REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 832/2013

In the matter between:

NICORIQUE FRANCOISE BANDAT **Applicant**

and

PHILIP WOUTER DE KOCK **First Respondent**

DE KOCK CONSULTING ENGINEERS CC **Second Respondent**

Heard: **11, 12 and 13 August 2014**

Delivered: **2 September 2014**

Summary: Dismissal – whether resignation constituting dismissal – principles stated – continued employment not intolerable – applicant failing to prove existence of dismissal – applicant's resignation motivated by her own subjective considerations

Dismissal – case of sexual harassment advanced as reason for resignation – sexual harassment not shown to exist – no nexus between resignation of applicant and any case of sexual harassment

Discrimination – sexual harassment – principles relating to sexual harassment considered – no case of sexual harassment made out – relationship between the parties considered and found to be inconsistent with the existence of

sexual harassment

Discrimination – burden of proof considered – only proper inference from applicant's own case is that no sexual harassment exists

Interpretation of statute – amendment to EEA – retrospectivity considered on issue of onus

Absolution from the instance – principles stated – applicant failed to make out a case of discrimination and prove the existence of dismissal on her own version as it stands – absolution from the instance granted

COIDA – limitation of liability of employer – Section 35(1) considered

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JUDGMENT

SNYMAN, AJ:

Introduction

[1] This matter arose from the applicant having resigned from the employment of the second respondent on 5 July 2013 with immediate effect. The applicant contended that this resignation was in fact tantamount what is commonly known as a 'constructive dismissal'. The applicant then pursued two disputes against the second respondent to the CCMA, the one being an alleged automatic unfair dismissal was contemplated by section 187(1)(f) of the LRA,[1] and the other being a discrimination dispute pursuant to section 10 of the EEA.[2] The CCMA issued a certificate of failure to settle in respect of both these disputes on 23 August 2013, and the applicant then filed a statement of claim with the Labour Court on 17 September 2013, against the first and second respondents, with the first respondent having been joined as the alleged perpetrator of the discrimination upon the applicant.

[2] The applicant's first cause of action in her statement of claim was that she been dismissed by the second respondent and that such dismissal was automatically unfair as contemplated by section 187(1)(f) of the LRA. The

[1] Labour Relations Act 66 of 1995.
[2] Employment Equity Act 55 of 1998.

applicant's second cause of action in her statement of claim was that she had been discriminated against by the first and second respondents, in that she had been subjected to sexual harassment by the first respondent. The applicant did not seek reinstatement and sought maximum compensation as contemplated by section 194 of the LRA in respect of an automatic unfair dismissal, as well as damages of R100 000.00 in terms of section 50 of the EEA. The applicant had a third claim in her statement of claim, being compensation relating to medical expenses she had to incur as a result of an accident she had whilst at work.

[3] The matter came before me for trial on 13, 14 and 15 August 2014. The applicant commenced leading evidence. The applicant herself and two other witnesses testified on her behalf. After the conclusion of the evidence of the applicant, the respondents sought to apply for absolution from the instance, contending that the applicant failed to make out even a *prima facie* case against the respondents in respect of all of her claims. It is this absolution from the instance application that forms the subject matter of this judgment.

Issue of absolution from the instance

[4] It is now trite that the Labour Court has the power to consider and determine applications for absolution from the instance.[3]

[5] The test to be applied in considering an application for absolution from the instance was enunciated in *Gordon Lloyd Page and Associates v Rivera and Another*[4] as follows:

> 'The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G - H in these terms:
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> > '... (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be

[3] See *Janda v First National Bank* (2006) 27 *ILJ* 2627 (LC) at para 4; *Joubert v Legal Aid South Africa* (2011) 32 *ILJ* 1921 (LC) at para 5; *Wallis v Thorpe and Another* (2010) 31 *ILJ* 1254 (LC) at para 9; *Sihlali v SA Broadcasting Corporation Ltd* (2010) 31 *ILJ* 1477 (LC) at para 4.
[4] 2001 (1) SA 88 (SCA) at para 2.

established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson (2)* 1958 (4) SA 307 (T).)'

This implies that a plaintiff has to make out a *prima facie* case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff (*Marine and Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G - 38A; Schmidt *Bewysreg* 4th ed at 91 - 2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (*Schmidt* at 93)… The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice.'

[6] It is therefore clear that in considering the respondents' absolution application, I need to consider if the applicant has produced sufficient evidence to at least, and on her own case so far, reasonably establish the *prima facie* existence of a dismissal and of sexual harassment. In simple terms, did the applicant's evidence properly back up her claims? As the Court said in deciding this issue in *Motaung v Wits University (School of Education)*:[5]

'In view of the nature of the applicant's claim, it has to be established whether the applicant has adduced sufficient evidence supporting the facts required to back up her claim, and upon which this court might give judgment against the respondent.'

[7] The consideration of an absolution application does entail some measure of evaluation of the evidence of the applicant up to the point of the closing of her case. In other words, the consideration of an absolution application is not done on the basis of simply accepting that all the testimony presented by the

[5] (2014) 35 *ILJ* 1329 (LC) at para 13.

applicant is true. The evidence must still be evaluated and in particular, be compared to the evidence of the other witnesses for the applicant that testified as well as the agreed and accepted documentary evidence, as well as the pleadings. It must be decided if the applicant's case is at least one reasonable inference that can at this stage be drawn from the evidence properly before the Court as a whole. In *Nombakuse v Department of Transport and Public Works: Western Cape Provincial Government*[6] the Court held:

> 'In the case of an inference, the test at the end of the applicant's case is as follows: the court will refuse the application for absolution from the instance unless it is satisfied that no reasonable court could draw the inference for which the applicant contends. The court is not required to weigh up different possible inferences but merely to determine whether one of the reasonable inferences is in favour of the applicant.'

[8] In deciding any absolution application, the issue of who bears the onus is also of importance. The simple point is that if the applicant does not bear the onus, then the applicant is not required to establish a *prima facie* case and simply has to make an allegation which the respondent has the onus to rebut. Therefore, the consideration of any absolution application is always inextricably linked with which party bears the onus. The Court in *Janda v First National Bank,*[7] in dealing with an absolution application, said:

> 'The test to be applied by the court at this stage of the proceedings is whether there is sufficient evidence upon which a reasonable person could find for the applicant or, as it has also been expressed, the question is whether there is such evidence, assuming it to be true, upon which a reasonable court might, not should, give judgment against the respondent. (See Zeffertt et al *The SA Law of Evidence* at 164-5 and the authorities referred to.) To answer this question it is necessary to determine the nature of the onus and where it lies. As correctly submitted by Mr *Hulley*, for the applicant, the incidence of the onus is determined by the law and that the views of the parties as expressed in the pretrial minute are not conclusive thereof…' (emphasis added)

[6] (2013) 34 *ILJ* 671 (LC) at para 23.
[7] (2006) 27 *ILJ* 2627 (LC) at para 5.

Similarly and in *Black v John Snow Public Health Group*[8] it was said that '… It has been said that absolution from the instance can only be granted if the onus rests on the plaintiff and not on the respondent'.[9] I will now proceed to consider where the onus in this matter, relating to the applicant's one claim of automatic unfair dismissal and other claim of discrimination, in fact lies.

[9] Insofar as it concerns the applicant's automatic unfair dismissal claim, the issue *in casu* is, before it can even be determined whether the dismissal is automatically unfair, whether the applicant has actually been dismissed. As stated above, it was common cause the applicant resigned and that she is now alleging the existence of a dismissal as contemplated by section 186(1)(e). This issue is very much in dispute, with the respondents contending that the applicant was never dismissed. The issue of the onus to prove the existence of a dismissal is found in section 192(1) of the LRA which reads: '[i]n any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.' In applying this section, it is now trite that the onus to prove the existence of what is commonly known as a 'constructive dismissal' would rest squarely on the applicant.[10]

[10] However, and where it comes to the issue of the applicant's discrimination claim, the issue is not that simple. What complicate matters is the amendments to the EEA,[11] which came into effect on 1 August 2014, which was before this matter was heard but after it was instituted. Prior to this amendment, the issue of the onus was determined in Section 11 of the EEA as follows:

[8] (2010) 31 ILJ 1152 (LC) at para 35.
[9] See also *Mouton v Boy Burger (Edms) Bpk* (2011) 32 *ILJ* 2703 (LC) at 2709A-B; *Bedderson v Sparrow Schools Education Trust* (2010) 31 *ILJ* 1325 (LC) at para 20*; Schmahmann v Concept Communications Natal (Pty) Ltd* (1997) 18 *ILJ* 1333 (LC); *Rockliffe v Mincom (Pty) Ltd* (2007) 28 *ILJ* 2041 (LC).
[10] See *Jordaan v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 *ILJ* 2331 (LAC) at 2336; *Old Mutual Group Schemes v Dreyer and Another* (1999) 20 *ILJ* 2030 (LAC) at 2036; *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others* (2012) 33 *ILJ* 363 (LC) at para 36; *SA Police Service v Safety and Security Sectoral Bargaining Council and Others* (2012) 33 *ILJ* 453 (LC) at para 23; *Value Logistics Ltd v Basson and Others* (2011) 32 *ILJ* 2552 (LC) at para 35; *Eagleton and Others v You Asked Services (Pty) Ltd* (2009) 30 *ILJ* 320 (LC) at para 25; *Pretoria Society for the Care of the Retarded v Loots* (1997) 18 *ILJ* 981 (LAC) at 983.
[11] EEA Amendment Act 47 of 2013.

> 'Whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair.'

Following the aforesaid amendment, Section 11 now provides:

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

What is clear is that following the amendment of section 11 of the EEA, all the employee party has to do is to allege that discrimination exists on one of the grounds specified in section 6(1), and the onus would squarely be on the employer party to prove that it does not exist. If this amended provision applies *in casu*, then the respondents' absolution application with regard to the applicant's discrimination cannot succeed, as the respondents would have the overall onus, and the applicant has indeed alleged discrimination on a ground specified in section 6(1).[12]

[11] The crisp question now is whether the amendment to section 11 of the EEA will apply retrospectively, considering the amended version of the section did not apply when the claim arose, the statement of claim was filed, and pre-trial proceedings were concluded. In this regard, the relevant principle was set out in *Bell v Voorsitter van die Rasklassifikasieraad en Andere*[13] as follows:

> '… Die aanvaarding as deel van ons reg van die reël dat waar 'n wetsbepaling terugwerkend of andersins gewysig word onderwyl 'n geding hangende is, die regte van die gedingvoerende partye, by onstentenis van 'n ander bedoeling, volgens die wetsbepalings wat ten tyde van die instelling van die geding gegeld het, beoordeel moet word, blyk dus duidelik te wees. Dat dit die reël is

[12] Section 6(1) of the EEA reads '(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.' The ground contended by the applicant relates to sex.
[13] 1968 (2) SA 678 (A) at 684F-H.

wat ook deur die Engelse Howe by die uitleg van Wette toegepas word, blyk duidelik uit die gewysdes waarna in *Bartman v Dempers (supra*) verwys word. (Sien ook Maxwell *Interpretation of Statutes* 11de uitg op 212.)…'

[12] The *ratio* in *Bell* was followed in *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission, and Others; Transnet Ltd (Autonet Division) v Chairman, National Transport Commission, and Others,*[14] where the Court said:

'One may start the conspectus by stating the time-honoured principle formulated in *Peterson v Cuthbert and Co Ltd* 1945 AD 420 at 430, based upon the Roman-Dutch law, that no statute is to be construed as having retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws), unless the Legislature clearly intended the statute to have that effect (see also, inter alia, *Bartman v Dempers* 1952 (2) SA 577 (A) at 580C).

Then there is the distinction made in the case law between 'true' retrospectivity (ie where an Act provides that from a past date the new law shall be deemed to have been in operation) and cases where the question is merely whether a new statute or an amendment of a statute interferes with or is applicable to existing rights (see *Shewan Tomes and Co Ltd v Commissioner of Customs and Excise* 1955 (4) SA 305 (A) at 311; *R v Grainger* 1958 (2) SA 443 (A) at 445C et seq; *Euromarine International of Mauren v The Ship Berg and Others* 1986 (2) SA 700 (A) at 710E-J; *Adampol (Pty) Ltd v Administrator, Transvaal* 1989 (3) SA 800 (A) at 811D-812D; Transnet Ltd v Ngcezula 1995 (3) SA 538 (A) at 548H-549D ('Transnet'); *National Iranian Tanker Co v MV Pericles GC* 1995 (1) SA 475 (A) at 483I).'

The Court in *Unitrans Passenger* then dealt with the issue of the statute amending a procedure, which is what the current change in onus in the amendment of Section 11 of the EEA can be equated to, and said:[15]

'Even accepting that the matter under discussion relates to procedure, a useful and necessary distinction is that between the case where a statute amending existing procedures comes into effect *before* the procedure has

[14] 1999 (4) SA 1 (SCA) at paras 12 – 13.
[15] Id at paras 16 – 17 and 19.

been initiated, and the case where the amending statute comes into effect *after* the procedure has been initiated and is pending.

In the first type of case, it has usually been held that the new procedure applies to any action instituted or application initiated after the date on which the amending statute takes effect unless a contrary intention appears from the legislation. The *ratio* of this rule is understandable. By the time the action is instituted or the application initiated, the old procedure is not part of the law any more…

What is the correct approach in cases such as the present, where the action was instituted or the application was initiated *before* the amending legislation came into being? The rule is that unless a contrary intention appears from the amending legislation, the existing (old) procedure remains intact.'

The above approach is in any event fully in line with what the Court held in *Bellairs v Hodnett and Another*:[16]

'There is a general presumption against a statute being construed as having retroactive effect and even where a statutory provision is expressly stated to be retrospective in its operation it is an accepted rule that, in the absence of a contrary intention appearing from the statute, it is not treated as affecting completed transactions and matters which are the subject of pending litigation.'

[13] The Labour Court had the opportunity to consider this issue in *Fouldien and Others v House of Trucks (Pty) Ltd*[17] and held:

'The rules of interpretation of statutes regarding the operation, ie the retrospectivity or prospectivity of amendments to statutes, have been crystallized. These rules which are of particular importance to this matter, may be summarized as follows:

1 No statute is to be construed as having retrospective operation. See *Petersen v Cuthbert* 1945 AD 420 at 430.

[16] 1978 (1) SA 1109 (A) at 1148F-G.
[17] (2002) 23 *ILJ* 2259 (LC) at para 9.

2 The presumption against retrospectivity addresses 'elementary considerations of fairness [which] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly'. Per Steven, J in *Landgraf v USI Film Products* et al 511 US 244 (1994) at 265. This passage was cited with approval in *National Director of Public Prosecutions v Carolus and Others* 2000 (1) SA 1127 (SCA) at 1139C-D.

3 Even a statute, which is expressly stated to be retrospective, is not to be treated as affecting matters which are the subject of pending litigation, save in the absence of a clear indication to the contrary. See *Bellairs v Hodnett and Another* 1978 (1) SA 1109 (A) at 1148F.

4 A distinction is made between true retrospectivity, ie where an Act provides that from a past date, the new Act or amendment is deemed to have been in operation and cases where the question is merely whether a new statute or an amendment of a statute interferes with or is applicable to existing rights. ….

5 Where the court is left in doubt it should favour an approach to the law which is conservative.

6 The distinction between amending statutes affecting substantive rights and those affecting procedural rights is no longer regarded as being decisive. See the *Unitrans* case at 7.

7 Where the existing procedure is altered after the action or claim was instituted, unless a contrary intention appears, the old procedure applies. See *Bell v Voorsitter van die Rasklassifikasieraad en Andere* 1968 (2) SA 678 (A).

8 Considerations of fairness and equity are to be taken into account in considering whether amending legislation is applicable to pending actions.'

It is clear that all of the provisions referred to above have been referred to, with approval, by the Court in *Fouldien*, and I shall accordingly follow suit.

[14] *In casu*, there is nothing in the EEA or in the amendment thereof which indicates that it must be applied retrospectively. As such, the presumption that must apply is that it is not retrospective and that the existing procedure prior to the amendment must find application. This presumption can then only be rebutted if there exists particular considerations of fairness and equity to do so and if there is a clear intention to be gathered from the statute itself that it was intended to apply to even pending proceedings. I can find no indication in the EEA of any intention that the amendment applies to existing and pending proceedings, already in existence prior to the amendment. I can equally find no compelling reasons of equity and fairness necessitating a departure from the general principles as stated. In fact, the entire litigation in this matter was conducted by both parties on the understanding of the application of Section 11 prior to amendment. So much is clear from the pre-trial minute itself. In any event, and as stated in *Fouldien*, the conservative approach has to be the most prudent one *in casu*. I therefore conclude that the amended provisions of section 11 of the EEA do not apply in this instance, and that the provisions of Section 11 prior to its amendment will find application.

[15] Having thus concluded that the prior procedure in section 11 of the EEA applies, the next question then is how does this provision determine the issue of the onus in a discrimination claim? It has been generally accepted that this provision of the EEA contemplated the application of the principles as set out in *Harksen v Lane NO and Others.*[18] The *Harksen* approach entails that it must firstly be established if the differentiation (conduct) in fact amounts to discrimination, and then secondly, if this is established, whether this conduct is unfair. This approach means that the duty is firstly on the complainant to establish the existence of discrimination, before the onus can shift to the employer to prove that it was fair.[19]

[16] The *Harksen* test has been consistently applied by the Labour Court in deciding discrimination claims, either in the form of automatically unfair dismissals cases in terms of section 187(1)(f) of the LRA, or outright

[18] 1998 (1) SA 300 (CC) at paras 43 - 46.
[19] See *Department of Correctional Services and Another v Police and Prisons Civil Rights Union and Others* (2013) 34 *ILJ* 1375 (SCA) at para 21; *University of South Africa v Reynhardt* (2010) 31 *ILJ* 2368 (LAC) at para 21.

discrimination damages claims in terms of sections 10 and 50 of the EEA. In fact, and specifically in the context of an absolution application, the Court in *Nombakuse*[20] said:

> 'Our courts have consistently held that, in order for the applicant to shift the burden of proof to the respondent to prove that the alleged discrimination was fair, the applicant must at least establish that there was discrimination on a listed (or analogous) ground.'

[17] I also wish to make reference to *IMATU and Another v City of Cape Town*[21] where it was said that '… moreover, s 11 of the EEA provides that whenever unfair discrimination is alleged, the employer against whom the allegation is made must establish that it is fair. This in effect creates a rebuttable presumption that once discrimination is shown to exist by the applicant it is assumed to be unfair and the employer must justify it…' Similarly and *Farhana v Open Learning Systems Education Trust*[22] the Court held that 'in cases involving allegations of discrimination the duty is on the party making the allegations to show that there was discrimination and whether the discriminatory practice has impacted on the dignity of the affected individual.'[23]

[18] Therefore, and *in casu*, I accept that the onus to prove that she has in fact been discriminated against, in the first place, rests on the applicant. In the context of the current matter, she therefore has to show the existence of her being sexually harassed by the first respondent.

[19] With the applicant thus bearing the onus in respect of both her claims; firstly, to prove that she was dismissed and secondly, that she has been sexually harassed, it is competent to proceed to decide, in terms of an absolution from the instance application, whether the applicant has at least made out a prima facie case in this regard and whether her evidence, as led to closure of her case, can at least lead to a reasonable inference that she had been dismissed

[20] *Nombakuse* (*supra*) at para 29.
[21] (2005) 26 *ILJ* 1404 (LC) at para 79.
[22] (2011) 32 *ILJ* 2128 (LC) at para 24.
[23] *Co-operative Workers Association and Another v Petroleum Oil and Gas Co-operative of SA and Others* (2007) 28 *ILJ* 627 (LC) at para 34; *Ntai and Others v SA Breweries Ltd* (2001) 22 *ILJ* 214 (LC).

and sexually harassed. I will now proceed to set out the background facts as established by the evidence properly before me, as a whole, to the point of the applicant closing her case.

Background facts

[20] The business of the second respondent is in essence that of a consulting engineer. Also, the business of the second respondent is really the first respondent, being his own consulting engineers' practice.

[21] The applicant commenced employment with the second respondent on 1 October 2011, as the first respondent's personal assistant (PA). She actually started working on 3 October 2011. The duties of the applicant included administration, typing of reports, quotations, acting as receptionist and answering the telephone. Although there was some dispute about the applicant having to attend at site inspections with the first respondent, it became clear from the evidence that this was in fact part of the applicant's duties and that she regularly attended site inspections with the first respondent, especially in Bela Bela, where she took notes for the purposes of typing reports given by the first respondent following such inspections. Finally, and because the first respondent was closely associated with the Voortrekkers, the applicant also had to fulfil some administrative duties relating to the Voortrekkers.

[22] What was clear from the evidence is that the first respondent was a likeable person. He seemed to gravitate towards having close relationships with his PA's (including the applicant's predecessor which will be dealt hereunder). Suffice it to say, the relationship between the applicant and the first respondent was no exception. I have no hesitation in concluding, based on the applicant's own evidence and the concessions she made under cross examination, that she developed a close relationship with the first respondent that moved far beyond the realms of what can be considered an arms' length employment relationship and into the realm of the first respondent being a confidant of the applicant and a friendship developing between them.

[23] What was undisputed by the applicant, as a general proposition, is that she

shared all the intimate details of her life with the first respondent. The applicant did suggest that this because the first respondent was interested in and initiated discussions about her personal life but in the end this matters not. The fact is that whomever initiated what, both the applicant and the first respondent shared intimate details of one another's personal lives, on a regular basis, with one another. This happened throughout the applicant's employment with the second respondent. In particular, the applicant discussed her sex life with her husband (or better put lack of it) with the first respondent, suggesting that her husband was addicted to pornography and had girlfriends. What is obvious is that these kind of discussions would not normally be found in a relationship that is only one of employment.

[24] Added to the above, the offices of the second respondent were at the first respondent's home. The working environment was informal, to say the least. The first respondent could bring her child to work, which she regularly did, and her child would then interact with the children of the first respondent. The applicant was permitted to watch television in the lounge when she had no work to do. She could even swim in the swimming pool on the property during breaks in her work. The applicant also socialised with the first respondent and his family after working hours. The applicant conceded that she in fact at a social event in November 2011 described the first respondent a father to her and a grandfather to her daughter. This situation continued throughout the applicant's employment at the second respondent.

[25] The first respondent also from time to time financially assisted the applicant with loans. He allowed her flexibility in her working hours. For example, she could leave early on a Friday. Added to this, and when the applicant accompanied the first respondent on inspections to Bela Bela, they would often buy alcohol on the way back and then stop along the way to in essence have a picnic and have a few drinks. In fact, their relationship had become so comfortable with one another that reference was even made in the applicant's evidence to an occasion where the applicant relieved herself at the side of the road in relative close proximity to the first respondent. When it came to the applicant's work, she enjoyed her work and there was, for the most part, no

difficulties with her work performance.

[26] At face value, the above would seem to be the ideal working environment for any employee. How could this kind of environment then possibly give rise to the issues complained of by the applicant *in casu*? This question, in my view, would be very difficult for the applicant to answer. When the applicant's case is evaluated, it has to be done within the proper context of the true nature of the relationship between the applicant and first respondent as set out above. In particular, the individual causes of complaint raised by the applicant in her statement of case must all be assessed, considered and determined in such context.

[27] I will next deal with the specific instances of complaint raised by the applicant about the conduct of the first respondent. The first specific incident I will refer to as the 'swimming incident'. This happened sometime early in 2012. In a nutshell, the relevant events leading up to and relating to the swimming incident are as follows:

27.1 As stated above, the applicant would virtually every week accompany the first respondent to inspections in Bela Bela. The weather was often hot on these inspections. After one of these inspections, the first respondent took the applicant to a place called 'Verloren', which was a picnic spot that also had a waterhole in which persons could swim. On this occasion, the applicant took off her shoes, rolled up her jeans, and sat with her feet in the water consuming a sandwich. What is clear is that at some point in time on this day, there was a discussion between the applicant and the first respondent about swimming there. There was some dispute about who initiated the discussion and what was actually said by whom but nothing turns on this. The fact is that the first respondent suggested that they bring swimming clothes in the future to have a swim, but this ultimately never happened;

27.2 The applicant and first respondent would often stop at Verloren to have lunch, when doing inspection at Bela Bela. On another occasion, at Verloren shortly after the preceding discussion, the first respondent

mentioned to the applicant that he had swam in his underpants there, and after he swam, he simply took off his wet underpants and put them in the car. The applicant contended this was detail she did not want to know but said nothing to the first respondent about him having made this statement;

27.3 The first respondent was married on 10 March 2012 and according to the applicant, they had stopped at Verloren again shortly after the first respondent got married, again to have lunch. Again the applicant sat with her feet in the water and then, according to her, the first respondent took off his clothes and jumped into the water only wearing his underpants. According to the applicant, she was not comfortable with this. After finishing his swim, the first respondent then got out of the water, took off his wet underpants, and dressed. In giving her evidence in chief, the applicant suggested that the first respondent took off his underpants in full view and right in front of her, in essence exposing his genitals to her. Under cross examination, she however conceded that the first respondent at all times had his back turned to her when taking off his underpants. There was also some issue about how far away this happened from the applicant and to what extent the first respondent was concealed by bushes but again, nothing turns on this. The fact remains that when the first respondent took off his underpants and dressed, he did not expose his genitals to the applicant but certainly his rear was visible to the applicant. The applicant suggested she was shocked and disgusted by this but conceded that she said and did nothing about this nor complained to the first respondent that she found such conduct unacceptable;

27.4 There were in any event no similar incidents after this one incident, at Verloren.

[28] The second incident testified to by the applicant was what I will refer to as the 'sex offer' incident. This incident, according to the applicant, happened shortly after the swimming incident in 2012 referred to above. The relevant events are as follows:

28.1 The applicant testified that on the day in question, it was raining and she and the first respondent could not complete the inspection at Bela Bela, and came home early. They again had some drinks along the way and the first respondent took the applicant directly home. At the applicant's home, the first respondent asked to use the toilet and then sat down to finish his drink. The applicant asked the first respondent to look at some cracks in her house, which she believed was problematic and which she wanted to raise with her landlord. Some of these cracks were in her bed room. The first respondent agreed and inspected the cracks, including those in her bedroom;

28.2 After having completion this inspection for her, the applicant stated that the first respondent sat down in her lounge and proceeded to offer her R1 000.00 to have sex with him. According to the applicant, she was extremely shocked and did not know what to do. She testified that she sought to make light of the situation and made a joke to the effect that her rate was in fact R10 000.00. The matter was then left there;

28.3 The applicant conceded that she never challenged the first respondent on this. She never protested of informed him that she considered this conduct to be unacceptable. It was put to her under cross examination that this in fact never happened, which she disputed;

28.4 The applicant however did confirm that after this one incident referred to, such a proposal was never raised by the first respondent again. He never again offered her money for sex or in any way asked her for sex. He also never touched her in an untoward manner;

28.5 In fact, and under cross examination, the applicant added a version that at some point in time shortly after the incident, she tried to raise and discuss it with the first respondent on one of the Bela Bela trips but the first respondent simply immediately made light of it and did not entertain any discussion about it, and the applicant consequently left it there;

28.6 A final issue to refer to in this regard is that the applicant in fact led

testimony suggesting that the first respondent paid the motor vehicle instalments of his former PA and the applicant's predecessor, Sanet Steyn, in exchange for sex, a fact which Steyn, who was called gave evidence by the applicant, vehemently disputed.

[29] The third incident specifically referred to by the applicant was what I will call the 'Teazers incident'. This took place in February 2013. The relevant events are as follows:

29.1 It was common cause that the first respondent took the applicant to Teazers, being a strip club, in February 2013. The applicant contended that the first respondent suggested that they have lunch there and that she refused three times to do this, but based on the assurance by the first respondent that there were no strip shows in the afternoon, she agreed to go;

29.2 I may state at this stage that there were a number of inconsistencies in the applicant's evidence where it came to the Teazers incident. I do not intend to set these out in detail, but I am fairly sure that the applicant was indeed a willing participant, especially considering that the applicant conceded under cross examination that she was 'nuuskierig'(inquisitive) about what happens in Teazers;

29.3 The applicant testified that once in Teazers, she was very uncomfortable and that she saw to her dissatisfaction that there were in fact girls that were stripping. She said that she was very offended by this and did not want to be there. According to the applicant, any dignity she had left was eliminated by these events on that day;

29.4 However, and under cross examination, the applicant made some significant concessions. She stated that in Teazers, she in fact had a discussion with the first respondent how on one occasion she had kissed a girl. She commented on the girls that were stripping, about them. She never tried to leave and never said to the first respondent that she was not comfortable being there and wanted to leave. In fact, she conceded that on one occasion, she went outside to talk on her

telephone and then came back in and completed her lunch;

29.5 Again, and save for this one incident, there were no other similar occurrences.

[30] The above three incidents was the sum total of specific incidents the applicant contended was the basis of her sexual harassment claim. The applicant whilst giving her evidence further, and in addition to these three specific incidents, raised a general complaint that the first respondent continuously flirted with her and that she told him on several occasions to stop and he did not. The difficulty I have with this general flirting contention is that it was never pleaded in the applicant's statement of claim or raised as an issue in the pre-trial minute. The applicant also deposed to an affidavit on 24 July 2013 which formed part of her CCMA referral where she mentions all the events referred to above but makes no mention of this flirting. Worse still, there was a complete lack of any particularity testified to by the applicant as to dates when this may have happened and even what the first respondent was supposed to have said which she viewed as 'flirting'. I have little hesitation in considering this flirting complaint to be a fabrication by the applicant.

[31] The applicant also suggested in evidence that after she had informed the first respondent that she was having marital problems towards the end of 2012, he started invading her personal space. She stated that before she told him this, he would work on reports with her whilst standing at the other side of her desk. She stated that after she told him this, he moved in behind the desk and stood next to her and against her, and on occasion he would place his hand on her hand whilst she was operating the computer mouse, and she then jerked her hand away. Even if it is accepted that this is true, the applicant conceded that she never told the first respondent that she considered him to be invading her personal space or that his conduct in coming behind her desk or the manner in which he was making contact with her was unacceptable. She never told him to desist. She also conceded that even then he never made contact with her in an inappropriate manner.

[32] According to the applicant, and after the Teazers incident in February 2013,

she confided in two of her friends with regard to all of her predicaments she experienced at the hands of the first respondent. It is noteworthy that none of these friends were called by the applicant to corroborate this. However, and even more important, the applicant stated that at about the same time she contacted Riki Anderson, her former attorney, and raised the same issues with her. The applicant stated that Anderson specifically advised her that she had to convey to the first respondent the details of what he was doing to her which she considered to unacceptable. Anderson advised the applicant that she had to call on the first respondent to stop this conduct immediately. Anderson recommended that this be done in writing. Anderson advised the applicant that if the first respondent would then not stop, he would be liable for sexual harassment. Despite this clear advice, the applicant did nothing. She did not confront the first respondent, or tell him what conduct she found unacceptable. She did not call on him to stop anything. She raised nothing in writing.

[33] What is clear from the evidence is that towards the end of 2012, the applicant started having marital problems. I may add that the applicant reported nothing of what happened to her to her husband. The applicant's husband (now her former husband), Freddie Bandat, came to Court to testify, and stated that that one Robert, the husband of one of the applicant's friends (Irma), had told him about the incident of the first respondent having offered the applicant money for sex, which Robert in turn had heard from his own wife. This was according to Freddie Bandat in November 2012. He stated that he was very upset about this, especially considering the applicant's extramarital activities at her erstwhile employer. He confirmed that he confronted the applicant about this at the time. He stated that he never sought to confront the first respondent, because as far as he was concerned, his marriage with the applicant was over. It must be pointed out that dispute all of this, the applicant still goes to Teazers with the first respondent in February 2013.

[34] The next event of significance is not one of sexual harassment *per se*. According to the applicant, she accompanied the first respondent on 7 June 2013 to do an inspection at a building that had burnt down. According to the

applicant, she was afraid to do this inspection, as she had no idea of the circumstances of such an inspection. She enquired whether safety clothing, and in particular safety boots, were not needed, but the first respondent in effect laughed her off. The applicant also mentioned an earlier occasion in Makro where the first respondent bought himself safety boots but told her to buy her own. The applicant stated that throughout the inspection on 7 June 2013, she was afraid of the structure collapsing. She, however, completed the inspection with the first respondent on that day.

[35] The applicant also mentioned an earlier incident in April 2012, which she described specifically as an accident at work, where she during a site inspection at Bela Bela had sand accidentally kicked into her eyes. She had to have an operation as a result of this and had to pay for the medical expenses herself, as her medical aid was depleted. She stated the first respondent refused to pay for this and she complained that the first respondent was not even registered with workmens compensation so she could claim from such fund.

[36] The applicant was then asked by the first respondent to attend another inspection on 21 June 2013 (which was a Friday) of a building that had burnt down. On this occasion, and according to the applicant, and due to the safety concerns that she had raised, she declined and did not attend the inspection.

[37] When the applicant arrived at work the next Monday, 24 June 2013, there was a warning letter issued by the first respondent waiting for her on her desk. This warning letter was dated 21 June 2013, and constituted a written warning to the applicant for five individual instances of misconduct. The first instance was dereliction of duty for not attending the site inspection on 21 June 2014. The second issue related to her not checking work she sent out which contained spelling mistakes. The third instance was that she had not yet become familiar with the drawing computer package as she was required to do. The fourth instance related to concerns expressed about the amount of sick leave the applicant had used and included a complaint about the manner in which she took leave, being by simply telling the first respondent the morning she was taking leave. Finally, the first respondent raised a complaint

that the applicant was attending to personal issues in working time.

[38] I pause to state that the applicant never sought to contradict, in her evidence, the legitimacy of the issues relating to her leave and attending to personal issues in working time. The applicant accepted that she did not attend the inspection on 21 June 2013 but explained that she had a proper reason for not doing so for the reasons already mentioned above. As to the work quality issue, the applicant conceded under cross examination that shortly before this warning, there had been an informal discussion between her and the first respondent about her work quality and the fact that her personal circumstances at the time with her marriage was influencing her work. The applicant further stated that the first respondent in any event checks all work before it goes out. As to the drawing package, the applicant conceded that she was asked to become familiar with it and still did not but added that this had not been an issue for two years. The point however remains that even on the applicant's own version, the written warning had quite some merit insofar as it concerned the substance of the issues raised therein and was certainly not fabricated issues.

[39] The applicant did not take kindly to this warning. She conceded she was angry about it. She stated that she was also upset that the first respondent had simply issued the warning to her without discussing the issues with her first. There was no discussion between the applicant and the first respondent about the warning on the day (24 June 2013), despite the first respondent recording, in the warning, that 'Ek is beskikbaar vir gesprekvoering ten opsigte van bogenoemde'. The first respondent also recorded in the warning that it was intended to clear the air between them.

[40] The applicant had to go to her attorney that was attending to her divorce, on 24 June 2013, to sign some documents. According to the applicant, and whilst at this attorney, she proceeded to ask for advice about her employment circumstances and the warning. The applicant testified that she conveyed all the issues relating to her sexual harassment to these attorneys, and also discussed the content of the warning with them. These attorneys, being Geyser and Coetzee, undertook to send a letter to the respondents about this.

The applicant did not go back to work after seeing her attorneys.

[41] The applicant sent an SMS to the first respondent on 25 June 2013 that she was taking leave on that day. She was also not at work on 26 June 2013, attending to medical appointments. She was at work on 27 June 2013 and worked half day, as usual, on Friday 28 June 2013. There were no further issues or discussions about the warning between her and the first respondent during this week.

[42] The next event of significance is on 2 July 2013, when the letter by the applicant's attorneys to the second respondent arrived, and came to the attention of the first respondent. In this letter, these attorneys referred to the warning of 21 June 2013 to the applicant. Further, it was recorded that the first respondent made the applicant feel uncomfortable because of his sexual approaches to her but that details of this conduct would not be provided at this time. It was stated that it was this conduct was the cause of the applicant's 'weerspannige optrede'. The applicant's attorneys also raised the issue of the appropriate safety clothing not being available and that the second respondent was not registered for workmans' compensation. It was further said that it was the first respondent himself that typed and sent reports from the applicant's computer and that he had made the mistakes referred to. Finally, the applicant's attorneys objected to the process (or lack of it) that had been followed in respect of the issuing of the warning to the applicant. The second respondent was given seven days to respond to all the contentions in the letter.

[43] The respondents answered the same day. In a letter dated 2 July 2013, the first respondent disputed any untoward conduct towards the applicant and recorded that he took strong exception to the allegation. The first respondent also disputed that the site was unsafe and stated that in any event all the necessary safety gear was available. The first respondent referred to several circumstances where he had accommodated the applicant in the past, and disputed that he ever abused her. Finally, the first respondent referred to the conclusion of the warning letter which actually invited discussions.

[44] The applicant and the first respondent did not see each other on 2 July 2013. However, the preverbal bomb then burst on 3 July 2013 when they did see each other for the first time following the correspondence of 2 July 2013. The applicant conceded that the first respondent was very shocked and aggrieved as a result of the letter from her attorneys. I accept that there was a serious altercation between the applicant and the first respondent about this. I do not intend to delve into the detail of what the applicant and the first respondent said to one another, save to say it was not pleasant. It was, however, undisputed that the first respondent called the applicant's loyalty into question and told her that that if she did not like working there, then perhaps she should look for alternative employment. The applicant left the workplace immediately following this exchange in rather a huff. Of some importance in this matter is, however, the fact that the applicant conceded that when she left on the day, it was not her intention to finally leave her employment, and that she said to the first respondent that she was going to see her lawyer and that the first respondent would hear from her lawyer.

[45] The applicant then indeed went to her attorneys at the time, being Geyser and Coetzee but only on the following day, 4 July 2013. The applicant conceded that she was advised by such attorneys not to resign. She stated that she informed these attorneys that she needed her work. The applicant however contended that she never instructed these attorneys that she still wanted to work for the respondents. The applicant was extensively cross examined about this, and I found her evidence with regard to her intentions and what she said to her attorneys contradictory and unreliable. On the one hand, she would say that she still wanted to work at the respondents but on the other hand that she said she was not sure if she wanted to. She then changed version to say that she was actually considering not going back to work and informed the attorneys accordingly. Finally, she said that she would still be willing to work there if the first respondent was willing to discuss all her complaints with her. In my view, the truth is found in the letter then written by such attorneys on 4 July 2013 to the second respondent, following the consultation with the applicant. This letter recorded that the applicant left the respondents' offices the previous day in an emotional state, she still wanted to

work there, but she was unsure of her employments status following the incident the previous day. Clarity was requested as to her employment status.

[46] According to the applicant, she was not happy with Geyser and Coetzee and then went to Riki Anderson attorneys, her current attorneys of record. Following a consultation with them, and on 5 July 2013, such attorneys submitted a resignation on behalf of the applicant. The letter recorded that the applicant would be pursuing a constructive dismissal at the CCMA. Reference was made in the letter to the altercation on 3 July 2013. Although the letter also referred to what the relationship between the applicant and the first respondent had allegedly had deteriorated into, there was never any pertinent reference to sexual harassment.

[47] Following an exchange of correspondence between the two sets of attorneys of both parties, the applicant's CCMA referral then followed on 25 July 2013, ultimately giving rise to these proceedings.

Was the applicant dismissed?

[48] It was common cause that the applicant resigned with immediate effect on 5 July 2013. Therefore, and in order to show that she was dismissed, the applicant is compelled to rely on Section 186(1)(e), with reads:

> 'Dismissal' means that… (e) an *employee* terminated a contract of employment with or without notice because the employer made continued employment intolerable for the *employee*.'

This is what is known in the colloquial tongue as 'constructive dismissal'.

[49] As stated above, the onus is on the applicant to prove that she was constructively dismissed. This is no easy feat. In *Solid Doors* (Pty) *Ltd v Commissioner Theron and Others*[24] the Court said:

> '… there are three requirements for constructive dismissal to be established. The first is that the employee must have terminated the contract of employment. The second is that the reason for termination of a

[24] (2004) 25 *ILJ* 2337 (LAC) at para 28.

> contract must be that continued employment has become intolerable for the employee. The third is that it must have been the employee's employer who had made continued employment intolerable. All these three requirements must be present for it to be said that a constructive dismissal has been established. If one of them is absent, constructive dismissal is not established. Thus, there is no constructive dismissal if an employee terminates the contract of employment without the two other requirements present. There is also no constructive dismissal if the employee terminates the contract of employment because he cannot stand working in a particular workplace or for a certain company and that is not due to any conduct on the part of the employer.'

[50] *In casu*, it is clear that the applicant indeed terminated the contract of employment. The next question then is whether she did so because her continued employment became intolerable for her, as a result of the conduct of her employer, the second respondent (and of course the first respondent as sole proprietor of the business). I will firstly, in answering this question, refer to certain pertinent legal principles, before I turn to the facts.

[51] In *Albany Bakeries Ltd v Van Wyk and Others,*[25] the Court specifically referred, with approval, to the following ratio in the judgment of *Pretoria Society for the Care of the Retarded v Loots:*[26]

> 'When an employee resigns or terminates the contract as a result of constructive dismissal such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfill what is the employee's most important function, namely to work. The employee is in effect saying that he or she would have carried on working indefinitely had the unbearable situation not been created. She does so on the basis that she does not believe that the employer will ever reform or abandon the pattern of creating an unbearable work environment. If she is wrong in this assumption and the employer proves that her fears were unfounded then she has not been constructively dismissed and her conduct proves she has in fact resigned.'

[25] (2005) 26 *ILJ* 2142 (LAC) at para 28.
[26] (1997) 18 *ILJ* 981 (LAC).

The Court in *Albany Bakeries* then, in applying this ratio, said the following:[27]

> 'Conradie JA referred to the *Loots* case where mention was also made of a belief of the employee that the employer would never reform or abandon the pattern of creating an unbearable work environment. How will an employee ever prove that if he has not adopted other suitable remedies available to him? It is, firstly, also desirable that any solution falling short of resignation be attempted as it preserves the working relationship, which is clearly what both parties presumably desire. Secondly, from the very concept of intolerability one must conclude that it does not exist if there is a practical or legal solution to the allegedly oppressive conduct. Finally, it might well smack of opportunism for an employee to leave when he alleges that life is intolerable but there is a perfectly legitimate avenue open to alleviate his distress and solve his problem.
>
> As is clear from the remarks of Conradie JA an employee should make use of a grievance procedure…
>
> In addition, even if an employee was dissatisfied with the manner in which he was dealt with in terms of the grievance procedure, he could have made use of the machinery of the Act…'

[52] What the Court in *Loots* and *Albany Bakeries* thus clearly said was that the employee, in order to show that a continued working environment was intolerable, has to convince the Court that the employee had a genuine belief that the employer will never change its ways. An important component of establishing such a genuine belief then has to the use of suitably available alternative remedies, such as raising a grievance or using the remedies provided for in the LRA. As the Court said in *Albany*, it can be considered to be opportunistic for an employee to resign out of the blue, so to speak, without even raising an issue with the employer and giving the employer the opportunity to remedy the cause of complaint, thus giving it a chance to remedy any errant ways. In *Old Mutual Group Schemes v Dreyer and Another*,[28] the Court held:

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[27] Id at paras 28 – 30.
[28] (1999) 20 *ILJ* 2030 (LAC) at paras 16 and 18; See also *Foschini Group v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 *ILJ* 1515 (LC) at para 38.

> 'Billikheid sal normaalweg ook vereis dat 'n werknemer wat met sy werkgewer se opdragte en prosedures ontevrede is, aan die werkgewer 'n geleentheid bied om sake waaroor daar onmin bestaan reg te stel. 'n Werknemer kan, afgesien van ekstreme situasies, dus nie maar net uit die bloute bedank en dan aanvoer dat die diensverhouding onuithoudbaar geword het nie…
>
> Buitendien sou so 'n werknemer wat uit die bloute bedank dit gewoonlik moeilik vind om 'n hof te oortuig dat hy werklik konstruktief ontslaan is. Die bewyslas rus op die werknemer (*Jooste v Transnet t/a South African Airways* te 638B). Die bewyslas is nie 'n ligte een nie. (*LAWSA* band 13 te 226 para 418.) Dit is nie vir 'n werknemer maklik om aan te toon dat 'n werkgewer die voortsetting van sy diens onuithoudbaar gemaak het nie. Hy kan hom nie maar net op frustrasies en irritasies verlaat en hom bekla oor reëls wat vir alle werknemers geld, maar hom nie aanstaan nie. Net soos ontslag is gedwonge bedanking 'n allerlaaste opsie. Dit is 'n uitweg wat 'n werknemer nie mag volg terwyl daar nog ander uitweë oop is nie.'

[53] In addition to the above, the conduct of the employer which causes the intolerability must be without proper or at least reasonable cause. In deciding this, one has to consider the conduct of the employer as a whole. As an example, an employer that charges an employee with fraud knowing there is no cause for this could be seen to conduct itself in a manner that is without reasonable cause. If the employer does the same thing but for example with proper documentary evidence supporting at least a *prima facie* case, then there is reasonable cause. It can readily be accepted that an employer that acts against an employee without such reasonable cause can be considered to have behaved in a manner calculated to destroy the employment relationship which is one of the elements necessary to show to establish intolerability. In *Loots,*[29] the Court said:

> 'The enquiry [is] whether the appellant, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. It is not necessary to show that the employer intended any repudiation of a contract: the court's function is to look at the employer's

[29] *Loots* (*supra*) at 985A-C.

> conduct as a whole and determine whether… its effect, judged reasonable and sensibly is such that the employee cannot be expected to put up with it.'

[54] In other words, and in a nutshell, there has to be some or other culpability on the part of the employer in respect of its conduct which is the cause of the intolerable working conditions. In *Murray v Minister of Defence,*[30] the Court said:

> 'It deserves emphasis that the mere fact that an employee resigns because work has become intolerable does not by itself make for constructive dismissal. For one thing, the employer may not have control over what makes conditions intolerable. So the critical circumstances 'must have been of the employer's making'. But even if the employer is responsible, it may not be to blame. There are many things an employer may fairly and reasonably do that may make an employee's position intolerable. More is needed: the employer must be culpably responsible in some way for the intolerable conditions: the conduct must (in the formulation the courts have adopted) have lacked 'reasonable and proper cause'. Culpability does not mean that the employer must have wanted or intended to get rid of the employee, though in many instances of constructive dismissal that is the case.'

[55] The subjective views of the employee as to what may have been the motivation or reason behind the employer's conduct plays no role. The conduct of the employer, as a whole, must be evaluated objectively. In *Smithkline Beecham (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[31] it was held:

> '… the test for determining whether or not termination of employment constituted a constructive dismissal is an objective one. The subjective apprehensions of an employee can therefore not be a final determinant of this issue. The conduct of the employer must therefore be judged objectively. It would be unfair to an employer to allow the subjective perceptions of an employee of its conduct, particularly when these perceptions turn out to be

[30] (2008) 29 *ILJ* 1369 (SCA) at para 13.
[31] (2000) 21 *ILJ* 988 (LC) at para 38; See also *Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen and Others* (2012) 33 *ILJ* 363 (LC) at para 38.

incorrect, to be the determining factor in penalizing the employer with the penalties imposed by the Act.'

[56] And more recently, in *Jordaan v Commission for Conciliation, Mediation and Arbitration and Others,*[32] the LAC said:

'… In short, when faced with a case of constructive dismissal, an employee, such as appellant, bears an initial onus of showing, on an objective standard, that the employer has rendered the employment relationship so intolerable that no other option is reasonably available to an employee, save for termination of their relationship.'

After referring to the *dictum* from the judgment in *Dreyer,*[33] I have quoted above, the Court in *Jordaan* then concluded:[34]

'… This *dictum* represents a salutary caution that constructive dismissal is not for the asking. With an employment relationship, considerable levels of irritation, frustration and tension inevitably occur over a long period. None of these problems suffice to justify constructive dismissal. An employee, such as appellant, must provide evidence to justify that the relationship has indeed become so intolerable that no reasonable option, save for termination, is available to her.'

[57] In conclusion on the legal principles on constructive dismissal, I wish to refer to what I consider to be a particular apt *dictum* in the judgment of *Distinctive Choice 721 CC t/a Husan Panel Beaters v Dispute Resolution Centre (Motor Industry Bargaining Council) and Others,*[35] where it was held:

'If an employee finds herself confronted by conduct which she considers intolerable, but the employee can avoid such (intolerable) conduct by taking some course of action which is reasonably within her power, other than resignation, then the employee should follow such other course of action. To hold that the employee is entitled in such circumstances to resign and claim constructive dismissal would, in my view, undermine the right to fair labour practices enshrined in s 23 of the Constitution which requires that fairness be

[32] (2010) 31 *ILJ* 2331 (LAC) at 2336A-B.
[33] *Dreyer* (*supra*).
[34] *Jordaan* (*supra*) at 2336D-E.
[35] (2013) 34 *ILJ* 3184 (LC) at para 131.

viewed from the perspective of both employer and employee.'

[58] I will now proceed to apply the above principles to the facts *in casu*. In objectively considering the facts as whole, I have little hesitation in finding that the applicant has simply not discharged the onus of showing that her continued employment was rendered intolerable to the extent that she had no other reasonable option but to resign. I will now set out the reasons for so finding.

[59] It was clear that the catalyst for the resignation of the applicant was the written warning of 24 June 2013. In my view, it is clear that if it was not for this written warning, the applicant would never have acted as she did. It was the first warning of this kind the applicant had ever received, and she clearly took great exception to it. The problem is that this conduct of the applicant was entirely motivated by her own subjective point of view. The fact is, objectively speaking, that she had a close relationship with the first respondent. They were, in simple terms, close friends as well as employer and employee. She simply could not accept that a friend would give her such a warning or take her to task. Whilst the applicant may view this as subjectively intolerable, from an objective point of view it simply is not. As an employer, the first respondent on behalf of the second respondent was reasonably entitled to dispense the warning.

[60] I also consider that this warning of 24 June 2014 was never intended to orchestrate the departure of the applicant. The applicant has in any event led no such testimony. At best for the applicant, she said that this warning was given because she did not want to play the first respondent's 'sexual games', which is a contention I do not believe and will further address hereunder when dealing with the issue of sexual harassment. The warning itself records that it must be considered in the proper light and is intended to clear the air. It invited the applicant to discuss the matters contained therein. It did not in any way stipulate that the applicant's continued employment was at risk.

[61] I also cannot find that the respondents can be held culpably responsible in issuing the warning. It is in my view clear that the respondents had reasonable

cause for doing so. The fact is that the applicant did refuse to go on the site inspection on 21 June 2013. She did not take issue with the leave and work attendance complaints made in the warning. She did not become familiar with the drawing program. The evidence was that her marital problems were affecting her work. The applicant should have engaged the first respondent on these issues. Instead, she took offense and raised all kinds of other accusations which had no merit. In simple terms, she started playing the man, and not the ball. The point however remains that the respondents had reasonable cause to issue the warning.

[62] The next issue to consider is the availability of a suitable alternative remedy. To some extent, this consideration ties in with the sexual harassment issue. The fact is that if persistent sexual harassment of the applicant by the first respondent was occurring and especially considered against the actual background of the nature of the relationship between the applicant and first respondent I have referred to above, then the applicant was obliged to have informed the first respondent what conduct she found unacceptable and called on him to desist. The applicant was specifically so advised, on her own version, by her attorney. This is the course of action prescribed by the EEA and its related regulatory provisions, and is for the want of a better description, the 'remedy' she should have first applied. She never did any of this. She never raised a grievance. She never protested. She never submitted a written complaint. As to the warning itself, and if she believed it to be unfair, she could have referred an unfair labour practice to the CCMA. She was in any event legally assisted following the issue of the warning. In short, the applicant has several options open to her other than to resign. Resignation was not reasonably speaking a measure of last resort.

[63] An objective evaluation of the evidence convinces me that the applicant's working environment, in general, was not intolerable. As I have said, her relationship with the first respondent was really one of friendship as well as that of employer and employee. She in essence could behave at work as she would at home. She even regularly brought her child with her to work. The applicant also conceded that throughout her employment, and save for the

warning of 24 June 2013, there was no change in the manner in which the first respondent always behaved towards her. The fact that the applicant never once complained about the manner in which she was being treated, and only did so for the first time when issued with the warning, cements my view that objectively, no intolerability existed. The applicant's allegations of an intolerable working environment came at the very end and, in my view, it was nothing more than retribution for having received the warning.

[64] I will now consider the events of 3 July 2013. It is true that there was a confrontation and unsavoury things were said by both parties to one another. These events, however, cannot serve to establish intolerability on its own. It was a heat of the moment argument motivated by what the first respondent saw as a betrayal and what the applicant saw as an undue reaction. The applicant also did not resign on the spot. In fact, she left to go see her attorney and conceded that when she left, it was not her intention not to return to work. What must, however, be the death knell to any contention of intolerability is the fact that the applicant's own attorneys, after consulting with her on 4 July 2013 after the altercation, recorded in writing that she acted in the heat of the moment when leaving the workplace on 3 July 2013 and she wanted to remain employed. I reject her contention that this letter was sent without her instructions as highly unlikely for a number of reasons. Firstly, as I have set out above, her evidence as to her intentions when leaving on 3 July 2013 was contradictory. Secondly, I find the suggestion that an attorney would do something as material as tendering services of a client without instruction to do so especially just after actually consulting with the client as untenable. Finally, there was no evidence or explanation presented by a witness from her erstwhile attorneys substantiating that they may have misconstrued her instructions to them.

[65] Another reason advanced by the applicant motivating her decision to resign is the issue of her not having safety boots and thus being afraid to do inspections. I am comfortable in concluding that this was not a genuine issue at all and actually an issue designed after the fact to try and justify the applicant's resignation. Firstly, these kind of inspections seemed to be rare.

Further, on her own version, the applicant conceded that helmets and goggles were available as safety equipment at all times. One must then ask – why not boots also, especially considering that the first respondent said in his letter of 2 July 2013 to the applicant's attorneys that boots were available, which was sent before any litigation arose? It makes no sense that there were no safety boots but everything else. In any event, one also has to ask how real this complaint of the applicant was, considering the fact that she chose not wear ever safety goggles despite the fact that as early as April 2012, sand came into her eyes at a site inspection as a result of which she had to have an operation. Also on her own version, when she was concerned for her safety, she simply did not attend the site inspection. She knew what her rights were in this regard. If, for example, the first respondent chose to dismiss her for not attending site inspections and it was true that it was dangerous to do so without safety boots, the applicant would have an excellent case for unfair dismissal as an alternative remedy. I therefore have little hesitation in concluding that, objectively speaking, the issue of the unavailability of safety boots had nothing to do with the applicant's resignation and was an issue created after the fact.

[66] The individual instances of alleged sexual harassment testified to by the applicant could also not have been the justification for constructive dismissal on 5 July 2013. I have dealt with the issue the available alternative remedy in this regard above but I need to highlight the absence of a proper temporal nexus. The first two events were at the beginning of 2012 and the Teazers event in February 2013. The applicant remained working throughout, with no change in circumstance. These individual events therefore simply cannot serve to substantiate a resignation based on intolerability, respectively firstly more than a year and secondly four months later.[36] The fact that the letter from the applicant's attorneys dated 5 July 2013 and containing the applicant's resignation records that the working relationship had soured only 'in the past few months', confirms the absence of the temporal nexus in this

[36] *Taylor and Another v ILC Independent Loss Consultants CC* (2011) 32 *ILJ* 2006 (LC) at para 34. See also for example the considerations of temporal coincidence applied in *Schatz v Elliott International (Pty) Ltd and Another* (2008) 29 *ILJ* 2286 (LC) at para 47 in considering whether an automatic unfair dismissal in terms of section 187(1)(g) existed.

respect.

[67] Therefore, the only true events that could serve to justify intolerability is the issuing of the warning on 24 June 2013 and the altercation on 3 July 2013. These events I have fully dealt with above and I reiterate that these events fall far short of establishing intolerability needed to form a proper foundation for constructive dismissal. In short, the applicant followed no internal dispute resolution process, the applicant had alternative remedies available, the first respondent had reasonable cause for his conduct and was certainly not culpably responsible.

[68] It is my view that the applicant, on the advice of her current attorneys, decided to resign and so create a cause of action to sue the respondents for compensation. This matter has all the hallmarks of intolerability designed after the fact, and is not one which is consistent with a true intolerable working environment.

[69] In the circumstances, the applicant has failed to make out even a *prima facie* case, on her own testimony, that she was constructively dismissed. As a result, the applicant's resignation is just that, being a resignation. Because the applicant was not dismissed, it is not necessary to consider her automatic unfair dismissal claim. Absolution from the instance therefore has to succeed insofar as it concerns the applicant's automatic unfair dismissal claim.

<u>The sexual harassment claim</u>

[70] As stated above, the applicant has a separate claim based on discrimination, being that of sexual harassment. It is not necessary for the applicant to have been dismissed for this claim to succeed. This is a distinct and separate cause of action under the EEA.[37] Accordingly, this claim of the applicant would remain unaffected by my finding as set out above that the applicant was not dismissed but resigned. It is, therefore, necessary to also consider whether the applicant has indeed discharged the burden on her to prove that she was subjected to discrimination in the form of sexual harassment.

[37] See *Dial Tech CC v Hudson and Another* (2007) 28 *ILJ* 1237 (LC) at para 63.

[71] I will once again, and before dealing with the facts, make the necessary references to the relevant principles of law. In terms of section 6(1) of the EEA:

> 'No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.'

Where it then comes to harassment, section 6(3) provides that

> 'Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).'

By definition therefore, sexual harassment would constitute discrimination as contemplated by section 6(1) of the EEA.[38]

[72] As to conduct that may be considered to constitute sexual harassment, guidance can be found in the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace[39] ('the Code') issued in terms of the EEA. Sexual harassment is defined in clause 4 of the Code as follows:

> 'Sexual harassment is unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:
>
> 4.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
>
> 4.2 whether the sexual conduct was unwelcome;
>
> 4.3 the nature and extent of the sexual conduct; and

[38] *Potgieter v National Commissioner of the SA Police Service and Another* (2009) 30 *ILJ* 1322 (LC) at para 43.
[39] GenN 1357 in *GG* 27865 of 4 August 2005 issued in terms of Section 54(1)*(b)* of the EEA. See also GenN 1367 in *GG* 19049 of 17 July 1998 for the Code of Good Practice on the Handling of Sexual Harassment Cases published in terms of the LRA.

4.4 the impact of the sexual conduct on the employee.'

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

[73] The Code also deals with the kinds of conduct that may constitute sexual harassment, in clause 5, where it is provided:

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

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

5.3.1.2 Verbal conduct includes unwelcome innuendos, suggestions, hints, sexual advances, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person's body made in their presence or to them, inappropriate enquiries about a person's sex life, whistling of a sexual nature and the sending by electronic means or otherwise of sexually explicit text.

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

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

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

5.2.3.2 *Quid pro quo* harassment occurs where a person such as an

> owner, employer, supervisor, member of management or co-employee, influences or attempts to influence an employee's employment circumstances (for example engagement, promotion, training, discipline, dismissal, salary increments or other benefits) by coercing or attempting to coerce an employee to surrender to sexual advances. This could include sexual favouritism, which occurs where a person in authority in the workplace rewards only those who respond to his or her sexual advances.'

[74] How does one then go about in objectively determining whether the kind of conduct as set out in clause 5 of the Code is unwelcome? In my view, the first question that has to be asked is whether the conduct was ever complained about by the employee. This can be done by the perpetrator being informed that the employee considered the conduct to be unwelcome and the perpetrator then being called on to cease the conduct. Or the employee can formally pursue a complaint with more senior management using relevant harassment policies that may be applicable, or raising a grievance. I therefore accept that it is not the be all and end all for an employee to have raised a grievance but at least the employee must make to clear to the perpetrator that what is happening is not acceptable and must stop. The Code itself reflects this consideration in clause 5.2, where it is recorded as follows:

> '5.2.1 There are different ways in which an employee may indicate that sexual conduct is unwelcome, including non-verbal conduct such as walking away or not responding to the perpetrator.
>
> 5.2.2 Previous consensual participation in sexual conduct does not necessarily mean that the conduct continues to be welcome.
>
> 5.2.3 Where a complainant has difficulty indicating to the perpetrator that the conduct is unwelcome, such complainant may seek the assistance and intervention of another person such as a co-worker, superior, counsellor, human resource official, family member or friend.'

The point is that once conduct is complained of (one way or another) and a perpetrator is called on to desist but does not, it will be near impossible to

contradict that the conduct must be considered to be 'unwelcome' in terms of the Code.

[75] In *Gaga v Anglo Platinum Ltd and Others,*[40] the Court said… 'if not the initial behaviour, then, at the very least, the persistence therein is unacceptable….', and then concluded:[41]

> '…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…'

[76] I also agree with the following dictum in *Mokoena and Another v Garden Art Ltd and Another,*[42] where the Court said:

> 'Sexual attention becomes sexual harassment if the behaviour is persisted in, although a single incident of harassment may constitute sexual harassment, the recipient has made it clear that the behaviour is considered offensive and the perpetrator should have known that the behaviour would be regarded as unacceptable.'

[77] What a complainant in a sexual harassment case is thus required to do is firstly to prove the particulars of the conduct complaint of. If the conduct is not proven then that is the end of the matter. If the conduct is proven, then what secondly must be proven that either the complainant complained about the conduct, or, if the complainant did not complain about the conduct, the complainant would be required to provide a plausible and reasonable explanation for not doing so. In *Makoti v Jesuit Refugee Service SA,*[43] the Court said the following:

[40] (2012) 33 *ILJ* 329 (LAC) at para 41.
[41] Id at para 43.
[42] (2008) 29 *ILJ* 1196 (LC) at para 47.
[43] (2012) 33 *ILJ* 1706 (LC) at para 44.

> 'The applicant's testimony of the specific acts of sexually aggressive behaviour of the director aimed at her was relatively detailed, plausible and could not be directly contradicted by the respondent. Understandably, the respondent sought to suggest that her account ought not to be believed because she never raised any grievance about it at the time. It is true that the applicant's failure to make an issue of a deeply felt grievance at the time when it was suffered calls for a plausible explanation, which must be carefully assessed.'

[78] The approach that complaining about the conduct is an important consideration in establishing whether the conduct is 'unwelcome' is consistent with the provisions of section 60 of the EEA. This Section deals specifically with the liability of an employer and provides that an employer can only be held liable in terms of the EEA for the conduct of individual employee(s) as against another, if the provisions of this section are complied with. Section 60 reads:

> '(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.
>
> (2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.
>
> (3) If the employer fails to take the necessary steps referred to in subsection (2), and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.
>
> (4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.'

I accept that the first respondent, as an individual person and not the employer of the applicant, can be held liable for sexual harassment in terms of the EEA without compliance with section 60. It is the second respondent as employer that can only be held liable if section 60 is complied with. The point I, however, make is that section 60 provides clear support for the contention that as a general principle, conduct can only be unwelcome if complained of.

[79] The Code also deals with the issue of reporting sexual harassment in clause 8 and provides:

> '8.1.1 Section 60(1) of the EEA provides that conduct in contravention of the EEA must *immediately* be brought to the attention of the employer.
>
> 8.1.2 In instances of sexual harassment, the word '*immediately*' shall mean, as soon as is reasonably possible in the circumstances and without undue delay, taking into account the nature of sexual harassment, including that it is a sensitive issue, that the complainant may fear reprisals and the relative positions of the complainant and the alleged perpetrator in the workplace.
>
> 8.1.3 Sexual harassment may be brought to the attention of the employer by the complainant or any other person aware of the sexual harassment, for example a friend, colleague or human resources official acting on the request of the complainant, where the complainant has indicated that she/he wishes the employer to be made aware of the conduct. However, where the sexual harassment is of a particularly serious nature, the complainant should be encouraged to inform the employer.'

[80] Another important consideration is the actual dynamic and nature of the relationship between the alleged perpetrator and the complainant. This dynamic must not only be considered within the context of the employment relationship, but also at a personal level. It may well be that this dynamic is that which justifies and reasonably explains a situation where there is no

complaint about the conduct, despite such conduct on face value being conduct worthy of complaint. The Court in *Gaga,*[44] said:

> '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 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.'

[81] In summary, in order for the applicant to show that she has been discriminated against in the form of sexual harassment, she must show that the kind of conduct that would be considered to be sexually harassing behaviour exists. If such kind of conduct is shown to exist, the applicant must then show the conduct was unwelcome. In order to determine whether the conduct was unwelcome, the dynamic of the work and personal relationship between the applicant and the first respondent must be considered. It must then also be considered whether the applicant complained about the conduct in the manners as set out above. If the applicant did not complain about the conduct, she must provide a reasonable and plausible explanation for not doing so. Finally, in order to hold the second respondent as employer liable, the applicant would also have to show that the provisions of Section 60 of the EEA have been complied with.

[82] The proper point of departure *in casu* is firstly a consideration whether there in fact exists conduct that could amount to sexual harassment. In the pre-trial minute, the applicant has contended this conduct to be: (1) the first

[44] *Gaga* (*supra*) at para 42.

respondent exposed himself to be naked to the applicant; (2) the first respondent offered the applicant money to have sex with him; (3) the first respondent took the applicant to a strip show against her will; (4) the first respondent frequently intruded in her personal space; (5) the first respondent disregarded the applicant's safety fears; (6) the first respondent failed to pay contributions to workmens' compensation; (7) the first respondent bullied, insulted and intimidated the applicant; (8) the applicant was victimised for failing to submit to the first respondent's sexual advances; (9) the first respondent exploited the applicant's vulnerability knowing she was financially dependent on her work; and (10) the first respondent forced the applicant to accompany him to dangerous sites.

[83] I am compelled to immediately point out that several of these items of conduct referred to do not constitute conduct associated with harassment of a sexual nature. These would be the disregarding of the applicant's safety fears, not paying workmen's compensation and compelling her to go to unsafe sites. This is simply not conduct of a sexual nature as contemplated by the Code, referred to above. These instances of conduct would only be relevant to the issue of whether the applicant's continued employment was intolerable in the context of a constructive dismissal, which I have dealt with above. However, and for the purposes of deciding the issue of sexual harassment, I consider these issues to be irrelevant.

[84] Other than the one instance of the applicant contending the first respondent offered her money for sex, there was no evidence presented by the applicant that the first respondent bullied or intimidated her, or exploited her in any way. The evidence was limited to the existence of one sexual advance, and certainly not multiple advances as alleged by the applicant in the pre-trial minute. In addition, there was no *quid pro quo* harassment. The applicant was never financially prejudiced pursuant to conduct of a sexual nature. She was never promised advancement or benefits in exchange for sex. She was in fact, on her own version, given financial assistance by the first respondent in the form of loans when she needed it and was never asked for anything untoward in return. The applicant was certainly not victimised in any way and

presented no such evidence. Finally, never at any time was she brought under the impression that her continued employment was at risk of she did not accede to untoward conduct of the first respondent. The point I make is that there is simply no case or evidence of continuous, regular and repetitive conduct of the first respondent towards the applicant of a sexual nature that could form the basis of a sexual harassment complaint.

[85] In her evidence the applicant contended that the first respondent regularly 'flirted' with her and she told him to stop but he did not. I have dealt with this evidence above, which I have already said I have no hesitation in rejecting as a fabrication by the applicant for the purposes of the trial. Significantly, this was never raised in the statement of case and was not listed as a basis of conduct complained of in what is a detailed pre-trial minute. The applicant was confronted with this lacuna in the pleadings under cross examination but could offer no explanation why this was not mentioned. Added to all of this criticism already given, the applicant did not even provide particulars of what this alleged 'flirting' entailed and what the first respondent had allegedly said to her in this respect. The applicant provided no indication as to when this had even happened. Despite the fact that I simply do not believe the applicant in this regard, the mere and bald statement of the first respondent 'flirting' without providing any particulars or factual context simply cannot prove conduct constituting sexual harassment.

[86] This then brings me to the instances of the first respondent undressing in the presence of the applicant, offering her money for sex, taking her to Teazers and invading her personal space, as four elements of conduct constituting sexual harassment. I accept that considering the provisions of the Code I have referred to, such conduct would certainly qualify as conduct that could constitute sexual harassment. Now it was common cause that the undressing incident and the Teazers incident happened. In respect of these two incidents, I therefore accept that the applicant has shown conduct to exist that could constitute sexual harassment, and it thus needs to be considered whether this conduct was unwanted. Also, there was really nothing to gainsay the applicant's testimony that at some time after she started experiencing marital

problems, the first respondent as far as she was concerned invaded her personal space. I thus equally accept that the applicant has shown the existence of this conduct complained of, equally necessitating a determination as to whether it was unwanted. I, however, do not accept the applicant's testimony that the first respondent offered her money for sex and I conclude that she had not proven this conduct to exist, with the reasons for my conclusion in this regard being set out later in this judgment.

[87] In deciding the issue of whether the conduct shown to exist was unwanted, I will first consider the dynamic of the relationship between the applicant and the first respondent. I have dealt with this to a large extent above. A proper consideration of the applicant's own testimony leaves me convinced that as far as the dynamic of the relationship is concerned, nothing of what the first respondent did was unwanted. It only became unwanted after the fact, once the applicant had left and sought to sue the respondents. A proper unpacking of the true relationship between the applicant and the first respondent in my view shows the following:

87.1 The applicant and the first respondent were actually close friends;

87.2 The applicant and the first respondent regularly and continuously shared intimate details of one another's lives with one another;

87.3 The applicant and the first respondent were actually comfortable and familiar in the presence of one another and behaved accordingly;

87.4 The applicant and the first respondent shared jest of a sexual nature. The applicant for example conceded an incident where she took some condoms and made a sexual joke about her husband and his alleged sexual escapades, to the first respondent;

87.5 The applicant and the first respondent spent long periods of time driving together. They regularly stopped and had picnics. They even bought alcohol and had drinks along the way;

87.6 The applicant and her family socially interacted with the first respondent

> and his family. The applicant actually behaved at the second respondent's offices, which was at the first respondent's home, like she would at her own home.

In the context of this kind of relationship, the limited instances of what the applicant has suggested to be unwanted conduct and with particular reference to the swimming and Teazers incidents, simply cannot be considered to be unwanted, especially, and as I will now address, in the absence of any complaint or protest by the applicant.

[88] In her evidence, the applicant conceded that she never complained to the first respondent about any of his behaviour. She never told him that what he was doing was improper nor did she ask him to desist. In fact, and considering the nature of their relationship, this clearly explains why this was the case, being that it was not unwanted. All this being the case, then how can it ever be accepted that the conduct complained of was unwanted. It was crucial for the applicant to have, especially considering the undisputed nature of the interaction between her and the first respondent, set the boundaries, so to speak. To illustrate, the first respondent would think nothing of taking a friend to Teazers unless such a friend set a boundary in this regard. As a matter of principle, the applicant's failure to ever raise a protest or complaint can only reasonably lead to the conclusion that the conduct referred to was never unwanted.

[89] The next question is whether the applicant has provided a plausible and reasonable explanation for not complaining. In my view, she has no such explanation, for the reasons now set out. As I have referred to above, shortly after the Teazers incident, the applicant on her own version was specifically advised by her attorney as to what to do with regard to issues of sexual harassment, which the applicant never did. I also cannot fathom how the applicant can allege that she is afraid to tell the first respondent that his conduct is not acceptable in circumstances where she basically shared all the intimate details of her life with him. The applicant also said she was afraid to lose her job, but did not provide any evidence to show that her job was ever threatened or that the first respondent conducted himself in any way so as to

indicate to her that her job was at risk. In fact, knowing what she was supposed to have done, the applicant records in her CCMA referral that 'although I protested against his actions (referring to the first respondent), he actually started to punish me (making snide comments about my work or accusing me that I am not doing my work or not doing it properly) since I did not want to take part in his 'games'. This statement, in the light of the applicant's own evidence in Court, is patently false, considering the applicant never protested and she conceded that there was save for the warning of 24 June 2013 never any issue raised about her work performance. Equally, there was no evidence by the applicant about any alleged 'games' or what this entailed. Worse still, and in the pre-trial minute, the applicant records 'the applicant did let the First Respondent know that his sexual harassment and abuse should stop in the work place and privately', which contention is simply untrue on her own evidence. In a final attempt to try and save her case in this regard, the applicant then testified that she was abducted and raped by her father when she was six years old and that is why she could not complain about such things to the first respondent. Whilst I do not wish to make light of such a contention, I find it most strange that this kind of explanation was never raised before. I also find it unlikely that if such an event could have the consequence that the applicant now contends to be the case, she could still discuss all the intimate details of her life with the first respondent as she did. I conclude on this issue by referring to the fact that the resignation letter of 5 July 2013 makes no pertinent reference to sexual harassment, in any event.

[90] The applicant did testify that she complained about the events to two of her friends, being Giselle Langerman and Irna Ignon. In terms of the Code, reporting conduct constituting sexual harassment to a friend is contemplated to be a form of protest. But then, and in terms of the Code, the friend must be asked to intervene and assist. There were some inconsistencies in the time lines as to when this reporting to her friends happened, which came apparent when the applicant was cross examined on this, which must detract from her credibility in this regard. The bigger difficulty for the applicant is however that she never called one of these two friends to substantiate what she reported to them and when, and further what she asked them to do about it. In *ABSA*

Investment Management Services (Pty) Ltd v Crowhurst[45] the Court said:

> '... it is long established that the failure of a party to call an available witness may found an adverse inference, the inference being that the witness will not support - and may even damage - that party's case. Compare Zeffertt et al SA Law of Evidence (5 ed) at 128-30.'

The applicant in any event also herself never testified that she asked any of her friends to intervene and assist.

[91] In short, it is accordingly my view that the conduct the applicant now complains of was never unwanted. It is conduct that would not be untoward in the context of the kind of relationship the applicant had with the first respondent. The applicant also never complained about any of this conduct to the first respondent, and simply has no reasonable and plausible explanation for not doing so. Accordingly, there simply cannot be any reasonable inference to the effect that the applicant was indeed sexually harassed. Quite the contrary, I simply do not accept that the applicant was sexually harassed.

[92] This then leaves only one incident to deal with, being the alleged offer to the applicant of R1 000.00 for the first respondent to have sex with her. I do not believe this ever happened. Although I did touch on this above, I consider it prudent to deal with this in detail. I find it inexplicable that for such a serious issue, the applicant is so vague on the date when it happened.[46] The best I could finally get from her evidence was some time in the latter half of 2012. The applicant, on her own version, never took issue with the 'offer' or refused it, and actually made a joke about it to the effect that her fee was higher. If the applicant thus never actually rejected or truly resisted the offer, then why was a similar offer not again made at any time in the future, after that, by the first respondent, which would be expected? The point is – if the applicant never turned the first respondent down, why did he never ask again, especially considering the applicant's contention that he was a sex pest? I must also mention that the applicant conceded that she regularly asked the first

[45] (2006) 27 *ILJ* 107 (LAC) at para 14.
[46] I refer to similar reasoning in *SA Municipal Workers Union on behalf of Petersen v City of Cape Town and Others* (2009) 30 *ILJ* 1347 (LC) at paras 39 – 40.

respondent for loans, which he always gave her without condition, and in particular, without attaching a request for sex with it. Finally, the first respondent never touched the applicant in an untoward manner. He never forcibly sought to claim her affections or tried to kiss her. I also consider that in giving evidence in chief the applicant suggested that during the swimming incident, he in fact stood naked right in front of her and exposed his genitals to her, which was never the case, as the applicant conceded in cross examination. I also consider that despite the applicant laying it on quite thick as to how the applicant allegedly hated being in Teazers, the applicant was actually there and whilst having lunch, she told the first respondent how she had kissed a girl. It is my view that all of this indicates that the applicant has no qualms in being creative, to the detriment of the truth, in seeking to make out a case. Although the first respondent did not testify about this, I do take note of the hefty reaction to this contention as recorded in the correspondence of 8 August 2013 forming part of the documentary evidence in this matter. In the end, the first respondent and the applicant were never intimate or even had any intimate kind of contact.

[93] The applicant sought to call her predecessor at the second respondent, Sanet Flynn ('Flynn'), to testify about what was really similar fact evidence to the effect that the first respondent was a sex pest and was prone to offering financial favours for sex, in support of her version as set out above. I accept that in the context of these kinds of discrimination cases such similar fact evidence could be relevant and must be considered.[47] What, however, concerns me is that Flynn's testimony showed nothing of the sort. The applicant stated in her evidence that the first respondent specifically told her that he paid the vehicle installments of Flynn's motor vehicle in exchange for sex and that she (the applicant) answered this by telling the first respondent she was not Flynn. Flynn vigorously denied any such event and appeared genuinely upset by the suggestion. I have no doubt that the applicant was fabricating her own testimony in this respect. In addition, the applicant stated that the first respondent also took Flynn to Teazers and equally Flynn did not like it. When Flynn testified she said nothing like this. Flynn confirmed that the

[47] See for example *Gaga v Anglo Platinum Ltd and Others* (*supra*) at para 45.

first respondent took her to Teazers but stated that she wanted to do so as to see what happens in such places. She then stated that after a half hour she was 'uitgekuier' there, and they left. This testimony certainly does not support the picture that the applicant tried to paint.

[94] It is true that the first respondent had an intimate relationship with Flynn. He was not married at the time. The relationship was consensual. In fact, Flynn offered quite a lot of praise for the first respondent, stating that he helped her out of her depression, supported her and was a very good and close friend to her. It became clear to me that that Flynn wanted a lot more out of the relationship than the first respondent was willing to give. There were also some conflicts in personalities that would have made a permanent relationship difficult. Flynn, however, stated that she kept her work and personal life separated and her intimate and personal relationship with the first respondent had nothing to do with her work. She in fact kept the intimate relationship with the first respondent secret. Flynn made it clear that she loved working for the first respondent and would still work for him. What was clear from Flynn's evidence is that the relationship with the first respondent ended for, in essence, two reasons. The first is that she became married but despite this, the first respondent still wanted to continue with the personal relationship as it was and even said to her that he wanted to marry her. She considered it inappropriate that the first respondent had insufficient regard for her as a married woman following the change in circumstances. Secondly, Flynn, as a very neat person, would often find the office in a dirty and untidy state after weekends (the office was also the first respondent's home). The first respondent was not a neat person and this was a source of great irritation to Flynn. She stated that in 2010, when she came to work again and found the office in a state, she had enough and left. However, despite all of this, Flynn writes the following in an email to the first respondent on 13 October 2010, after she left:

> 'Ek wil vir jou uit die diepte van my hart bedank vir die tyd wat ek by jou kon werk. Ek sal dit wat jy vir my gedoen het altyd koester. As ek moet kies tussen jou vir 'n baas en 'n vriend kies ek die tweede een. Ek het ongelooflik lekker gewerk… Jy is 'n stunning mens, moet dit nooit vergeet nie!!'

[95] Several points must be made following Flynn's testimony. The first is that the first respondent was simply not the sex pest that the applicant made him out to be. What seemed to be the case is that the first respondent gravitated towards a relationship of friendship with his assistants rather than maintaining an arms' length working relationship. Whilst I do not think it is entirely proper to have these kinds of relationships with employees, this does not make the first respondent a sexual harasser. Secondly, the first respondent never offered Flynn financial reward in exchange for sexual favours as the applicant suggested. Thirdly, the intimate relationship that the first respondent had with Flynn had nothing to do with the workplace and was entirely consensual. Finally, if the first respondent was such a convincing sex pest and had cajoled Flynn into an intimate relationship using the workplace and dependency on a salary as motivating factors, then why was the applicant never equally cajoled into having sex with the first respondent? The end result is that Flynn's evidence establishes no similar facts supporting the applicant's case, and in fact shows the opposite.

[96] I will conclude with two references in the case law, by way of factual comparison to the contrary, so to speak, as to instances where conduct was found to have constituted sexual harassment. In *Makoti,*[48] a director made a number of direct advances on a junior employee who successfully resisted and his behaviour then changed from attempting to win her over to shunning her and treating her with contempt. In *Christian v Colliers Properties,*[49] the employee's superior in essence trapped her in her office, tried to kiss her and she pushed him away and left the office. She later told him it was not acceptable and he then gave her an ultimatum to either be 'out or in', meaning accepting his advances or not. When she said she was not 'in' she was given an envelope with two days' salary and dismissed. These examples are clearly worlds apart from the matter *in casu*.

[97] Therefore, the applicant has failed to establish even a *prima facie* case against the first respondent of sexual harassment. Accordingly, the applicant has equally not made out a *prima facie* case of discrimination. As a result,

[48] *Makoti,* (*supra*) at paras 45 and 48.
[49] (2005) 26 ILJ 234 (LC) 238H-239D.

absolution from the instance must equally follow on this claim of the applicant as well.

The occupational accident claim

[98] The applicant also claimed an amount of R5 494.19 as a result of an accident she contended that she suffered at work during a site inspection, when sand came into her eyes and she had to have an operation. The applicant contended that because her medical aid was exhausted, she had to pay the medical expenses out of her own pocket and the respondents refused to pay. The applicant finally stated that she considered this to be an accident at work and thus the respondents are liable. The applicant further contended that the second respondent was not registered for workmen's compensation and paid no contribution in this regard, resulting in her being unable to make a claim from the workmen's compensation fund.

[99] This claim of the applicant was still born from the outset. If it is accepted, as is the case on the applicant's own version, that the sand in the applicant's eyes was an accident at work, then the provisions of the Compensation for Occupational Injuries and Diseases Act[50] ('COIDA') finds application. In section 1 of COIDA, 'accident' is defined as 'an accident arising out of and in the course of an employee's employment and resulting in a personal injury, illness or the death of the employee'. Further, 'compensation' for the purposes of COIDA means 'compensation in terms of this Act and, where applicable, medical aid or payment of the cost of such medical aid'. Finally, 'occupational injury' means 'a personal injury sustained as a result of an accident'. Clearly, the applicant's claim is for compensation resulting from an occupational injury as contemplated by COIDA.

[100] In terms of section 35(1) of COIDA:

> 'No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall

[50] Act 130 of 1993.

> arise save under the provisions of this Act in respect of such disablement or death.'

Further, and in terms of section 80(1) of COIDA, every employer carrying on business in the country is obliged to register in terms of COIDA, and must provide a prescribed return to the compensation commissioner and the employer's contribution to the compensation fund is then determined by the compensation commissioner based on such return.[51]

[101] An employer that fails to comply with the provisions of Chapter IX of COIDA commits an offence and can be subject to a fine, in addition to any arrear contributions to the compensation fund being claimed. In addition, if an employee meets with an accident in circumstances where an employer had not complied with its aforesaid obligations, a further fine not exceeding the full amount of the compensation payable in respect of such accident can be imposed on the employer.[52]

[102] Therefore, in terms of the above provisions of COIDA, the applicant simply cannot institute a claim against the second respondent for her accident at work. The consequence of section 35(1) of COIDA is that any claim for an injury resulting from such an accident, as against the second respondent as employer, is expunged and replaced with an alternative and statutory prescribed claim dispensation and process as against the compensation fund. In *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening),*[53] the Court said the following, in specifically considering section 35(1) of COIDA:

> 'By way of contrast the effect of the Compensation Act may be summarized as follows. An employee who is disabled in the course of employment has the right to claim pecuniary loss only through an administrative process which requires a Compensation Commissioner to adjudicate upon the claim and to determine the precise amount to which that employee is entitled. The procedure provides for speedy adjudication and B for payment of the amount due out of a fund established by the Compensation Act to which the employer

[51] See Chapter Ix of COIDA and in particular Sections 81 and 82.
[52] Section 87(2)(a) of COIDA.
[53] (1999) 20 ILJ 525 (CC) at paras 13 – 14.

> is obliged to contribute on pain of criminal sanction. Payment of compensation is not dependent on the employer's negligence or ability to pay, nor is the amount susceptible to reduction by reason of the employee's contributory negligence. The amount of compensation may be increased if the employer or co-employee were negligent but not beyond the extent of the claimant's actual pecuniary loss. An employee who is dissatisfied with an award of the commissioner has recourse to a court of law which is, however, bound by the provisions of the Compensation Act. That then is the context in which s 35(1) deprives the employee of the right to a common-law claim for damages.
>
> The Compensation Act supplants the essentially individualistic common-law position, typically represented by civil claims of a plaintiff employee against a negligent defendant employer, by a system which is intended to and does enable employees to obtain limited compensation from a fund to which employers are obliged to contribute.'

[103] More recently, and in *Mankayi v Anglogold Ashanti Lt*d,[54] the Constitutional Court once again dealt with the same issue and said:[55]

> 'It is, of course, important to be attentive to the precise language of the provision. What s 35 (1) does, in one extended sentence, is two interrelated things. Firstly, it expunges the common-law claims of employees against the employer and, secondly, it limits an employer's liability to pay compensation save for under the Act. It expressly mentions that 'no liability for compensation on the part of such employer shall arise save under the provisions of this Act...' It limits the employer's liability to pay compensation to liability under COIDA alone…'

[104] The fact that the second respondent may have failed to comply with its obligations under Chapter IX of COIDA does not make it directly liable towards the applicant for compensation. The effect of the statute remains the same, being that the applicant's common law claim for compensation against the second respondent as her employer remains expunged. The failures or non-compliance by the second respondent is a matter between the second respondent, and the compensation commissioner, in terms of the punitive

[54] (2011) 32 *ILJ* 545 (CC).
[55] Id at para 92; See also *Road Accident Fund v Monjane* (2007) 28 *ILJ* 2516 (SCA) at para 12.

measures referred to above. The fact remains that the applicant's claim still only lies against the compensation fund in terms of the process prescribed by COIDA.

[105] Finally, the applicant cannot use the current proceedings before the Court based on other causes of action as in essence a guise to claim compensation for an occupational injury. In my view, this is exactly what the applicant sought to do. Similar conduct was dealt with in *Free State Consolidated Gold Mines (Operations) Bpk h/a Western Holdings Goudmyn v Labuschagne*[56] and the Court held as follows:

> 'Die aangevoerde aanspreeklikheid van die werkgewer sou myns insiens in stryd wees met die bepalings van art 35 van die Wet op Vergoeding vir Beroepsbeserings en -Siektes 130 van 1993….
>
> Die respondent het dus geen eis teen die appellant uit hoofde van sy beserings gehad nie, ook nie indien die appellant verwytbaar opgetree het nie. Artikel 35 onthef juis 'n werkgewer van deliktuele aanspreeklikheid vir alle skade, nie slegs vir skade-items wat in die Wet genoem word nie. Die respondent kon nie die bepalings van die Wet op Vergoeding vir Beroepsbeserings en -Siektes omseil deur te maak asof 'n verwytbaar opgedoende besering 'n onbillike arbeidspraktyk daarstel en dan op grond van die bepalings van die Wet skadevergoeding te wil eis nie.'

[106] Accordingly, in terms of COIDA, no claim lies against the second respondent where the injury to the applicant is as a result of her claimed accident at work and on the site at Bela Bela in April 2012. Absolution from the instance must thus follow on this claim as well.

Conclusion

[107] Based on the above, I conclude that the applicant has failed to provide sufficient evidence to even establish a *prima facie* case that she had been dismissed and had been discriminated against by the respondents. This Court, in applying its mind reasonably to the applicant's own case and evidence, simply could not conclude at the conclusion of such evidence that

[56] (1999) 20 *ILJ* 2823 (LAC) at paras 13 – 14.

the Court could ultimately find in her favour, even in the absence of testimony from the respondents. The application for absolution from the instance must therefore succeed, both in respect of the applicant's automatic unfair dismissal claim in terms of the LRA and her discrimination claim in terms of the EEA.

[108] Because the applicant has not reasonably shown she had been dismissed and discriminated against, there has been no shift of any *onus* onto the respondents. It is thus not necessary to consider the fairness of the respondents' conduct.

[109] As to the applicant's occupational injury claim, no cause of action lies against the second respondent.

Costs

[110] As to costs, it is true that the respondents have been successful in their application for absolution from the instance, which successfully defeats the applicant's case. I am, however, mindful of the fact that the first respondent, to a large extent, brought the current predicament upon himself. In my view, it is the first respondent's inclination to gravitate towards a personal relationship with his assistants that lands him in these kinds of predicaments. The fact that the applicant did not manage to prove that she was dismissed or discriminated against does not mean that the respondents are at least not deserving of some form of censure for the first respondent undressing in the presence of the applicant and taking her to Teazers, being the kind of conduct that should not be found in the workplace. Hopefully the first respondent would have learnt his lesson and will keep the relationship with future personal assistants workmanlike and professional. I am also mindful of the applicant's current personal circumstances, including the fact that she is now divorced. This Court in any event has a broad discretion, as contemplated by section 162 of the LRA, where it comes to the issue of costs. I intend to exercise my discretion in making no order as to costs, which I believe to be fair and appropriate in the circumstances.

Order

[111] I make the following order:

1. The respondents' application for absolution from the instance succeeds.

2. Absolution from the instance is granted in respect of all of the claims as contained in the applicant's statement of claim.

3. There is no order as to costs.

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Snyman, AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant:	Mr D W de Villiers of Riki Anderson Attorneys
For the Respondents:	Advocate T Colyn
Instructed by:	Bester & Rhoodie Attorneys