Reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

CASES: C 886/17 & C627/2018

In the matter between:

SHOPRITE CHECKERS (PTY) LTD	**Appellant (Applicant in review)**
and	
JL	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION	**Second Respondent**
COMMISSIONER MARIEKE VAN ROOYEN *N.O.*	**Third Respondent**

Date of Hearing: 12 November 2020

Date of Judgment: 10 December 2021

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and

release to SAFLII. The date and time for handing down judgment is deemed to be 12h00 on 10 December 2021

Summary: (Sexual harassment – Appeal against arbitration award - s 6(3) and 10(6) of the Employment Equity Act 55 of 1998 – Liability of employer under s 60 of Act – Unfair Suspension – Unfair Constructive Dismissal – Costs. Appeal only successful in respect of quantum of compensation for sexual harassment. Review of findings of procedurally unfair suspension and unfair dismissal successful – Arbitrator's cost award set aside in light of mixed success of parties in the appeal and review – consideration of Code on Sexual Harassment and when liability arises under s 60 of EEA)

JUDGMENT

LAGRANGE J

Introduction

[1] This application concerns three separate disputes that were determined by a senior CCMA commissioner, the third respondent, in consolidated arbitration proceedings, namely:

1.1 A sexual harassment claim under s 6(3) read with s 10(6)[1] the Employment Equity Act 55 of 1998 ('the EEA').

1.2 An unfair suspension dispute.

1.3 A constructive dismissal dispute.

[2] Shoprite Checkers (Pty) Ltd ('Shoprite') has appealed against the arbitrator's findings under s 10(8) of the EEA and has applied to review her findings on the suspension and constructive dismissal disputes. For

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[1] Viz:

> 6 (3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).
> …
> 10 (6) If the dispute remains unresolved after conciliation-
> (a) any party to the dispute may refer it to the Labour Court for adjudication;
> (aA) an employee may refer the dispute to the CCMA for arbitration if-
> (i) the employee alleges unfair discrimination on the grounds of sexual harassment

the purposes of the judgment when reference is made to Shoprite as the applicant, it also refers to it in its capacity as the appellant.

[3] All the claims arose consequent to an alleged incident on 20 December 2016. The arbitrator found in favour of the applicant, Ms JL[2] ('JL'), on all claims and awarded her compensation of R 50,000 in respect of the unfair discrimination claim of harassment, six months' remuneration in respect of her constructive dismissal and one month's remuneration for the suspension which she found to be unfair. The arbitrator also made an order of costs in favour of JL and ordered the company to adopt a sexual harassment policy and develop a program to inform all its employees of it.

Summary narrative

[4] A summary of the timeline of events giving rise to the claims is set out below.

[5] Shortly before 18h00, on 20 December 2016, JL, a telesales clerk in the Checkers Food Services division was assisting the general manager, Mr KB ('KB'), to access the status of an order of a particular client on the computer of another sales clerk who was not present.

[6] The absent colleague's computer was located behind a desk partition in the telesales room where the telesales staff worked. Though there is some dispute about precisely where KB stood, on the most favourable interpretation of the evidence to him, he was standing next to her on her left hand side while she was standing and operating the computer to retrieve and print the order. It is while they were there that she claimed that he slapped her on her left buttock. At the time, or immediately afterwards as they proceeded to the printer outside the telesales room, JL claimed that KB giggled.

[7] On the opposite side of the telesales room where they were standing was a partition wall with a window in it. On the other side of the partition wall near the window was the printer. Someone standing at the printer looking

[2] In view of the value placed on the confidentiality of parties in grievances and disciplinary proceedings in item 9 of the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace it would be at odds with the spirit of that document to disclose their identities in a judgment. Accordingly, names and initials have not been used.

through the window would have been able to see JL and KB standing at the cubicle, though according to the arbitrator's *in loco* inspection observations it was not an unobstructed view.

[8] JL retrieved the printed order and showed it to KB. He then left and went home. She went to speak to another sales assistant, Ms S Pieterse ('Pieterse'), and related to her what she claimed KB had done.

[9] The following day, through her life partner and attorney, Mr P Jacobs ('Jacobs'), she sent letters by email to KB and the regional general manager, Mr L van der Spuy ('Van der Spuy'), in which she raised a grievance. The gravamen of the grievance was that she claimed that KB had "slapped her on her private parts" in the office.

[10] Mr C De Villiers ('De Villiers'), the regional personnel manager, was informed by Van der Spuy of JL's allegations. Sometime around 12h00, De Villiers called KB to his office and discussed JL's grievance with him. JL did not report for work the following day as she was waiting for a doctor's appointment and from 24 December was booked off until 9 January for stress and anxiety as a result of the alleged incident.

[11] Shoprite advised Jacobs the same day that Shoprite was investigating the allegations. On 22 December, Shoprite updated JL on the status of the investigations and she was interviewed twice on record about the incident. De Villiers interviewed the complainant and KB as well as other potential witnesses and his preliminary investigations concluded that there were no witnesses who could confirm her allegations.

[12] On 9 January 2017, KB underwent a polygraph test the results of which indicated that he showed no deception in denying he had touched JL's 'private parts' on the day in question.

[13] De Villiers concluded there was insufficient evidence to support her complaint and she was invited to receive the outcome of the grievance at a meeting on 10 January, to which KB was also invited.

[14] The outcome of the grievance investigation recorded that:

14.1 no "conclusive evidence" existed to prove that KB was guilty of sexual harassment;

14.2 various witnesses questioned, video surveillance was studied none of which could provide evidence that he was guilty, and

14.3 KB's version that he did not touch JL was "accepted according to the polygraph".

[15] The document further stated that:

> "The grievance made by JL claims sexual harassment misconduct from KB. After a thorough investigation, no clear evidence has surfaced proving KB guilty. Taking the polygraph evidence into account the burden might be on JL to prove she is not presenting false allegations against KB."

Both parties were expected to sign that they agreed to the outcome, but JL refused to do so because she was adamant that the incident had taken place. KB signed the document and left the room. De Villiers then shut the door and asked JL, in Afrikaans, "What kind of games are you playing?"[3] He also warned her that KB was considering suing her for defamation. De Villiers suspended her on the same day until 16 January. There is a dispute whether he gave her reasons for her suspension at the time. JL immediately referred a dispute to the CCMA over her alleged unfair suspension and about the alleged sexual harassment asking for action to be taken against KB and compensation.

[16] On 11 January, she wrote to De Villiers rejecting the outcome of the investigation, and contesting De Villiers's reliance on KB's polygraph test. She did implicitly agree that there were no eyewitnesses to the event. In her letter she also asked why she must undertake a polygraph test and the reason for her suspension.

[17] On 12 January De Villiers responded to JL's letter. He recorded that JL had agreed to undertake a polygraph exam and would meet with her to determine if there was any additional information that would insist the investigation. He also sent her a brochure of the company's health program which provided free trauma related support. It turned out, apparently unbeknownst to De Villiers, that the service he referred JL to did not provide support in sexual harassment cases. He did not provide

[3] "Watse games speel jy?"

any written reasons for the suspension. On 13 January, JL underwent a polygraph test which sought to determine if she had been deceptive in making her allegations against KB. The report indicated that her responses were deceptive.

[18] On 16 January, her suspension was extended pending a disciplinary inquiry until 20 January. On 18 January she was issued with a notice of a disciplinary inquiry to be held on 20 January. She was charged with making a false accusation of sexual harassment against her manager. On the same day, JL gave 30 days' notice of her resignation stating that she believed she had been constructively dismissed. De Villiers responded, disputing her claim of constructive dismissal and assured her that the inquiry would be conducted by an independent chairperson.

[19] On 19 January she replied that she would not be attending the inquiry and that she had not been properly notified of it. There followed further email correspondence between the two of them. The same day she referred her claim of constructive dismissal to the CCMA and claimed compensation.

[20] The disciplinary inquiry which had been scheduled for 23 January was postponed to the 26th January and the notice was amended to include a charge of unauthorised absenteeism from 16 to 20 January. On 23 January, De Villiers wrote to her cautioning that since she was still employed she was required to attend the disciplinary inquiry and attempted to reassure her that no findings had been made against her. She then responded by withdrawing her resignation on notice and repeated her allegation of constructive dismissal.

[21] In the pre-arbitration minute, the parties recorded that it was in dispute whether or not:

21.1 KB had sexually harassed her;

21.2 2. Shoprite had followed a fair and just investigation process in relation to her claim;

21.3 3. Reasons had been provided for her suspension;

21.4 4. Whether she had been paid until 19 January 2017;

21.5 5 Whether she was given reasonable support and counselling in terms of the code of good conduct for sexual harassment, and whether or not

21.6 6. the evidence used in determining whether she had been sexually harassed was admissible and just.

The award

[22] The arbitrator outlined the legal principles governing the different claims. She noted that almost invariably in sexual harassment claims there will be only be the evidence of the alleged victim and the alleged perpetrator. She also recorded that JL bore the onus of making out a *prima facie* case of sexual harassment, after which the onus shifted to the employer to prove that it did not take place in terms of section 11 of the EEA[4]. Further, she mentioned that an employer may deny any liability for sexual harassment if it had met its own obligations in terms of section 60 of the Act[5].

[23] In determining whether sexual harassment had occurred, the arbitrator found that JL was a more credible witness than KB.

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[4] Viz:

> **11 Burden of proof**
>
> (1) If unfair discrimination is alleged on a ground listed in section 6 (1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination-
>
> (a) did not take place as alleged; or
>
> (b) is rational and not unfair, or is otherwise justifiable.

[5] Viz:

> **60 Liability of employers**
>
> (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 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 prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.

[24] There was also no history of animosity between them and she found that JL made concessions when they were due. Had he been prepared to apologize she would have put the incident behind her. She also informed a colleague about the incident shortly afterwards and Peterson testified that JL was visibly upset when she told her about the incident.

[25] The arbitrator drew an adverse inference against KB asking Peterson the day after the alleged incident "whether she had seen anything". The arbitrator reasoned, he would have had no reason to ask that question if there had been nothing to see. The arbitrator also dismissed the suggestion that KB would never have asked another staff member about the incident out of embarrassment, because the question he asked Peterson was open and vague and she would not have known what he was referring to if she knew nothing about the incident.

[26] The arbitrator found KB to be overly dramatic, confused and evasive at times, which created the impression he was trying to avoid the truth. She found it odd that he could not remember when he first found out the specific details of the complaint, namely that he had slapped JL on her buttock. The arbitrator reasoned that if he had done nothing, he would have wondered what the complaint about him slapping her "private parts" actually referred to. His testimony that he did not regard anyone's buttocks as private parts did not explain why he denied the event so dramatically, when he might be expected simply to deny that he had slapped her "private parts". The arbitrator also found that his demeanour was not consistent with his stated view that he did not consider buttocks to be private parts.

[27] The arbitrator took account of the fact that KB could not think why JL would have lied about the incident as they had a good relationship and he was planning on promoting her. She dismissed KB's suggestion that perhaps JL thought she would get some time off over the busy Christmas period when leave was normally not granted or that she did it in order to avoid disciplinary action for being absent the day before the alleged incident, as being at odds with his claim that he was planning to promote her.

[28] Another factor noted by the arbitrator was that JL was never charged with being absent on 19 December, when other charges were levelled against her. Furthermore, JL herself had no plans to take time off at the time of the incident and could have obtained a medical certificate if she just wanted a few days off. Further, if that had been the purpose of her complaint, it was improbable that she would have continued to pursue it after Shoprite rejected it.

[29] The arbitrator carefully considered whether the arrangements of the computer workstation would have made it difficult for KB to slap JL on the buttock as JL claimed. She decided, based on the inspection *in loco* that this was not the case.

[30] The arbitrator dismissed discrepancies between the versions of the complaint JL provided in the letters she sent to KB and Van der Spuy on 21 December and her summary of facts contained in her CCMA referral, as being slight and not material in light of the totality of the evidence.

[31] She found it was credible that JL had to stand in close proximity to KB when she showed him the invoice at the printer, but that she was feeling very uncomfortable at that point.

[32] As to the evidence of Mr Willoughby, a drivers' assistant, who claimed that he observed that the incident did not occur, the arbitrator found that the *in loco* inspection revealed that he would not have had an unobstructed view of JL and KB. Moreover, Willoughby's recollection was based principally on viewing the video footage, which tended to confirm that there was nothing he had personally observed which gave him reason to remember events.

[33] Following this assessment, the arbitrator concluded that JL's version should be favoured over that of KB as more probable.

[34] The arbitrator concluded that Shoprite had committed an unfair labour practice when it suspended JL and that she was unfairly constructively dismissed. In addition, she found that the employee was unfairly discriminated against in that she was sexually harassed by KB, and that the employer was liable for this in terms of section 60 of the EEA.

Grounds of appeal and review

[35] As mentioned already, Shoprite has appealed against the finding and award of compensation for the unfair discrimination claim based on sexual harassment, in terms of s 10(8)[6] of the EEA. It also seeks to review the findings made and the relief awarded relating to the unfair suspension and constructive dismissal claims. Obviously, the appeal and reviews are to be determined by the different tests applicable to each type of application. However, since the determination of an appeal concerns the correctness of the award rather than whether it is one that no reasonable arbitrator could reach, the outcome of the appeal is dispositive of the review application, insofar as the claim of unfair discrimination is concerned.

The appeal against the finding of Sexual Harassment and the Relief granted

Characterisation of sexual harassment

[36] Section 3 of the EEA states:

> 'This Act must be interpreted-
>
> (a) in compliance with the Constitution;
>
> (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.'

[37] The Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace[7] ('the Code') states *inter alia* :

> '**3 Sexual Harassment as a form of unfair discrimination**
>
> Sexual harassment in the working environment is a form of unfair discrimination and is prohibited on the grounds of sex and/or gender and/or sexual orientation.

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[6] Viz:

(8) A person affected by an award made by a commissioner of the CCMA pursuant to a dispute contemplated in subsection (6) (aA) may appeal to the Labour Court against that award within 14 days of the date of the award, but the Labour Court, on good cause shown, may extend the period within which that person may appeal.

[7] GenN 1357 in GG 27865 of 4 August 2005

…

4 Test for Sexual Harassment

Sexual harassment is unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:

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

4.2 whether the sexual conduct was unwelcome;

4.3 the nature and extent of the sexual conduct; and

4.4 the impact of the sexual conduct on the employee.

5 Factors to establish sexual harassment

5.1 Harassment on a prohibited ground

5.1.1 The grounds of discrimination to establish sexual harassment are sex, gender and sexual orientation.

5.1.2 Same-sex harassment can amount to discrimination on the basis of sex, gender and sexual orientation.

5.2 Unwelcome conduct

5.2.1 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.

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

5.2.3 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 a co-worker, superior, counsellor, human resource official, family member or friend.

5.3 Nature and extent of the conduct

5.3.1 The unwelcome conduct must be of a sexual nature, and includes physical, verbal or non-verbal conduct.

5.3.1.1 Physical conduct of a sexual nature includes all unwelcome physical contact, ranging from touching to sexual assault and rape, as well as strip search by or in the presence of the opposite sex.

5.3.1.2 Verbal conduct includes unwelcome innuendos, suggestions, hints, sexual advances, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person's body made in their presence or to them, 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.

5.3.1.3 Non-verbal conduct includes unwelcome gestures, indecent exposure and the display or sending by electronic means or otherwise of sexually explicit pictures or objects.

5.3.2 Sexual harassment may include, but is not limited to, victimization, *quid pro quo* harassment and sexual favouritism.

5.3.2.1 Victimization occurs where an employee is victimized or intimidated for failing to submit to sexual advances.

5.2.3.2 *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. This could include sexual favouritism, which occurs where a person in authority in the workplace rewards only those who respond to his or her sexual advances.

5.3.3 A single incident of unwelcome sexual conduct may constitute sexual harassment.

5.4 Impact of the conduct

The conduct should constitute an impairment of the employee's dignity, taking into account:

5.4.1 the circumstances of the employee; and

5.4.2 the respective positions of the employee and the perpetrator in the workplace.'

(emphasis added)

[38] If the alleged incident took place, it is common cause it would have amounted to sexual harassment on the part of KB. The only question is whether it probably did occur, based on the evidence.

Grounds of appeal against the finding of sexual harassment

[39] Shoprite raised grounds of appeal relating both to the arbitrator's findings of fact and law, which are addressed below.

Credibility findings

[40] Shoprite argues that the arbitrator erred in the way she dealt with two irreconcilable versions of the event. It attacks her finding in favour of JL's credibility and further contends the arbitrator should have found another

witness, Ms S Pietersen, was also not credible. It also argues that Pietersen's evidence was improbable. By contrast it submits that the evidence of KB and Mr Willoughby's evidence should have been accepted.

[41] In particular, Shoprite argues that there were discrepancies in JL's version of what transpired. It claims these discrepancies concerned material differences between the letters she wrote to KB and Van der Spuy even though they were written around the same time, and she could not explain these differences. In addition, in her written statement prepared in anticipation of arbitration proceedings at the CCMA, she related a third version of the events. On one version, KB had slapped her while they were still standing at the cubicle where she was using Visagie's computer and he was standing directly behind her. In another version, he immediately giggled after slapping her. In the third version, she claimed that he was standing beside her when he slapped her and only giggled as they were already proceeding towards the printer.

[42] Shoprite also argues that the arbitrator should not have relied on the evidence of Pietersen because her version was highly improbable. She had claimed that the morning after the alleged incident, KB had called her into his office and told her he had received an email and asked her if she had seen anything the previous day. However, KB said he had only become aware of the emailed letter to himself after he was called in by Van der Spuy around 12h00 when they discussed the complaint together with De Villiers, who was on a speakerphone. Consequently, Shoprite contends Pietersen could not have been called in by KB that morning. Secondly, her claim to have been called in to speak with KB and De Villiers on the same day could not have been true because De Villiers was not in the office on 21 December. The only meeting she could have been thinking of was one attended by the three of them on 20 December to discuss JL's absence from work on 19 December. Since that meeting took place before the alleged incident it could never have been the topic of discussion at that meeting.

[43] Moreover, since JL had not mentioned speaking to Pietersen in her letter of complaint, there was no reason for KB to think she might know anything about the incident. It was more natural and plausible that KB would not have raised this with other staff because, as a senior manager, he would not wish to publicise such an embarrassing complaint and was even less likely to raise it with a temporary employee like Pietersen. Pietersen also denied that all of the telesales employees had become aware of the details of the incident, contrary to JL's own testimony.

[44] By contrast, Shoprite contends its witnesses were credible and reliable. In particular, the arbitrator failed to consider that KB was honest in admitting when he was uncertain and the arbitrator misconstrued this as confusion and evasiveness on his part. In regard to the critical evidence of the incident, he had said he was standing outside of the cubicle partitioning and Willoughby corroborated this evidence, which was not challenged under cross-examination. KB's only reason for approaching JL that evening was to see that the order had been received and he left as soon as he had ascertained that.

Assessment of JL's motive

[45] Shoprite argues that the undisputedly good working relationship between JL and KB was irreconcilable with JL's version. Moreover, she faced a real risk of serious disciplinary action which could lead to her dismissal for her unauthorised absence on 19 December, and the arbitrator had wrongly discounted this.

Polygraph evidence

[46] Shoprite contends that the arbitrator made material errors in her assessment of the polygraph tests in that she:

46.1 failed to take account of the evidence that polygraph test results had a 1% margin of error;

46.2 failed to attach enough weight to the polygraph results in determining which of the mutually exclusive versions of JL and KB should be preferred;

46.3 wrongly took account of the evidence that the polygraphist could not say when the machine was last calibrated, whereas the machine was self-calibrating;

46.4 failed to take account the unchallenged evidence that the test results were confirmed by the polygraphist's colleague;

46.5 wrongly decided that a different person should have conducted the test on JL, because the polygraphist was already familiar with the results in the case of KB, and

46.6 wrongly held that the polygraphist had admitted that the reports were not complete.

Assessment of Willoughby's evidence

[47] Shoprite submits that the arbitrator wrongly held that Willoughby had conceded that his only recollection of events was the video footage, whereas it was apparent he recalled things not appearing in the footage. The arbitrator also wrongly concluded that he could not have had an unobstructed view of KB and JL when they were standing at the cubicle, without this proposition been put to him and given that JL herself conceded that he could have seen where they were standing. His evidence that he saw nothing untoward occurring should have been given more weight by the arbitrator.

Evaluation of grounds of appeal on the merits

Credibility findings

[48] The *locus classicus* on the evaluation of evidence in instances of irreconcilable versions is *Stellenbosch Farmers' Winery Group Ltd and Another v Martell Et Cie and Others* 2003 (1) SA 11 (SCA), in which the court held:

> "[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature

may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence C of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[49] To this may be added further qualifications raised in the jurisprudence, namely:

"[5] Whilst a Court of appeal is generally reluctant to disturb findings which depend on credibility it is trite that it will do so where such findings are plainly wrong (R v Dhlumayo and Another 1948 (2) SA 677 (A) at 706). This is especially so where the reasons given for the finding are seriously flawed. Overemphasis of the advantages which a trial Court enjoys is to be avoided, lest an appellant's right of appeal 'becomes illusory' (Protea Assurance Co Ltd v Casey 1970 (2) SA 643 (A) at 648D - E and Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd 1979 (1) SA 621 (A) at 623H - 624A). It is equally true that findings of credibility cannot be judged in

isolation, but require to be considered in the light of proven facts and the probabilities of the matter under consideration."[8]

and

"[14] It has been said by this Court before, but it bears repeating, that an assessment of evidence on the basis of demeanour - the application of what has been referred to disparagingly as the 'Pinocchio theory' - without regard for the wider probabilities, constitutes a misdirection. Without a careful evaluation of the evidence that was given (as opposed to the manner in which it was delivered) against the underlying probabilities, which was absent in this case, little weight can be attached to the credibility findings of the Court a quo. Indeed, on many issues, the broad credibility findings, undifferentiated as they were in relation to the various issues, were clearly incorrect when viewed against the probabilities."[9]

[50] The inconsistencies in JL's evidence, which Shoprite places emphasis on are discrepancies about: whether KB giggled after touching her and precisely when he did so; whether he was standing behind or next to her at the cubicle, and whether he proceeded first in the direction of the printer or whether she started walking to the printer first. Much was made of the fact that JL's initial written statement made no mention of him giggling and the two written expressions of her grievance made to KB himself and Van der Spuy on the same day were not the same.

50.1 The relevant portion of the letter which she emailed to KB on 21 December, read:

"You came to my desk to inquire about in order that I had to resolve about a client that was not happy. I went to the workstation of a colleague to check the order.

When I checked the order you then violated my personality rights by slapping me on my private parts. I was shocked at first but then my shock turned to anger. You have violated me as a person and you action was totally uncalled for and borders [on] sexual harassment."

50.2 The equivalent portion of the grievance letter JL sent to Van der Spuy read:

[8] *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA)

[9] *Medscheme Holdings (Pty) Ltd and Another v Bhamjee* 2005 (5) SA 339 (SCA)

> "On 20th of December 2016 on or about 18H00 hours working light on some queries when the said manager approached me at my desk and asked me to resolve an order of a client that was unhappy.
>
> I proceeded to my colleague's desk where I checked the order in question. The manager followed me to the desk. As I was finished I proceeded to return to my desk. The manager then slapped me on my private parts and giggled."

JL explained that she used the term "private parts" because she regarded her buttocks as such.

[51] When JL testified in chief, she simply said that KB had followed her to her colleague's desk, where she retrieved the email, and he had slapped her on her left buttock, but she could not tell which hand he had used. He giggled, which she found very strange, and he followed her to the printer to retrieve the printout. After he had left, she then looked for Pieterse, who was also working that evening, and told her what KB had just done and said she was not sure what to do, to which Pieterse responded, "That's a tough one." She was not sure whether to tell her partner when she got home, but he asked her if something was bothering her and she told him. He then advised her on how to proceed with the grievance.

[52] Later, during her evidence in chief, she was asked to provide more detail of the incident and she explained that KB was standing next to her left hand side when he made contact with her body. In terms of the summary she prepared for the CCMA , she said that he had been standing next to her and had slapped her on her 'bum' and that she was in a state of shock but wanted to get the order sorted out. As she proceeded to print the order KB laughed or giggled and walked out toward the printer and she followed him.

[53] The alleged variation in her versions was slight and amounted to little more than expressing the same event in similar if not absolutely identical terms. It was not an incident that was prolonged, or truncated, but took place over the very short period of time that she and KB were in close proximity, while she was retrieving the order. Essentially, her version remained the same, namely that KB had slapped her on her buttock when

she was at her colleague's computer retrieving the order KB wanted and that he had giggled after doing so, whether immediately or as they were walking towards the computer to retrieve the printout. Whether KB had been standing directly behind her when she was accessing the email on her colleague's computer, which seems unlikely given the space for two people to stand comfortably behind each other in the cubicle facing the computer, or whether he was standing to the left of her he would have been in a position to have made contact with her buttock with his hand. The fact that the letter to KB placing her complaint on record did not mention the detail that he giggled, whereas she did in the grievance letter written at the same time, is not an issue of great significance. In any event, it was arguably more important that she did not omit this detail in the grievance letter to Van der Spuy than the fact that she did not mention it in her letter to KB.

[54] KB did not dispute that when he was standing next to the cubicle that he asked JL if the order had come through and that he would have been able to see the email himself if he was standing where she said he was. It is true that this could be interpreted that as supportive of KB's version that he was not standing right next to her because if he had been able to see the screen he would not have needed to ask her if the order had come through. However, the fact that he asked the question is not necessarily incompatible with him standing close enough to JL to have touched her buttock. It is true that JL on the one hand had said that KB had followed her to the printer and on the other that he had started walking to the printer before she did. The evidence of the video footage showing them leaving the area where the cubicles were confirmed that KB is seen leaving first with JL behind him. On either of their versions this is more probable as he would have to have moved first in order for JL to exit the cubicle.

[55] The video footage of KB leaving the cubicle area also showed that he had a bag in his left hand and another bag over his right shoulder, with his right hand free. Although it was KB's version that these items he was carrying would have made it difficult for him to have touched JL, it would have been possible for him to have done so with his free right hand if he was standing near enough to JL.

[56] JL had testified that after the incident she returned to her own workstation and signalled to Pieterse, who was seated at her own workstation wearing her earphones, to come over to JL's workstation, because she wanted to tell her something in private. JL claims she told her that KB slapped her on her bum. Pieterse effectively confirmed her version. Pieterse said she was shocked and did not know what to say or what to advise her.

[57] Shoprite argues that Pieterse's credibility is fatally undermined by her contention that KB called her in the following morning after the incident and said something happened the previous night and asked her if she had seen anything. She responded that she had not seen anything, and but that JL had told her about the incident. According to her, she was again called by KB when he was together with Van der Spuy and they had the same conversation. She could not remember exactly but Van der Spuy asked her but it concerned what had happened. She could not remember if they provided any details about the alleged act of sexual harassment.

[58] When she was cross-examined it was put to her that she had said that KB spoke to her first thing in the morning on 21 December, which could not have happened because he had only received the letter from JL at 11h30 that morning. In fact, all Pieterse said was that he called her KB's office that morning, and that later he had called her again when Van der Spuy was in his office. At no stage did she volunteer that this had been first thing in the morning. When she was questioned further about this she said that she could not remember the exact times she had been called in by KB on 21 December, but he had his laptop in front of him and had told her that he had received a letter from JL stating that something had happened the previous night and he asked her if she saw what happened. She was hoping that he did not want to see her about the incident and was shocked to realise that the matter was now going somewhere, when KB told her about the letter. It was also suggested to her that it was improbable that KB or De Villiers would have spoken to her the following day about the incident as she had not been mentioned by name in JL's letter to Van der Spuy. In re-examination, she confirmed that she was the only other staff member left in the telesales room at the time the alleged incident took place.

[59] During her testimony, Pieterse said she was not sure whether the meeting at which KB and Van der Spuy were both present had taken place on the same day or whether that had been the following day. Shoprite's version put to her was that there had been no meeting between her and KB on his own, or with De Villiers or Van der Spuy present, on 21 December. It was not specifically put to her that De Villiers was not at the premises that day. It was never put to her that she had any motive to falsely implicate KB, or to falsely confirm that JL had spoken to her shortly after KB had left on the evening of 20 December.

JL's motive

[60] While it is true that JL might have faced an inquiry and possible dismissal arising from her absence without leave on 19 December, KB's own testimony on the probability of such an outcome did not suggest that was a likely outcome. Implicit in Shoprite's speculation that her complaint against KB was a pre-emptive attempt to avoid an inquiry into her absence, is that she came up with this scheme within a few minutes of unexpectedly being in KB's presence for a very short while that evening and further that she quickly set her plan in motion by speaking to Pieterse just after KB left. Also implicit in this scenario is that JL thought that a strategy of making such a serious allegation against KB carried little risk, because she was confident she would be able to persuade Shoprite that KB had acted as she claimed, despite the fact that he would obviously deny it and that she would not be able to produce any independent eyewitness evidence to the incident. In addition, she would have to have been confident that she would be believed despite the absence of any prior difficulties in her relationship with KB. This high risk strategy to thwart possible disciplinary action which did not seem likely to result in dismissal seems far less probable than her version that KB had behaved in an unexpected way, which had left her in a state of shock and confusion as to how to deal with it. It was only when she had got home and her partner asked her if there was something wrong that she told him and he advised her to lodge the grievance.

Polygraph evidence

[61] In effect, Shoprite contends that because the versions of KB and JL were mutually exclusive, the arbitrator should have given more weight to the outcome of the polygraph tests as an accurate indicator of who was telling the truth. It argued that she had also wrongly discounted the accuracy of the actual polygraph test results.

[62] I agree that the arbitrator's inferences about the reliability of the instrument based on doubts about whether it had been calibrated were somewhat tendentious based on the evidence. Similarly, the fact that the same polygraphist conducted the test on JL, should not have affected the outcome of the electro-mechanical test. Nonetheless, the arbitrator was not incorrect in law in stating that the tests cannot be accepted as conclusive proof. Her ultimate conclusion was that the test results simply did not accord with the surrounding evidence and consequently should be discounted.

[63] In passing, it is questionable how useful the test conducted on KB could have been even if it should have been given more weight. KB was not asked specifically if he had touched JL on her buttocks, but only if he had touched her 'private parts'. It was clear from KB's own evidence in the arbitration that he did not consider a person's buttock as a 'private part'. Such an understanding is in keeping with the more correct usage of the term as a reference only to genitals[10], contrary to JL's broader interpretation of the term. Whether or not KB knew that the specific allegation against him was that he touched JL's buttock, this would not necessarily have changed his view of the truth of the statement that he did not touch her private parts. He could truthfully have answered he did not touch her 'private parts', despite knowing he touched her buttock.

Willoughby's evidence

[64] Willoughby, a driver's assistant, had been standing with his driver at the photocopy machine during the time that the alleged incident took place. Despite the arbitrator's concern that his view might not have been

[10] See Shorter OED, 6 ed, 2007 at 2351.

unobstructed, it was common cause that he would have had a view of KB and JL through the glass window in the partition screen when they were at the computer.

[65] All of his material testimony was given after viewing the video footage. He also confirmed that the first time he had been approached about the event, was when he was shown the video footage in April 2017, four months afterwards. He remembered KB and JL at the workstation. KB was standing outside the partition. Willoughby agreed that sometimes he was looking down at the printer and sometimes he was looking at what was happening in the telesales office where KB and JL were. He admitted that his attention had not been on the two of them the whole time and conceded that the video evidence showed that he was chatting with his colleague and they were intermittently looking at what came out of the printer because they were printing invoices for a delivery. At some stage they had to change the paper in the printer. Although he admitted that his attention was not on KB and JL all the time he believed he would still have noticed if something had happened, because even though a slap might have been a momentary event, he would have noticed the reaction afterwards.

[66] Whether Willoughby's testimony relied in part on his memory being refreshed by the video footage, the fleeting nature of the incident meant that his alternating observations of KB and JL could hardly be a reliable indicator of whether or not the incident occurred. The best that can be said is that he did not see anything untoward taking place at those times he was looking through the window of the telesales room. JL's own evidence was that she was shocked but did not show any outward sign of her inner state at the time. It must be remembered that her entire interaction with KB from the time he entered and enquired about the order to the time he left the telesales room took less than a couple of minutes.

[67] On the evidence there is no reason to fault the arbitrator's findings in relation to Willoughby's evidence.

[68] In summary, Shoprite has not advanced grounds on which to overturn her finding that KB's conduct amounted to an act of sexual harassment.

Was the arbitrator correct in holding Shoprite liable for KB's conduct in terms of section 60 of the EEA?

[69] In *Liberty Group Ltd v MM* [2017] 10 BLLR 991 (LAC), the labour appeal court dealt with the interpretation of S 60 in the following terms:

> '[35] While it is clear that section 60 imposes liability on an employer where a provision of the EEA has been contravened, in its construction and wording the provision is not a model of clarity. The result is that confusion has arisen regarding what is required to prove an employer liability under section 60, with the requirements of section 60(2) often being conflated with those of section 60(4). As much was evident in the decision of *Matambuye v MEC for Education and others*, in which the Labour Court noted that it was not required to decide whether section 60(2) refers to steps the employer must take immediately following a report of harassment and whether subsection (4) refers to reasonable steps that the employer must take in advance to eliminate and prevent acts of unfair discrimination.
>
> [36] Much of the lack of clarity as to what must be proved under section 60 centres on section 60(4). The debate has often turned on whether the reference to an employer's obligation "to ensure that the employee would not act in contravention of this Act" is intended to mean that the employer take steps in advance to eliminate future conduct. The unduly narrow interpretation given to section 60 in *Mokoena and another v Garden Art (Pty) Ltd* and another has, correctly in my mind, been criticised for permitting a conclusion that liability arises only where the harassment is repeated after an initial complaint is lodged and then only where the employer had failed to take reasonable steps to prevent such further harassment.
>
> [37]It seems to me that a preferable interpretation was given to section 60 in *Biggar v City of Johannesburg, Emergency Management Services* in which the Court found that the employer had failed to take all necessary steps to eliminate racial abuse perpetrated by its employees and to have failed to do everything reasonably practicable to prevent continued harassment. This followed sustained racial harassment of the applicant and his family by co-employees in residential premises provided by the employer.
>
> [38] The Court in *Potgieter v National Commissioner of the SA Police Service and another* ("Potgieter") usefully set out the requirements for employer liability to arise under the EEA where the complaint raised is one of sexual harassment. These are 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 the 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.

[39] It is noteworthy that in recording the last requirement as whether the employer failed to take steps to ensure that employees "did not" act in contravention of the EEA, *Potgieter* moves away from the words "would not" in section 60(4).'

(footnotes omitted)

[70] Paragraphs (vi) and (vii) in the extract above correspond to sections 60 [3] and section 60 [4] of the EEA.[11] The authors of Harassment in the Workplace: Law, Policies and Processes[12] insightfully analyse the relationship between the two sections thus:

"… (S)ection 60 will apply unless the employer can avail itself of the defences provided for in the section. These two defences are discussed later in more detail, but an important question is whether an employer is required to prove one or both of these defences to escape liability. Put differently, is the summary of the requirements of section 60 in Mokoena (and quoted at the start of this section) correct? More particularly, is the insertion of the word "and" between requirements (f) and (g) correct? In other words, is the employer required to meet all the requirements as listed in Mokoena before it can escape liability? It is a rule of interpretation that where the language of a legislative instrument is clear, the ordinary meaning must be given to the language. A further rule of interpretation is that language is not used unnecessarily and that each word of a statute must be given a meaning. The online version of the Oxford English Dictionary describes the meaning of "despite" as "in spite of ". It certainly does not mean "and". Therefore, it is suggested that the use of the word "despite" in section 60(4) indicates that this subsection is to be applied "in spite of" ("regardless of" or "notwithstanding") the requirements listed in the previous subsection, rather than it being a further requirement that the employer must meet in order to escape liability.

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

[11] See fn5 above.

[12] Rochelle le Roux; Alan Rycroft; Thandi Orleyn; assisted by Sufinnah Singlee, May 2010, (Butterworths).

> 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, 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"

(emphasis added – footnotes omitted)

[71] What emerges from the jurisprudence and the commentary is that 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 defence. Items 7 and 8 of the Code set out the type of measures that ought to be taken for an employer to avail itself of the defence, but its failure to do so will not render it liable for an employee's misconduct[13]. It will only deprive it of a possible defence.

[72] In holding that Shoprite was liable in terms of the section, the arbitrator's findings fall into two categories. The first category concerns the conclusions that Shoprite had failed to prove that it had provided its employees with information about what constituted sexual harassment, how it should be reported on, and the processes to be followed if such report was made. She found that an employer the size of Shoprite should have a code on sexual harassment and would have educated its employees on the issues mentioned. Secondly, the arbitrator found that Shoprite had handled the grievance incompetently and failed to follow an informal procedure which would have been the most effective at resolving the issue in the circumstances in question. Its approach to the investigation and its conclusion that there was "no evidence" to sustain JL's allegation, when in fact there was enough to proceed with the

[13] See *Ntsabo v Real Security CC* (2003) 24 *ILJ* 2341 (LC) at 2378I-2379A.

disciplinary inquiry against KB and the insensitive remarks of Van der Spuy led her to conclude that Shoprite was liable under section 60.

[73] The more detailed faults the arbitrator found with the employer's approach to the grievance, together with Shoprite's attack on the arbitrator's reasoning in arriving at those conclusions, are set out below and discussed:

73.1 The arbitrator noted that the option of an informal process was not considered and JL was not even asked what outcome she was seeking. As a result, De Villiers only became aware after reading the report of her polygraph test that she would have been satisfied with an apology from KB. KB was also potentially prejudiced by this approach. While conceding that it did not advise JL of an alternative to the formal grievance process, Shoprite contends that such a failure does not necessarily mean it should be held liable under section 60. Even though Shoprite did not have the type of procedures in place as envisaged by the code, before embarking on the investigation it ought to have considered the Code and to have given JL the option of trying to address it informally[14]. The arbitrator's observation that the whole episode might have been more simply resolved if this process had been followed is well made.

73.2 The arbitrator found that Van der Spuy inappropriately phoned KB's wife assuring her that he believed in her husband's innocence. KB was a party to Van der Spuy's first discussion with De Villiers about the grievance. Shoprite contends Van der Spuy's call to KB's spouse was an irrelevant consideration because Van der Spuy was not involved in the investigation conducted by De Villiers. It is true that Van der Spuy was drawn into the matter because the grievance was referred to him, as KB's superior. Even though the investigation was assigned to De Villiers to deal with, thereafter Van der Spuy should not have engaged with either of the parties directly or indirectly except in so far as the procedure adopted by De Villiers required it. It can hardly inspire confidence in the impartiality of the process to

[14] Items 8.3.1 and 8.5 of the Code.

know that the senior manager of the accused party was providing comforting reassurance to that party's spouse about his innocence. Equally, he should not have included KB in his initial discussion with De Villiers after receiving the grievance, in the absence of JL, given also that he worked more closely with KB than with JL.

73.3 The arbitrator held that the respective treatment of KB and JL in regard to time off following the incident could not be justified. While KB was given the afternoon off to recover from the shock of the complaint, Shoprite would not give JL any time off work except on an unpaid basis when she asked for it. De Villiers also never suggested to her that she could convert some of her annual leave into special leave as the company policy allowed. Shoprite argues that the arbitrator ignored the fact that JL did not return to work after 20 December 2016 until she returned to receive the outcome of the grievance. It is true that JL did not come to work the day after the incident, but was told she must be at work for a proper investigation to be conducted. De Villiers believed that, having proposed that there should be an intermediary handling any communications between KB and JL, he had done enough to address this issue. JL made it clear that she did not feel comfortable being at work and objected when De Villiers advised her that, if she did not want to come to work, she would have to take unpaid leave because her annual leave was exhausted. JL objected to the proposed unpaid leave because she said the situation was forced on her and normally she would not have taken leave at that time. Following this last response by JL in an email, De Villiers phoned her to try and explain that she was not in any direct danger given the measure of an intermediary he had put in place. He readily admitted that he had inappropriately said: "It is not as if KB raped you", in the course of this discussion. Even if De Villiers reasonably believed that given the nature of the alleged act of harassment and interposing an intermediary between KB and JL was a sufficient safeguard against a recurrence of the incident, such a comment plainly reflected an attitude that belittled her complaint and feelings and cast a shadow on his neutrality as the investigator. That

said, item 10.1 of the Code does not suggest that an employer needs to consider offering paid sick leave except in serious cases of sexual harassment.[15] On JL's own account, she would have been content with an apology. As such, the employer cannot be accused of unfairly withholding sick leave, or of not trying to shield JL from direct contact with KB.

73.4 The arbitrator found the company should have appointed someone other than De Villiers to conduct the investigation given that De Villiers worked closely with KB on a regular basis. Shoprite argues that the arbitrator had no compelling reason to assume that De Villiers would not be objective in his conduct of the investigation, and her finding was unjustified. The Code does not recommend that an employer must appoint a person with specific skills to conduct an investigation of sexual harassment. Obviously, given the complexity of such matters relative to other misconduct investigations that would be preferable, but it is not a prerequisite. In terms of the company hierarchy, De Villiers was a regional personnel manager and on the face of it would not have been obviously inappropriate. Had Shoprite known of his remarks made to JL during the investigation and still left it in his hands it would have had to consider his suitability to continue with it, but there was no evidence anyone, other than himself and JL, would have been aware of them.

73.5 The arbitrator also concluded that De Villiers was not trained to handle sexual harassment investigations and inappropriately gave advice to KB on what to do in response to the complaint but offered no such assistance to JL. De Villiers also received representations from KB as to KB's suspicions about JL's motive for lodging the grievance, but never conveyed these to her for her response. The employer argues that the arbitrator incorrectly interpreted De Villiers telling KB not to send his response to JL directly as a form of improper advice to KB, whereas De Villiers simply did so to avoid an

[15] Viz: "10.1 Where an employee's existing sick leave entitlement has been exhausted, the employer should give due consideration to the granting of additional paid sick leave in cases of serious sexual harassment, where the employee, on medical advice, requires trauma counselling."

escalation of the situation and to make sure that all representations by either of them were made to him as the person in charge of the investigation. I agree that De Villier's instruction to KB not to send his response to JL did not amount to giving him advice but rather was a genuine attempt by De Villiers to take control of the investigation and prevent the incident from escalating. Nonetheless his failure to test KB's suspicions about JL's motives with her meant that a material factor which could have swayed his view about JL's *bona fides* was not divulged to her for her input.

73.6 The arbitrator determined that Shoprite should have considered other measures to minimise contact between JL and KB, such as transferring JL to another department while the investigation took place, given the fact she raised her discomfort with De Villiers and considering the close proximity between her and KB in the workplace. She was also not offered any counselling before she asked for it and when she did she was referred to an organization that did not deal with sexual harassment issues. This only occurred after her grievance was dismissed. The employer argues that the arbitrator failed to appreciate that JL was not present at work for almost the entire course of De Villiers's investigation. Accordingly, the arbitrator's emphasis on the failure to implement additional measures to minimize contact between De Villiers and JL in the workplace was unwarranted in the context. Insofar as alternatives to the use of an intermediary was concerned, the only one that was debated between De Villiers and JL was her taking leave. She did not seem amenable to anything less so it is somewhat understandable that De Villiers did not think of anything else. Accordingly, it was not unreasonable of him to think that preventing direct contact between them by the use of an intermediary was sufficient to address any discomfort JL might have had given the nature of the alleged incident.

73.7 The arbitrator also considered it was significant that KB remained at work throughout the investigation of the complaint, JL was immediately suspended when she was charged. KB was offered a

polygraph test, but JL was only offered the test when disciplinary charges were levelled against her. On the question of the disparate approach to suspension, the employer argues that the arbitrator's interpretation of this as a flaw in its approach to the investigation is based on a failure to comprehend that in the case of JL it had enough evidence to show that she probably had falsely accused KB, whereas the same could not be said at the time JL levelled her accusation against KB. By this, I understand the employer to be arguing that, having found that there was no evidence implicating KB in sexual harassment, this amounted to *prima facie* evidence that JL had falsely implicated him. However, it does not explain why JL needed to be placed on precautionary suspension on the basis she might interfere with witnesses, whereas the same consideration did not apply when it was investigating her complaint against KB. Having decided to discipline her because it believed it had a *prima facie* case against her that she had lied about an incident, in respect of which she had never alleged the existence of an eyewitness, it is difficult to see why such a precaution was necessary. By contrast, before the employer knew anything at all about the existence of any witnesses to the event, it had seen no need to temporarily remove KB from the workplace despite him being in a position to summons employees to speak with him. This highlights another flaw in the conduct of the harassment investigation, apart from any implications it has for the fairness of JL's suspension.

73.8 The arbitrator also found De Villiers did not keep JL up-to-date about the delay in providing the grievance outcome. The employer took no issue with this finding as such.

[74] More generally, Shoprite contends that it could not be held liable for non-compliance with the Code. The applicable legal principles have already been discussed above and to the extent that the arbitrator decided that the failure to take proactive steps rendered Shoprite liable for the acts of sexual harassment committed by KB, she was wrong in law.

[75] Did the arbitrator err in her findings about the steps taken by Shoprite once it knew of JL's complaint? There is no suggestion that Shoprite would have had any prior warning, any more than JL did, that KB might behave as he did. Once it became aware, unlike in many of the reported cases, it did act promptly and the investigation was reasonably thorough, if lopsided. Some of the arbitrator's findings discussed above were unfounded. Nonetheless, the employer failed to take the necessary steps it should have in the manner it initiated and conducted the enquiry, because it was not done in a way that treated both parties to the complaint even-handedly and appropriately. In this respect, the arbitrator's findings that Shoprite failed to consider an informal way of dealing with the matter and giving JL that option cannot be faulted. Secondly, the improprieties of Van der Spuy and De Villiers discussed above seriously tarnished the neutrality of the investigation and De Villiers's remarks were at odds with the degree of sensitivity expected of an employer in handling such matters.

[76] Though not the most egregious example of an employer's failure to deal with a sexual harassment complaint adequately, Shoprite's handling of the matter fell short of what was necessary. In particular, its treatment of JL and KB was not even-handed and no advice was given to JL on different ways the matter could be handled. Further, in requiring 'conclusive evidence' that KB was guilty of harassment, De Villiers set an unreasonably high threshold of proof merely to initiate a disciplinary enquiry. Deciding that no conclusion could be reached because there were two irreconcilable versions of the event and no independent corroboration, meant that their versions were not subjected to any scrutiny. As the arbitrator correctly observed, most frequently in sexual harassment complaints that there will be no witnesses to the event except the complainant and the alleged harasser. By adopting the approach it did, Shoprite effectively discounted the value of the only direct evidence available in its entirety. At the very least, it should have provided an opportunity to both parties for their versions to be tested, if one them did not accept the outcome. Shoprite's reasoning would result in most investigation outcomes favouring the alleged harasser. If the outcome of

KB's polygraph test was in fact a consideration in De Villiers's reasoning it would not merely have been one factor he took into account, but would have been the decisive one, because evidence of KB and JL was not evaluated. Accordingly, Shoprite did not do what was reasonably necessary in the circumstances to address JL's sexual harassment complaint, and on that account the arbitrator's finding it should held liable for the harassment under s 60 should stand.

Appeal against the award of R 50,000 compensation

[77] Irrespective of the outcome of the appeal against the findings of sexual harassment and Shoprite's liability therefor, Shoprite also argues there was no basis on the facts of the case to make an award of compensation of R 50,000. Shoprite does not dispute the correctness of the arbitrator's order that it should adopt a sexual harassment program and inform all it employees thereof and report to the CCMA on the steps it had taken, in the event it is unsuccessful on the substantive merits.

[78] In support of its argument that the arbitrator should have ordered a lesser amount of compensation, Shoprite makes the following trenchant points

78.1 The sexual harassment was a single incident and on JL's own evidence would have been rectified by an apology.

78.2 It had not been dilatory in taking action to address the issue.

78.3 In comparison with far more serious instances of sexual harassment, such as that which occurred in the case of *Ntsabo v Real Security CC* (2003) 24 *ILJ* 2341 (LC), in which the employee was awarded R 50,000 for general damages under circumstances where she had been regularly harassed and ultimately sexually assaulted, the award of an equivalent amount in this case was excessive.

[79] I am broadly in agreement with the submissions above, though they do not embrace all the relevant considerations. Other considerations which have a bearing on the appropriateness of the amount of compensation due are: the manner in which the investigation was conducted in which consultations with JL about the process to be followed was limited; KB was privy to discussions that JL was excluded from; the expression of

support for KB by Van der Spuy and De Villiers's disparaging remark about the significance of JL's complaint belittling JL's complaint, and the failure to initiate proceedings for the reasons advanced by Shoprite. While none of these reasons can justify an award of compensation equivalent to the general damages awarded in *Ntsabo*, allowance also needs to be taken of the fact that the award in that case was made nearly twenty years' ago and would have been much greater had it been made today, allowing for inflation.

[80] In the circumstances, even though the award of R 50,000 cannot be justified on the facts, an award of R 25,000 would be appropriate.

Appeal against the arbitrator's award of costs

[81] Both parties had sought cost order in the arbitration proceedings. The arbitrator decided that requirements of law and fairness necessitated an order of costs in favour of JL. The decisive factor in the exercise of discretion was that she found that if a proper harassment policy had been put in place, JL would probably have been satisfied with the outcome and the matter would never have escalated to the CCMA requiring her to incur legal costs.

[82] It seems to be implicit in the arbitrator's reasoning that KB was guilty, but because JL was willing to accept an apology and the employer failed to provide the option of an informal procedure for addressing the grievance, the natural consequence of such a process would have been that the matter ended there.

[83] This is not the kind of litigation which individuals can easily conduct on their own. Using the services of professionals is difficult to avoid. The point made by the arbitrator is that it would have been unnecessary to pursue the matter in the CCMA and engage professionals to deal with it is relevant. In light of these considerations, it cannot be said that the arbitrator failed to properly exercise her discretion when making a cost award, by departing from the norm that cost awards are not ordinarily made in proceedings between employers and employees under the LRA.

[84] Nonetheless, the fact that Shoprite has been partially successful on appeal at least in respect of the unfair dismissal claim and the procedural fairness of the suspension necessitates a reconsideration of the cost order. Considering that the monetary value of the award, is more than halved, but that the important claim under s 60 of the EEA is upheld, law and fairness would dictate that each party bear its own costs. In the circumstances the appeal against the cost award should succeed.

Reviewing the arbitrator's award in respect of JL's suspension and her alleged unfair dismissal.

JL's suspension

[85] The arbitrator had found JL's suspension was both procedurally and substantively unfair and awarded her one month's remuneration as compensation. The arbitrator found that it was common cause that she was not given an opportunity to make representations before being suspended and that it was a matter of dispute whether she was given reasons for her suspension at the time she was suspended.

[86] In *Long v SA Breweries (Pty) Ltd & others* (2019) 40 *ILJ* 965 (CC) the constitutional court has restated the principles governing the procedural and substantive fairness of a precautionary suspension:

> "[24] In respect of the merits, the Labour Court's finding that an employer is not required to give an employee an opportunity to make representations prior to a precautionary suspension, cannot be faulted. As the Labour Court correctly stated, the suspension imposed on the applicant was a precautionary measure, not a disciplinary one. This is supported by *Mogale, Mashego* and *Gradwell*. Consequently, the requirements relating to fair disciplinary action under the LRA cannot find application. Where the suspension is precautionary and not punitive, there is no requirement to afford the employee an opportunity to make representations.
>
> [25] In determining whether the precautionary suspension was permissible, the Labour Court reasoned that the fairness of the suspension is determined by assessing first, whether there is a fair reason for suspension and secondly, whether it prejudices the employee. The finding that the suspension was for a fair reason, namely for an investigation to take place,

> cannot be faulted. Generally where the suspension is on full pay, cognisable prejudice will be ameliorated. The Labour Court's finding that the suspension was precautionary and did not materially prejudice the applicant, even if there was no opportunity for pre-suspension representations, is sound."

(Footnotes omitted)

In light of this, it is clear that the arbitrator misconstrued the law relating to procedural fairness in a precautionary suspension and her finding that JL's suspension was procedurally unfair must be set aside.

[87] Was the arbitrator's finding that the suspension was substantively unfair also wrong in law because the Shoprite wanted to conduct an investigation and wanted to avoid the possibility of her interfering with witnesses? This must be evaluated against the backdrop of the preceding events, which the arbitrator clearly had in mind. The arbitrator stated:

> in "De Villiers testified that the applicant was placed on precautionary suspension because she could interfere with witnesses. I have already mentioned that this was not a concern to the respondent when KB's conduct was under scrutiny. It is also doubtful that the applicant would have interfered with witnesses, because De Villiers had interviewed all potential witnesses already by that time and the applicant certainly did not have the ability to influence KB."

[88] It is striking that De Villiers believed JL's suspension was necessary despite claiming to have conducted a thorough investigation of what were essentially the same factual issues, without considering the need to suspend the alleged harasser. JL complained that the disparate treatment relating to suspension gave the impression that she was perceived in a less favourable light than KB pending possible disciplinary action. On the facts of the case, it cannot be said the arbitrator's finding that her suspension was substantively unfair is one that no reasonable arbitrator could have reached.

[89] In light of this finding on review, it is necessary to consider whether the award of compensation of one month's remuneration for unfair suspension should be varied. Ordinarily, the setting aside of the finding of procedural fairness would lead to a reduction of the award of compensation. In this

case, I believe that the arbitrator's erred unduly on the conservative side in the exercise of her discretion given her finding that the suspension was both substantively and procedurally unfair and given the reason why it was substantively unfair. Accordingly, I believe it would be inappropriate to reduce the compensation awarded.

JL's claim of unfair constructive dismissal

[90] The arbitrator acknowledged that there was a dispute whether she had given notice of her resignation before receiving the disciplinary charge, and did not decide this issue. Nonetheless, she accepted that ordinarily an employee who resigns to avoid disciplinary action would not be able to prove constructive dismissal. However in this instance, the principle did not apply. The arbitrator concluded that from the evidence and the correspondence between the parties it is clear that JL resigned because she was unhappy with the way in which the initial investigation had been conducted and Shoprite's failure to take initiate disciplinary action against KB, whereas it did so in her case.

[91] Noting that the employer had emphasised that it merely found that insufficient evidence existed to take disciplinary action against KB and not that it had exonerated him, the arbitrator held that if Shoprite had conducted an unbiased investigation it would not have come to that conclusion and would not have "amplified the impairment of her dignity". The arbitrator stressed that she was not saying that if a genuine investigation resulted in a finding that there was insufficient evidence to establish sexual harassment had occurred that an employer would be open to a claim of constructive dismissal.

[92] The timing of JL's notice of resignation on the same day she received notice of the disciplinary inquiry, which was more than a week since her suspension, is simply too coincidental to be unrelated, on any reasonable interpretation of the evidence. The arbitrator ought to have made a decision on this issue. In any event, even if JL rightly felt that the initiation of the disciplinary inquiry against her was inconsistent and unfair in

circumstances in which Shoprite had declined to initiate disciplinary proceedings against KB, the employer's *bona fides* for doing so and the intrinsic merits of the charges against her were issues she could contest in the inquiry. The merits of any adverse decision resulting from her disciplinary inquiry could be challenged under the available mechanisms of the LRA and EEA.

[93] It is understandable JL might have had little faith in Shoprite's *bona fides* given the preceding investigation and might have believed it was probable she would be found guilty. Nevertheless, she ought to have taken the opportunity to make out her case at the disciplinary enquiry and to challenge evidence raised against her, rather than foregoing it altogether. This was an alternative to simply resigning. Although the investigation of her complaint was seriously wanting and wrongly resulted in no disciplinary action being initiated against KB, it could not be claimed that he had been exonerated by the process and found guiltless. Equally it follows that it also did not necessarily imply that JL had falsely accused him. Accordingly, contrary to what the arbitrator held, it is not correct that the outcome of the investigation meant that JL's guilt was predetermined as a matter of logic. Consequently, this not to have been a consideration in the arbitrator's reasoning.

[94] Leaving this consideration aside, the justification for JL resigning boiled down to a reasonable skepticism that the inquiry would have a favourable result for her. However, such skepticism was not sufficient for her to conclude that the outcome was predetermined, irrespective of what she might raise in the inquiry. The arbitrator could not reasonably conclude that this was enough to justify her ending her employment without utilizing that process. In the circumstances, the arbitrator's finding of an unfair constructive dismissal must be set aside.

Conclusions and relief

[95] In summary, and without detracting from what is set out above, I am satisfied that:

95.1 Shoprite's appeal against the arbitrator's findings that JL was sexually harassed and that it should be held liable under section 60 should be dismissed.

95.2 In respect of the review, the arbitrator's finding that JL's suspension was substantively unfair should stand, but the finding that it was procedurally unfair should be set aside. Likewise, the arbitrator's finding that JL was constructively dismissed and that her dismissal was unfair should be set aside.

[96] In her award, the arbitrator required Shoprite to report on the steps it had taken to comply with the remedial measures she ordered by 28 February 2018, which was approximately three months after the date of the award.

[97] On the issue of the costs of the appeal, both parties have been partially successful in a number of respects. In the circumstances, as a matter of law and fairness an adverse order of costs against either party would not be appropriate.

Order

[1] The appeal against the Third Respondent's findings in her award dated 17 November 2017 case number WECT 951-17 ("the award") that the Respondent was sexually harassed and that the Appellant is liable under section 60 of the Employment Equity Act 55 of 1998 ('the EEA") is dismissed.

[2] The appeal against the quantum of compensation awarded by the Third Respondent in an amount of R 50,000 is upheld, and the amount of compensation payable to the First Respondent in terms of paragraph 119 of the award, is amended to R 25,000.

[3] The additional relief ordered in paragraph 122 of the award is varied by substituting the existing paragraph with the following:

'122. The respondent is ordered to adopt a sexual harassment policy, develop a program to inform all its employees thereof and report to the CCMA on or before 15 March 2022 what has been done in this regard.'

[4] The Third Respondent's finding that the First Respondent's suspension by the Applicant was procedurally unfair is reviewed and set aside and substituted with a finding that her suspension was procedurally fair.

[5] The Third Respondent's finding that the First Respondent's suspension by the Applicant was substantively unfair is upheld and the compensation awarded in respect of the unfair suspension remains unchanged at one month's remuneration, amounting to R 9583.33.

[6] The Third Respondent's finding that the First Respondent was unfairly dismissed and the compensation awarded under paragraph 121 of the award is reviewed and set aside.

[7] The cost order in paragraph 123 of the award is set aside and replaced with the following:

'123. Each party is responsible for their own costs of the arbitration'.

[8] All amounts due to the First Respondent by the Applicant in terms of this order must be paid within 15 days of the date of this order.

[9] Each party must bear their own costs in the appeal and review.

Lagrange J
Judge of the Labour Court of South Africa

Appearances

For the Appellant/Applicant	C Bosch instructed by Cliff Decker Hofmeyer
For the Respondent	E Benade instructed by Tobin Attorneys at Law