



(1) Reportable: NO
(2) Of interest to other Judges: Yes/No
(3) Revised

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: J622/18

In the matter between:

N[...] M[...]

Applicant

and

TRANSNET SOC

First Respondent

RAMAKOA MAKOE

Second Respondent

Heard: 24 February 2026

Delivered: 18 August 2026

JUDGMENT

NAIDOO, AJ

Introduction

[1] I thought it appropriate to begin this judgment by reminding ourselves that Chapter 2 of the Constitution¹ begins by affirming that the “*Bill of Rights is a*

¹ The Constitution of the Republic of South Africa, 1996 (Act 108 of 1996)

*cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”*²

- [2] Whilst this year we celebrate 30 years since our Constitution was adopted, we are, nevertheless, tragically all too often reminded of just how far we, as a society, still have to go to ensure that all people – by virtue of simply being ‘human beings’ - enjoy basic rights, such as the right to dignity, equality, freedom, and security.
- [3] Gender-based violence,³ which, by definition, includes sexual harassment, remains a scourge on society. What can possibly motivates an individual to not only violate but actively destroy another’s constitutionally guaranteed right? Equally perplexing is the inaction of those tasked with the responsibility to address and prevent these inhumane acts.
- [4] Perhaps these issues are best left for psychologists, sociologists, and the like to address. Even though the underlying psyche behind such acts may escape the majority of us, what unfortunately remains clear is that these written rights, which are codified in numerous pieces of legislation, are but a myth to those who are victims of these appalling acts. A mere ‘pie in the sky’.
- [5] Within the context of the workplace, our Courts have rightfully adopted a robust and concerted approach to address instances of sexual harassment. Sexual harassment has often been described as the ‘*most heinous conduct that plagues a workplace*’ which ‘*creates an offensive and very often intimidating work environment that undermines the dignity, privacy and integrity of the victim and creates a barrier to substantive equality in the workplace.*’⁴

² Section 7(1) of the Constitution.

³ In the National Council on Gender-Based Violence and Femicide Act 2024, ‘gender-based violence’ is defined as ‘*violence associated with gender, which includes physical, sexual, verbal, emotional, economic, domestic, educational or psychological abuse or threats of such acts of abuse in public or private life.*’

⁴ *Campbell Scientific Africa (Pty) Ltd v Simmers & others* (2016) 37 ILJ 116 (LAC) at para 20, *Tlou v Commission for Conciliation, Mediation & Arbitration & others* (2020) 41 ILJ 1445 (LC) at para 46 and reiterated in *McGregor v Public Health & Social Development Sectoral Bargaining Council & others* (2021) 42 ILJ 1643 (CC) at para 1.

- [6] Even though our courts have issued a stern warning against sexual harassment, a court, in most circumstances, only intervenes after a violation has occurred. The main function of a court is to hold those responsible to account and to provide a remedy to the victim; a court cannot undo the events that led the victim to seek justice. The duty to eradicate all forms of gender-based violence rests on us as a nation. To give credence and legitimacy to the values of this hard-fought-for democratic country, we all bear the obligation to rally together and actively seek and adopt measures which will one day, hopefully in the not-too-distant future, eliminate these unjust and atrocious acts. In so doing, our written laws will transcend into a reality for all who live in this country. I shall conclude this narrative by saying it will only be then that we can truly call ourselves a civilised society.
- [7] Replacing my philosophical cap with my judicial one, I shall now address the matter before this Court.
- [8] The applicant, N[...] M[...] (M[...]), is employed by the first respondent, Transnet SOC Ltd (Transnet), and, for a period, reported to the second respondent, Ramakoa Makoe (Makoe).
- [9] By way of an application, M[...] has referred a dispute to this Court seeking the following orders:
- 8.1 *“Declaring that the applicant was subjected to unfair discrimination in the form of sexual harassment by the second respondent, which is prohibited by section 6 of the Employment Equity Act 55 of 1998 (“the EEA)”*
- 8.2 *Declaring that the first respondent is liable in terms of section 60 of the EEA for its failure to take steps to eliminate sexual harassment in the workplace.*
- 8.3 *Declaring that the first respondent is liable in terms of section 60 of the EEA for its failure to ensure compliance with the provisions of the EEA*
- 8.4 *Declaring that the first respondent’s conduct violated section 22 of the*

Constitution of South Africa by infringing on the applicant's right to choose her trade, occupation or profession freely.

- 8.5 *Declaring that, as a result, the first respondent is deemed to have contravened section 6(1), read with section 6(3), of the EEA in accordance with section 60(3) of the EEA.*
- 8.6 *Declaring the first respondent to comply with the provisions of section 6 and 60 of the EEA and the Code of good Practice on the Handling of Sexual Harassment Cases (GenN 1367 in GG 19049 of 17 July 1998) ("the Code"), published in terms of section 203(1) of the Labour Relations Act 66 of 1995 ("the LRA").*
- 8.7 *Directing the first respondent to ensure compliance with its Sexual Harassment Policy and Disciplinary Code and Procedure.*
- 8.8 *Granting any order which is just and equitable, including orders:*
 - 8.8.1 *Directing the first respondent to take steps to ensure that unfair discrimination in the form of sexual harassment does not occur;*
 - 8.8.2 *Directing the first respondent to compensate the applicant in the amount of R408 686.76 being the equivalent of 12 months' remuneration; and*
 - 8.8.3 *Directing the first respondent to pay the applicant damages in the amount of R10 907 088.10.*
- 8.9 *Condoning the late filing of this application, to the extent that such condonation is required."*

Background

[10] M[...]’s employment relationship with Transnet began in 2001 as a trainee, and by 2008, she was appointed to the position of Safety Specialist. At that stage, Makoe worked in the same division, occupying a senior position.

[11] In August 2008, M[...] received an offensive joke of a sexual nature, sent by

email from Makoe. The email referred to a woman with large buttocks. In response to M[...] raising her concern directly with Makoe, informing him that she found the email inappropriate and offensive, Makoe laughed the matter off and told her she was behaving like a child.

- [12] At a subsequent meeting with Mr Brenden Randall (Randall), a Human Resources Manager within Transnet, M[...] reported the incident, after which Randall advised he would look into her complaint and revert; however, nothing further came of the matter.
- [13] Later that year, M[...] accompanied Makoe on a work assignment to Witbank. According to M [...], it was the responsibility of the senior employee to arrange accommodation when required. Upon their arrival, M[...] discovered that Makoe had booked one room for both himself and M [...]. M[...] was deeply uncomfortable, shocked, and upset with this arrangement and immediately contacted her superior and advised him of the situation. Alternate arrangements were made for her that evening. On her return, M[...] informed Randall of what had transpired; yet again, nothing was done to address this incident.
- [14] Sometime in 2010, M[...] began reporting directly to Makoe. During this time and on a daily basis, Makoe would make inappropriate comments to M [...], telling her she was 'hot', that he wanted to have sex with her, that he lusts for her, that he dreamt he was making love to her. On one occasion, he enquired from M [...], who was at her house, as he wanted to make love to her. In response to M[...] informing him that his comments were inappropriate and unwanted, Makoe would say that his comments were meant in jest and that she was behaving like a child.
- [15] M[...] reported these ongoing encounters with Makoe to Mr. Mahenye (Mahenye), who was the Executive Manager in the division she and Makoe worked in. Mahenye, having addressed the matter with Makoe, later informed M[...] that Makoe had denied making any such comments.
- [16] M[...] escalated her grievance to Ms Jabulile Zondo (Zondo), an HR Official within Transnet. Zondo advised M[...] that she would not report the incidents,

as employees who make such accusations are often victimised.

- [17] M[...]’s subsequent request to Mahenye for a transfer out of that department proved unsuccessful.
- [18] Makoe continually made unwarranted and inappropriate comments to M[...], which were degrading and derogatory. On one occasion in 2012, when a colleague was getting married, Makoe commented to her that all her colleagues were getting married except for her. M[...] interpreted Makoe’s comments as suggesting that her time for marriage had ended.
- [19] In mid-June 2013, having taken family responsibility leave, Makoe issued M[...] a final written warning for unauthorised absenteeism. Challenging this sanction on the basis that Makoe had initially approved her leave, M[...] wrote to Mahenye informing him of the events, as well as the ongoing sexual advances, which she had rejected and which she believed to be the reason why Makoe was victimising her. While Makoe was instructed to remove the warning issued, nothing further came of her complaint about being victimised and the reasons therefor. I shall refer to this as M[...]’s ‘June 2013 grievance’.
- [20] Makoe’s conduct towards M[...] took a toll on her health, and she began suffering from asthma attacks. Her repeated requests to be transferred out of the department fell on deaf ears.
- [21] In July 2013, Makoe initially scheduled to meet M[...] for a work-related assessment on a particular Friday, but later cancelled the meeting and requested that they reschedule the meeting for that Saturday at her residence. Fearing that she would be charged for insubordination for refusing this request, M[...] agreed but arranged with her brother that he be present for the duration of the assessment. The following Monday, Makoe commented that the reason why M[...] was not married was that her brother accompanied her everywhere and acted as her bodyguard.
- [22] Makoe’s unwanted and suggestive remarks continued, and on a further occasion, when a colleague returned from honeymoon and bought M[...] a bag, Makoe, in the company of other colleagues and M[...], advised the

colleague that she should have rather brought M[...] a husband instead of a bag.

- [23] In January 2014, while on a company retreat at the Drakensberg, M[...] swapped rooms with a colleague, Mr M Matsaung (Matsaung). The next morning at breakfast, Matsaung informed M[...] that at 02h00 that morning, someone was knocking on his door. While at breakfast, Makoe enquired from M[...] about the man in her room the previous night. It later transpired, at a subsequent disciplinary enquiry, that Makoe admitted that as part of the organising committee, he was aware of which room had been allocated to M[...].
- [24] In June 2014, having granted M[...] leave to attend to her daughter, who had suffered an epileptic attack while at university, Makoe commented that M[...]’s daughter had taken ill as a result of her worrying about her mother ‘not getting sex’ while she was away at university.
- [25] In September 2014, and in response to Makoe again accusing her of unauthorised absenteeism, M[...] wrote a further grievance letter that eventually came before Mahenye. I shall later refer to this grievance as M[...]’s ‘September 2014 grievance’.
- [26] I pause to make the point that, in its answering affidavit, Transnet does not bring into question the above incidents, save to assert that M[...], for the first time, raised with it her complaints of being sexually harassed in September 2014.⁵ Thereafter, Transnet begins its narrative with events that occurred after September 2014.⁶
- [27] When M[...], in summary, repeats certain incidents in her founding affidavit, including the allegation that she informed her superiors of these incidents prior to 2014⁷ Transnet denies the same in its answering affidavit⁸ and repeats its position that M[...] only reported these incidents to it in September 2014.

⁵ Paragraph 31 of Transnet's answering affidavit.

⁶ Paragraphs 32 to 51 of its answering affidavit.

⁷ Paragraphs 130 to 132.

⁸ Paragraph 63.

- [28] Returning to the respective parties' versions: there is some controversy concerning what sparked Transnet to institute disciplinary action against Makoe. Transnet avers that M[...]’s September 2014 grievance, which she escalated after it was initially not resolved, was the catalyst for the enquiry against Makoe. M[...] submits that, with the assistance of a trade union, she lodged a formal complaint against Makoe in November 2014. Nothing material turns on this impasse. The fact remains that Transnet did take steps to address M[...]’s complaint.
- [29] Transnet changed M[...]’s reporting line in November 2014.
- [30] In January 2015, and presumably pursuant to M[...]’s complaint, a senior manager within Transnet’s Marketing Division, Ms Y Capede, enquired of M[...] whether she was in a relationship with Makoe. Capede prefaced her question by saying that women often make accusations of sexual harassment when relationships with co-workers fail. M[...] took offence at both Capede’s question and her rationale behind it.
- [31] The parties are *ad idem*; alternatively, there is no material dispute as to what transpired thereafter.
- [32] On 20 April 2015, and in terms of a forensic investigation report, a recommendation was made that disciplinary action be instituted against Makoe for transgressing Transnet’s Sexual Harassment Policy.⁹
- [33] At his disciplinary enquiry, on 5 September 2015, Makoe pleaded guilty to the charges preferred against him and was subsequently dismissed.
- [34] On 22 September 2015, in a bizarre turn of events, Makoe was reinstated to his position.
- [35] Having been dismissed, Makoe referred an unfair dismissal dispute to the bargaining council. The matter was set down for a ‘con/arb’ on 22 September 2015, after which arbitration proceeded on the same day.
- [36] Perusing the arbitration award annexed to M[...]’s founding affidavit reveals

⁹ See Forensic report under ‘Recommendation.’

that Makoe's representative informed the arbitrator that at the commencement of his internal enquiry, Makoe, together with Transnet's representative, Mr S Mkhize (Mkhize), Transnet's Industrial Relations Manager, entered into a 'plea agreement' wherein Makoe would plead guilty to the lesser charge of 'inappropriate behaviour towards a colleague' and receive a final written warning. According to Makoe's representative, the chairperson erred by failing to have regard to this agreement.

- [37] Not only did both Adv Pela, who represented Transnet at arbitration, and Mkhize, who testified at arbitration, confirm that parties had indeed entered into this agreement at the beginning of Makoe's internal enquiry, both individuals further confirmed that Transnet was, at the arbitration stage, willing to accept that such an agreement, if implemented, would reflect a fair outcome.
- [38] Having found that both parties agreed that the sanction of dismissal was too harsh, the arbitrator reinstated Makoe.
- [39] M[...] suffered a mental breakdown after being informed of Makoe's return. She was subsequently diagnosed with PTSD and booked off by her psychologist.
- [40] At the end of December 2015, Makoe was transferred to another building, which was in close proximity to the building M[...] worked at.
- [41] In October 2015, M[...] was advised that disciplinary action would be instituted against Adv Pela, and while she was unaware of whether Transnet acted on its intentions, Transnet submits that Adv Pela received a final written warning for his actions at arbitration.
- [42] M[...] remained absent until her return at the end of January 2017. She had been booked into a mental health clinic in November 2015 for a period of time. M[...] had exhausted her sick leave and annual leave at the beginning of 2016, and from March 2016 to her return in January 2017, she remained on unpaid leave.

[43] In March 2016, M[...] referred an unfair discrimination dispute to the CCMA, and a certificate of outcome was issued on 19 April 2016.

[44] On the strength of the aforementioned certificate, M[...] referred her unfair discrimination dispute to this Court by way of a statement of claim.

[45] On 28 February 2018, M[...] instituted this application.

[46] I shall include further relevant facts when assessing each of M[...]’s claims.

Transnet’s special pleas/in limine

[47] Transnet has raised several preliminary arguments, one of which, if upheld, would dispense with M[...]’s claim in its entirety, while others seek to dispose of certain claims raised.

- Alibi lis pendens

[48] Transnet argues that M[...]’s unfair discrimination dispute, brought by way of a stated case and which is currently pending, is essentially the same dispute before this Court. M[...] has since withdrawn her initial claim brought by way of a statement of claim. Her decision to do so lays to rest Transnet’s argument.

- M[...]’s unfair discrimination dispute brought in terms of s6(1) of the EEA is not properly before this Court.

[49] As earlier recorded, amongst the orders M[...] seeks is an order declaring that Makoe’s conduct constitutes unfair discrimination, which is prohibited in terms of section 6 of the EEA.

[50] Transnet submits that M[...]’s complaints relating to Makoe, which underscore her EEA claim in terms of section 6, occurred between 2008 and September 2014. In terms of section 10(2) of the EEA, M[...] was obliged to refer her dispute to the CCMA within 6 months of the act/s that gave rise to her claim. Yet M[...] only referred her unfair discrimination dispute to the CCMA in April 2016.

[51] Responding to this point in her replying affidavit, M[...] appears to distance

herself from her section 6 claim. She submits that the subject matter of her dispute before this Court *'is not the fact of the sexual harassment to which I was subjected in and of itself,'* but rather, it is about *'Transnet's continuous (and still on-going) failure to take adequate steps to address the sexual harassment'* which is broader than an allegation of sexual harassment.

- [52] Although M[...] only seeks declaratory relief, and not any form of compensation, in respect of her section 6 claim, and despite her response recorded above, she has not unequivocally abandoned her section 6 claim, which calls upon this Court to address Transnet's preliminary point.
- [53] To the extent M[...]’s referral to the CCMA in April 2016 included a stand-alone claim that she had been sexually harassed by Makoe in breach of section 6 of the EEA, she would have, on her own version of events, had to first apply for condonation at the CCMA.
- [54] There is no proof that she did so (nor does she allege she did so), and insofar as it is relevant, the certificate of outcome indicates that condonation was not required.
- [55] This Court ought to decline to exercise its jurisdiction in respect of a claim where an employee ought to have first applied and been granted condonation at the conciliation stage but failed to do so.
- [56] Faced with a similar situation, the court in *La Foy v Department of Justice & Constitutional Development & others*,¹⁰ held that;

“[35] ...On the version of La Foy, as demonstrated by the referral documents, the dispute that this court must adjudicate upon arose on 24 April 2017. She referred that dispute for conciliation, as required by s 10(2) of the EEA, on 9 May 2017. Howbeit, this court benignantly received testimony about incidents that took place in 2016, shortly after La Foy assumed employment with Justice. These incidents would as a matter of fact have fallen outside the prescribed six-month period. Nevertheless, on her own version, the dispute that was conciliated upon arose in April 2017. As an annexure to the referral

¹⁰ *La Foy v Department of Justice and Constitutional Development and Others* [2023] ZALCJHB 253; (2023) 44 ILJ 2731 (LC); [2023] 12 BLLR 1275 (LC) at para 35 and 36

form, La Foy vaguely listed acts complained of and deliberately failed to set out the dates of each incident... Had she disclosed the dates of each incident, she may have been compelled to show good cause as required by s 10(3) of the EEA.

[36] Axiomatically, this court should decline to exercise jurisdiction over incidents that were not properly conciliated upon as appears to be the case in relation to incidents that arose six months before 9 May 2017.

[57] Insofar as M[...] intended this Court to pronounce over her unfair discrimination claim brought in terms of section 6 of the EEA, this Court has no jurisdiction.

Condonation for M[...]’s claim in terms of s60 of the EEA.

[58] The CCMA issued a certificate of non-resolution on 19 April 2016, whereafter M[...] had 90 days from that date to file this application. Yet, M[...] only did so some 19 months later on 28 February 2018.

[59] There is no dispute that M[...] timeously referred her dispute to the CCMA for conciliation, as well as her initial dispute brought by way of a stated case to this Court.

[60] In a rather scant explanation for the delay in bringing this application, M[...] says she was initially assisted by a trade union when filing her statement of claim. Once she secured legal representation, she became aware of the option to file an application seeking the same or similar relief.

[61] M[...]’s decision to change vehicles, so to speak, was aimed at preventing her from suffering secondary trauma had she been required to testify in open court on her experiences. M[...] further submits that Transnet will not suffer any prejudice if this Court were to grant condonation.

[62] The period of delay is lengthy, and M[...]’s explanation is somewhat scarce in that she does not inform the Court when she first consulted with her legal representative, when the option of filing an application was made to her, and how long thereafter this application was filed. The reason for not wanting to pursue her action is nevertheless reasonable.

- [63] On M[...]’s version, she has excellent prospects of success.
- [64] Whilst our courts have often adopted the principle that prospects of success are immaterial in the absence of a proper and reasonable explanation for the full period of the delay,¹¹ our courts have also adopted the principle that in order to give meaning to the term ‘*interest of justice*,’ all factors concomitant with a condonation application should be assessed, irrespective of a poor explanation for a lengthy delay.¹²
- [65] In *Government Printing Works v Public Service Association and Another*¹³ (*Government Printing*) and referring to judgments delivered by the Labour Appeal Court, it was held that: ‘*In this court, it has been acknowledged that excellent prospects of success lead to the granting of condonation even when the delay is substantial and the explanation inadequate.*’
- [66] Adopting a flexible approach, the Labour Appeal Court in *Government Printing* held:

‘A measure of flexibility has been applied where required in the interests of justice. In National Education Health & Allied Workers Union on behalf of Mofokeng & others v Charlotte Theron Children’s Home, for example, it was held that the interests of justice demanded that the case be heard given that the policy in question (namely, that only white housemothers could supervise white children) was seemingly ‘saturated with a racist outlook’ and was causing ongoing racism. The circumstances were described as exceptional, so as to justify less focus than normal on an unexplained delay. In Toyota Marketing v Shmeizer, a case involving alleged gender discrimination, the proper administration of justice compelled the granting of condonation because the case had been pleaded in a fashion that made it difficult to

¹¹ See *Aspen Holdings Pty Ltd and Another v Phelane and Another* [2025] ZALAC 4; [2025] 4 BLLR 409 (LAC) at para 29, wherein the LAC followed this principle, as recorded in *Grootboom v National Prosecuting Authority and Another* [2013] ZACC 37; 2014 (2) SA 68.

¹² See *Government Printing Works v Public Service Association and Another* [2024] ZALAC 63; [2025] 2 BLLR 112 (LAC); (2025) 46 ILJ 915 (LAC) at para 27 – 28 which followed the principle that all factors must be considered, as held in *Steenkamp and Others v Edcon Limited* [2019] ZACC 17; 2019 (7) BCLR 826 (CC).

¹³ *Government Printing Works v Public Service Association and Another* [2024] ZALAC 63; [2025] 2 BLLR 112 (LAC); (2025) 46 ILJ 915 (LAC) at para 29

*formulate a fair and effective order.*¹⁴

- [67] A court, as well as arbitrators, ought to be cautious not to adopt an overly technical approach when pronouncing on a condonation application, the outcome of which may well lead to a failure of justice, whereas on a proper assessment of the relevant facts, a case has been made that an applicant has already suffered an injustice.
- [68] Additionally, and as stated, sexual harassment remains a scourge on society, and allegations of such should, where justice demands, be addressed. Particularly when the nature of these claims transcends beyond the private interests of the parties before a court and extends to the public at large.
- [69] Despite a lengthy delay and sparse explanation for the delay, the nature and merits of M[...]’s claim dictate that it would nevertheless be in the interest of justice to grant M[...] condonation.
- [70] Additionally, it cannot be said that for a period of 19 months, M[...] sat back and did nothing to pursue her claim. She timeously referred her dispute to the CCMA and then to this Court initially by way of an action. At all material times, M[...] had the intention of ventilating her dispute in a court of law.
- [71] For these reasons, condonation is granted.
- Application v Action.
- [72] Transnet’s last preliminary point, which it regards as fatal to M[...]’s claim, is her decision to bring her dispute by way of an application, under circumstances where she was compelled to ventilate her dispute by way of an action.
- [73] Transnet does not attack this Court’s jurisdiction to hear the nature of M[...]’s claim; rather, Transnet argues that M[...] was obliged to comply with the ‘*procedural prerequisites governing the referral of such disputes to the Labour Court*’.

¹⁴ Id at para 25.

- [74] In broad terms, Transnet argues that Rule 6 of the erstwhile Labour Court rules, which was applicable when M[...] launched her application, listed the nature of disputes which had to be referred to the Labour Court by way of a statement of claim, and which included unfair discrimination disputes. Conversely, Rule 7 listed the disputes that had to be referred to the court on notice. Noticeably, so Transnet's argument goes, unfair discrimination disputes did not appear on that list.
- [75] The lists Transnet refers to appear as a footnote to Rules 6 and 7, respectively. The word '*rules*' is defined to include '*any footnote to a rule*'.▶
- [76] Transnet also relies on the wording of section 10(7) of the EEA to substantiate its interpretation of the then rules.
- [77] The upshot of Transnet's argument is that this Court ought to decline to hear a dispute brought before it, by way of an incorrect procedure.
- [78] Whilst I shall expand on both of Transnet's arguments, it is noteworthy that section 10(6) of the EEA affords an employee the right to refer their unfair discrimination dispute to the Labour Court for adjudication. The Cambridge Dictionary defines the word '*adjudicate*' to mean '*to act as judge in a competition or argument, or to make a formal decision about something*'. No single process, be it an action or application, is inherent to the meaning of the word 'adjudication'.
- [79] Although not canvassed on behalf of M[...], Transnet's argument appears to extinguish, or at the very least limit, M[...]'s statutory right to have her unfair discrimination disputed adjudicated.
- [80] Whilst this stance may initially seem attractive, such an argument fails to distinguish between a '*statutory right*' and a '*procedure*' in which to enforce that right.
- [81] In *Appels v Education Labour Relations Council & others*,¹⁵ the Labour Appeal Court made the point that changing the procedure in which to enforce a right

¹⁵ (2019) 40 ILJ 2284 (LAC) at para 13 read with 16.

‘does not take away the right of the referring party from being heard.’ In *casu*, Transnet’s argument raises a dispute about the procedure by which M[...] may enforce her statutory right to have a dispute adjudicated. There is no suggestion by Transnet that M[...] has lost this right.

- [82] Having clarified Transnet’s argument, both parties, for different reasons, referred me to the recent decision in *Denel Soc Ltd V Elias Ntshile*¹⁶ (*Denel*).
- [83] When faced with a similar question, the Court in *Denel* asked the question, whether there is anything in law which prevents an employee from referring their unfair discrimination dispute on notice as opposed to filing a statement of claim. Although the arguments before the Court in *Denel* were limited to the new Labour Court Rules, I think it is appropriate to adopt the same question herein. I must add that the Court in *Denel* also found that the word *‘adjudication’*, includes both applications and actions.
- [84] Returning to Transnet’s written submissions and beginning firstly with its interpretation of section 10(7) of the EEA, Transnet makes the point that *“s10(7) of the EEA makes Parts C and D of Chapter VII of the LRA applicable to disputes that are referred to the Labour Court, with the changes required by the context having been made. The disputes that are referred to the Labour Court in terms of Chapter VII include automatically unfair disputes. Those disputes covered in s191 of the LRA which must be referred to the Labour Court for adjudication are dealt with in terms of Rule 7 as set out above”*.
- [85] Further on in its submissions, Transnet repeats this viewpoint wherein it states that *“...section 10 of the EEA which makes it clear that the provisions of s191 of the LRA apply when unfair discrimination disputes are referred to the Labour Court. In terms of s191 of the LRA, disputes are referred to the Labour Court by way of a referral and, therefore, in terms of Rule 11.”* (my emphasis)
- [86] Whilst Transnet has accurately recorded s10(7) of the EEA, the underlined sentence immediately thereafter (as appears at paragraph 83 herein) is incorrect. Part C of Chapter VII of the LRA is irrelevant for purposes of this

¹⁶ [2025] ZALCJHB 439 (3 October 2025)

discussion. Part D of the LRA does not include any section that refers to or includes automatically unfair dismissal disputes, as suggested by Transnet. In fact, s191 is located in Chapter VIII of the LRA and not VII. For this reason, the second underlined sentence in Transnet's submissions is also incorrect. Section 10 of the EEA does not say that the provisions of s191 of the LRA apply to discrimination disputes referred to the Labour Court. Section 191 falls within Chapter VIII of the LRA and not in Chapter VII of the LRA, which is the chapter section 10(7) of the EEA contemplates.

- [87] Turning to Transnet's interpretation of the repealed rules, Rule 6 dealt with referrals to the Labour Court by way of a statement of claim.
- [88] The footnote to rule 6 lists the disputes applicable or contemplated in that rule, which included referrals of *unfair labour practice disputes in terms of item 3(4) of Schedule 7* of the LRA.
- [89] Schedule 7 of the LRA defined *residual unfair labour practices*, to include unfair discrimination disputes, as per item 3(4)(a) of Schedule 7.
- [90] On the strength of the above, Transnet argues that, in terms of the then rule 6, unfair discrimination disputes had to be referred by way of a statement of claim.
- [91] What this argument overlooks is that in June 2002, item 3 of Schedule 7 was deleted from the LRA by section 55(a)¹⁷ of the amended LRA¹⁸. Section 64 of the EEA, read with Schedule 2 of the EEA, reiterates this position.
- [92] At the time M[...] referred her application to this Court for adjudication in February 2018, item 3 of Schedule 7 had long since been repealed and could therefore not apply. To the extent the footnote to Rule 6 remained unchanged despite this amendment, does not assist Transnet.
- [93] Assuming momentarily that the footnote to rule 6 had been amended and the phrase '*unfair labour practice disputes*' in the footnote to rule 6 had been substituted with the phrase '*unfair discrimination disputes in terms of the*

¹⁷ S55 read "Schedule 7 to the principal Act is amended by- (a) the deletion of items 2, 3 and 4".

¹⁸ 12 of 2002

EEA', that in itself would likewise not assist Transnet.

- [94] The footnote to Rule 6 commenced by stating '*This rule applies to the following referrals*' and beneath that listed the disputes which ought to be brought on action. The footnote did not say '*this rule must apply to the following referrals*' or '*this rule applies only to the following referrals*', as Transnet suggests. Simply put, the footnote to the then Rule 6 was not cast in prescriptive and/or restrictive language.
- [95] For these reasons, neither the applicable rule at the time nor the EEA prevented M[...] from initiating her dispute before this Court on notice, and Transnet's argument is dismissed.
- [96] This finding nevertheless presents an opportunity to sound a cautionary warning to employees wishing to pursue their unfair discrimination claim on notice. An employee who elects to follow this procedure must stand or fall on the application of the relevant principles imbued and inherent in motion proceedings. Conflicting versions are not resolved on probabilities in applications.¹⁹ Not only could the adopting of these principles lead to an adverse finding on the merits of an employee's claim, it could equally have a direct bearing on an employee's attempts to prove any damages claimed, even if they succeed on the merits.

M[...]’s s60 claim.

- [97] Section 60 of the EEA provides:

(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.*

(2) *The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and*

¹⁹ *Member of the Executive Council for Health, North West Province v SA Medical Association & another* (2022) 43 ILJ 134 (LAC) at para 29.

comply with the provisions of this Act.

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

[98] Items 10.2 and 10.3 of the *Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace*²⁰ (the Code) repeat the provisions in section 60.

[99] Within the context of a sexual harassment claim, the Labour Appeal Court in *Liberty Group Ltd v M*,²¹ (*Liberty Group*) set out the following requirements in relation to a section 60 enquiry;

98.1 *"The sexual harassment conduct complained of was committed by another employee.*

98.2 *It was sexual harassment constituting unfair discrimination.*

98.3 *The sexual harassment took place at the workplace.*

98.4 *The alleged sexual harassment was immediately brought to the attention of the employer.*

98.5 *The employer was aware of the incident of sexual harassment.*

²⁰ GG 1890 of 18 March 2022. The code is published in terms of section 54(1)(b) of the Employment Equity Act 1998, and replaces the code issued on 4 August 2005.

²¹ *Liberty Group Limited v M* [2017] ZALAC 19; (2017) 38 ILJ 1318 (LAC); [2017] 10 BLLR 991 (LAC) at para 38, wherein the LAC followed the requirements recorded in *Potgieter v National Commissioner of the SA Police Service & Another* (2009) 30 ILJ 1322 (LC).

98.6 *The employer failed to consult all relevant parties, or take the necessary steps to eliminate the conduct will otherwise comply with the provisions of the EEA.*

98.7 *The employer failed to take all reasonable and practical measures to ensure that employees did not act in contravention of the EEA.”*

[100] Turning to the issue of onus, section 60 resides in Chapter VI of the EEA, and hence the statutory onus recorded in section 11 of the EEA, which applies to Chapter II disputes, does not apply in a section 60 enquiry. Therefore, the civil rule of ‘*he who alleges must prove*’ applies to an employee who invokes section 60.

[101] Therefore, an employee will bear the onus to prove:

100.1 that he or she acted swiftly in bringing to the attention of their employer that they are or recently have been unfairly discriminated against by a fellow employee,

100.2 that their employer failed to consult with the relevant parties and to take the necessary steps to eliminate the alleged unfair discrimination and

100.3 that the conduct complained of was in fact a breach of a provision of the EEA, thus constituting unfair discrimination.

[102] Once an employee establishes the above, the deeming provision in section 60(3), namely that the employer is found to have also breached the same provision in the EEA, will be triggered. The evidentiary burden will thereafter shift to the employer to raise its defence to the deeming provision in accordance with s60(4), and, if successful, the employee’s claim will fail.

[103] The last sub-enquiry adopted by the Labour Appeal Court in *Libert Group*, namely that ‘*the employer failed to take all reasonable and practical measures to ensure that employees did not act in contravention of the EEA*’, does not, in my view, accurately encompass or reflect a shift in the evidentiary burden once the deeming provision is triggered.

[104] A more accurate way of setting out the requirements for a s60 claim appears in *SAMKA v Shoprite Checkers (Pty) Ltd & others*²² and reads;

‘40.1 [T]he conduct must be by an employee of the employer;

40.2 the conduct must constitute unfair discrimination ...;

40.3 the conduct must take place while at work;

40.4 the alleged conduct must immediately be brought to the attention of the employer;

40.5 the employer must be aware of the conduct;

40.6 there must be a failure by the employer to consult all relevant parties, or to take the necessary steps to eliminate the conduct or otherwise to comply with the EEA; and

40.7 the employer must show that it did all that was reasonably practicable to ensure that the employee would not act in contravention of the EEA.’

[105] What emerges from these requirements, and which will become relevant for a later discussion, is the fact that an employer does not attract liability in terms of s60 once it is established that one of its employees was unfairly discriminated against by another. Proving unfair discrimination is but a sub-enquiry within a broader enquiry. Loosely speaking, an employer’s liability in s60 arises from their intentional or negligent inaction in the face of a complaint that an employee is being unfairly discriminated against by a fellow employee, which complaint is found to be true.

[106] Prior to engaging with the aforementioned requirements, it would be convenient at this point to address two issues:

95.1 firstly, whether M[...]’s version, on application of the *Plascon-Evans* rule,

²² *Samka v Shoprite Checkers (Pty) Ltd and Others* [2020] ZALAC 11; (2020) 41 (ILJ) 1945 (LAC); [2020] 9 BLLR 916 (LAC) at para 12, where the Labour Appeal Court endorsed the approach set out in *Mokoena & another v Garden Art (Pty) Ltd & another* (2008) 29 ILJ 1196 (LC).

is accepted and

95.2 secondly, if accepted, whether this Court, in the face of its ruling that it has no jurisdiction to hear M[...]’s claim that she was sexually harassed in terms of section 6 of the EEA, can nevertheless make a finding that M[...] was sexually harassed for purposes of her section 60 claim.

- Facula disputes in motion proceedings.

[107] M[...] seeks final relief, and hence the *Plascon-Evans* rule applies.

[108] In *SA Football Association v Mangope*²³ (SAFA) the Labour Appeal Court held:

“...failure to deal with an allegation by the applicant amounts to an admission. ...Unless an admission, including a failure to deny, is properly withdrawn (usually by way of an affidavit explaining why the admission was made and providing appropriate reasons for seeking to withdraw it) it will be binding on the party and prohibits any further dispute of the admitted fact by the party making it as well as any evidence to disprove or contradict it. (emphasis added)

[109] As to what constitutes a genuine dispute of fact, the Supreme Court of Appeal in *Wightman t/a JW Construction v Headfour (Pty) Ltd & another*²⁴ (*Wightman*) state, *inter alia*, as follows:

“A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed.”

[110] As already noted, Transnet does not materially dispute the events that give rise to M[...]’s claim that she was sexually harassed. Transnet does, however, dispute the timing of when M[...] raised her concerns. On M[...]’s version, she reported many of these incidents to senior management, but nothing was done to address her complaints. On the other hand, Transnet’s version is that

²³ *South African Football Association v Mangope* [2012] ZALAC 27; (2013) 34 ILJ 311 (LAC) at para 9

²⁴ *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) at para 13.

M[...], for the first time, raised her concerns in September 2014.

[111] For purposes of section 60(1) of the EEA, which requires an employee to ‘*immediately*’ raise their complaint with an employer, it appears as though Transnet has raised a material dispute of fact.

[112] Although acknowledging that the word *immediately* must be afforded a *sensible meaning having regard to the purpose of the EEA*,²⁵ it will be ill-conceived if this Court, applying the *Plascon-Evens* rule, finds that M[...] has satisfied the requirements of s60(1) when she only reported the incidents for the first time, some years after the events, on Transnet’s version.

[113] However, before accepting Transnet’s factual version, this Court must first be satisfied that Transnet has indeed raised a *real, genuine and bona fide* dispute of fact as laid out in *Wrightman*.

[114] M[...] alleges that in her July 2013 grievance, addressed to Mahenye, she complained of the fact that Makoe had issued her a written warning for unauthorised absenteeism, under circumstances where he initially approved her leave. In the same grievance, she further informs Mahenye that it was as a result of her refusing Makoe’s sexual advances that he was victimising her.

[115] M[...] attached this grievance to her founding papers. The following extract is relevant;

“I would like your intervention as I believe I followed the right procedure. I feel that I am being victimized because I refused his sexual advances. He first denied me doing change management duties and the induction and all of a sudden a written warning. I would like to be transferred to another department when this matter is investigated. I would like to request your intervention.”

[116] The grievance is dated 8 July 2013.

[117] Although in its answering affidavit, and in responding to M[...]’s version of each incident from 2008 to 2014, Transnet, in a single sweeping statement,

²⁵ *Liberty Group Ltd v M* (2017) 38 ILJ 1318 (LAC) at paras 51 – 53.

denies that M[...] raised her complaint any time before September 2014,²⁶ Transnet does not address, refer to and/or raise any issue in respect of M[...]’s July 2013 grievance. The date and content of this document bring the veracity of Transnet’s denial into serious question.

[118] There are two legal consequences that flow from the above. Either, as per the *dictum* in *SAFA*, Transnet’s failure to address the content of M[...]’s July 2013 grievance constitutes an admission, by virtue of which Transnet cannot rely on any contradictory averments to that admission. Or at the very least, Transnet’s omission in failing to specifically address and deal with M[...]’s July 2013 grievance renders its subsequent denial ambiguous and/or not serious or contradictory.

[119] The outcome of both consequences is the same, *i.e.* Transnet has failed to raise a *real, genuine, and bona fide* factual dispute in accordance with *Wrightman*. It is not open for a respondent to ignore a material version supported by documents and thereafter simply deny the same.

[120] In its heads of argument, Transnet argues that M[...] failed to provide sufficient proof that she reported the incidents at any time before September 2014. However, having tacitly admitted to M[...]’s version, alternatively, having failed to raise a genuine dispute of fact, Transnet’s submissions on this issue, raised in its heads of argument, do not likewise come to Transnet’s aid.

[121] For these reasons, M[...]’s version in relation to when and to whom she reported Mokeo’s transgressions is accepted.

- S6 claim v s60 claim.

[122] I have already given reasons why this Court does not have jurisdiction to hear M[...]’s claim of sexual harassment brought in terms of s 6 of the EEA. Does it axiomatically follow from this finding that this Court is barred from deciding whether M[...] was sexually harassed for purposes of her s60 claim?

[123] Section 50(1)(j) of the EEA gives this Court the power to deal with ‘*any matter*

²⁶ Para 31 of Transnet’s answering affidavit reads: “*The Applicant alleges that the sexual harassment dated back to August 2008, but she never made the First Respondent aware of it until 2014*”.

necessary or incidental to performing its function in terms of this Act’. As recorded earlier, an enquiry into whether an employee was unfairly discriminated against, within the context of a section 60 dispute, is a sub-enquiry within a broader enquiry and hence, is incidental to a section 60 enquiry.

[124] Additionally, in *National Union of Metalworkers of SA v Passenger Rail Agency of SA*²⁷ this Court held;

“...in a s 60 claim, a party suing may prove the contravention of the EEA intra s 60 proceedings, which proving does not require a s 10 referral first.”
(emphasis added)

[125] Therefore, this Court’s ruling in respect of M[...]’s s6 claim has no bearing on whether she had been sexually harassed, for purposes of her section 60 claim.

Assessing M[...]’s s60 claim.

- Was M[...] sexually harassed?

[126] Item 5.2.5 of the Code describes sexual harassment as unwanted conduct that must be of a *‘sexual nature and includes physical and verbal or non-verbal conduct, whether expressed directly or indirectly.’*

[127] This may include:

113.1 *‘sexual attention, advances, or proposals: or other behaviour, whether explicit or implicit, including suggestions, messages, advances, attention or proposals of a sexual nature’.*²⁸

113.2. *‘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*

²⁷ *National Union of Metal Workers of South Africa (NUMSA) and Another v Passenger Rail Agency of South Africa* [2021] ZALCJHB 312; (2021) 42 ILJ 2637 (LC); [2022] 1 BLLR 90 (LC) at para 21.

²⁸ Item 5.2.5.4 of the Code.

the sending by electronic means or otherwise of sexually explicit text.'

29

[128] Item 5.3 records the test for sexual harassment, which includes an assessment of the following factors:

114.1 *'whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation.*

114.2 *whether the sexual conduct was unwanted or unacceptable*

114.3 *the nature and extent of the sexual conduct and*

114.4 *the impact of the sexual conduct on the employee'.*

[129] S6(3) of the EEA, read with item 5.1³⁰ of the Code makes it clear that sexual harassment constitutes unfair discrimination.

[130] Having regard to the nature of sexual harassment, as well as the test employed to establish sexual harassment, there can be little doubt that on the facts before this Court, M[...] was sexually harassed.

[131] Each incident she complained of, assessed individually, constitutes sexual harassment. Although not an *essentialia* to a claim of sexual harassment,³¹ M[...] informed Makoe that his conduct was unwanted and inappropriate. On two occasions, Makoe responded that she should stop acting like a child, and on another occasion, he replied that he was merely joking.

[132] M[...] describes the impact on her as being '*uncomfortable*', '*disrespected*', '*violated*', '*humiliated*', and '*degraded*'. She felt shocked and hurt by these incidents, causing her mental anguish.

[133] I am therefore satisfied that M[...] has established that she was sexually harassed in the workplace by a colleague.

[134] M[...] timeously reported certain incidents to Transnet. She reported incidents

²⁹ Item 5.2.5.6 of the Code.

³⁰ Item 5.1 states: "Sexual Harassment of an employee is a form of unfair discrimination and is prohibited on the grounds of sex, gender, or sexual orientation..."

³¹ See item 5.2.4 of the Code.

to those in senior positions and/or to those, by virtue of their function, had the authority to address her complaints. This included an employee working with the HR department, an HR Manager, an Executive Manager, as well as a senior manager in another division. Thus, Transnet was aware of the incidents which gave rise to M[...]’s complaint.

[135] Outside the fact that Transnet disciplined Makoe (a factor which I shall address further on), on each occasion M[...] reported these incidents, Transnet officials failed to either address her complaint (on one such occasion M[...] was told that she would be victimized if she lodged a formal complaint) or took her complaint only so far as to confront Makoe, whereafter nothing was done after he denied M[...]’s allegation.

[136] I am thus satisfied that on the facts before this Court, M[...] has established that she timeously reported incidents of sexual harassment to Transnet, who failed to consult or take any steps to eliminate such conduct, and that her complaints constituted sexual harassment. This triggers the deeming provision in section 60(3) of the EEA.

- Transnet’s defence.

[137] Transnet relies on section 60(4) of the EEA and makes the argument that as soon as it became alive to M[...]’s complaint, it disciplined and dismissed Makoe.

[138] Firstly, for reasons advanced above, I do not accept that Transnet became aware of M[...]’s complaints only through her September 2014 grievance.

[139] Secondly, the disciplinary enquiry against Makoe was an absolute sham.

[140] In terms of the arbitration award, the content of which Transnet does not dispute and which confirms M[...]’s version on this issue: on the day of Makoe’s enquiry and prior to it commencing, Transnet and Makoe entered into an agreement whereby Makoe would plead guilty to the charges against him in exchange for a sanction short of dismissal. At arbitration, not only does Transnet confirm this agreement but also relies on this agreement in support

of Makoe's argument that the sanction of dismissal was too harsh. Transnet went so far as to say the agreement represented a fair outcome.

[141] To avoid any confusion, I am not proposing that Makoe's dismissal would have been the only possible outcome in order for Transnet to establish that it did all that was reasonably practical to eliminate such conduct.

[142] Whilst the sanction imposed by an employer on an employee who is found to be guilty of unfair discrimination may be a factor in a section 60 claim,³² and although the sanction of dismissal acts as a deterrent, which sends a strong warning to employees who harass others;³³ it would be an incorrect message to both employees and employers that, for an employer to meet the statutory threshold in section 60(4), dismissal is the only possible sanction for an employee found guilty of sexual harassment. Flexibility is necessary to achieve the purpose and objectives of the LRA.

[143] Nor am I suggesting that the arbitrator erred by finding dismissal as a sanction too harsh. As correctly pointed out in *Potgieter v National Commissioner of the SA Police Service & another*,³⁴ the enquiry before this Court is not one which seeks to review and set aside the arbitration award.

[144] What I am saying is that on a proper conspectus of the facts before this Court, one is left with the discernible impression that Transnet did all that it could to protect Makoe despite his serious transgressions.

[145] Firstly, Transnet does not act when informed of Makoe's wrongdoing; secondly, when it eventually takes steps to address M[...]s numerous complaints, Transnet attempts to shield Makoe from dismissal by entering into the aforementioned arrangement. Thirdly, when Makoe is dismissed, Transnet relies on this very same agreement at arbitration in support of Makoe's unfair dismissal claim, the legal consequences of which facilitated Makoe's return to Transnet mere weeks after his dismissal.

³²See *Future of SA Workers Union on behalf of AB & others v Fedics (Pty) Ltd & another* (2015) 36 ILJ 1078 (LC) at para 165.

³³ *McGregor v Public Health & Social Development Sectorial Bargaining Council & others* (2021) 42 ILJ 1643 (CC) at para 49, wherein the CC quoted from *Campbell Scientific Africa (Pty) Ltd v Simmers & others* (2016) 37 ILJ 116 (LAC).

³⁴ (2009) 30 ILJ 1322 (LC) at para 51.

[146] This is not a case where Transnet vigorously defended its decision to dismiss Makoe at arbitration, and despite which the arbitrator reinstated Makoe. The reality is that Transnet had a direct hand in the eventual outcome at arbitration.

[147] It is within this context that I find Transnet's attempts to rely on the fact that it took steps to discipline and dismiss Makoe disingenuous.

[148] Transnet had a duty to take steps to address and eliminate sexual harassment, yet it directly and/or indirectly facilitated and abetted Makoe's vile and despicable conduct. Instead of protecting M[...] from being sexually harassed, Transnet chose to protect Makoe, in particular his status as its employee, at M[...]s expense.

[149] The fact that Transnet sanctioned Adv Pela does not assist Transnet in the overall scheme of what I have said thus far. By virtue of their positions, both Adv Pela and Mkhize were tasked to represent Transnet at Makoe's internal enquiry, as well as at arbitration. Transnet cannot now distance itself from Adv Pela's involvement by issuing him a warning. That being said, Transnet is silent on what action, if any, was taken against Mkhize for his part, both at the internal enquiry and at arbitration.

[150] For these reasons, Transnet's defence to the deeming provision stands to fall, following which M[...] succeeds in her s60 claim.

Remedy

- Compensation.

[151] In *SA Airways (Pty) Ltd v Jansen van Vuuren & another*³⁵ (SAA), the Labour Appeal Court stated that under the EEA, '*compensation*' refers to the award of an amount as a solatium (ie to non-patrimonial loss). The court went further and found that '*in the case of compensation for non-patrimonial loss, the purpose is not to place the person in a position he or she would have otherwise been in, but for the unfair discrimination, since that is impossible,*

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

*but to assuage by means of monetary compensation, as far as money can do so, the insult, humiliation and indignity or hurt that was suffered by the claimant as a result of the unfair discrimination.*³⁶

[152] In *Hoffmann v SA Airways*³⁷ (*Hoffmann*) the Constitutional Court said the following in determining what appropriate relief is;

“The determination of appropriate relief, therefore, calls for the balancing of the various interests that might be affected by the remedy. The balancing process must at least be guided by the objective, first, to address the wrong occasioned by the infringement of the constitutional right; second, to deter future violations; third, to make an order that can be complied with; and fourth, of fairness to all those who might be affected by the relief. Invariably, the nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in the particular case. Therefore, in determining appropriate relief, ‘we must carefully analyse the nature of [the] constitutional infringement, and strike effectively at its source’.

[153] Although the Court in *Hoffmann* adopted the above approach to determine whether the remedy of instatement was an appropriate remedy, I see no reason why the same considerations ought not to be taken into account when determining the quantum of compensation to award an employee for their non-patrimonial loss suffered under the EEA.

[154] M[...]’s constitutionally guaranteed right not to be unfairly discriminated against had been repeatedly breached over an extended period of time.

[155] I have recorded how M[...] described her feelings after each incident of sexual harassment. It is clear that she felt disrespected, humiliated, and degraded. Her humiliation was compounded further when her complaints fell on deaf ears, and she was made to suffer further indignity upon Makoe’s return.

[156] It would be just and equitable for Transnet to compensate her 12 months of her remuneration, which is equivalent to R408 686.76. The quantum awarded also serves as a clear message to Transnet to ensure that another of its

³⁶ Id at para 80

³⁷ 2001 (1) SA 1 (CC); (2000) 21 ILJ 2357 (CC) at para 45.

employees does not find themselves in the same or similar circumstance in the future.

- Damages (loss of income from March 2016 to Feb 2017)

[157] In SAA, the Labour Appeal Court referred to damages as ‘*an actual or potential monetary loss (ie patrimonial loss)*’³⁸ wherein the ‘*purpose of an award of damages for patrimonial loss by means of a monetary award, is to place the claimant in the financial position he or she would have been in had he, or she, not been unfairly discriminated against.*’³⁹

[158] It is common cause that M[...] was not at work from September 2015 to January 2017. It is further common cause that M[...] was not paid her salary from March 2016 to the end of January 2017 and was only paid a portion of her salary in February 2017. Transnet does not dispute the fact that M[...] was booked off during this period as a result of her ordeals with Makoe, which culminated in her being diagnosed with PTSD.

[159] Transnet’s defence is that M[...] was requested to complete the necessary forms, together with her psychiatrist’s report, and submit the same to its insurer, in terms of its Risk Pool and Retirement due to Ill-health Policy (Risk Pool Policy). According to Transnet, had its insurer approved M[...]’s application, she would have received 90% of her salary between March 2016 and January 2017. Despite its requests, M[...] refused on the understanding that her claim for outstanding salaries ought to have been filed with the Compensation for Injuries and Diseases Act⁴⁰ (COIDA).

[160] M[...] claims that when submitting her COIDA claim, Transnet inserted the incorrect code on the forms. M[...] states that her claim to COIDA was the correct option, as confirmed by a COIDA official.

[161] The controversy around whether M[...] ought to have submitted her claim in terms of Transnet’s Risk Pool Policy or COIDA is immaterial. The fact remains

³⁸ SAA para 78.

³⁹ SAA para 80. See also *BMW (SA) (Pty) Ltd v National Union of Metalworkers of SA & another* (2020) 41 ILJ 1877 (LAC) at para 67.

⁴⁰ Act 130 of 1993.

that she was not paid for the period under question. Moreover, Transnet does not claim that had M[...] submitted her claim to its insurer, she would have been guaranteed 90% of her salary for the full duration of her absence. Rather, Transnet states that payments to M[...] would be subject to 'approval by the insurer'.

[162] Whilst it appears that any potential payment from Transnet's insurer to M[...] would have been on account of her temporary ill-health, there is uncertainty concerning what factors the insurer would have considered when deciding whether M[...] would have qualified for any payment, or if approved, for how long payments would be made to M[...] and at what rate in relation to her salary.

[163] What is clear is that any payment from Transnet's insurer to M[...] would not have constituted damages for her unfair discrimination, nor would it have served the same purpose as damages, namely, to place M[...] in the same position she would have been had she not been unfairly discriminated against.

[164] An issue not raised by Transnet, the initial concern this Court had was that if M[...]’s assertion of having a valid claim under COIDA was correct, then her claim for damages against Transnet may have been bad in law in accordance with section 35(1) of COIDA.

[165] However, when an employer raised this very issue by way of a special plea to an employee's claim for damages brought after the employee was sexually assaulted at work, the Supreme Court of Appeal in *MEC for the Department of Health, Free State Province v DN*⁴¹ posed the question as to whether or not 'the act causing the injury was a risk incidental to the employment'. Having found that assault could not have been incidental to the applicant's employment, the Supreme Court of Appeal rejected the employer's special plea. From a policy perspective, the Supreme Court of Appeal stated:

'...I have difficulty contemplating that employees would be assisted if their

⁴¹ *MEC For The Department of Health, Free State Province v D* [2014] ZASCA 167; 2015 (1) SA 182 (SCA); [2015] 1 All SA 20 (SCA); [2014] 12 BLLR 1155 (SCA); (2014) 35 ILJ 3301 (SCA).

*common-law rights were to be restricted as proposed on behalf of the MEC. If anything, it might rightly be said to be adverse to the interest of employees injured by rape to restrict them to COIDA. It would be sending an unacceptable message to employees, especially women, namely, that you are precluded from suing your employer for what you assert is a failure to provide reasonable protective measures against rape because rape directed against women is a risk inherent in employment in South Africa. This cannot be what our Constitution will countenance.*⁴²

[166] Sexual harassment cannot likewise be considered 'risk incidental' or a risk which was inherent to M[...]’s employment.

[167] M[...] is therefore entitled to damages equivalent to the remuneration she would have received between 1 March 2016 and 31 January 2017, that being R374 629.53.⁴³ M[...] seeks the balance of her salary for February 2017; however, she has not informed the Court what amount remains outstanding. This Court is therefore not in a position to assist her on this score.

[168] Transnet makes much with regard to the efforts it took to assist and facilitate M[...]’s return to work. Those efforts do not assist Transnet’s defence to M[...]’s s60 claim as they occurred *post facto*, nor do they play a factor when deciding the quantum of damages to award.

- Past and future medical expenses.

[169] As part of her damages claim, M[...] claims past medical expenses in the amount of R57 088-09 and future medical expenses in the amount of R550 000-00.

[170] In support of her past medical costs, M[...] attached her medical aid statements as of 31 December 2015, 31 January 2016, 30 September 2016, 30 November 2016, and 30 April 2017. These statements demonstrate that her medical aid covered her medical expenses and that there were no shortfalls that M[...] had to pay. There is nothing before this Court which

⁴² Id at para 33

⁴³ Mahlasela submits that 12 months of her remuneration equated to R408 686.76. She was not paid her salary for a period of 11 months, ie from 1 March 2016 to 31 January 2017, which is equivalent to R374 629.53 (R408 686.76/12 x 11)

substantiates how M[...] has arrived at the figure she claims for past medical expenses. In contrast, the statements M[...] relies on demonstrate that she was not left out of pocket. The Labour Appeal Court reiterated in *Moses Kotane Institute v Mzimele and Others*⁴⁴ that an applicant seeking damages must, amongst other issues, tender cogent evidence to substantiate a claim for damages and that the *'mere filing of documents, absent a coherent and particularised damages case, does not constitute proof of patrimonial loss'*.

[171] In support of her claim for future medical expenses, M[...] attaches a report from her attending psychologist, in terms of which her psychologist opines that M[...]’s therapy would continue for 3 years at an estimated cost of R550 000-00.

[172] The problem this Court has with M[...]’s claim in this regard is the absence of an affidavit from M[...]’s psychologist. In *Mgobhozi v Naidoo NO & others*⁴⁵ the Labour Appeal Court confirmed that the Labour Court has the same status as a High Court, and hence the rules applicable to the admissibility of evidence, as applied in the High Court, equally apply to proceedings at the Labour Court. Faced with a medical certificate and a report from a psychologist, attached to an employee’s condonation application, without any affidavit from the medical practitioners, the LAC held

*‘Section 3(4) above makes it clear that hearsay evidence includes that given in writing by a person other than the person deposing to the affidavit that includes the evidence in question. The fact that the appellant on oath in an affidavit refers to the medical certificates of other witnesses does not rescue such affidavit from the stigma of hearsay. There obviously have to be affidavits from the doctors in question themselves.’*⁴⁶

[173] The Labour Appeal Court went further to find that the absence of any explanation as to why there were no affidavits from the attending medical practitioners ought to be viewed *‘in a most serious light’*.

⁴⁴ (DA18/2023) [2026] ZALAC 24 (26 May 2026) at para 86.

⁴⁵ *Mgobhozi v Naidoo and Others* ZALAC 17; [2006] 3 BLLR 242 (LAC); (2006) 27 ILJ 786 (LAC) (*Mgobhozi*).

⁴⁶ *Mgobhozi ibid* Para 22.

[174] In *casu*, M[...] has not tendered any reason why there is no accompanying affidavit (confirmatory or otherwise) from her psychologist confirming the content of his report. M[...] chose to bring her dispute by way of motion proceedings and is therefore bound by the applicable rules. Her claim for future medical expenses rests solely on her psychologist's report, which is inadmissible, and no reasons have been forwarded to explain why there is no affidavit from her psychologist.

[175] It cannot be said that because Transnet has not raised this issue, it has tacitly consented to the report being admitted. Transnet's objection to M[...]’s claim is that M[...]’s psychologist needed to testify in open court on what M[...]’s future medical costs would be. That would have meant the psychologist taking the oath or affirmation. The reality is that even in these proceedings, the psychologist has not attested to his report.

[176] It would be prejudicial to Transnet if this Court were to grant M[...] damages for future medical expenses when the evidence relied upon is not properly before this Court, and no explanation is tendered to address this issue.

[177] M[...]’s claim for past and future medical expenses is dismissed.

- Damages for pain and suffering, emotional shock, loss of amenities in life, and for impairment of dignity.

[178] M[...] claims damages for pain and suffering, emotional shock, loss of amenities in life and the impairment of her dignity, all as a result of being sexually harassed, in the sum of R10 000 000.00.

[179] M[...] has not set out the factual or legal basis that justifies the amount claimed. She has merely inserted a monetary value next to each claim.

[180] Her claims collectively can best be described as a claim for general damages⁴⁷. Awarding general damages is akin to awarding non-patrimonial damages.

[181] M[...] has already been compensated 12 months' remuneration for her non-

⁴⁷ See *Pharmaco Distribution (Pty) Ltd v EWN* (2017) 38 ILJ 2496 (LAC) at para 48.

patrimonial damages, as a result of being unfairly discriminated against, and which amount is deemed fair and equitable.

[182] In *Pharmaco Distribution (Pty) Ltd v EWN*⁴⁸ the LAC held;

'As indicated, the respondent's claim for damages is for non-patrimonial damages for impairment of dignity as a result of being unfairly discriminated against and not for patrimonial loss. There is in principle no difference between her claim for compensation under s 194(3) of the LRA and her damages claim under s 50(2)(b) of the EEA for non-patrimonial loss. To award both non-patrimonial damages and compensation to the respondent for the same wrongful conduct of the appellant would, in my view, not be just and equitable as it would amount to penalising the employer twice.'

[183] This principle must likewise extend to the facts of this case. M[...] has already been compensated under the EEA for her non-patrimonial damages. To grant her additional general damages, under the EEA, and in respect of the same events, would amount to penalizing Transnet twice. Although I accept that an employee, relying on the same events, may refer two different disputes under two different statutes, (for example a claim for constructive dismissal under the LRA, as well as a claim for unfair discrimination under the EEA), an employee cannot duplicate their claim for what is essentially the same relief, under the same Act and in respect of the same events.

[184] M[...]’s claim for general damages stands to fall.

- Constitutional Claim.

[185] M[...]’s constitutional claim is that her right to freely choose her trade, occupation or profession, as guaranteed by s22 of the Constitution, had been unduly infringed.

[186] In support of her claim, M[...] firstly states that during the time she was booked off sick, her right to pursue her occupation had been denied and secondly, during the same period, she was *'forced to accept a considerable curtailment of her career progression.'*

⁴⁸ Id at para 49.

[187] Additionally, M[...] submits that Transnet failed to assist with her reintegration upon return and instead forced her to undergo a medical assessment before being allowed to resume her duties, and secondly, she was not allowed to return to her position that she occupied immediately prior to her absence and was in fact asked to determine her own job description on her return.

[188] M[...]’s claim is pinned directly on s22 of the Constitution.

[189] In *Strydom v Arcelormittal SA*⁴⁹ the Court said the following in relation to section 157(2) of the LRA;

“Section 157(2) gives the Labour Court jurisdiction in respect of any alleged or threatened violation of any fundamental right entrenched in chapter 2 of the Constitution and arising from employment and labour relations and any dispute over the constitutionality of any executive or administrative act or conduct or any threatened executive or administrative act or conduct by the state in its capacity as an employer. Section 157(2) refers to a ‘fundamental right entrenched in Chapter 2 of the Constitution’ and it has been accepted that it refers to a ‘fundamental right’ as set out in the ‘Bill of Rights’”

[190] Whilst noting that M[...] has failed to refer to, or even mention, s157(2) in her founding affidavit, her pleaded case is that her s22 right has been violated as a result of Transnet’s inaction. This Court has jurisdiction to hear a claim of that nature.

[191] M[...]’s failure to refer to s157(2) of the LRA and instead rely directly on section 22 of the Constitution does not offend the principle of subsidiarity. In terms of the subsidiarity principle, an applicant cannot rely directly on the Constitution and must formulate their claim within the enabling legislation. In *casu*, all that M[...] failed to do was to refer to s157(2) of the LRA, under circumstances where the substance of her claim falls squarely within the ambit of that section.

[192] However, for the same reasons why M[...] is not entitled to general damages, she would not be entitled to damages even if she can substantiate this claim.

⁴⁹ (2024) 45 ILJ 931 (LC) at para 45.

[193] Moreover, on the facts, there is no evidence before this Court to sustain the position that had M[...] not been booked off, she would have progressed in her career in some meaningful way.

[194] M[...]’s version that Transnet failed to assist her reintegration upon her return is denied by Transnet. Transnet says it did all that was reasonably practical to facilitate her return and requested a reintegration plan from her psychologist. On application of the *Plascon-Evens* rule, I must accept Transnet’s submission.

[195] M[...]’s argument, in further support of a violation of her constitutional right, is that on her return, she was not placed in the position she occupied prior to her absence. I am not convinced that an individual’s right in section 22 of the Constitution can be extended to mean M[...] had a right to return to the very position she previously occupied. M[...] does not say she has been removed from the field in which she wishes to be or grow within.

[196] For these reasons, M[...]’s claim that her constitutional rights had been violated is dismissed.

[197] Neither party sought costs.

Order

1. The late filing of this application is condoned.
2. The applicant’s claim that she was unfairly discriminated against by the second respondent in terms of s6 of the Employment Equity Act is dismissed.
3. The first respondent’s remaining preliminary points are dismissed.
4. The applicant succeeds in her claim that the first respondent unfairly discriminated against her in terms of section 60 of the Employment Equity Act.
5. The first respondent is to pay the applicant R408 686.76 in compensation, which is equivalent to 12 months’ remuneration of the applicant.

6. The first respondent is to pay the applicant an amount of R374 629.53, which is the salary she would have received from 1 March 2016 to 31 January 2017.
7. The applicant's claim for general damages as well as her claim that her constitutional right had been violated are dismissed.
8. The first respondent is ordered to comply with the provisions of section 60 in the future.
9. There is no order as to costs.

M. Naidoo
Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Mr. D Mbuyisa of Haffegge Roskan Savage Attorneys.

For the First Respondent: Mr. P Maserumule of Puke Maserumule Attorneys.

LABOUR COURT