisted, or aggravated in part or fully, by the use of information and communications technology such as mobile phones, smart phones, the Internet, social media platforms or email. Bullying when conducted online is referred to as cyber-bullying.*

4.8 **Prohibited grounds**

- 4.8.1 *Harassment of an employee is prohibited in terms of section 6(1) of the EEA, if the harassment is related to one or more prohibited grounds.*
- 4.8.2 *It may also be possible for a person who has been harassed to establish that the conduct was a result of an arbitrary ground, as contemplated by section 6(1) of the EEA.*

[15] Section 5 of the Code specifically relates to sexual harassment and reads as follows:

5. **SEXUAL HARASSMENT**

5.1 *Sexual harassment of an employee is a form of unfair discrimination and is prohibited on the grounds of sex, gender, or sexual orientation. Same sex harassment can amount to discrimination on the basis of sex, gender, sexual orientation and gender-based harassment.*

5.2 **Factors to establish sexual harassment**

Unwanted conduct

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

5.2.2 *Previous consensual participation in sexual conduct does not necessarily mean that the conduct continues to be acceptable to the employee.*

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

5.2.4 *The fact that the complainant does not indicate that the conduct is unwanted does not entail that there has not been sexual harassment, if the conduct is such that the harasser/perpetrator ought to have known it could be regarded as unwanted.*

Nature and extent of the conduct

5.2.5 *The unwanted conduct must be of a sexual nature and includes physical, verbal, or non-verbal conduct, whether expressed directly or indirectly. Conduct amounting to sexual harassment may include –*

5.2.5.1 *physical conduct of a sexual nature, ranging from touching, kissing, to sexual assault and rape;*

5.2.5.2 *strip searching, including by a person of the same sex in the presence of the opposite sex, or with appropriate privacy;*

5.2.5.3 *following, watching, pursuing or accosting of an employee;*

5.2.5.4 *sexual attention, advances or proposals; or other behaviour, whether explicit or implicit, including suggestions, messages, advances, attention or proposals of a sexual nature;*

- 5.2.5.5 *implied or express threats of reprisal or actual reprisal to comply with sexually oriented requests, advances, attention or proposals;*
- 5.2.5.6 *verbal conduct such as innuendos, suggestions, hints, sexual advances, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person's body, 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; or*
- 5.2.5.7 *non-verbal conduct such as unwelcome gestures, indecent exposure and the display or sending by electronic means or otherwise of sexually explicit pictures or objects.*
- 5.2.6 *Sexual harassment may include, but is not limited to, victimization, quid pro quo harassment, sexual favouritism and creating or permitting a hostile working environment (i.e. conduct that creates an intimidating, hostile or humiliating working environment for the recipient).*
- 5.2.6.1 *Victimization occurs where an employee is victimized or intimidated for failing to submit to sexual advances, attention, or proposals or for complaining about gender-insensitive conduct.*
- 5.2.6.2 *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.*
- 5.2.6.3 *Sexual favouritism is a form of quid pro quo harassment, which occurs where a person in authority in the workplace seeks to utilise this power to reward those who respond to his or her sexual advances.*
- 5.2.7 *A single incident of unwelcome sexual conduct may constitute sexual harassment.*

Impact of the conduct

- 5.2.8 *The conduct should constitute an impairment of the employee's dignity, taking into account:*
- 5.2.8.1 *the circumstances of the employee; and*
- 5.2.8.2 *the respective positions of the employee and the perpetrator in the workplace.*

5.3 Test for Sexual Harassment

5.3.1 *Sexual harassment is unwelcome conduct of a sexual nature, whether direct or indirect, that the perpetrator knows or ought to know is not welcome. Sexual harassment may be offensive to the complainant, make the complainant feel uncomfortable or cause harm or inspire the reasonable belief that the complainant may be harmed. Sexual harassment may interfere with the work of the complainant although it need not necessarily do so. Sexual harassment violates the rights of an employee and constitutes a barrier to equality in the workplace.*

5.3.2 *The test for establishing whether there has been sexual harassment takes into account the following factors:*

5.3.2.1 *whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;*

5.3.2.2 *whether the sexual conduct was unwanted or unacceptable;*

5.3.2.3 *the nature and extent of the sexual conduct; and*

5.3.2.4 *the impact of the sexual conduct on the employee.*

[16] In terms of the EEA read with the Code, sexual harassment of an employee is a form of unfair discrimination and is prohibited.

Vicarious liability in terms of section 60 of the EEA

[17] Section 60 of the EEA states:

'Liability of Employers

60(1) *If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.*

60(2) *The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.*

60(3) *If the employer fails to take the necessary steps referred to in subsection (2), and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.*

60(4) *Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.'*

Relevant background facts/evidence

Common cause facts/evidence

- [18] On or about 10 July 2024, Angela Evertse-Brown (Ms Evertse-Brown) made a joke about the size of the Third Respondent's genitals in front of a number of other employees of the Appellant, all of whom were female employees (the other employees).
- [19] Whilst she and other employees were busy cleaning a stationary cupboard, she came across fingerettes. She called the Third Respondent over to take some of the fingerettes.
- [20] When he came over, she jokingly said that the fingerettes were as big as the Third Respondent's "mthondo" (i.e., his penis) and gave the fingerettes to him. All the employees in attendance laughed.
- [21] At that time, Ms Evertse-Brown was the Appellant's warehouse manager and she supervised the Third Respondent (employed by the Appellant as a warehouse attendant).
- [22] The joke was an isolated and once off event. The parties were also in agreement that the joke may be described in a variety of ways, namely - untoward, unfortunate, crude and of a sexual nature.
- [23] Later, on the same day (10 July 2025), the Third Respondent expressed his dissatisfaction directly to Ms Evertse-Brown about what she had said. Ms Evertse-Brown immediately and without reservation apologised (which apology she repeated on more than one occasion subsequently).
- [24] The Third Respondent was not at work on the next day (on or about 11 July 2024). When Ms Evertse-Brown called him to ascertain why he was not at work, he informed her that he was dealing with what she had said to him the previous day (i.e., the joke that she had made).

[25] The Appellant convened a grievance meeting presided over by an independent chairperson to try and resolve the matter between the Third Respondent and Ms Evertse-Brown, which the Appellant dealt with as a grievance (i.e., something that the Third Respondent was dissatisfied about).

[26] During the grievance meeting, Ms Evertse-Brown: (i) apologised for making the joke; (ii) acknowledged that she overstepped the mark and behaved inappropriately as a manager; and (iii) undertook not to repeat this conduct. There was no indication that Ms Evertse-Brown's apology at the grievance meeting as well as on or about 10 and/or 11 July 2024, was not *bona fide* and sincere.

[27] The grievance meeting chairperson made the following three recommendations (as set out in his 'Recommendation' document dated 23 July 2024, which forms part of the Record of the Arbitration Proceedings (at pages 79 to 81) –

5.1 *The chairperson found that the grievant accepted the terms of the resolution of the grievance and as such the chairperson found the grievance resolved subject to the agreed way forward;*

5.2 *The chairperson also noted potential misconduct committed by the respondent and grievant and recommends that the Company sets up a general meeting and / or message to all employees regarding appropriate office behaviour and Company policies and procedures; and*

5.3 *The chairperson also recommends that the Company sets in place an unbiased forum and procedure where employees can submit grievances without the influence of management and these grievances get properly investigated with appropriate actions taken.*

[28] The chairperson's Recommendation document also stated the following in its final paragraph – "*The grievant is further advised that he may refer a dispute to the CCMA within ninety (90) days*".

[29] Notwithstanding the chairperson's Recommendation dated 23 July 2024 and any conduct on the part of the Third Respondent pursuant thereto, the Third Respondent referred a dispute to the CCMA on or about 5 August 2024 (the CCMA dispute).

[30] During the relevant conciliation proceedings, the true nature of the dispute between the Appellant and the Third Respondent was identified, being an alleged unfair discrimination dispute on the ground of sexual harassment. The CCMA dispute proceeded on that basis and culminated in the Arbitration Award.

Disputed facts/evidence

Was the joke degrading

[31] Whilst the parties were in agreement that the joke may be described in a variety of ways, namely - untoward, unfortunate, crude and of a sexual nature, the Third Respondent further contended that the joke was also degrading. I could not find any evidence of this being common cause though.

[32] The joke, however, appears to be *prima facie* degrading because it was made in the presence of other staff members (all female staff), related to the Third Respondent's penis and the size thereof, and Ms Evertse-Brown and the other staff members laughed at the Third Respondent.

Any prejudice / adverse impact suffered by the Third Respondent as a result of the incident

[33] The Appellant contended that the Third Respondent appears to have given no indication during his evidence at the arbitration proceedings of any prejudice / adverse impact he may have suffered as a result of the incident.

[34] However, the Third Respondent clearly did not take kindly to the joke seeing that:

34.1 he expressed his dissatisfaction directly to Ms Evertse-Brown on the day that it happened;

34.2 he was not at work the next day because of the joke;

34.3 he continued to convey his dissatisfaction about the joke on and after 12 July 2024; and

34.4 he contended that he felt humiliated by the joke.

[35] The remark reduced the Third Respondent's dignity as an adult and made him look like he was undignified, particularly because all those who heard the remarks were laughing at him. These remarks were describing his private parts in front of all who were present, all of whom were females.

Was the matter resolved at the grievance meeting

- [36] The Appellant contended that the matter (i.e., the grievance) was resolved in the grievance meeting, as the Third Respondent: (i) accepted Ms Evertse-Brown's apology; and (ii) did not appear to suggest an alternative basis upon which his complaint could or should have been resolved.
- [37] In relation to the chairperson's recommendations, the Third Respondent agreed with the Appellant's propositions put to him during the arbitration proceedings that the Appellant had given effect to the chairman's three recommendations.
- [38] However, it is apparent from what was put to the Third Respondent in this regard during the arbitration proceedings and his subsequent responses as reflected in the transcript of the arbitration proceedings (Record: page 190, line 11 to page 195, line 19) that the Third Respondent had not agreed that the matter/grievance was resolved if the Appellant gave effect to the three recommendations.
- [39] According to the Third Respondent, the three recommendations was the Appellant's proposals on the matter/grievance could be resolved and the chairperson gave effect to that even though the Third Respondent indicated that during the grievance meeting he had come up with his own 'issue' (or way to address the matter/grievance) that Ms Evertse-Brown be dealt with according to the Appellant's disciplinary policy.
- [40] It appears that the Third Respondent wanted the Appellant to take disciplinary action against Ms Evertse-Brown and that the matter/grievance would be resolved in that way. When asked why the chairperson's Recommendation document makes no mention of this, the Third Respondent stated that the chairperson compiled the document and it was up to him what was stated therein.
- [41] It is apparent to me from this that the Third Respondent was dissatisfied with how the Appellant dealt with his matter/grievance and with the outcome of the grievance meeting (i.e., the three recommendations as a resolution).
- [42] This subsequent dissatisfaction is foreshadowed by the chairperson indicating in his Recommendation that the Third Respondent is further advised that he may refer a dispute to the CCMA within ninety (90) days. This would be an odd statement to make if the recommendations had been agreed to by the Third Respondent as the way in which the matter/grievance was resolved.

[43] The referral of the CCMA dispute on or about 5 August 2024, less than two weeks after the grievance meeting, further fortifies my view that in the Third Respondent's assessment, the matter (i.e., the grievance) was not resolved by the grievance meeting.

[44] In paragraphs 45 to 108 below, I set out the respective submissions of the Appellant and the Third Respondent in respect of each leg of the appeal.

First leg of the appeal – Whether or not the Third Respondent was subjected to unfair discrimination on the grounds of sexual harassment

Appellant's submissions – first leg of the appeal

[45] The Code describes 'unwanted' and 'unwelcome' as synonyms. The Court in *Amathole District Municipality v Commission for Conciliation, Mediation and Arbitration and Others*³ dealt with clause 4 of the Code and said that:

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

[46] In *Bandat v De Kock and Another*⁴ the Court held:

'...central to the existence of sexual harassment is conduct that must be 'unwelcome'. If the conduct is not unwelcome, it cannot be sexual harassment. The determination of whether conduct is 'unwelcome' is an objective one, because conduct that may be subjectively unwelcome to one person may not be unwelcome to another...'

[47] As to what may be considered to be 'unwanted', this is also specifically dealt with in the Code, in particular in clauses 5.2.1 to 5.2.4, where it is stipulated that 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. Further, previous consensual participation in sexual conduct does not necessarily mean that the conduct continues to be welcome. Next, 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

3 (2023) 44 ILJ 109 LAC at para 56.

4 (2015) 36 II-J 979 (LC) at para 72.

a co-worker, superior, counsellor, human resource official, family member or friend. And finally, even if the complaint does not indicate the conduct is unwanted, it does not entail that there has been no sexual harassment, if the perpetrator ought to have known that it could be regarded as unwanted.

[48] Applying all of the aforesaid provisions of the Code, a distinct structure for establishing whether sexual harassment exists unfolds.

48.1 First, it must be objectively considered if the conduct is considered to be unwanted.

48.1.1 The proper point of departure is establishing whether the perpetrator of the conduct is told that it is unwanted.⁵ This conveying to the perpetrator that the conduct is unwanted is not limited to specific verbal articulation made directly to the perpetrator, but could include the complainant pursuing a complaint or grievance to the employer's management or third parties about the conduct.⁶⁷ Further, and even if no such complaint or grievance is raised, the conduct may still be considered to be sexual harassment, provided a proper explanation is provided by the complainant for not raising the complaint earlier"

48.1.2 The nature of the behaviour may also be such that the perpetrator should be able to reasonably assess for himself or herself that it would be unwanted, considering the reaction from the complainant, which should prompt the perpetrator of his or her own accord to not repeat it again. If the perpetrator then persists with the behaviour, it could then constitute sexual harassment, even in the absence of a specific complaint.

48.1.3 The complainant could also indicate to the perpetrator that the conduct is unwanted by way of non-verbal reactions. Examples of these reactions are where the complainant turns away or walks away, physically obstructs the approach of the perpetrator or pushes the perpetrator away, deliberately avoids or obstructs contact or interaction with the perpetrator, or engages third parties to 'run interference' between the perpetrator and the complainant"

⁵ See clause 5.2 of the Code.

⁶ *Bandat* (supra) at para 74.

⁷ *University of Venda* (supra) at para 66; *Makoti v Jesuit Refugee Service SA* (2012) 33 ILJ 1706 (LC) at para 44.

⁴⁴ *Gaga v Anglo Platinum Ltd and Others* (2012) 33 ILJ 329 (LAC) at para 41 ; *Mokoena and Another v Garden Art Ltd and Another* (2008) 29 ILJ 1196 (LC) at para 47.

- 48.1.4 The actual dynamic and nature of the relationship between the perpetrator and the complainant, is an important consideration in assessing whether conduct by the perpetrator could be seen to be unwanted.⁴⁶ This dynamic must not only be considered within the context of the employment relationship, but also at a personal level. It may well be that this dynamic justifies and reasonably explains a situation where there is no complaint about the conduct, despite such conduct being, on face value, conduct worthy of complaint. In simple terms, was there in existence, what the Court in *Campbell Scientific Africa (Pty) Ltd v Simmers and Others*⁴⁷ called a substantial 'power differential', which made exploitation by way of sexual harassment possible"
- 48.2 Second, and once it is determined that the conduct is unwanted, it must be next decided whether the conduct is of the kind that could be seen to be sexual harassment (i.e., the nature and context of the conduct).
- 48.2.1 Clauses 5.2.5 and 5.2.6 of the Code provide the necessary guidance in this regard.
- 48.2.2 In this context, the unwanted conduct must be of a sexual nature, which can take the form of physical, verbal or non-verbal conduct, whether expressed directly or indirectly.⁴⁹ Applicable in casu would be clause 5.2.5.6, which provides that verbal conduct in the form of sex related jokes or insults could be seen to be sexual harassment.
- 48.3 Third, it would also have to be considered what the impact of this conduct was on the Third Respondent.
- 48.3.1 Clause 5.2.8.1 provides that the conduct should constitute an impairment of the employee's dignity, taking into account: (i) the circumstances of the employee; and (ii) the respective positions of the employee and perpetrator in the workplace.
- 48.3.2 In this context, an important consideration is whether a hostile working environment was created.

[49] Whilst it is true that where it comes to the sanction to be meted out to perpetrators of sexual harassment, as a general principle no quarter should be given [as the Court said in *Campbell Scientific Africa (Pty) Ltd v Simmers and Others*⁸ - "... the sanction imposed serves to send out an unequivocal message that employees who perpetrate

⁸ (2016) 37 ILJ 116 (LAC) at para 35

sexual harassment do so at their peril and should more often than not expect to face the harshest penalty.'], care should be taken that employers do not adopt the kind of approach tantamount to overreaction where it comes to any possible sexual harassment transgressions.

- 49.1 It should be remembered that the real and objective facts relating to harassment must always be established by the employer, and that mere allegations, feelings and opinions of people should not suffice.
- 49.2 One must also always bear in mind that an alleged perpetrator of sexual harassment is still entitled to be fairly treated.
- 49.3 An over-zealous pursuit of any conduct that may remotely be seen to be sexual harassment defeats the very objective of fair and even-handed discipline in the workplace⁹. It could also place an undue strain on the employment relationship, not only between employer and employee, but amongst co-employees.

[50] The Appellant conceded that the first element of finding that sexual harassment may exist, was present. The Appellant made this concession in the context of and with reference to the facts *in casu*, that: (i) it can be said that the joke made by Evertse-Brown towards the Third Respondent was unwanted, or as the Code also calls it, 'unacceptable'; (ii) the Third Respondent's reaction to the joke certainly speaks to it being unwanted / unacceptable to him; and (ii) the joke is the kind of joke that could, objectively considered, lead to a conclusion that it would be unwanted to a male recipient such as the Third Respondent.

[51] Notwithstanding this concession, the Appellant contended that the other requirements/elements of finding that sexual harassment may exist, was not present for the following reasons:

51.1 First, the joke by Ms Evertse-Brown was one single incident, that never happened before and never happened again.

51.1.1 Although it is true that a single incident can constitute sexual harassment, the fact that there is only a single incident, considering the particular conduct in a

⁹ Compare *Duncanmec (Pty) Ltd v Gaylard N.O. and Others* (2018) 39 ILJ 2633 (CC) at para 48, where the Court held, with regard to racism, which falls within the same heinous category of misconduct as sexual harassment, that: '*There is no principle in our law that requires dismissal to follow automatically in the case of racism. What is required is that arbitrators and courts should deal with racism firmly and yet treat the perpetrator fairly....*'

particular case, may still be an important consideration in establishing that sexual harassment does not exist.

51.1.2 For example, in *Mokoena and Another v Garden Art Ltd and Another*¹⁰, the Court dealt with the issue of a once off incident of sexual harassment which was not repeated, and held:

'It seems to me that where the employer was aware of the sexual harassment and it was brought to its immediate attention and he failed to take steps to eliminate it and a further act of sexual harassment took place, the employer cannot escape liability in terms of s 60 of the EEA Where there is one incident of sexual harassment, which is brought to the attention of the employer immediately after the incident, an employer will not be held liable in terms of s 60 of the EEA The aggrieved employee may then have to consider a different basis to hold the employer liable either in terms of common law etc. I do not know how an employer would be able to take reasonable steps to ensure that the employee would not act in contravention of the EEA in the second example that I have given..'

51.2 Second, and *in casu*, there was simply no evidence nor indication that Ms Evertse-Brown had a propensity towards such kind of conduct or that the Third Respondent had experienced anything similar in the past.

51.3 Third, the joke had a particular context, even though it was inappropriate. At the time of the event, the Third Respondent did nothing to indicate his dissatisfaction and even laughed at the joke along with the others.

51.4 Fourth, there is no indication that Ms Evertse-Brown acted in malice or had some unacceptable or hostile intention towards the Third Respondent.

[52] The joke was an inappropriate single workplace incident, which is not the kind of incident that can serve to establish sexual harassment, and the First Respondent had no regard to any of these considerations and effectively stopped the enquiry at the point of deciding the conduct was unwanted to the Third Respondent – which was materially an error.

[53] In addition, the nature of the joke cannot be ignored.

¹⁰ (2008) 29 ILJ 1196 (LC) at para 42

- 53.1 It is not lewd or sexually provocative, nor was it uttered in a sexual context. It was simply a statement which compared the size of a finger head to the third respondent's penis.
- 53.2 It is clearly intended, even on face value consideration thereof as something in jest and is not sexual in nature.
- 53.3 In short, it is not sexual, nor sexually charged. In fact, Ms Evertse-Brown presented undisputed testimony that she never intended the joke to be insulting towards the third respondent.

[54] Another critical issue to consider is that the Third Respondent did not think to immediately raise a grievance with the Appellant's Human Resources department or with Ms Evertse-Brown's superior.

- 54.1 Instead, he considered it appropriate to rather inform her directly that he felt insulted by what she said, and himself suggested that they needed to talk about it.
- 54.2 This is hardly the reaction of a person who feels so insulted and aggrieved to the extent that a harassment case based on discrimination can be inferred. Then and added to that, Ms Evertse-Brown immediately answers, unreservedly apologised, acknowledged her wrongdoing and stated that she never intended to insult the Third Respondent.
- 54.3 The Third Respondent does not reply to contradict this, which would have been expected if he believed that the situation was not remediable by way of the apology offered by Ms Evertse-Brown.
- 54.4 And finally, the Third Respondent, despite being compelled to do so under his contract of employment, never actually files a formal grievance.

[55] All of this was completely ignored by the First Respondent.

[56] One final consideration is that the Third Respondent never pointed to any prejudice or adverse consequences / impact he suffered as a result of the joke.¹¹

- 56.1 He never indicated that it was impossible for him to continue to work with Ms Evertse-Brown. There is not even a suggestion of a hostile working environment being created, and his actual work was not impacted at all.

¹¹ Compare *Bandat supra* at para 84

- 56.2 Added to this, the Third Respondent never testified that his fellow employees or managers felt differently or somehow less towards him as a result of this.
- 56.3 The Third Respondent's only complaint, in the face of being prompted to explain what his actual prejudice was, was to say that that as far as he was concerned, Ms Evertse-Brown overstepped the mark.
- 56.4 Whilst that may be true, it is entirely insufficient to establish the kind of prejudice that could justifiably lead to a conclusion that sexual harassment, as contemplated by the Code, exists.
- 56.5 In short, and on the facts, the joke made simply did not have had any adverse impact on the Third Respondent.

Third Respondent's submissions – first leg of the appeal

- [57] An act of sexual harassment is demeaning to the person who is the victim of such undignified act. The recipient of this act or behaviour is left undignified by the perpetrator. The victim is stripped of his humanity and integrity. It is worse when this type of behaviour is meted out in front of others.
- [58] This kind of behaviour takes away the victim's self-respect. It is worse when it is said in front of others who find it funny without thinking about the victim's feelings. This type of behaviour violates the recipient's right to integrity of the body and personality. Acts of sexual harassment whether committed through acts or through words are degrading to a person who is the target of these acts.
- [59] It is for these reasons that the legislature has put measures in place to curb this type of behaviour. The legislature had insight into how this behaviour can affect an individual. Hence the legislature put preventative measures in place to curb or even prevent such behaviour from taking place in the workplace, through the EEA (which was promulgated for these reasons).

Second leg of the appeal – Whether or not the Appellant is vicariously liable for the abovementioned sexual harassment in terms of section 60 of the EEA

Appellant's submissions – second leg of the appeal

Requirements for vicarious liability

[60] In applying the provisions of section 60 of the EEA, the Court in *Potgieter v National Commissioner of the SA Police Service and Another*¹² had the following to say:

'An employer will be held liable if it is shown in terms of s 60 of the EEA, that:

- (i) The sexual harassment conduct complained of was committed by another employee.*
- (ii) It was sexual harassment constituting unfair discrimination.*
- (iii) The sexual harassment took place at the workplace.*
- (iv) The alleged sexual harassment was immediately brought to the attention of the employer.*
- (v) The employer was aware of the incident of sexual harassment.*
- (vi) The employer failed to consult all relevant parties or take necessary steps to eliminate the conduct or otherwise comply with the provisions of the EEA.*
- (vii) The employer failed to take all reasonable and practical measures to ensure that employees did not act in contravention of the EEA.'*

[61] In *AK v Right to Care NPC*¹³, the Court succinctly summarized the enquiry as follows:

'Notably, s 60 creates a statutory vicarious liability for employers for conduct of an employee, while at work, that contravenes any provision of the EEA. Therefore, the issues for determination are three. First, whether the alleged sexual harassment had been immediately reported to the respondent. Second, upon being notified of the discriminatory conduct, the next enquiry turns on whether the respondent took necessary steps to eliminate the alleged discriminatory conduct in consultation with the relevant parties. Third, to escape vicarious liability, the respondent must show

¹² (2009) 30 ILJ 1322 (LC) at para 36. This dictum was relied on in *Liberty Group Ltd v M* (2017) 38 ILJ 1318 (LAC) at para 38

¹³ (2023) 44 ILJ 2200 (LC) at para 29

that it did all reasonably possible to create an environment that is free from sexual harassment.'

[62] In *Moatshe v Legend Golf and Safari Resort Operations (Pty) Ltd*¹⁴, the Court held as follows:

'Unpacking the provisions of s 60, and in order for an applicant to succeed with a compensation and/or damages claim against his or her employer in terms of s 50(2)(a) and (b) of the EEA, such applicant has the evidentiary burden to show the existence of the following:

29.1 It must be shown that discriminatory conduct as contemplated by chapter II of the EEA exists.

29.2 This conduct must have been committed by an employee of an employer, towards another employee of the same employer.

29.3 This conduct must have been immediately brought to the attention of the employer.

29.4 Despite this conduct having been brought to the attention of the employer, the employer must have failed to consult all the parties and then have failed to take necessary steps to eliminate and/or remedy the conduct complained of.

29.5 If applicable, the employer had not taken all reasonably practicable steps beforehand to ensure that its employees would not commit such kind of conduct.'

Requirements of section 60(1) of the EEA have not been satisfied – no immediate reporting to the employer

[63] Whilst it can be accepted that at least, the Third Respondent immediately complained about his alleged sexual harassment to the perpetrator herself. It must however be said, as a matter of common sense and logic, that complaining to the perpetrator is not reporting the incident to the employer. In fact, there is no evidence of the Third Respondent actually having reported the matter to the Appellant's responsible management, by way of the grievance procedure or otherwise. This is especially important, considering the Third Respondent's contractual obligation to follow the grievance process if he is dissatisfied about anything in the workplace. It appears from the Third Respondent's own version that the grievance meeting was convened

¹⁴ (2015) 36 ILJ 1111 (LC) at para 29

because he informed the Appellant's Human Resources department that he was referring the matter to the CCMA, and not because he lodged a formal complaint on the basis of reporting the matter to management and wanting management to deal with it.

[64] As held in *National Union of Metalworkers of SA and Another v Passenger Rail Agency of SA*⁵⁸: 'As I see it, to my mind the reporting must be to an employer through the mechanism in its adopted policy. One thinks of a situation where an employee simply confides in another employee, as Limo did to Connie and Le Roux. In such a situation, it cannot, in my view, be said that the alleged conduct was brought to the attention of an employer. It must be remembered that the bringing to the attention of an employer serves a statutory purpose. That purpose is to enable an employer to eliminate the alleged conduct...'

[65] Consequently, it can be said that the requirement of 'reporting' his alleged sexual harassment to the Appellant as his employer was not satisfied. Thus, the claim should fail on the basis that section 60(1) has not been complied with.

Compliance with section 60(2) of the EEA – the employer consulted all relevant parties and took the necessary steps to eliminate the alleged conduct and comply with the EEA

[66] The claim must also fail on the basis of the application of section 60(2). It was common cause that immediately following the event on 10 July 2024, the Appellant was at least aware of the event. After the Appellant became aware of the incident, it did the following about it: (i) firstly, and applying the Third Respondent's own version, there was a meeting convened with the Appellant's Human Resources department to discuss the matter (thus consulting the Third Respondent about the incident), where, according to the Third Respondent, the matter could not be resolved, and he said he would refer it to the CCMA; (ii) secondly, and in response to this, the Appellant then convened a grievance meeting before an independent chairperson, specifically as contemplated by the grievance procedure in the IR/HR Policy Manual, which is a process specifically designed to deal with such complaints. There is no suggestion that a proper and fair grievance hearing was not conducted. The Third Respondent and Ms Evertse-Brown were present at the grievance meeting, and the matter was actually mediated by the chairperson. In fact, the evidence shows that the grievance chairperson dealt with the complaint in a conscientious, fair and proper manner, and a proper consultation took place; (iii) thirdly, considering the nature of the complaint, on the undisputed facts, the three grounds applied by the chairperson in resolving the

matter was justified, and reasonable; (iv) fourthly, there is no suggestion nor evidence that the Appellant could and should have done anything else; (v) fifthly, actually and properly considered, the evidence shows that the grievance meeting resolved the complaint and the Third Respondent accepted Ms Evertse-Brown's apology; and (vi) sixthly, the grievance chairperson recommended that the Appellant train its employees on the application of the grievance procedure so that they understood their rights, and on the undisputed evidence, this was also done.

[67] Consequently, it is difficult to understand what more the Appellant could have done. The First Respondent's reasoning appears to be based on his own personal views that the matter should have been differently dealt with and resolved, and that Ms Evertse-Brown needed to be disciplined. This approach is unfounded, and completely in error. The enquiry is not whether the Appellant could have acted differently. The enquiry is if the Appellant acted reasonably.

[68] In *Mokoena and Another v Garden Art Ltd and Another*¹⁵, the Court stated that caution must be taken not to adopt an armchair critic approach, but an objective assessment must be made of all of the steps taken by the respondent as a whole, to ascertain if these steps were reasonable to the extent of avoiding liability accruing to the respondent in terms of section 60 of the EEA.

[69] The Appellant clearly did so, especially considering there was no suggestion by the Third Respondent himself as to what the Appellant could have done differently. The Appellant immediately dealt with the complaint, even in the absence of a proper grievance being lodged and resolved it in a manner that was actually palatable to all parties. The First Respondent's approach was entirely unfounded and a misdirection.

[70] In *Amathole District Municipality supra*, the Court held as follows, which can equally apply *in casu*:¹⁶

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

¹⁵ (2008) 29 ILJ 1196 (LC) at para 47

¹⁶ Also compare Moatshe (*supra*) at para 34

that she had been sexually harassed by Mr Fredericks, there was no evidentiary basis to conclude that the appellant was liable in terms of s 60 of the Act to compensate the employee...¹⁷

[71] In the context of an employee that perpetrated an act of sexual harassment not being dismissed by an employer, and it being contended that this rendered the employer liable in terms of section 60(4), the Court in *Right to Care supra* had the following to say¹⁷:

'I don't agree with the submission by the applicant's counsel that such a sanction is contrary to the zero-tolerance stance against sexual harassment adopted by the respondent. Ordinarily, the appropriateness of the sanction is informed by the grossness of the transgression and progressive discipline tenet, I accept Mr N's evidence that Mr Molele's perverted conduct was swiftly weeded out as soon as it was brought to the attention of the respondent in accordance with the sexual harassment policy.'

[72] In the context of the First Respondent's intimation that Ms Evertse-Brown should have been disciplined and perhaps dismissed, this conclusion is inappropriate and wrong.

Compliance with section 60(4) of the EEA need not be established

[73] Once it is established that the requirements of section 60(1) have not been satisfied and / or section 60(2) has been complied with, that must be the end of the matter. It is not necessary for the Appellant to also establish compliance with section 60(4).

[74] This is evident from the following reasoning in *Shoprite Checkers (Pty) Ltd v JL and Others*¹⁸: '*...Section 60 should therefore be interpreted as meaning that the employer becomes liable in terms of section 60(3) if one of its employees contravenes a provision of the EEA, while at work, in respect of another employee, and, despite its immediate reporting, the employer fails to take the necessary steps to eliminate the conduct. It is only upon this failure that the conduct of the primary perpetrator is assigned to the employer. However, notwithstanding the employer failing to act as contemplated in section 60(2) of the EEA section 60(4) provides another "escape route" for the employer if it can show that "it did all that was reasonably practicable to ensure that the employee would not act in contravention of" the EEA. Put differently,*

¹⁷ Para 48

¹⁸ (2022) 43 ILJ 903 (LC) at para 70. See also para 71, where the Court added: '*...the failure of an employer to take all reasonable practicable proactive steps to ensure employees do not contravene the EEA, is not a separate basis for holding it liable for sexual harassment or other acts of unfair discrimination, but if the employer has done so it can raise this as a defense....'*

section 60(4) will therefore only become a point of discussion if the employer has failed to meet the requirements of section 60(3), and section 60(4) is not an additional requirement that must be met before the employer can escape liability.'

[75] The issue of the application of section 60(4) is where the First Respondent finally exits the rails. She continued to consider, as a separate requirement, that section 60(4) must also be proven, and that the Appellant took no further steps to ensure that the harassment does not happen again in the future. Considering that the Appellant complied with section 60(2), this entire consideration is irrelevant.

[76] It can perhaps just be emphasised in this context that the chairperson in the grievance hearing recommended training on the application of the grievance procedure, as the proper means to deal with such complaints, which training in fact happened.

Suspension and removal from the workplace are not automatic

[77] In the judgment of *Potgieter supra*, and in relation to the reasoning of the First Respondent, the court dealt with a similar claim to the claim of the Third Respondent *in casu*. By way of comparison, the issues raised by the employee in that case were *inter alia* that the employer failed by not removing the perpetrator from the workplace after the incident, that the sanction imposed on the perpetrator was too lenient, and the employee was not properly assisted.

[78] The Court dealt with these causes of complaint as follows¹⁹:

'It may well have been prudent for Mafodi to have been suspended or removed from the workplace and transferred to another workplace, however there is no general rule that suspension or removal from the workplace is automatic in every sexual harassment complaint. In my view the nature and extent of the sexual harassment may indicate whether suspension or removal from the workplace of the perpetrator was a necessary step which the employer ought to have taken...'

Summary

[79] In summary, and even accepting sexual harassment occurred in this instance, which it actually did not:

79.1 it was an isolated incident and the Third Respondent never properly reported his complaint to the Appellant as employer as required by section 60(1);

¹⁹ At para 53

- 79.2 the Appellant also complied with section 60(2) as -
- 79.2.1 considering the incident itself, the joke complained of was not sexual in nature, nor sexually charged;
 - 79.2.2 considering that the Appellant did have knowledge of the complaint, it, in a *bona fide*, justified and fair manner, sought to convene a grievance meeting before an independent third party to attempt to resolve the matter, in which the Third Respondent fully and willingly participated;
 - 79.2.3 this grievance meeting led an agreed resolution, which included Ms Evertse-Brown once again submitting an apology and the Third Respondent accepting the apology;
 - 79.2.4 the Third Respondent never suggested alternative means by which the complaint should have been dealt with; and
 - 79.2.5 there was also no adverse impact of any kind towards the Third Respondent as a result of what had transpired.

[80] In light of the above, the Appellant cannot be held vicariously liable for any conduct on the part of Ms Evertse-Brown and the appeal stands to be upheld and the Arbitration Award set aside [on the basis that the Third Respondent failed to satisfy the requirements of section 60(1) of the EEA and even if he did, the Appellant had complied with section 60(2) of the EEA].

Third Respondent's submissions – second leg of the appeal

[81] The EEA was also promulgated in order to guide the employer on how to deal with sexual harassment matters. The EEA encourages employers to take appropriate action in order to prevent acts of sexual harassment. However, where an employer fails to implement the guidelines contained in the EEA, such an employer would attract penalties.

[82] Section 60(1) to (3) of the EEA makes it clear that an employer shall be held responsible for the acts of the harasser. It is clear that in this case, Ms Evertse-Brown made crude demeaning remarks of sexual orientation against the Third Respondent. A grievance meeting was held and recommendations were made. The Appellant failed to implement these recommendations - one of which was to ensure that such acts are not repeated.

- [83] The Appellant did not implement the recommendations, and this shows that it took this matter lightly even though the dignity and reputation of the Third Respondent was tarnished by Ms Evertse-Brown.
- [84] Ms Evertse-Brown was a senior employee and the manager of the Appellant. She was required to act in an exemplary manner. However, her behaviour was not exemplary before other employees. She demeaned the Third Respondent in front of others. The Appellant failed to realize how serious this was and failed to implement the grievance procedure because it took this matter lightly.
- [85] This amounted to a promotion of crudeness and discrimination in the workplace. Therefore, the Appellant must not complain when its own failures led to the First Respondent issuing the harsh penalty.
- [86] In the matter of *Motsamai v Everite Building Products (Pty) Ltd*²⁰, the court stated at paragraph 20:

"I now turn to the appellant's complaint that the respondent should not have held a disciplinary hearing but should have attempted to conciliate between Mbisi and him because that is what was required in terms of the respondent's disciplinary code. 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 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. In the circumstances, I believe, to force conciliation or mediation between the perpetrator and the victim further compounds the wrong. Therefore, unless the victim agrees to any other form of resolution of a complaint of sexual harassment the employer should hold a disciplinary hearing against the perpetrator. A disciplinary hearing must however be proceeded with, with the victim's cooperation, where the victim, having raised the complaint, is uncomfortable with proceeding with any process whether formal or informal the employer must find a way to deal with the issue lest he be found culpable for failing to deal with the matter. In the latter case some form of counselling for the victim might be appropriate if the employer is of the means of providing it".

20 (2011) 2 BLLR 144 (LAC) at paragraph 20

[87] The Appellant ignored the Third Respondent's dissatisfaction with how it dealt with his grievance. The Third Respondent informed the Appellant that he wanted the grievance procedure to be followed in relation to his grievance. The Appellant ignored this – contrary to the judgment in *Motsamai supra* which confirmed that an employee cannot ignore its policies or the concerns of the victim.

[88] The Court in *Motsamai* further stated:

“In this matter the victim wanted a disciplinary hearing: in such an instance it would have been improper for the respondent to proceed with a process other than a disciplinary hearing. The fact that the respondent's disciplinary code provided for conciliation does not mean that the respondent is inextricably bound to follow that process. The procedure must be chosen by the employer but it must do so in consultation with the victim. In the circumstances there are no grounds to interfere with the Commissioner's finding that the dismissal was procedurally fair, it is a decision that a reasonable Commissioner could properly arrive at”.

[89] The First Respondent took this into account that the Appellant was dismissive of the Third Respondent's dissatisfaction.

[90] In the matter of *Mokone v Sahara Computers (Pty) Ltd*²¹ the court held at page 7 that:

“In my view the fact that her complaint to her manager did not adequately address the sexual harassment, grounds an inference that the defendant's management and disciplinary structures were insufficient to do so. Put differently, the defendant should have had management and disciplinary structures that would immediately and effectively have dealt with the plaintiff's complaint. For instance, Stenekamp should have been obliged immediately to have referred the complaint to HR. There is no doubt that it reasonably was within the defendant's means to create the necessary structures. In my view the defendant acted unreasonably when it failed to do so.”

[91] The Court further stated on the same page that:

“Moreover, by reporting to Stenekamp, her manager, the plaintiff brought the sexual harassment under the defendant's attention. Failing to act to protect the plaintiff in the circumstances was unreasonable. I conclude that the plaintiff has succeeded in proving negligence on the part of the defendant.”

21 *Mokone v Sahara Computers (Pty) Ltd* case no: 21881/09 (2010)

[92] The court's findings were that the employer must be held liable for failing to take proper steps and to implement the policy given the non-satisfaction of the employee. The same principle must apply in this case. It is the same principle that the First Respondent applied when she came to the conclusion that the Appellant must compensate the Third Respondent. The First Respondent acted well within the powers that are afforded to her by the discretion she has.

Third leg of the appeal – Whether or not the Appellant is to pay the Third Respondent the sum of R100 000.00 as a result of such vicarious liability or any amount at all

Appellant's submissions – third leg of the appeal

[93] In the event that this Court nonetheless accepts that the Appellant is liable to the Third Respondent by virtue of the application of section 60 of the EEA, the Appellant takes issue with the award of compensation made by the First Respondent on the basis that it is unduly punitive, grossly excessive, and an exercise of her discretion which is simply not judicial.

[94] For what the First Respondent describes as a breach of the right to dignity, she awards an arbitrary 'flat rate' of R100 000.00. Considering the Third Respondent earns R5 500.00 per month,⁶³ this is compensation equivalent to an award of just more than 18 (eighteen) months' salary.

[95] It is clear from the record that the Third Respondent proved no actual damages. As such, the award made by the Third Respondent is one of compensation, based on a solatium only.

[96] As was held in *SA Airways (Pty) Ltd v Jansen van Vuuren and Another*²²:

'In the EEA, "damages" refer to an actual or potential monetary loss (ie patrimonial loss) and "compensation" refers to the award of an amount as a solatium (ie to non-patrimonial loss). It is conceivable that cases of unfair discrimination may involve actual (or patrimonial) loss for the claimant, as well as injured feelings (or non-patrimonial loss).'

[97] In determining the quantum of a compensation award for non-patrimonial loss, the Court in *SA Airways supra*⁷⁹ said that:

²² (2014) 35 ILJ 2774 (LAC) at para 78

'It is a matter for the discretion of the Labour Court, which discretion must be exercised in the light of all the relevant facts and circumstances. Most importantly, as provided in s 50(1) of the EEA, the order must be "appropriate" and in terms of s 50(2) must be "appropriate" and "just and equitable in the circumstances"'.⁶⁵

[98] The Court in *Christian v Colliers Properties*²³ provided the following guidance in this regard:

'Section 50(1) of the Equity Employment Act requires the court to make an order which is appropriate. The determination of appropriate relief requires that the court duly consider various interests, including the need to redress the wrong caused by the infringement, the deterrence of future violations, the dispensation of justice which is fair to all those who might be affected, and the necessity of ensuring that the order can be complied with.'

[99] The Court in *Christian supra* also concluded:

'In the assessment of damages for compensation resulting from unfair discrimination, useful guidance is to be found in the case of Alexander v Home Office (1988) IRLR 190 (CA), where the court said the following: 'The objective of an award for unlawful racial discrimination is restitution. For the injury to feelings, for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend on the experience and good sense of the judge and his assessors. Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, awards should be restrained. To award sums which are generally felt to be excessive does almost as much harm to the policy and the result which it seeks as do nominal awards.'

Our courts should strive to achieve this balance. On the one hand, awards should give effect to the qualities and purposes which underlie the anti-discriminatory measures in the Employment Equity Act. An award should be sufficiently high to deter the defendant and other persons from similar behaviour in the future — Buthelezi v Porter 1975 (4) SA 608 (W) at 617. On the other hand, awards should not be so exorbitant or excessive that they induce a sense of shock, or lead to a situation where even litigants who have suffered minor consequences as a result of

²³ (2005) 26 ILJ 234 (LC) at 240E-G

unfair discrimination reap financial benefits far in excess of what could, in any normal economic sense, be regarded as their loss. There is good reason for the conservative approach traditionally adopted by our courts...'

[100] The Court in *ARB Electrical Wholesalers (Pty) Ltd v Hibbert*²⁴ held that:

'The determination of the quantum of compensation is limited to what is "just and equitable". The determination of what is "just and equitable" compensation in terms of the LRA is a difficult horse to ride....'

[101] In this context, the Court in *ARB Electrical supra* then held that the following principles should be used as a guideline in deciding appropriate compensation to be awarded:

'[T]he nature and seriousness of the injuria, the circumstances in which the infringement took place, the behaviour of the defendant (especially whether the motive was honourable or malicious), the extent of the plaintiff's humiliation or distress, the abuse of a relationship between the parties, and the attitude of the defendant after the injuria had taken place.'

[102] The following examples in the case law, specifically in the context of harassment, bear mentioning:

102.1 In *Christian supra*, the Court considered that:

'... that the acts complained of all occurred on the same day and within a short space of time, that the only direct physical advance was Mr Collier's attempt to kiss applicant on her neck, and that there is no evidence before me of any particularly severe psychological trauma or consequences...', in awarding R10 000.00 (five months' salary).⁷⁰

102.2 In *Shoprite Checkers supra*, the Court accepted that the employer failed to take the necessary steps it should have in the manner it initiated and conducted the enquiry into the complaint, because it was not done in a way that treated both parties to the complaint even-handedly and appropriately, and the Court considered that the improprieties of two employees that investigated the matter seriously tarnished the neutrality of the investigation and was at odds with the degree of sensitivity expected of an employer in handling such matters, resulting in the Court awarding R25 000.00 (two and a half months' salary).

²⁴ (2015) 36 ILJ 2989 (LAC) at 24

102.3 In *Wallace v Du Toit*²⁵, the Court awarded a sum of R25 000.00 (some six months' salary) in compensation, based on the following reasoning:

*'...In determining the appropriate measure of damages, I must bear in mind that the award should not be minimal as that would tend to trivialize or diminish respect for the public policy to which the Act gives effect. On the other hand, because it is impossible to assess the monetary value of injured feelings, awards should be restrained. To award sums which are generally felt to be excessive does as much harm to the policy and the result which it seeks as do nominal awards (see *Alexander v Home Office* [1988] IRLR 190 (CA) quoted with approval in *Christian v Colliers Properties* at 240). Applicant led no evidence of any significant additional factor in support of her damages claim under the Employment Equity Act. She simply seeks to be compensated for the affront to her inherent dignity as a woman and her feelings of hurt that she suffered by being dismissed for falling pregnant. Landman J in a case involving similar unfair discrimination (*Mashava v Cuzen and Woods Attorneys* (2000) 21 ILJ 402 (LC)) awarded a solatium of five months over and above the compensation he awarded for patrimonial loss. The solatium element is in effect damages for the injuria-element of a dismissal premised upon discrimination...'*

102.4 The Court in *Biggar v City of Johannesburg*²⁶, awarded compensation in an amount equivalent to one month's salary of the employee, and in doing so reasoned as follows:

'Regarding the question of compensation, I accept that the applicant suffered the racial hostility of his colleagues over an extended period of time and some kind of compensation for the past negative impact on his dignity caused by the systematic racial harassment would be appropriate. Likewise some compensation is justified for the employer's partial approach to initiating disciplinary measures against him alone and not against the two white colleagues who were involved in the fracas. This must be balanced against the fact that the employer did take some action on an ad hoc basis...'

²⁵ (2006) 27 ILJ 1754 (LC) at paras 19-20

²⁶ (2011) 32 ILJ 1665 (LC) at para 25

102.5 The following dictum in *Future of SA Workers Union on behalf of AB and Others v Fedics (Pty) Ltd and Another*²⁷, in the context of the First Respondent's findings of policy failures on the part of the Appellant:

'In this instance, no evidence has been led to assist the court in determining an amount of compensation and I am of the view that the nature of the inadequacies of the steps taken by the respondent and given that it did take some meaningful action, the award of compensation should be in the form of a solatium and should be confined to an award of six weeks' wages for each of the remaining individual complainants....'

[103] Thus, there can be little doubt that the compensation award of some eighteen months' salary made by the First Respondent is grossly excessive, unduly punitive, and obviously unfair towards the Appellant, having proper regard to the following undeniable considerations:

- 103.1 The complaint concerned a once off incident.
- 103.2 The joke, although said by the Third Respondent to be humiliating towards him, was not sexually charged nor sexual in nature.
- 103.3 The issue was not egregious.
- 103.4 When the Third Respondent complained to the perpetrator (Ms Evertse-Brown), an apology immediately followed.
- 103.5 There has been a proper investigation and consultation.
- 103.6 The Third Respondent fully participated in the grievance process, which was overall considered fair and reasonable.
- 103.7 Even if the Appellant should have dealt with Ms Evertse-Brown more harshly for the reasons given by the First Respondent, it does not justify a compensation award of some eighteen months' salary. This is especially true considering the Third Respondent led no evidence as to the impact of what happened to his dignity or employment at the appellant. Simply put, no adverse impact of any kind existed in the workplace.

[104] All considered, a justified and fair compensation award would have been no more than 1 (one) month's salary.

²⁷ (2015) 36 ILJ 1078 (LC) at para 175

Third Respondent's submissions – third leg of the appeal

[105] The First Respondent had a discretion in awarding the quantum and acted within the law based on the discretion bestowed on her.

[106] The First Respondent took into account that the Appellant failed in its duties to protect the Third Respondent even after he had suffered sexual harassment in the hands of a senior manager.

[107] Furthermore, the pain of humiliation which led to the Third Respondent not coming to work the following day because of the embarrassment he suffered at the hands of his manager in front of his female colleagues. This indignity led to the emotional stress he suffered.

[108] All of this caused the First Respondent to decide on the quantum which is fair given the circumstances.

Analysis/Evaluation

First leg of the appeal

[109] Having set out the submissions of the Appellant and the Third Respondent in respect of the first leg of the appeal in paragraphs 45 to 59 above, I turn now to consider whether the First Respondent was correct in finding that the Third Respondent was subjected to unfair discrimination on the grounds of sexual harassment. The applicable legal framework is found in the EEA, read together with the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace. As I have set out above, the test for establishing whether sexual harassment has occurred requires consideration of: (i) whether the conduct was unwanted or unwelcome; (ii) whether the unwanted conduct was of a sexual nature; and (iii) the impact of that conduct on the complainant, including whether it impaired his dignity. I address each of these elements in turn.

[110] As regards the first element, the Appellant correctly conceded that the joke made by Ms Evertse-Brown was unwanted. The Third Respondent's reaction to the joke – expressing his dissatisfaction directly to Ms Evertse-Brown on the same day, absenting himself from work the following day, and ultimately pursuing the matter through the CCMA – speaks unequivocally to the conduct being unwelcome. This concession was properly made, and I need say no more on this point.

[111] Turning to the second element – whether the conduct was of a sexual nature – I am unable to agree with the Appellant’s submission that the joke was not sexual in nature or sexually charged. The remark made by Ms Evertse-Brown compared the size of fingerettes to the Third Respondent’s penis. This is, on any objective assessment, a remark of a sexual nature. It relates directly to the Third Respondent’s genitalia and falls squarely within clause 5.2.5.6 of the Code, which provides that verbal conduct in the form of sex-related jokes or insults may constitute sexual harassment. The fact that the joke was not ‘lewd’ or uttered in what the Appellant describes as a ‘sexual context’ does not alter its character. The content of the remark – a reference to a male employee’s private parts – is inherently sexual in nature regardless of the context in which it was uttered or the intention with which it was made.

[112] I turn next to the Appellant’s submission that this was a single, isolated incident and that the First Respondent erred by failing to have regard to this consideration. It is correct that clause 4.5.1 of the Code provides that harassment may occur as a result of a single instance, provided it is of a serious nature. The Appellant relies on the dictum in *Mokoena and Another v Garden Art Ltd and Another supra* to suggest that a once-off incident may not constitute sexual harassment. However, the passage relied upon by the Appellant in that judgment relates to the question of employer liability under section 60, not to the threshold question of whether sexual harassment exists in the first instance. A single incident can constitute sexual harassment if it is sufficiently serious. In the present matter, the joke was made by a superior (the warehouse manager) in the presence of multiple female colleagues, and it related to the Third Respondent’s genitalia. Having regard to the respective positions of the parties in the workplace and the circumstances in which the remark was made, I am satisfied that this was a sufficiently serious single incident to constitute sexual harassment.

[113] As to the impact of the conduct on the Third Respondent, I am not persuaded by the Appellant’s contention that no prejudice or adverse impact was established. Clause 5.2.8 of the Code provides that the conduct should constitute an impairment of the employee’s dignity, taking into account the circumstances of the employee and the respective positions of the employee and the perpetrator in the workplace. The evidence demonstrates that the Third Respondent: (i) expressed his dissatisfaction directly to Ms Evertse-Brown on the day of the incident; (ii) was absent from work the following day because of the joke; (iii) continued to convey his dissatisfaction thereafter; and (iv) testified that he felt humiliated. The remark was made in the presence of female colleagues who laughed, thereby compounding the indignity. It reduced the Third Respondent’s dignity as an adult male employee and subjected him

to ridicule before his peers. That the Third Respondent did not testify to ongoing workplace consequences or an inability to continue working with Ms Evertse-Brown does not negate the impairment of his dignity. The Code does not require that a hostile working environment be created in perpetuity; it suffices that the conduct impaired the employee's dignity.

[114] The Appellant further submitted that the Third Respondent's reaction – speaking directly to Ms Evertse-Brown rather than immediately lodging a formal grievance – was inconsistent with a genuine case of sexual harassment. I disagree. There is no requirement in the Code that a complainant must follow a particular process in order for sexual harassment to be established. Clause 5.2.1 of the Code expressly recognises that there are different ways in which an employee may indicate that sexual conduct is unwelcome. The Third Respondent's direct expression of dissatisfaction to Ms Evertse-Brown on the same day is, if anything, a clear and immediate indication that the conduct was unwanted. That he chose to raise the matter directly rather than through a formal grievance channel does not diminish the sexual nature of the conduct or its impact on his dignity.

[115] I accept that, as the Appellant submitted, care must be taken not to adopt an over-zealous approach to conduct that may remotely be seen to constitute sexual harassment. However, having applied the structured test as set out in the Code and the applicable case law, I am satisfied that all elements of the test for sexual harassment have been met in this instance. The conduct was unwanted; it was of a sexual nature; it was made by a superior in the presence of other employees; and it impaired the Third Respondent's dignity. The First Respondent's finding that the Third Respondent was subjected to unfair discrimination on the grounds of sexual harassment was accordingly correct. The first leg of the appeal is dismissed.

Second leg of the appeal

[116] Having set out the submissions of the Appellant and the Third Respondent in respect of the second leg of the appeal in paragraphs 60 to 92 above, I turn now to the second leg of the appeal, which concerns the question of vicarious liability under section 60 of the EEA. Having found that the Third Respondent was subjected to sexual harassment, the next enquiry is whether the Appellant, as employer, is liable for the conduct of Ms Evertse-Brown. Section 60 of the EEA creates a statutory vicarious liability for employers in respect of conduct by an employee that contravenes the EEA. The requirements for such liability, as distilled from the authorities cited above, are: (i) the sexual harassment was committed by an employee; (ii) it took place at the

workplace; (iii) it was brought to the attention of the employer; (iv) the employer failed to consult all relevant parties or take the necessary steps to eliminate the conduct; and (v) the employer failed to do all that was reasonably practicable to ensure the employee would not contravene the EEA. It is common cause that the first three requirements are satisfied. The dispute centres on whether the Appellant took the necessary steps to address the complaint.

[117] The Appellant submitted that the requirement of 'reporting' under section 60(1) was not satisfied because the Third Respondent never formally reported the matter to management through the grievance procedure. I am unable to accept this submission. Whilst the Third Respondent did not initially lodge a formal written grievance, the evidence establishes that the Appellant was aware of the incident. Ms Evertse-Brown herself was the Third Respondent's direct supervisor and the perpetrator. The Third Respondent expressed his dissatisfaction to her on the same day. Thereafter, a meeting was convened with the Appellant's Human Resources department. The Appellant then convened a formal grievance meeting before an independent chairperson. In these circumstances, it cannot be said that the matter was not brought to the attention of the employer. As the Court held in *AK v Right to Care NPC supra*, the statutory purpose of the reporting requirement is to enable the employer to eliminate the alleged conduct. Where the employer is aware of the conduct and has actually taken steps to address it – as the Appellant did here by convening the grievance meeting – the purpose of section 60(1) has been fulfilled.

[118] The more difficult question concerns section 60(2) – whether the Appellant consulted all relevant parties and took the necessary steps to eliminate the alleged conduct. The Appellant submitted that it complied with section 60(2) by convening a grievance meeting, which was conducted fairly by an independent chairperson, and that the matter was resolved through Ms Evertse-Brown's apology. The Third Respondent, however, submitted that the Appellant failed to implement the recommendations and ignored his dissatisfaction with the outcome.

[119] I accept that the Appellant did take certain steps in response to the incident. A grievance meeting was convened before an independent chairperson, Ms Evertse-Brown apologised, and recommendations were made. However, I am not persuaded that these steps were sufficient to discharge the Appellant's obligations under section 60(2). The enquiry under section 60(2) is whether the employer took the '*necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.*' This requires more than merely convening a meeting. It requires the employer to genuinely

consult with the complainant and to take steps that are responsive to the nature of the complaint.

[120] In this regard, several considerations are material. First, the evidence establishes that the Third Respondent did not consider the matter resolved by the grievance meeting. He had expressed a desire for disciplinary action to be taken against Ms Evertse-Brown, but this was not reflected in the chairperson's recommendations. The chairperson's own recommendation that the Third Respondent be advised of his right to refer a dispute to the CCMA within ninety days is telling – it suggests that the chairperson himself recognised that the matter might not have been resolved to the Third Respondent's satisfaction. The referral to the CCMA less than two weeks later confirms this. Second, the Appellant treated the matter as a mere interpersonal grievance rather than as a complaint of sexual harassment requiring a response commensurate with the seriousness of such a complaint. As the Court held in *Motsamai v Everite Building Products (Pty) Ltd supra*, unless the victim agrees to another form of resolution of a complaint of sexual harassment, the employer should hold a disciplinary hearing against the perpetrator. The Appellant failed to appreciate the gravity of the conduct and to respond accordingly.

[121] The Appellant further submitted that, having complied with section 60(2), it was unnecessary to consider section 60(4). I have found, however, that the Appellant did not comply with section 60(2). It follows that section 60(4) becomes relevant. In terms of section 60(4), an employer is not liable if it can prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of the EEA. The Appellant has not discharged this onus. Whilst the grievance chairperson recommended training on appropriate office behaviour and the grievance procedure, the evidence does not establish that the Appellant had, prior to the incident, taken proactive steps such as implementing a sexual harassment policy, providing training on sexual harassment, or creating adequate reporting mechanisms. In these circumstances, I am satisfied that the Appellant has not established the defence contemplated by section 60(4).

[122] I am mindful of the caution expressed in *Mokoena supra* that an objective assessment must be made of all the steps taken by the employer, and that an armchair-critic-approach must be avoided. However, having considered the totality of the evidence, I am satisfied that the Appellant's response was inadequate in the circumstances. The Appellant failed to treat the complaint as one of sexual harassment warranting a commensurate response and failed to genuinely address the Third Respondent's

expressed dissatisfaction. The First Respondent's finding that the Appellant is vicariously liable in terms of section 60 of the EEA was accordingly correct. The second leg of the appeal is dismissed.

Third leg of the appeal

[123] I turn finally to the third leg of the appeal, which concerns the quantum of compensation awarded by the First Respondent (having set out the submissions of the Appellant and the Third Respondent in respect of the third leg of the appeal in paragraphs 93 to 108 above).

[124] The First Respondent awarded the Third Respondent the sum of R100 000.00, which represents approximately eighteen months' gross remuneration. The Appellant contends that this award is unduly punitive, grossly excessive, and constitutes an exercise of discretion that is not judicial. The Third Respondent submits that the First Respondent acted within her discretion. It is trite that a court exercising appeal jurisdiction is not entitled to interfere with a discretionary award unless that discretion was not properly exercised. As I have set out above, a discretionary power is regarded as not having been exercised judicially if the decision-maker applied it capriciously, was moved by a wrong principle of law or an incorrect appreciation of the facts, did not bring an unbiased judgment to bear on the issues, or did not act for substantial reasons.

[125] Section 50(1) of the EEA empowers this Court to make an order that is 'appropriate', and section 50(2) requires that such an order be 'just and equitable in the circumstances'. As the Court held in *SA Airways (Pty) Ltd v Jansen van Vuuren and Another supra*, the determination of the quantum of a compensation award for non-patrimonial loss is a matter for judicial discretion, to be exercised in light of all relevant facts and circumstances. The Court in *Christian v Colliers Properties supra* provided further guidance, holding that appropriate relief requires consideration of the need to redress the wrong, the deterrence of future violations, the dispensation of justice that is fair to all affected parties, and the necessity of ensuring the order can be complied with. Awards should not be minimal, as that would trivialise the wrong, but neither should they be so excessive as to induce a sense of shock.

[126] The Court in *ARB Electrical Wholesalers (Pty) Ltd v Hibbert supra* held that relevant considerations include the nature and seriousness of the injuria, the circumstances in which the infringement took place, the behaviour of the defendant, the extent of the plaintiff's humiliation or distress, the abuse of a relationship between the parties, and

the attitude of the defendant after the injuria had taken place. I have regard to these factors in assessing whether the award of R100 000.00 was just and equitable.

[127] Having considered the totality of the circumstances, I am satisfied that the award of R100 000.00 – equivalent to approximately eighteen months' salary – constitutes a grossly excessive exercise of the First Respondent's discretion and warrants interference on appeal. I reach this conclusion for the following reasons. First, this was a single, isolated incident. There was no pattern of conduct, no repetition, and no indication that Ms Evertse-Brown had a propensity towards such behaviour. Second, upon being confronted, Ms Evertse-Brown immediately and sincerely apologised, acknowledged her wrongdoing, and undertook not to repeat the conduct. Her attitude after the injuria was contrite and remorseful. Third, whilst I have found that the conduct impaired the Third Respondent's dignity, the Third Respondent led no evidence of ongoing or substantial prejudice. He did not testify to any inability to continue working, to any hostile working environment, or to any psychological harm beyond the immediate humiliation. Fourth, the Appellant did take certain remedial steps, even if those steps were ultimately found to be insufficient for the purposes of section 60(2). The convening of a grievance meeting before an independent chairperson, the provision of training thereafter, and Ms Evertse-Brown's repeated apologies are relevant mitigating considerations.

[128] I have had regard to comparable awards in the case law. In *Christian v Colliers Properties supra*, the Court awarded R10 000.00 (approximately five months' salary) in respect of conduct occurring on a single day where no evidence of particularly severe psychological trauma was led. In *Shoprite Checkers (Pty) Ltd v JL and Others supra*, the Court awarded R25 000.00 (approximately two and a half months' salary) where the employer's investigation was found to be deficient. In *Wallace v Du Toit*, the Court awarded R25 000.00 (approximately six months' salary) as a solatium for an affront to dignity. In *Biggar v City of Johannesburg supra*, the Court awarded one month's salary where the employer had taken some action. In *Future of SA Workers Union on behalf of AB and Others v Fedics (Pty) Ltd and Another supra*, the Court awarded six weeks' wages where the employer had taken some meaningful action, but its steps were inadequate.

[129] Balancing the need to appropriately redress the impairment of the Third Respondent's dignity, to deter similar conduct, and to ensure that the award is just and equitable to all parties, I am of the view that a compensation award equivalent to approximately R25 000.00 (twenty-five thousand rand), being an amount equivalent to four and a half

months' gross remuneration, is appropriate in the circumstances. This amount – R25 000.00 – sufficiently recognises the wrong done to the Third Respondent whilst also reflecting the mitigating circumstances: that this was a single incident, that an immediate apology was tendered, that the Appellant took some remedial steps, and that the Third Respondent did not establish ongoing prejudice beyond the immediate indignity suffered. An award of this magnitude is consistent with the range of awards in comparable cases and gives appropriate effect to the purposes of the EEA without being unduly punitive.

[130] Accordingly, the third leg of the appeal is upheld. The First Respondent's award of R100 000.00 is set aside and substituted with an order that the Appellant pays the Third Respondent compensation in the sum of R25 000.00 (twenty-five thousand rand), being an amount equivalent to approximately four and a half months' gross remuneration.

Costs

[131] In terms of the provisions of section 162(1) of the LRA, which regulates orders for costs in this Court, I have a wide discretion when it comes to the issue of costs, having regard to the requirements of the law and fairness after taking into account all of the relevant facts and circumstances.

[132] In exercising this judicial discretion, the Constitutional Court in *Long v South African Breweries (Pty) Ltd and Others*²⁸ re-affirmed the principle set in *Zungu v Premier of the Province of Kwa-Zulu Natal and Others*²⁹ with regard to costs in employment disputes and stated that '*when making an adverse costs order in a labour matter, a presiding officer is required to consider the principle of fairness and have due regard to the conduct of the parties.*'

[133] I also refer to what the Constitutional Court said with regard to costs in employment disputes in *Union for Police Security and Corrections Organisation v SA Custodial Management (Pty) Ltd and Others*³⁰ which is that when making a costs order in a labour matter, a Judge is required to consider that costs are not ordinarily awarded, the principle of fairness must be considered, and due regard must be had to the conduct of the parties.

²⁸ (2019) 40 ILJ 965 (CC) at para 30.

²⁹ (2018) 39 ILJ 523 (CC) at para 25.

³⁰ (2021) 42 ILJ 2371 (CC) at para 35. See also *Zungu v Premier of the Province of Kwa-Zulu Natal and Others* (2018) 39 ILJ 523 (CC) at para 25.

[134] *In casu*, I do not believe any of the parties acted unreasonably in bringing this appeal, or in opposing it. As such, it is my view that the ordinary principle as set out above that costs do not follow the result should be applied. Therefore, I am satisfied in this case that no order as to costs is appropriate and fair. A costs order is accordingly not appropriate.

[135] In the circumstances, the Court makes the following order:

Order

[136] The appeal against the First Respondent's finding in the Arbitration Award in respect of the Third Respondent being subjected to unfair discrimination on the grounds of sexual harassment (the first leg of this appeal) is dismissed.

[137] The appeal against the First Respondent's finding in the Arbitration Award in respect of the Appellant being vicariously liable for such unfair discrimination (the second leg of this appeal) is dismissed.

[138] The appeal against the First Respondent's finding in the Arbitration Award in respect of the relief granted to the Third Respondent (the third leg of this appeal) is upheld, and that finding is set aside and substituted with the following order – *“The Appellant shall pay the Third Respondent compensation in the sum of R25 000.00 (twenty-five thousand rand), being an amount equivalent to approximately four and a half months' gross remuneration calculated at a monthly gross remuneration of R5 500.00 (five thousand five-hundred rand), within 15 (fifteen) court days of the date of this judgment”*

[139] There is no order as to costs.

M Sass

Acting Judge of the Labour Court
of South Africa

Appearances

For the Appellant:

Dr R Orton (Snyman Attorneys).

For the Third Respondent:

Advocate TM Sadike.

LABOUR COURT