IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JA 44/10

In the matter between:

MZI GAGA	Appellant
and	
ANGLO PLATINUM LIMITED	First Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Second Respondent
COMMISSIONER N MBELENGWA	Third Respondent

Date of Hearing : 18 August 2011

Date of Judgment : 20 October 2011

JUDGMENT

MURPHY AJA

1. The appellant was employed by the first respondent as a Group Human Resources Manager, with responsibility for "people development", with effect from 1 May 2005 until his dismissal on 18 July 2008 on grounds of sexual harassment. He appeals to this court against the decision of the Labour Court (Cele J) setting aside the arbitration award of the third respondent, ("the commissioner"), a commissioner of the Commission for Conciliation, Mediation

and Arbitration ("the CCMA"), the second respondent, and substituting a finding that the dismissal was fair.

2. The position held by the appellant was a senior post attracting a salary of R79 000 per month.

3. At a disciplinary enquiry held by the first respondent in June 2008 the appellant was charged with four counts of misconduct, namely:

> "1.1 It is alleged that you committed acts of sexual harassment by, over a period of some two years, subjecting your personal assistant, Ms Esme Makosholo to unwelcome advances and continuing to do so despite being informed that your advances were not welcome; and/or
>
> 1.2 that you abused your position of authority as a manager by attempting to engage your immediate subordinate and personal assistant Ms Esme Makosholo in a sexual relationship; and/or
>
> 1.3 that you allegedly passed comments and/or innuendos of a sexual nature in the workplace to a fellow employee of the opposite gender and specifically your personal assistant Ms Esme Makosholo which conduct is inappropriate for a senior manager such as yourself; and/or

1.4 that you, through all or any of the conduct referred to above, acted in a manner that has the effect of bringing the good name and reputation of the company into disrepute."

4. The charges were based upon the first respondent's Sexual Harassment Policy. The aim of the policy is stated as follows:

> "All Anglo Platinum employees have the right to work in a pleasant and productive work environment where the individual rights and dignity of each employee are respected. This includes the right to work in an environment which is free from conduct of a harassing or abusive nature. In order to maintain an atmosphere of mutual respect, conduct characterised as sexual harassment will not be condoned or tolerated."

5. Paragraph 2 of the policy delineates various forms of conduct as constituting sexual harassment. Those relevant to this case include:

> "(a) Suggestive comments, remarks or insinuations ….
>
> (e) Direct sexual proposition.
>
> (f) Continued pressure for dates or sexual favours.
>
> (g) Letters or telephone calls of a sexual nature."

6. The policy defines sexual harassment specifically as:

> "Unwelcome conduct of a sexual nature that:
>
> - is repeated despite being declined;
> - is personally offensive;
> - fails to respect the rights of others;
> - interferes with work effectiveness and productivity; and
> - creates an intimidating, hostile or offensive work environment."

7. In an attempt to give content to the concept the policy further provides:

> "Sexual harassment does not refer to behaviour or compliments that are acceptable to the recipient, nor to the mutual attraction between people which must be treated as a private concern.
>
> Sexual harassment is mostly subjective. It is clearly for each individual to decide what behaviour is acceptable to him/her and what he/she regards as offensive. The focus is on how the recipient responds to the conduct or incident rather than on the intent of the harasser."

8. Responsibility for implementation of the policy rests with the Human Resources Department, the department in which the appellant was employed as a senior manager with responsibility for people development.

9. The concepts and terminology in the policy resemble those in the Code of Good Practice on the Handling of Sexual Harassment Cases ("the Code"),[1] issued in terms of section 203 of the Labour Relations Act ("the LRA"),[2] which defines sexual harassment as "unwanted conduct of a sexual nature" and recognises that sexual attention becomes harassment if it is persisted in; and/or the recipient has made it clear that the behaviour is considered offensive; and/or the perpetrator should have known that the behaviour is regarded as unacceptable.[3] The focus of the enquiry is upon the effect of the perpetrator's conduct, in particular the infringement it may entail of the complainant's dignity. Employers have a duty to ensure that their employees are not subjected to harassment, which frequently leads to humiliation, embarrassment, demoralisation and a possible decline in work performance.[4]

10. The disciplinary enquiry found that the appellant was guilty of sexual harassment in that he had propositioned the complainant, his subordinate, to engage in a sexual relationship; that he had persisted in his propositions despite his requests being declined; and that such conduct was unacceptable in a senior employee which besides impacting negatively on the employee, jeopardised the reputation of the company. The appellant was accordingly dismissed. His internal appeal was not successful. He then referred an alleged unfair dismissal

[1] GN 1367 of 17 July 1998
[2] Act 66 of 1995
[3] Item 3 of the Code.
[4] *J v M Ltd* (1989) 10 ILJ 755 (IC) at 757G-758D; and *Media 24 Ltd and Another v Grobler* (2005) 26 ILJ 1007 (SCA) at para 67.

dispute to the CCMA which became the subject of the arbitration proceedings before the commissioner.

11. At the arbitration the complainant testified about suggestive comments and remarks, as well as direct sexual propositions, made intermittently by the appellant throughout the two years of her employment as his personal assistant until her resignation. The complainant decided to resign in June 2008 because she no longer wanted to reside in Johannesburg and preferred to return to Cape Town, her hometown. On the day of her resignation, she was called to an exit interview by the Head of Human Resources, Ms Lerato Mogaki, who quizzed her on why she was leaving. After she explained her wish to return to Cape Town, Ms Mogaki asked her whether the appellant had made any advances to her and this prompted the complainant to outline the incidents that led to the disciplining of the appellant. At different times during her testimony, the complainant made it clear that she had not chosen to resign because of the appellant's behaviour but had done so mainly because she wanted to return to Cape Town. She did say though that the appellant's behaviour had contributed "a little bit" to her decision. She testified that she had not been aware of the sexual harassment policy until it was brought to her attention in the exit interview by Ms Mogaki. On reading the policy she felt offended and embarrassed and chose the following day for the first time to make a complaint of sexual harassment against the appellant.

12. The complainant's testimony regarding the nature of the alleged harassment is to the effect that within months of commencing employment the appellant began to proposition her for sexual favours. The propositions, at first, were not direct but took the form of innuendo and suggestions that they should meet at various places after work with the obvious implication that they could engage in sexual intercourse. Later he was more direct in his invitations and frequently suggested they should "do it", which the complainant understood to mean have sex, as it would be understood colloquially by most people. He also used the Zulu term "*ngiyakugalela*" which unambiguously, crudely and offensively expresses a desire to engage intimately. When asked how long the behaviour carried on, the complainant testified:

> "Yes, it was a continuous thing ….. every time I would come to his office he would sort of propose it and say it and say when are we really going to be - have a relationship, and I would say no, I am just - I am not interested, it is not going to happen and so forth, you know. So it never stopped until the last day."

13. It is unnecessary to examine all the occasions of alleged inappropriate conduct or to canvass their details fully; it being sufficient to mention a few of the more notable incidents reflective of the pattern of conduct. For instance, at the Christmas party of 30 November 2007, the appellant suggested to the complainant that they should meet after the party and go to a hotel to have sex. The complainant declined but the appellant persisted and more than once

thereafter raised the possibility of visiting a hotel. There was a further incident where the appellant had not been able to take the complainant out for lunch for Secretary's Day and had then proposed that she make alternative arrangements for a later date, including hotel arrangements. On another occasion when the complainant was preparing for exams, the appellant allegedly suggested that he should come to her home after work and they would "do it", and that she "would probably have a smooth exam thereafter". Added to that, the appellant would comment sporadically about the complainant's appearance and her clothing, and on one occasion asked her to unbutton her top coat and spin around so that he could admire her. He also sent her suggestive sms's.

14. The first respondent's case is that these instances and others reveal that there was a pattern of inappropriate behaviour expressed predominantly in the making of unseemly comments and continued pressure for sexual favours, which were persisted in despite being declined.

15. The appellant denied totally that he ever made any direct propositions or suggestive remarks of any kind. If the complainant's version is accepted as the more probable, then the appellant's behaviour, in the various guises described by the complainant, is of a kind which categorically falls into the range of conduct listed in paragraph 2 of the policy. The inquiry then shifts to whether the conduct was unwelcome, unacceptable, offensive, etc.

16. The evidence discloses that the complainant was somewhat ambivalent in her responses to the appellant. The impression she gave was that although she regarded the remarks and propositions as unwelcome, she was not overly offended and most of the time sought to dismiss them flippantly. She preferred to deal with the appellant's conduct "in my own way" and thought it best just to write it off. She explained her typical response as follows:

> "Well I would dismiss it and say yes okay, we will do it but then I would not - I knew that I am not going to be part of it, you know, but then how I would respond to it also, I would sort of like say yes, you know, yes whatever, but I knew that it is not going to happen."

Yet, as she readily conceded, she was not harsh or abrupt in her dismissal of the proposals. It is evident that the complainant was not without affection for the appellant. She liked him as a person and respected him as a professional. She volunteered that they had "a very good working relationship" and described the appellant as "not a difficult man to work with" and "quite professional". She characterised their relationship as "relaxed and easy". She also admitted to speaking to the appellant about personal things and having told him that she had dreamt about him sitting with her family. He reportedly responded by saying that he too had dreamt of making passionate love to her, a remark the complainant says she considered to be inappropriate. In cross-examination the complainant was adamant that her own dream, and her intention in telling the appellant of it, were entirely without sexual connotation.

17. While she admitted to only feeling offended once she had read the policy, the complainant insisted that the sexual advances had always made her uncomfortable. Nevertheless, she conceded that her responses at times might have been construed as "inviting", in that she had once in response to an overture asked the appellant: "Do you really find me attractive?" She denied that the question amounted to a solicitation. She endeavoured to explain that she was responding to his advances in a way intended to put distance between them. Thus, she testified:

> "… in my understanding when I asked him that question I was like I mean, come on, you are my boss, do you see me that way, do you see me - are you attracted to me like that. That is what the question was all about."

18. Despite her outward uncertainty, the complainant did display a measure of firmness in rejecting the appellant's overtures. Thus, when on one occasion outside of working hours the appellant sent her an sms enquiring whether she had made the necessary arrangements for them to meet in a hotel, she replied by sms stating unequivocally: "please stop what you are doing, it is making me uncomfortable". The appellant, according to the complainant, persisted with his advances after this sms, notwithstanding his giving an undertaking to desist. The complainant was unable to produce evidence of the sms since she had deleted it from her cell-phone memory.

19. Despite his unmitigated denials of ever making overtures of a sexual nature, the appellant throughout cross-examination and in argument before the CCMA put up a case that much in the complainant's behaviour signified that she did not regard his advances as offensive or unwelcome; her ambivalence, he argued, removed his conduct from the sphere of sexual harassment.

20. In addition to relying on the complainant's assumed ambivalence, counsel for the appellant emphasised that the complainant had from time to time complimented the appellant on his appearance, had invited him to a friend's wedding, had given him the phone-number of some of her girlfriends, and at the time of her resignation had asked him to phone her in Cape Town when he came down on business. The complainant did not deny any of these factual allegations but explained in relation to each of them that they were without sexual implication and gave no cause for the appellant to presume that his advances were welcome.

21. The first respondent's second witness was Ms Mogaki, the Head of Human Resources who conducted the exit interview with the complainant. She portrayed the appellant as a good performer and valuable employee, but one whom she had counselled beforehand about his relations with female staff members. She referred to the fact that the appellant had previously been charged with sexual harassment, but had been acquitted on the grounds that the relationship with that complainant was shown to be consensual. It was her

knowledge of this prior history that prompted her to enquire of the complainant during the exit interview whether the appellant had made any sexual advances.

22. Before Ms Mogaki could testify regarding the nature and extent of the appellant's prior conduct, counsel for the appellant objected to the admissibility of the evidence on the ground that it was irrelevant similar fact evidence, insufficiently relevant to the determination of whether the alleged misconduct had been committed and which would involve the commissioner in time wasting collateral inquiries prejudicial to the appellant. The first respondent countered that such evidence should be exceptionally admissible because it was relevant to establishing a pattern of serial harassment, and would assist resolve which of the two versions was true on the probabilities. The evidence, it was submitted, also bore relevance to the extent of the appellant's knowledge of the nature, scope and ambit of the rule against sexual harassment, and whether in the light of such knowledge and his record, dismissal was the appropriate penalty in the circumstances. The commissioner ruled the evidence to be inadmissible. In his *ex tempore* ruling he stated:

> "… any evidence that the witness will submit with regard to the other incidents will not assist me in determining the dispute, that is the incident that led to the dismissal of the applicant and therefore I am of the view that the evidence should not be allowed."

23. In paragraph 16 of its founding affidavit, the first respondent referred to seven instances of sexual conduct of a questionable nature allegedly committed by the appellant during the course of his employment. The allegations were undoubtedly those the first respondent had hoped to prove in the arbitration proceedings, but was prevented from doing so by the ruling of the commissioner. The appellant responded in his answering affidavit by denying the truthfulness of the allegations and contended not without justification that the first respondent was illegitimately seeking to introduce the inadmissible evidence "through the back door". He declined to deal with the allegations further on the grounds that such "may be seen as a condonation of the introduction of these allegations in these proceedings".

24. I will return in due course to the question of whether the commissioner committed an irregularity by excluding the similar fact evidence. Suffice it at this point to say that the first respondent did not apply to the Labour Court for the matter to be remitted to the CCMA for the hearing of this evidence. It sought the setting aside of the award and substitution of the decision on the question of substantive unfairness. As a consequence, the assessment of the substantive reasonableness, justifiability or rationality of the commissioner's decision must be done on the basis of the evidence that was before him, which, rightly or wrongly, excluded the similar fact evidence.

25. Later in her evidence, Ms Mogaki justified the line of enquiry she followed at the exit interview by saying that her knowledge of the history and pattern of the appellant's behaviour placed her under a duty to investigate whether the appellant's behaviour had contributed to the complainant's decision to resign. Her probing led to the complainant informing her that the appellant had made persistent advances. Counsel challenged this evidence but later withdrew the objection. The objection was that the evidence was hearsay, but in substance counsel in fact objected additionally on the grounds that it comprised a previous consistent statement. However, counsel did not object to a second consistent statement made to Ms Mogaki by the appellant, presumably because it fell within the exception to the exclusionary rule. Previous consistent statements are exceptionally admissible in cases of sexual misconduct, provided the statement is made at the first opportunity that reasonably presents itself.[5] Ms Mogaki testified about what the appellant told her as follows:

"…. Mzi Gaga (the appellant) had approached her in wanting to sleep with her. In fact she said, *that very day*, that very day when her and I were speaking, Mzi had also phoned her to say they should go again to a hotel to have sex because that would have helped her to relax, something to that effect."

It was not put to the witness that the appellant would deny that the alleged phone-call took place, and the appellant did not deny the fact in his evidence.

[5] *S v Banana* 2000 (3) SA 885 (ZSC) at 895 F-G; and *Holtzhauzen v Roodt* 1997 (4) SA 766 (W) at 778E.

26. The first respondent's third witness was Lauren Mahloko, a secretary employed by the first respondent. She testified that the complainant had once left her a note saying: "what do you do when someone says he dreams of you". The complainant later explained the note to her by informing her that the appellant had made advances, but did not elaborate on their nature. According to Ms Mahloko, the complainant did not appear overly perturbed. Not much, in my opinion, turns on this evidence. Although the appellant's general denial may have been intended to cover what he was alleged to have said in response to the complainant telling him of her dream, the evidence regarding the conversation about the dreams is common cause. In so far as it is relied upon to point to ambivalence on the part of the complainant that too is not seriously disputed.

27. The appellant, as I have mentioned already, denied all the allegations against him. He denied sending suggestive sms's to the complainant, ever propositioning her for sex or suggesting that they visit a hotel or her home for that purpose. He said he was mystified and shocked by the allegations against him and maintained that no indication was given to him by the complainant that he had ever made her feel uncomfortable. He was not asked in his evidence in chief to comment on the complainant's testimony that she had sent him an sms informing him that his advances made her uncomfortable, that he should desist and that he then undertook to do so. However, when it was put to him in cross-examination that she had sent him the sms, he did not address the question

directly but answered generally, and evasively, that the complainant had never raised her grievances with him.

28. The commissioner held that the first respondent had failed to show on a balance of probabilities that the appellant was guilty of sexual harassment. Implicit to his finding is the assumption that before he could find that sexual harassment had occurred, the first respondent was required in terms of the policy to establish the existence of unwelcome conduct of a sexual nature that is repeated despite being declined, and cumulatively that such conduct was personally offensive, failed to respect the rights of others, interfered with work effectiveness and productivity, and created an intimidating, hostile or offensive work environment.

29. The commissioner made no explicit finding accepting or rejecting the appellant's total denial that he had ever made any suggestive remarks or had ever sexually propositioned the complainant. His findings for the most part proceed rather on the supposition that the remarks and propositions were made but that they were experienced by the complainant as neither unwelcome nor offensive. He held that the complainant enjoyed the attention given to her by the applicant as evidenced by her dismissing the advances with the words "ok whatever", and her asking the appellant if he really found her attractive. He was fortified in his view by the complainant's admission that they had a good working relationship and her description of the appellant in her testimony as "a model

gentleman". He did not accept that a victim of sexual harassment would describe her abuser in such positive terms.

30. While the commissioner was prepared to accept that the complainant was discomforted by some of the remarks and propositions made by the appellant, he rejected as improbable her evidence that she became offended only on reading the policy, and hence also that she had been offended prior to that. His opinion that the complainant was not offended at all by the appellant's conduct was reinforced in his opinion by the fact that the relationship between them could be described as cordial, as evidenced by her use of the respectful title "tata" when addressing the appellant and his use of her clan name. As added proof of a lack of offence, he referred to her telling the appellant of her dream, her looking forward to attending the Secretary's Day dinner, and her invitation to the appellant to call her when he visited Cape Town. He saw the failure by the complainant to lodge a grievance and her lack of elaboration on the nature of the incidents to Lauren Mahloko as further indications that she was not offended. Additionally, because both parties described their working relationship in generally positive terms, the commissioner held that the appellant's conduct had not interfered with work effectiveness and productivity, nor had it created a hostile work environment.

31. For those reasons the commissioner held that the appellant's dismissal was substantively unfair. He ordered the appellant's reinstatement and the payment of five months back pay.

32. The first respondent applied to the Labour Court for review on various grounds. There are four review grounds of significance. The first is that the commissioner failed to determine on a balance of probabilities which of the two conflicting factual versions was truthful and had to be accepted. He made no definitive findings about whether unwelcome suggestive remarks and propositions had been persistently made, or whether the complainant had declined the advances and requested the appellant to desist. He thus, according to the first respondent, committed a reviewable irregularity by failing properly to apply his mind to the material evidence about the nature and gravity of the misconduct and thereby ignored relevant considerations. Secondly, it was contended that the commissioner acted irregularly by determining whether sexual harassment had occurred almost exclusively on the basis of whether the complainant was sufficiently offended; and as a result he erred in his interpretation of the policy, ignored key relevant elements of the policy and did not apply his mind to whether the appellant's conduct amounted to sexual harassment in the form of "unwelcome conduct of a sexual nature that is repeated despite being declined". Thirdly, it was (in effect) contended that the finding that the complainant enjoyed the advances, on the basis of her responses, was irrational or unjustifiable in that there is no rational connection

between that finding, the reasons for it and the evidence which reveals that the responses were made with the motive of resisting or dismissing the advances. And, fourthly, it was submitted that the commissioner's exclusion of the similar fact evidence was irregular insofar as that evidence was relevant to deciding which of the mutually destructive versions was truthful, in that it would have shown a habitual pattern of behaviour on the part of the appellant in inappropriately propositioning junior female employees.

33. With reference to section 145 of the LRA, and relying on the test laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[6] the Labour Court identified the essential question before it to be whether the award was one that a reasonable decision-maker could not reach. The court accepted the complainant's version as the most probable and held that the commissioner had not applied his mind properly to the material facts and the scope of the policy to the extent that his decision was unreasonable. It set aside the award and substituted its decision that the dismissal was substantively fair.

34. Despite the commissioner not making any firm finding about which version was true and which remarks and propositions were made, it appears from his assessment of the evidence that for the most part he accepted her evidence that the remarks and propositions had in fact been made. He then evaluated the evidence with the limited aim of determining whether the remarks and

[6] [2007] 12 BLLR 1097 (CC)

propositions were experienced by the complainant as offensive. His approach however unduly narrowed the scope of the inquiry.

35. The appellant's bare denials of the allegations against him are unconvincing in the face of the complainant's evidence, its partial corroboration by the other witnesses and the manner and circumstances in which the complaint arose. The probabilities overwhelmingly support a finding that the complainant was the more credible witness. She offered her testimony with candour, conceding a measure of ambivalence and honest recognition that she had been less than forceful in rejecting his advances. The possibility that she was flattered, as I have intimated, cannot be discounted. But there is one consistent, incontrovertible thread which runs throughout her evidence; and that is her allegation that the appellant regularly and repeatedly made suggestive remarks and propositioned her sexually. Her testimony is corroborated by the admissible previous consistent statement she made to Ms Mogaki.

36. The complainant had no discernible reason to be dishonest about the pattern of behaviour and her discomfort. Both she and the appellant confirmed that in all other respects they had a good working relationship. At the time she testified before the CCMA, the complainant had already re-located and was unlikely to have anything further to do with either party in the future. For the court to accept the appellant's total denials as truthful, we would be required to believe that the complainant and Ms Mogaki, with unknown motives, had

conspired to falsely accuse the appellant of serious misconduct. Neither witness displayed bias against the appellant of that order. On the contrary, during much of her testimony the complainant seemed reluctant to incriminate the appellant, and left the impression that she would not have pursued the matter had management not raised it at the exit interview. Nor did her evidence suffer any inconsistencies or contradictions in relation to the three main issues: first, that the suggestive remarks and propositions had been made; second, that they were unwelcome; and third, that the appellant persisted after being requested not to do so. Her evidence that the appellant regularly propositioned her and paid no heed to her declining his advances is entirely convincing.

37. The commissioner's conclusion that the complainant enjoyed the attention of the appellant, on the basis of her chosen way of dealing with the remarks, irrationally ignored her credible explanation that she intended to be dismissive and tried to put the appellant off.

38. The complainant's testimony regarding the sms that she sent informing the appellant that his advances were unwelcome and made her uncomfortable is particularly important and was not cogently challenged. Her assertion that she asked the appellant in the sms to desist was at least *prima facie* credible. In comparison, the appellant's response when directly asked about the sms in cross-examination was evasive and non-responsive. The commissioner's finding regarding the sms is irrational. He appeared firstly to accept that the message

was sent, but later drew an adverse inference from the complainant not having kept a copy for the purpose of lodging a grievance. His rejection of her evidence for that reason is clearly unreasonable. Because the complainant evidently liked the appellant, as she said, she was initially hesitant to re-act harshly or to lodge a complaint and probably felt no need to collect evidence for that purpose. Had she not been confronted during her exit interview with the true implications of his conduct, it is unlikely that disciplinary action would ever have been taken. The inference sought to be drawn by the commissioner from the complainant's failure to keep a copy of the sms, namely that the relevant sms's were never exchanged, is therefore not rationally connected to the evidence. The probabilities support a finding that for the most part the appellant's advances were unwelcome and caused a measure of discomfort, and the sms was intended to convey that message unmistakably.

39. In conclusion, therefore, the commissioner's rejection of the case against the appellant on the basis that the remarks could not be considered to be sexual harassment because the complainant was not offended, was premised upon too narrow an inquiry and ignored the material evidence that the remarks were unwelcome and caused discomfort. It furthermore took no account of the relevant consideration that a senior manager in the position of the applicant, fully aware of the policy should not repeatedly make remarks and suggestions of such an order to a subordinate. Even if the complainant may not have been offended by the suggestive remarks and behaviour, the repeated conduct, unwanted and

unwelcome, nonetheless remained inappropriate conduct on the part of a senior manager with responsibility for people development.

40. Besides, and most importantly, it is not a requirement of either the first respondent's policy or the Code for a victim to be offended before conduct will constitute sexual harassment. Repeated unwelcome remarks will be enough. The definition of sexual harassment in the policy specifies "unwelcome conduct of a sexual nature" as the essential element of the offence. The policy identifies different deeds as being "conduct of a sexual nature", including: suggestive comments, remarks or insinuations; direct sexual propositions; and continued pressure for dates or sexual favours. In addition to the unwelcome conduct of a sexual nature, one of the other elements in the definition, and not all of them, must be present; namely conduct which:

- is repeated despite being declined;
- is personally offensive;
- fails to respect the rights of others;
- interferes with work effectiveness and productivity; and
- creates an intimidating, hostile or offensive work environment.

Although the elements are divided from each other by the word "and" in the last sub-paragraph, the intention is manifestly disjunctive rather than conjunctive. Sexual harassment may take many forms. Thus "unwelcome conduct of a

sexual nature that is repeated despite being declined" will be sexual harassment as such; just as much as "unwelcome conduct of a sexual nature that is personally offensive"; or similar conduct creating a hostile work environment. It is inconceivable that the intention of the policy was for the employer to establish all the specified elements cumulatively in order to justify disciplinary action. Neither the first respondent's policy nor the Code envisages so onerous an evidentiary burden.

41. The rule against sexual harassment targets, amongst other things, reprehensible expressions of misplaced authority by superiors towards their subordinates. The fact that the subordinate may present as ambivalent, or even momentarily be flattered by the attention, is no excuse; particularly where at some stage in an ongoing situation she signals her discomfort. If not the initial behaviour, then, at the very least, the persistence therein is unacceptable. By applying too narrow a definition of sexual harassment, the commissioner overlooked these considerations and made a material error that denied the first respondent a full and fair determination of the issues; thereby committing an irregularity or misconduct.[7]

42. The failure by the complainant to take formal steps against the appellant should be construed likewise in the light of the personal and power dynamic in the relationship, which probably operated to inhibit the complainant; keeping in

[7] *Irvin and Johnson Ltd v CCMA and Others* [2006] 7 BLLR 613 (LAC); and *Hira and Another v Booysen and Another* 1992 (4) SA 69 (AD) at 93C-H.

mind that she notably changed her stance at the time of her resignation once she was apprised of the policy. It would be unfair to the employer were the appellant to be allowed to avoid liability for sexual harassment on the basis of the ignorance of his victim of the steps required to be taken in the policy and her hesitation in taking them. The complainant's evidence looked at as a whole suggests that she was uncertain about how to deal with the situation. Her conspicuous vacillation was an understandable response in a youthful and junior employee. She was placed in the invidious position of being compelled to balance her sexual dignity and integrity with her duty to respect her superior; which obligation no doubt was appreciably compromised by his behaviour. Many years ago the Industrial Court drew attention to the dilemma facing junior employees subjected to sexual harassment. In *J v M Ltd,*[8] the seminal decision on the topic, which took cognisance of pertinent academic studies and surveys, it observed:

> "It is indeed not uncommon for employees to resign rather than subject themselves to further sexual harassment. The psychological effect on sensitive and immature employees, both male and female, can be severe, substantially affecting the emotional and psychological well-being of the person involved. Inferiors who are subjected to sexual harassment by their superiors in the employment hierarchy are placed in an invidious position. How should they cope with the situation? It is difficult enough for a young girl to deal with

[8]Above n 4.

> advances from a man who is old enough to be her father. When she has to do so in an atmosphere where rejection of advances may lead to dismissal, lost promotions, inadequate pay rises etc – what is referred to as tangible benefits in American law – her position is unenviable."[9]

43. In the result, the commissioner's lapse in not performing a full assessment of the complainant's credibility with reference to her almost guileless candour, forthright demeanour, lack of bias, and the consistency of her evidence in relation to the remarks and propositions having been made and their unwelcome nature, as supported by the inherent probabilities evident particularly in the manner in which the complaint came to light, meant that he ignored relevant considerations and failed to apply his mind properly to material evidence and the definitional requirements of sexual harassment in the policy and the Code. There is accordingly no rational basis justifying the commissioner's conclusion that there was no sexual harassment on the limited ground that the remarks and behaviour caused no offence or discomfort. The evidence established that the remarks and behaviour were unwelcome and inappropriately repeated despite being declined. They demonstrated a lack of respect and were demeaning of the relationship between superior and subordinate. The commissioner ignored those material facts and considerations by focusing too narrowly upon the issue of whether the complainant initially took offence.

[9] Id at 758A-C

44. Where a commissioner fails properly to apply his mind to material facts and unduly narrows the inquiry by incorrectly construing the scope of an applicable rule, he will not fully and fairly determine the case before him. The ensuing decision inevitably will be tainted by dialectical unreasonableness (process-related unreasonableness), characteristically resulting in a lack of rational connection between the decision and the evidence and most likely an unreasonable outcome (substantive unreasonableness). There will often be an overlap between the ground of review based on a failure to take into consideration a relevant factor and one based on the unreasonableness of a decision. If a commissioner does not take into account a factor that he is bound to take into account, his or her decision invariably will be unreasonable. The flaw in process alone will usually be sufficient to set aside the award on the grounds of it being a latent gross irregularity, permitting a review in terms of section 145(1) read with section 145(2)(a)(ii) of the LRA. In his minority judgment in *Sidumo.*[10] Ngcobo J (as he then was) in effect distinguished review on grounds of dialectical unreasonableness from substantive unreasonableness, when he observed:

> "It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing …. the commissioner's action prevents the aggrieved party from having its

[10] Above n 6.

> case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration, as contemplated in section 145(2)(a)(ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings."[11]

45. As regards the commissioner's ruling in respect of the similar fact evidence, that too was a reviewable irregularity. The exclusion of evidence that ought to be admitted will be either misconduct in relation to the duties of a commissioner or a gross irregularity in the conduct of the arbitration proceedings, as contemplated in section 145(2)(a) of the LRA. In the context of an unfair dismissal arbitration, similar fact evidence of a pattern of behaviour or serial misconduct will often be relevant to both the probabilities of the conduct having been committed and the appropriateness of dismissal as a sanction. It may be more so where the alleged misconduct is characterised by an element of impulsivity, as often the case with sexual misconduct. There ordinarily would be a sufficient link or nexus between the earlier similar misconduct (if proved) and the disputed facts pertaining to a method of commission, or a pattern possibly revealed, to make that evidence exceptionally admissible.[12] Given the nature of the evidence which the first respondent proposed to lead, and the fact that the allegations would have been known to the appellant, it would not have been

[11] At para 268
[12] *R v Ball* [1911] AC 47 (HL); and *R v Straffen* [1952] 2 All ER 657

unfair or oppressive to have allowed the evidence because the appellant had adequate notice and was in a position to deal with it.[13]

46. The consequence, however, of the commissioner irregularly excluding the evidence in the present case, in the final analysis, is neutral or inconsequential in the adjudication of the issue of unreasonableness. Had the first respondent requested the Labour Court to remit the matter to the CCMA for the admission and hearing of the excluded evidence, the irregularity alone would have been sufficient for that purpose. By itself, it constituted an irregularity sufficient to set aside the award, because without more it resulted in the commissioner failing to have regard to material facts and thereby impeded a full and fair determination of the issues. In certain instances where evidence is irregularly not admitted by a commissioner, the only fair remedy may well be for the matter to be remitted to the CCMA. However, where, as in the present case, there is sufficient other evidence enabling the court to determine the fairness of the dismissal, then, in order to avoid further delay and prejudice to the successful party, the court should rather substitute its own decision for that of the commissioner. In which case, as now, the irregularity will serve only to strengthen the conclusion, based on the presence of other irregularities, that the arbitration was latently and procedurally flawed, and perhaps unreasonable in its outcome.

[13] *Omega, Louis Brandt et Frère SA and Another v African Textile Distributors* 1982 (1) SA 951 (T)

47. The absence of the similar fact evidence has some bearing on the determination of the appropriate sanction in this case. Without such, this court is obliged to regard the appellant as a first offender, albeit one who had been advised and counselled by his superior in the past, and who by virtue of his position in the company would have been aware of the reprehensible nature of sexual harassment in general.

48. By and large employers are entitled (indeed obliged) to regard sexual harassment by an older superior on a younger subordinate as serious misconduct, normally justifying dismissal. In *SA Broadcasting Corporation Ltd v Grogan NO and Another,*[14] Steenkamp AJ (as he then was) observed that sexual harassment by older men in positions of power has become a scourge in the workplace. Its insidious presence is corrosive of a congenial work environment and productive work relations. Harassment by its nature will steadily undermine the supervisory authority vested in the superior, upon which the employer perforce must rely, and hence will diminish or even destroy the trust requisite in the employment relationship; ultimately justifying the imposition of the sanction of dismissal. It is appropriate then for this court and employers to send out an unequivocal message: senior managers who perpetrate sexual harassment do so at their peril and should more often than not expect to face the harshest penalty. Much will depend on the circumstances, with the court or commissioner being obliged to have regard to the nature and gravity of the infringement; the impact on the victim; the relationship between the perpetrator and victim; the

[14] (2006) 27 ILJ 1519 (LC) at 1532A, para 51.

position and responsibilities of the perpetrator; and whether or not there is a pattern of behaviour evidenced by prior misconduct.

49. In the present case, the nature of the harassment was wholly deplorable, perpetrated as it was by a man entrusted by his employer with the task of people development. The appellant's use of the Zulu expression "*ngiyakugalela*" was especially distasteful, offensive and inappropriate language for a man in his position. While there is no evidence of psychological trauma on the part of the complainant, her dignity was clearly affronted and she had to endure the appellant's repugnant conduct on a daily basis for virtually the entire duration of her employment. The appellant held a senior position involving considerable authority and responsibility. By conducting himself as a persistent, annoying sexual pest, he abused the trust invested in him by his employer to the extent that the continuation of the employment relationship became intolerable. He compounded his folly by not taking his employer into his confidence, preferring to stick to his untenable total denials. An employee will always risk further damaging the substratum of trust by putting forward an untruthful version or defence. Dismissal was accordingly the appropriate sanction.

50. The Labour Court thus did not err in its conclusion that the commissioner's decision was unreasonable or in its substitution of the award with a declaration in terms of section 158(1)(a)(iv) of the LRA that the dismissal was substantively fair.

51. With regard to costs; as a general rule in labour matters costs should be awarded against the unsuccessful party sparingly. The dispute mechanisms of the LRA aim at the social good of channeling disputes to appropriate means of resolution in order to ensure fairness, justice and hopefully greater stability in the workplace. Onerous costs awards risk defeating that purpose by discouraging deserving litigants from approaching the CCMA and the labour courts, and thereby denying access to justice. The appellant's prosecution of this appeal was not unreasonable or vexatious. For that reason, the parties should bear their own costs.

52. In the premises, the appeal is dismissed and the parties are to pay their own costs.

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JR MURPHY AJA

Mlambo JP and Mocumie AJA concur in the judgment of Murphy AJA

Appearances:

For the appellant	:	Adv. F. Saint
Instructed by	:	Matela and Associates
For the first respondent	:	Mr F. Malan
Instructed by	:	Edward Nathan Sonnenbergs