IN HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Reportable

CASE NO: AR162/2014

In the matter between

SINDISIWE LOVEDALY MNYANDU **APPELLANT**

and

THIVIANATHAN PADAYACHI **RESPONDENT**

JUDGMENT

Delivered on: **1 August 2016**

MOODLEY J (PLOOS VAN AMSTEL J concurring):

[1] The Preamble to the Protection from Harassment Act 17 of 2011 (the Act),[1] sets out the objectives of the Act:

> **'Since** the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic of South Africa, including the right to equality, the right to privacy, the right to dignity, the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from

[1] The date of commencement of the Act was 27 April 2013.

either public or private sources, and the rights of children to have their best interests considered to be of paramount importance;

AND IN ORDER to –

(a) afford victims of harassment an effective remedy against such behaviour; and
(b) introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act,…'

One of the remedies afforded to a victim under the Act is the issue of a protection order by the Magistrates' Court against the perpetrator of harassment.

[2] On 24 May 2013 the respondent, Thivianathan Padayachi (applicant in the court *a quo*), applied for a protection order in terms of s 2(1) of the Act against the appellant, Sindisiwe Lovedaly Mnyandu (respondent in the court *a quo*), at the Magistrates' Court, Durban, alleging that the appellant had harassed and subjected him to slander, false allegations and defamation in an email she had sent to their colleagues at Mondi Paper Limited, Merebank (Mondi), where they were both employed. The appellant denied the allegation. After the hearing of oral evidence, the court *a quo* found in favour of the respondent and issued a final protection order against the appellant on 29 November 2013. This is an appeal against the judgment delivered by the Magistrate, Durban, on 29 November 2013.

[3] Both Mr *Shepstone* who represented the appellant, and Mr *Combrinck* who represented the respondent, held the consensual view that the Magistrate was correct in holding that the sending of a single email could constitute an act of harassment, provided that the further requirements for harassment were proved.

[4] Mr *Shepstone* submitted that the Magistrate had misdirected herself by regarding statements made by the respondent during his closing argument as constituting evidence. He contended further that she had erred in failing to refer to the definitions of _harassment' and _harm' as set out in s 1 of the Act or to make a finding in respect of the harm caused to the respondent by the sending of the email. Further there was no evidence that any _harm', as defined in the Act, was caused to the respondent, no physical harm had been alleged, and there was no evidence to substantiate the respondent's allegations of potential economic harm. Therefore, the respondent had to prove that he suffered either mental or psychological harm,

neither of which was evident or alleged in his description of his reaction to, or the effect on him of, the appellant's email dated 4 May 2013; nor was there evidence of such mental or psychological harm.

[5] In response, Mr *Combrinck* contended that the respondent had proved that the appellant had infringed his constitutional rights as set out in the preamble of the Act. The sending of the email, the contents of which were false and defamatory, by the appellant was an act of harassment as contemplated by the Act, and therefore, the respondent had discharged the onus on him and was entitled to the relief ordered by the court *a quo*.

Factual Matrix

[6] The circumstances that gave rise to the allegations by the appellant and the application by the respondent are common cause.

6.1 The respondent is the Section Head of Finishing–Dispatch, WIP Stores and Packaging Manager at Mondi and the immediate senior of the appellant, who is one of the shift foremen reporting to him, and an Employment Equity (EE) representative.

6.2 Consequent to the refusal by the appellant to sign off a Work Skills Plan (WSP) for the section in which the parties worked for the 2013/2014 year, a meeting was called on the instructions of management on 26 April 2013, the objective of which was to resolve the reasons that the appellant offered for not supporting the WSP. The WSP had however already been submitted to the Department of Labour without the appellant's signature but had been signed off by the other EE representative, Bongani Sikhakhane.

6.3 Present at the meeting were the appellant, the respondent, Daniel Pillay, Bongani Sikhakhane (the aforesaid EE representative), and Sagie Pillay, who chaired the meeting. All those present attended a follow-up meeting which was held immediately thereafter at 12h00 with the Chief Operating Officer, Clinton Van Vught.

6.4 The respondent subsequently issued an invitation to a follow-up meeting on 2 May 2013. In response thereto, the appellant sent an email on 4 May 2013 to the recipients of the invitation and the respondent in which she declined the invitation and set out the reasons for her refusal to attend the proposed meeting, stating:

> I would like to provide you with a valid reason for not accepting this meeting.
>
> Our Department meeting set on Friday the 26th April, where we were supposed to have a successful plan for WSP issue. After 2 hrs of our meeting, we were given an opportunity by Clinton to schedule a date to resolve or put plan in place for Employee's Development plan.
>
> What Clinton didn't know, is that I (before we met with him)was verbally and emotionally abused by the same people that are inviting me. I couldn't inform CvV then, as I was still shaken by that 2 hours ordeal. I'm still shocked of the way I was attacked when my only purpose was to ensure that our organization is one where NO person is denied development opportunities. Instead, what I found in this department, were four MEN attacking a female, with an EE rep promoting it as well, extremely embarrassing for Mondi Employment Equity Committee.
>
> I've decided to follow our EE Policy and Procedure so that EEC will take a decision, therefore, I will not divulge everything that was said to me in this email.
>
> Lastly, I would like to emphasis to Thivian and Bongani the EE rep that. All Employees who have dealings with Mondi have the right to be treated with dignity irrespective of Gender.'

6.5 The respondent responded to the appellant's email on 6 May 2013 by way of an email headed 'Misconduct charges to be drafted against Finishing EE Representative', denying the appellant's allegations. Thereafter, on 24 May 2013, he launched the application for a protection order.

The application in terms of s 2(1) of the Act

[7] In Part A section 4 of the application, the respondent stated under ‗incidents of the harassment' that:

7.1 On 4 May 2013 at 14h02 the appellant had circulated an email which was ‗defamatory, slanderous, libellous, dishonest, deceitful and malicious' of the respondent and their three colleagues.

7.2 Contrary to the appellant's assertions in the email, the meeting on 26 April 2013 had been ‗cordial and constructive' and ‗civilized and polite'. All the participants had ‗treated each other with dignity, politeness, courtesy and respect throughout the meeting'. The managers had not ‗attacked, abused or impaired the dignity of any Mondi employee' including the appellant, at any time. Therefore the allegations of verbal and emotional abuse, an attack on the appellant by the four men and an ordeal of two hours, shocked the respondent.

7.3 The appellant had impaired his dignity, defamed him, adversely affected his wellbeing, and undermined his opportunity for promotion and financial benefit at Mondi by fabricating unfounded allegations against him.

[8] In paragraph 6 of the application the respondent advanced the following reasons for the urgency of the application:

8.1 Using her computer at Mondi, the appellant could spread ‗more malicious, defamatory, slanderous, libellous and deceitful acts' about the respondent, further damaging his good reputation at Mondi.

8.2 An s 189 retrenchment process was in progress at Mondi; the appellant might use the opportunity to undermine the respondent's ‗employment and promotional opportunities at this critical time' to the position of B.U. Manager-Pulpmill because she had created the perception that the respondent was ‗an abuser of women who regularly denies people their rights and dignity'.

8.3 The longer the delay before the appellant was restrained by a protection order, ‗the greater the likelihood that her fabrications will be accepted as gospel/the truth'.

[9] The relief sought by the respondent, as set out in paragraph 7 of the application, was an order, *inter alia*, interdicting the appellant herself or through a third party, from harassing or attempting to harass the respondent and the ‗related parties',[2] or defaming or levelling false accusations against them, or sending further emails maligning the respondent. The respondent also sought a retraction of the email in which he had been defamed, an unreserved written apology from the appellant and a costs order against her.

[10] No interim relief was ordered when the application was filed but a Notice in terms of s 3(4) of the Act, calling on the appellant to show cause why a final protection order should not be issued against her, was issued on the same day viz 24 May 2013.

[11] The appellant filed an opposing affidavit dated 21 June 2013, denying that she had levelled false accusations against or defamed the respondent or the ‗related parties', and pointed out that the ‗related parties' had not confirmed the allegations by the respondent.

[12] The respondent thereafter filed a replying affidavit and answering affidavit dated 10 July 2013 to which he annexed confirmatory affidavits by the ‗related parties', and a copy of the ‗Chairperson's Findings in the Grievance Hearing' held on 20 June 2013 at Mondi pursuant to the grievance lodged by the appellant against the respondent, in which the overall finding was that the allegations by the appellant against the respondent were unsubstantiated.

[13] The appellant subsequently filed a further answering affidavit dated 12 August 2013 to which she annexed a final draft of the ‗Employment Equity Internal Dispute Procedure' and a ‗Recognition and Procedural Agreement between Mondi Paper Company Limited and the Paper, Printing, Wood and Allied Workers Union'.

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[2] S Pillay, D Pillay and B Sikhakhane, the other three men who attended the meeting on 26 April 2013.

[14] The court *a quo* heard oral evidence on 23 October 2013. It is common cause that although the respondent cited ‗related parties' who filed affidavits, the participants at the meeting, other than the appellant and respondent, were not party to the application before the court *a quo*.

[15] The respondent was initially represented by an attorney but subsequently represented himself. He testified and called one witness, Daniel Pillay, who had attended the meeting on 26 April 2013.

[16] The respondent testified that he and his colleagues, Daniel Pillay and Sagie Pillay, had been requested to meet with the appellant and Bongani Sikhakhane, the EE representatives, to resolve issues arising from the failure of the appellant to sign off a WSP for the 2013/2014 year, in particular, promotion and development opportunities within the company. The appellant was not requested to sign any document at the meeting.

[17] The respondent described the meeting as constructive and fruitful. He was therefore shocked and confused at the contents of the appellant's email sent a week and a half later because she informed all the recipients of his invitation that she had been abused at the meeting, principally by him. The respondent pointed out that despite the several lines of recourse available to her; the appellant had not reported the ‗abuse' to anyone or lodged a grievance in the interim preceding the email. He believed that the appellant's email was motivated by Mondi's notice to its employees that it was contemplating retrenchments and that the appellant's intention was to cast him in a poor light, thereby placing him at risk of losing his job and jeopardising his prospects of promotion, while advancing her own prospects. Although an internal grievance procedure was available to him, the respondent sought relief by way of the application in terms of the Act because the adverse impact of the false allegations reached beyond the workplace into his personal life and was detrimental to his reputation in the community in which he lived. He persisted that the appellant had unreasonably, and in bad faith, sent the email containing false and malicious allegations against him.

[18] Mr Daniel Pillay corroborated the respondent's evidence about the objective of the meeting on 26 April 2013 and also described the meeting, in which ‗everyone was given an opportunity to share their ideas', as ‗well-structured', ‗calm', ‗fruitful'

and ‗productive', and denied that the appellant had been abused. Mr Pillay admitted that he had approached the appellant to sign the WSP while the respondent was on leave. He had given the EE representatives an opportunity to consider the WSP and make recommendations. Bongani Sikhakhane had done so and the issues he had raised were resolved. Mr Pillay testified that he had a good relationship with the appellant prior to her circulating the impugned email. He denied her allegations that abuse was meted out to her at the meeting on 26 April 2013. He confirmed that, despite the discussions on the WSP at the first meeting, they went into the second meeting with the original WSP. However Van Vught, had only been interested in the way forward and not in the discussions of the earlier meeting. He had reprimanded the managers for not keeping to their promise that from 2013, two persons were to be sent on the foremen development program, an issue which was raised by the appellant at the meeting with Van Vught.

[19] The appellant thereafter testified and called one witness, Mr Trevor Chinsamy, who served as a member of the Employment Equity Executive Committee (EEEC) with the appellant and as a shop steward at Mondi.

[20] The appellant confirmed that the meeting on 26 April 2013 was called to discuss the WSP but added that the WSP specifically included attendance at a foreman development program. The meeting had started well but about 20 minutes into the meeting the other participants had deliberately digressed from the purpose of the meeting and intentionally ignored her questions. The meeting overran its scheduled time because the discussion veered to issues unrelated to the WSP and was not fruitful. The appellant, who described the meeting as ‗very abusive' and ‗tense', felt intimidated because the respondent and Sagie Pillay were managers in seniority to her and had remained quiet. But when she was asked, near the end of the meeting, if she was happy with the discussion, she expressed her dissatisfaction at their digression from the business of the meeting and the resultant lack of resolution in respect of the failure to send employees for training in January 2013. This caused an argument and the appellant was forced to resign as EE representative, which she resisted.

[21] At the second meeting, which was to reschedule the training, she did not inform Van Vught of the abuse she had been subjected to by the respondent and the

others because she was still shaken. But she did tell him why she did not sign the WSP and Van Vught reprimanded the others for failing to reschedule the training. She had informed Mr Chinsamy and Nathi Nkosi, the Chairperson of their trade union, telephonically between 16h00 and 18h00 on 26 April 2013 about the emotional and verbal abuse that she had been subjected to.

[22] The email sent by the respondent on 2 May 2013 was an invitation to a rescheduled meeting to finalise dates for the training. The appellant did not attend the meeting because _the date was not specified', but responded by way of her email dated 4 May 2013.

[23] The appellant denied that she had intended to compromise the respondent's future at Mondi by sending the email; she had expressed her feelings about the treatment she had been subjected to. Under cross-examination, the appellant admitted that she was unaware that the foreman development program had terminated in 2011, although she had attended the training herself and had not graduated therefrom. She explained that she considered a question by her fellow EE representative on the suitability of certain employees for training, as an attack on her, and not part of the agenda. She also viewed being told that she had wasted the respondent's time at the meeting, and not being asked to sign the WSP, although the documents were on the table, as _abuse'.

[24] Mr Chinsamy was not at the meeting on 26 April 2013. He testified about the dispute relating to the WSP which he, the appellant and certain other members of the EEEC had refused to sign and the telephone call he had received in the late afternoon of 26 April 2013 from the appellant. She had informed him that the meeting was out of order and she had forced to sign the WSP (but had not done so) and attacked verbally; she had also been let down by the other EE representative who had signed the WSP and agreed to everything. She had been upset and emotional; so he had told her to send him an email when she was rational. The appellant had subsequently booked off work sick, but not immediately after the meeting on 26 April 2013. She had sent him the email on her return to work. He did not have a copy of the email. Mr Chinsamy confirmed that the issue of the WSP had occurred before 26 April 2013 and had been discussed by the EEEC prior to that date.

The judgment of the court *a quo*

[25] In her judgment, the learned Magistrate identified the issues for determination by her to be:

25.1 the veracity of the appellant's allegations; and

25.2 whether the appellant's conduct constituted harassment, entitling the respondent to the protection order sought.

[26] Having considered the evidence, the learned Magistrate held that the evidence presented by the appellant had failed to prove that she had been "subjected to numerous violations of her constitutional rights" and verbal and emotional abuse, as she had alleged in her email dated 4 May 2013, or that she had been subjected to a two hour ordeal and "attacked" by the respondent and other men present at the meeting. The Magistrate noted further that the appellant did not report the "ordeal" to Van Vught with whom she met immediately after the meeting and only telephoned Mr Chinsamy late that afternoon; she had also lodged a grievance with Mondi only after she was served with the Notice to show cause issued at the Durban Magistrates' Court, and that her complaint only related to the respondent, and not the other three men.

[27] Thereafter, holding that the Act "has a very wide interpretation", the Magistrate found that, although the appellant had only sent one email, it was sufficient to constitute "harassment in the workplace". She was therefore satisfied that the respondent's constitutional rights had been infringed by the appellant and granted a final protection order against her, interdicting her from defaming the respondent and his colleagues, making false accusations of gender based attack against the respondent, and sending malicious defamatory emails. She also ordered that the appellant pay the respondent's taxed attorney and client costs.

[28] It is trite that a court of appeal will not interfere with the findings of fact and credibility of the trial court unless it is apparent from the record that the court *a quo* either materially misdirected itself or erred to the extent that its findings are vitiated and fall to be set aside. The court of appeal must also remain cogniscent that the trial court has the advantage of having observed and heard the witnesses.

[29] In *S v Trainor*[3] Navsa JA set out the obligation of a trial court:

> 'A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the *onus* on any particular issue or in respect of the case in its entirety.'

[30] The court *a quo* was mindful that the onus lay on the respondent to prove that he was entitled to a protection order against the appellant because her conduct in sending the email in which she had made false allegations against him constituted 'harassment' in terms of the Act.

[31] The evidence of the respondent that the meeting was fruitful and constructive and overran its scheduled two hours because the various options for training were explored, and that there was no abuse of the appellant remained uncontroverted under cross-examination and was corroborated by Daniel Pillay, who also confirmed that he had approached the appellant to sign the WSP previously and not at the meeting. They both also testified that the appellant had not voiced any objection nor had she raised the issue of abuse at the meeting or at the later meeting with Van Vught. The credibility of both witnesses was not undermined in cross-examination.

[32] On the other hand, during her testimony, the appellant was unable to furnish clear and coherent examples of the emotional and verbal abuse she had allegedly suffered, as expressed in her email. Although it was put to the respondent that the appellant was forced to sign the WSP document, the appellant admitted that she was not asked to sign the WSP document.[4] She alleged that the objective of the first WSP meeting on 26 April 2013 was for management to reschedule the date for the training which was supposed to have taken place in January 2013, in accordance with the agreement of 2012. But when the other participants digressed, she:

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[3] 2003 (1) SACR 35 (SCA) para 9.
[4] Page 249 of the record.

> I looked at it as an attack because that was not the purpose of the meeting. The decision had already been made in 2012 to develop people in January, so that was an irrelevant question, that was an attack.'[5]

She persisted that it was an attack on her, which motivated her to send the email.[6] But she was unable to state exactly what the respondent had said to her:

> '…it was a heated argument, so you, the applicant and Seggy Pillay and the rest of the people in the boardroom, you were very happy to attack me, so the attack was coming from any one of you where….'[7]

She continued:

> 'Yes, I would never forget that day, just because you wanted my signature you abused me so severely.'[8]

But she admitted that she was not given the document for signature, stating:

> 'The signing is right at the end of the meeting, so there was no tangible thing that you gave to me so that I could sign the document, there was no time, you didn't even ask me to sign the document, and that was the purpose. Nobody asked me. The documents were sitting on the table, Mr Applicant'.[9]

[33] The appellant was evasive about the documents presented at the meeting and the discussions. She admitted that she was tense because they did not ask her to sign the WSP and that, 'when you didn't, I felt abused'.[10] She claimed to have been emotionally abused,[11] and vacillated between emotional and verbal abuse.

[34] Although the appellant alleged that she did not report her 'ordeal' to Van Vught because she was still in a state of shock, she did inform him that the immediate management had made promises which were not kept. Her report related to the WSP discussion at the earlier meeting, and if she had the equanimity of mind to report the problem, she ought to have had no difficulty in informing him that she had been subjected to abuse at that same meeting, but she did not.

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[5] Page 284, lines 14-17.
[6] Page 284, lines 12-25.
[7] Page 286, lines 8-11.
[8] Page 286, lines 24-25.
[9] Page 287, lines 10-14.
[10] Page 291, lines 5-6.
[11] Page 306, lines 5-7.

[35] Although the appellant relied on Mr Chinsamy for corroboration, he had not attended the meeting. He merely clarified that the issues of training and the WSP were on-going prior to the meeting attended by the parties and applied to other departments as well, but none had gained the magnitude that it had at the meeting attended by the parties. His testimony that the appellant was incoherent and emotional and could not explain what had happened did not assist the appellant, nor did he produce the email she had sent to him some time later.

[36] Therefore there was no consistent or convincing evidence to sustain the appellant's version that she had been subjected to abuse, whether emotional or verbal, or that she had suffered a two hour ordeal at the meeting. Consequently, I am satisfied that the Magistrate did not err in finding that the respondent had proved that the appellant's allegations of abuse by the respondent were false. Therefore, the sending of the impugned email may properly be found to constitute direct, unreasonable conduct on the part of the appellant.

[37] Although it was correctly pointed out by Mr *Shepstone* that the Magistrate misdirected herself by accepting a point raised in argument as a fact,[12] I am satisfied that such misdirection does not vitiate her findings on the credibility of the witnesses and that the allegations by the appellant were not true.

[38] The next issue before court *a quo* was whether the conduct of the appellant albeit unreasonable, constituted harassment.

Interpretation

[39] In s 1 of the Act "harassment" is defined as:

> "directly or indirectly engaging in conduct that the respondent knows or ought to know –
>
> (a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably –
>
> (i) …
>
> (ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or

[12] Page 366, lines 4-10.

(iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or a related person; or

(b) …[13]

‗harm' means any mental, psychological, physical or economic harm;'.

[40] As it is common cause that the appellant sent the email[14] complained of to the respondent and other colleagues at Mondi, but the contents were aimed at the respondent, the application appears to have been premised on s 1(a)(ii) and (iii) of the Act. The onus was on the respondent to prove on a balance of probabilities, that the appellant knew or ought to have known that by sending the email, she was engaging in conduct which would cause harm to the respondent or inspire the reasonable belief that harm would be caused to him, be it mental, psychological, physical or economic, and that her conduct was unreasonable in the circumstances.

[41] The Act came into effect on 27 April 2013. To date there is little South African jurisprudence on the Act and on the interpretation of ‗harassment' as defined in the Act.

[42] In their article entitled ‗The Protection from Harassment Act and its implications for the workplace', the authors AA Landman and MM Ndou state:

> ‗The Act applies to everyone. It may also apply to an employer or employee and it may have an effect on a workplace, management and personnel issues.'[15]

They acknowledge that the ‗Act is not specifically directed towards employers and employees but its ambit is wide enough to include them,'[16] and pertinently point out

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[13] Sub-sections of s 1 are immaterial for present purposes have been omitted.

[14] The South African Law Reform Commission (SALRC) supported a broad definition of stalking so as to encompass stalking irrespective of the medium used because it recognised the ready availability of different mediums, including cellular phones, and computerized technology. It therefore suggested that the prohibited conduct be defined broadly in terms of ―communication", ―harassment", or ―threats" without specifying the methods or defining stalking as including, but not restricted, to specified prohibited conduct. The SALRC also noted the distinction between direct and indirect online harassment. Direct online harassment includes threats, bullying, or intimidating messages sent directly to the victim via e-mail or other Internet communications media. Indirect online harassment includes spreading rumours about the victim in various Internet discussion forums.

[15] *Contemporary Labour Law* (2013) 22 (No 9) April at 81.

[16] Ibid at 86.

that the Protection from Harassment Act of 1997 currently in effect in the United Kingdom, is similarly worded and has been used in the workplace.

[43] I agree that the Act has application and may prove useful in the workplace environment as it enhances the remedies for harassment in the workplace available under other legislation. Outside the workplace, a complainant may seek relief under the Act although he/she may also have recourse for relief against harassment under the Domestic Violence Act 116 of 1998 (the DVA).

[44] Given the comprehensive ambit of the Act, it is essential that a consistent approach be applied to the evaluation of the conduct complained of, although the factual determination will depend on the circumstances under or context within which the alleged ‗harassment' occurred. If the conduct against which protection is offered by the Act were to be construed too widely, the consequence would be a plethora of applications premised on conduct not contemplated by the Act. On the other hand too restrictive or narrow a construal may unduly compromise the objectives of the Act and the constitutional protection it offers. Therefore the interpretation of the term ‗harassment' as defined in the Act, is significant.

[45] In *Natal Joint Municipality Pension Fund v Endumeni Municipality*,[17] Wallis JA provided useful guidance to interpretation and a relevant *caveat* against intruding into the realm of legislation:

> ‗…The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.

[17] 2012 (4) SA 593 (SCA) para 18.

> Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation…'

[46] On contextual interpretation, in *R v Smith*[18] the court stated:

> 'Lord Wilberforce said that consideration of the purpose of an enactment is always a legitimate part of the process of interpretation… The extent to which the courts should apply the 'mischief' approach must be a matter of judgment in the individual case. There is a case for saying that the courts should, where they think it appropriate, look more readily at ministerial statements which may help to identify the mischief which Parliament was invited to regard as the object of the legislation, and should not be inhibited from construing it accordingly, even where a natural reading of seemingly wide words might warrant a wider construction.'

[47] Accordingly, in order to understand the purpose to which the Act was directed and the material considered by the drafters, and to 'identify the mischief' targeted by the Act, I had recourse to the SALRC Discussion Paper on *Stalking*,[19] which reflects the legislation in comparative jurisdictions and submissions which the SALRC considered when drafting the Act and the subsequent evaluation and recommendations by the SALRC, which forms the basis of the following exposition. I have however quoted only those parts of the legislation referred to in the Discussion Paper which are relevant to the facts of this appeal, where possible without detriment to comprehension.

[48] The term 'stalking' as reflected in the title of Project 130 was initially used by the drafters. The SALRC found that the general tendency in comparative jurisdictions was to include 'harassment' and 'intimidation' within the definition of 'stalking'; that 'harassment' and 'intimidation' are encompassed in the ways in which a person may be stalked. The inclusion of 'harassment' under an umbrella definition of 'stalking' was endorsed by an expert consultation meeting held on 20 January 2004 in

[18] [2013] 2 All ER 804 para 23.
[19] South African Law Commission Project 130: *Stalking* Discussion Paper 108 (2004).

Durban, and the SALRC recommended that harassment and intimidation be incorporated in the definition of ‗stalking'.[20]

[49] However, when the SALRC released its report on 25 November 2008[21] which contained its final recommendations based on its investigation into stalking and a draft Bill which embodied a civil remedy to address stalking behaviour, the SALRC noted that internationally, the legal understanding of ‗stalking' had evolved to the point where it falls under the broad terms ‗harassment' and recommended that the broader term ‗harassment' should be used, in order to provide greater protection under the Act, as had been done in the United Kingdom and Canada. Hence the term ‗stalking' was replaced by ‗harassment' in the title of the Bill and subsequently the Act. It must therefore be borne in mind that reference to ‗stalking' in the Discussion Paper was effectively to what is currently termed ‗harassment'.

[50] In the Bill annexed to the Report ‗harassment' was defined as ‗directly or indirectly engaging in conduct that causes harm or inspires the reasonable belief that harm may be caused'.

[51] The SALRC noted in the Discussion Paper that anti-stalking laws almost always require that the alleged stalker engage in a **course of conduct**, not just a single act, to fall under their provisions. Typically, a course of conduct is characterised as a series of acts over a period of time, however short, evidencing a continuity of purpose.[22] Therefore the SALRC recommended that an element of repetition be included in the definition of ‗stalking'.

[52] In order to define ‗stalking' within the South African context the SALRC found it appropriate to note the matter in which the legislature had already addressed the phenomenon of stalking in relation to domestic relationships in the DVA, in which the definition of ‗domestic violence' includes intimidation, harassment and stalking.

[53] ‗Harassment' in the DVA is defined as ‗engaging in a pattern of conduct that induces the fear of harm to a complainant including –

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[20] Ibid para 1.33.
[21] South African Law Commission Project 130: *Stalking* Report (2008).
[22] Para 1.34 of the Discussion Paper.

(a) repeatedly watching, or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be;
(b) repeatedly making telephone calls or inducing another person to make telephone calls to the complainant, whether or not conversation ensues;
(c) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant;'

'Stalking' is defined as 'repeatedly following, pursuing or accosting the complainant'.

[54] The SALRC concluded that to constitute 'harassment' the conduct must be repeated, that is, occur more than once or be a pattern of conduct, must be regarded as abusive conduct and must induce the fear of harm, but that stalking may entail following, pursuing or accosting the complainant on one occasion without the proviso of induction of fear.[23]

[55] The SALRC also took particular note of the definition of 'unlawful stalking' in the Queensland Criminal Code. Section 359B of the Code sets out the elements of 'unlawful stalking' as follows:[24]

'Conduct –

(a) intentionally directed at a person; and
(b) engaged in on any 1 occasion if the conduct is protracted or on more than 1 occasion; and
(c) consisting of 1 or more acts of the following, or a similar, type –
    (i) …;
    (ii) contacting a person in any way, including, for example, by telephone, mail, fax, e-mail or through the use of any technology;

    …

(d) that -
    (i) …; or
    (ii) causes detriment reasonably arising in all the circumstances, to the stalked person or another person.'

[23] Ibid para 1.32.
[24] Parts immaterial for present purposes have been omitted.

[56] All four elements set out in s 359B are required for the conduct to constitute ‗unlawful stalking', as indicated by the word ‗and'. Distilling what is relevant to the present issue for determination, s 359B of the Queensland Criminal Code provides protection against intentionally directed conduct which occurs on one occasion (if protracted), or which occurs on more than one occasion and the conduct may consist in the act of sending one or more emails. It is the physical act of communication and not the contents of the communication that appears to be contemplated in subsections (b) and (c) of s 359B. Therefore, under the Queensland Criminal Code, the sending of one email, which is not a protracted act, may be considered not to constitute harassment, as the conduct did not occur on more than one occasion.

[57] In addition to the aforegoing elements, the contents of the communication must be such that they cause ‗detriment' to the stalked person. Section 359A of the Queensland Criminal Code which provides definitions for key words and phrases, defines ‗detriment' in terms of the consequences of the stalking behaviour, which includes:

> ‗(a) apprehension of fear or violence to, or against the property of, the stalked person or another person; and
>
> (b) serious mental, psychological or emotional harm;'

Therefore the victim must establish that the communication caused him fear of physical violence to person or property, or serious mental, psychological or emotional harm. Finally an objective test must be applied: the harm must ‗reasonably arise' from the relevant circumstances.

[58] Similarly the Criminal Law Consolidation (Stalking) Amendment Act 7 of 1994 of South Australia prescribes that the conduct complained of should occur on **at least two separate occasions** and could reasonably be expected to arouse the victim's apprehension or fear.

[59] In its *Report on Stalking* the Law Reform Commission of Hong Kong recommended that the following ought to form constituent elements of the criminal offence of stalking:

59.1 the ‗stalker' must pursue **a course of conduct** which amounts to harassment of another;

59.2 the harassment should be **serious** enough to cause that person alarm or distress; and

59.3 a reasonable person would think that the course of conduct amounted to harassment of the other.[25]

[60] The Protection from Harassment Act 1997 was enacted in the United Kingdom on 21 March 1997 ‗to make provision for protecting persons from harassment and similar conduct' creates two specific criminal offences, one of which is an offence of ‗harassment'.

[61] Section 1 enjoins a person not to pursue a **course of conduct** which amounts to harassment and which the person knows or ought to know amounts to harassment of another. Harassing a person includes alarming the person or causing the person distress, and the —course of conduct" must involve conduct on at least two occasions.[26]

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[25] The Law Reform Commission of Hong Kong Report on *Stalking* October 2000 at 184.

[26] The Protection from Harassment Act 1997 provides:

Section 1: Prohibition of harassment

(1) A person must not pursue a course of conduct—
  (a) which amounts to harassment of another, and
  (b) which he knows or ought to know amounts to harassment of the other.

(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.

(3) Subsection (1) does not apply to a course of conduct if the person who pursued it shows—
  (a) that it was pursued for the purpose of preventing or detecting crime,
  (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
  (c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

Section 2: Offence of harassment**:**

(1) A person who pursues a course of conduct in breach of section 1 is guilty of an offence.

Section 4: Putting people in fear of violence

(1) A person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.

(2) For the purposes of this section, the person whose course of conduct is in question ought to know that it will cause another to fear that violence will be used against him on any occasion if a reasonable person in possession of the same information would think the course of conduct would cause the other so to fear on that occasion.

Section 7 is the interpretation clause:

(1) This section applies for the interpretation of sections 1 to 5.

(2) References to harassing a person include alarming the person or causing the person distress.

Section 1(2) provides that ‗the person whose course of conduct is in question ought to know that it amounts to harassment of another if **a reasonable** in possession of the same information would think the course of conduct amounted to harassment of the other'. The legal test as to whether a person is guilty of harassment is therefore objective: the assessment of the conduct by ‗a reasonable person' - unlike most criminal offences which require a degree of intent before an offence is committed, because many stalkers claim that they have no intention of harassing their victims.

[62] Therefore the elements required to constitute harassment in terms of the Protection from Harassment Act 1997 in the United Kingdom are more than one occurrence of prohibited conduct and a reasonable person in the position of the offender thinking that the course of conduct amounted to harassment.

[63] The Protection from Harassment Act 1997 was amended by the Protection of Freedoms Act 2012, which introduced the offence of stalking.[27] Stalking is similarly constituted by the perpetrator following a course of conduct, which he or she knows or ought to know amounts to harassment of the other person. Under s 4A which creates the offence of stalking involving fear of violence or serious alarm or distress, the perpetrator's course of conduct must cause the victim to fear, on at least two occasions, that violence will be used against him or cause the victim serious alarm or distress which has a substantial adverse effect on his usual day-to-day activities; and the perpetrator must know or ought to know that his course of conduct will cause the victim such alarm or distress. The test applied remains an objective one: that of a reasonable person in possession of the same information who would think that such course of conduct would cause the victim so to fear on that occasion, or that it will cause him serious alarm or distress which has a substantial adverse effect on the victim's usual day-to-day activities.

[64] The substantive requirements that consistently occur in all the aforementioned reports and legislation were implemented in the following English cases:

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(3) A "course of conduct" must involve
(a) in the case of conduct in relation to a single person (see section 1(1)), conduct on at least two occasions in relation to that person conduct on at least two occasions.
(4) "Conduct" includes speech.

[27] See s 2A of the Protection from Harassment Act 1997.

64.1 *Dowson and others v Chief Constable of Northumbria Police*[28]

‚…a summary of what must be proved as a matter of law in order for the claim in harassment to succeed:

(1) There must be conduct which occurs on at least two occasions,

(2) which is targeted at the Claimant,

(3) which is calculated in an objective sense to cause alarm or distress, and

(4) which is objectively judged to be oppressive and unacceptable.

(5) What is oppressive and unacceptable may depend on the social or working context in which the conduct occurs.

(6) A line is to be drawn between conduct which is unattractive and unreasonable, and conduct which has been described in various ways: ~~-t~~orment" of the victim, ~~-o~~f an order which would sustain criminal liability".'

64.2 *Majrowski v Guy's and St Thomas's NHS Trust*[29]

‚[18] I turn to the material provisions of the 1997 Act. The purpose of this statute is to protect victims of harassment, whatever form the harassment takes, wherever it occurs and whatever its motivation. The Act seeks to provide protection against stalkers, racial abusers, disruptive neighbours, bullying at work and so forth.'

…

[30] …Courts are well able to separate the wheat from the chaff at an early stage of the proceedings. They should be astute to do so. In most cases courts should have little difficulty in applying the ‚close connection' test. Where the claim meets that requirement, and the quality of the conduct said to constitute harassment is being examined, courts will have in mind that irritations, annoyances, even a measure of upset, arise at times in everybody's day-to-day dealings with other people. Courts are well able to recognise the boundary between conduct which is unattractive, even unreasonable, and conduct which is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable the gravity of the misconduct must be of an order which would sustain criminal liability under s 2.'

[28] [2010] All ER (D) 191 para 142.
[29] [2006] 4 All ER 395. In this case the House of Lords considered whether an employee had been unlawfully harassed by his departmental manager in breach of s 1 of the Protection from Harassment Act 1997.

64.3 *Hayes v Willoughby*[30]

> Section 1(1) of the Protection from Harassment Act 1997 provides that a person must not pursue a course of conduct (a) which amounts to harassment of another, and (b) which he knows or ought to know amounts to harassment of the other'. Harassment is both a criminal offence under s 2 and a civil wrong under s 3. Under s 7(2), [r]eferences to harassing a person include alarming the person or causing the person distress', but the term is not otherwise defined. It is, however, an ordinary English word with a well understood meaning. Harassment is a persistent and deliberate course of unreasonable and oppressive conduct, targeted at another person, which is calculated to and does cause that person alarm, fear or distress.'

The court noted that the Protection from Harassment Act 1997 is capable of applying to any form of harassment, including repeated offensive publications in a newspaper and victimisation in the workplace.

64.4 *R v Smith*[31]

> In construing s 1 of the 1997 Act it is right to have regard to the type of mischief at which it was aimed. It is also right to have regard to what the ordinary person would understand by harassment. It does not follow that because references to harassing a person include alarming a person or causing a person distress (s 7(2)), any course of conduct which causes alarm or distress therefore amounts to harassment…So to reason would be illogical and would produce perverse results. …the definition of the word harass' in the *Concise Oxford Dictionary*…meaning to ~~t~~orment by subjecting to constant interference or intimidation". …Essentially it involves persistent conduct of a seriously oppressive nature, either physically or mentally, targeted at an individual and resulting in fear or distress.'

64.5 *R v Curtis*[32]

The court held that the impugned conduct must be unacceptable to a degree which would sustain criminal liability and must also be oppressive and agreed with the following analysis in *Thomas v News Group Newspapers Ltd* [2002] EMLR 78:

> [29] Section 7 of the 1997 Act does not purport to provide a comprehensive definition of harassment. There are many actions that foreseeably alarm or

[30] [2013] 2 All ER 405 para 1(references and footnotes omitted).
[31] [2013] 2 All ER 804 para 24 (references and footnotes omitted).
[32] [2010] 3 All ER 849 para 29.

cause a person distress that could not possibly be described as harassment. It seems to me that section 7 is dealing with that element of the offence which is constituted by the effect of the conduct rather than with the types of conduct that produce that effect.

[30] The Act does not attempt to define the type of conduct that is capable of constituting harassment. ~~H~~Harassment" is, however, a word which has a meaning which is generally understood. It describes conduct targeted at an individual which is calculated to produce the consequences described in section 7 and which is oppressive and unreasonable. The practice of stalking is a prime example of such conduct.'

[65] It is apparent from these cases that the offence of harassment is not merely constituted by a course of conduct that is oppressive and unreasonable but that the consequences or effect of the conduct ought not cause a mere degree of alarm; the contemplated harm is **serious** fear, alarm and distress. The legal test is always an objective one: the conduct is calculated in an objective sense to cause alarm or distress, and is objectively judged to be oppressive and unacceptable.

[66] In *SATAWU obo Dlamini / Transnet Freight Rail, a Division of Transnet Ltd & Another*[33] the arbitrator held that harassment is a form of unfair discrimination, and that although harassment is generally understood to denote repeated conduct a single extremely serious slur on the grounds of race could constitute harassment. He held further that although the test for establishing discrimination is objective, the Constitution requires that the primary focus be on the effect on the complainant of the action complained of, and that the proper test for assessing whether the conduct constituted harassment is by reference to the ~~r~~easonable victim."

[67] In my view this construction of the Act runs contrary to the application of the objective legal test as it shifts the evaluation from the conduct of the perpetrator to the impact on the victim. The test to be applied ought to remain consistent. But as the oppressive and unacceptable conduct may depend on the social or working context in which the conduct occurs',[34] the determination of allegations of harassment based on racial slurs may take place within the relevant social context

[33] [2009] JOL 24429 (TOKISO).
[34] *Dowson v Chief Constable of Northumbria Police supra.*

without changing the focus of the test from the oppressive and unreasonable conduct as defined in the Act.

The offence of Harassment in the South African context

[68] Based on its examination of international legislation, the SALRC recommended that the recurrent element of the offence should be incorporated in the definition of ‗harassment'. The definition in the Act states that ‗harassment' is constituted by ‗directly or indirectly engaging in conduct…'. However although the definition does not refer to ‗a course of conduct' in my view the conduct engaged in must necessarily either have a repetitive element which makes it oppressive and unreasonable, thereby tormenting or inculcating serious fear or distress in the victim. Alternatively the conduct must be of such an overwhelmingly oppressive nature that a single act has the same consequences, as in the case of a single protracted incident when the victim is physically stalked.

[69] It is against this background that I turn to the facts of this appeal. The conduct complained of was constituted by the sending of a single email, the contents of which were proved to be untrue. However, the lack of veracity does not mean that the appellant's conduct was necessarily oppressive or unreasonable. Her expressed intention in sending the email, to provide a reason for refusing the respondent's invitation to a follow up meeting, is also not pertinent.

[70] But applying the objective test to the information within the appellant's knowledge, her conduct must be evaluated within the context of the workplace. The WSP related disputes between management and members of the EEEC were on-going at Mondi, as testified to by Mr Chinsamy. The meeting on 26 April 2013 was held to resolve the failure of the appellant to sign off the WSP on the instructions of senior management. Her email on the 4 May 2013 appears to be a retaliatory response, based on her perception that she was ignored at the previous meeting because of gender bias and the objective of the meeting was not achieved as the other attendees digressed.

[71] In my view the conduct of the appellant in sending the email may have been unreasonable, as she allowed her emotions to cloud her perception, but I am not

persuaded that her conduct was objectively oppressive or had the gravity to constitute harassment.

[72] Further, the appellant levied accusations of abuse against all four men who were at the meeting. Only the respondent took serious umbrage at the allegations against him, and resorted to the application for an interdict. Although he alleged that his prospects of promotion and his dignity and reputation within Mondi and in the community may be compromised as a consequence of the email, there was no evidence to this effect.

[73] I am therefore unable to find that the facts of this matter sustain a finding that the conduct of the appellant constituted harassment as contemplated by the Act, and the appeal must succeed.

[74] The following order do issue:

1. The appeal is upheld.

2. The judgment of the court *a quo* delivered on 29 November 2013 is set aside.

3. The respondent is directed to pay the costs of appeal.

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MOODLEY J

I agree

_____

PLOOS VAN AMSTEL J