

IN THE LABOUR COURT OF SOUTH AFRICA  
HELD AT JOHANNESBURG

CASE NO JR129/09

Reportable

In the matter between:-

ANGLO PLATUNUM LIMITED

Applicant

And

COMMISSION FOR CONCILIATION  
MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER NORMAN  
MBELENGWA

Second Respondent

MZI GAGA

Third Respondent

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JUDGMENT

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CELE J

**Introduction**

- [1] The applicant seeks to have an arbitration award dated 6 January 2009, issued by the second respondent as a commissioner of the first respondent, reviewed and set aside in terms of section 145 of the Labour Relation Act No 60 of 1995, ( the Act). The application has been opposed by the third respondent, in whose favour the arbitration award was issued.

**Background facts.**

- [2] The third respondent, Mr. Mzi Gaga was in the employ of the applicant since 1 May 2005, in the position of a Group Human Resources Department (HRD) Manager. Ms Esme Makosholo was also employed by the applicant and she performed the duties of a Personal Assistant to Mr. Gaga and therefore the two worked very closely to each other. Her boyfriend at the time was a Mr. Isaac Mokgobi. Mr. Gaga reported to Ms Lorato Mogaki, the Head of HR & Development of the applicant.
- [3] Ms Makosholo tendered her resignation from the employment of the applicant. She cited relocation to Cape Town and a need to be next to her family that was Cape Town based, as a reason for her resignation. She had not found any employment to which she would immediately move. She was then subjected to an interview by Ms Mogaki, who appeared concerned about her resignation. Complaints of sexual harassment of Ms Makosholo by Mr. Gaga then surfaced. The applicant investigated the matter and thereafter preferred four charges of sexual harassment against Mr. Gaga, described as : -
- It is alleged that you (Mr. Gaga) committed act of Sexual Harassment by, over a period of some two years, subjecting your personal assistant Mrs. Makosholo, to unwelcome advances and continuing to do so despite being informed that your advances were not welcome;
  - That you (Mr. Gaga) abused your position of authority as a Manager by attempting to engage your immediate subordinate and personal assistant Mrs Makosholo, in a sexual relationship;
  - That you (Mr. Gaga) allegedly passed comments and/or innuendos of a sexual nature in the work place to a fellow employee of the

opposite gender and specially your personal assistant Mrs Esme Makosholo which conduct is inappropriate for a Senior Manager such as yourself;

- That you (Mr. Gaga) through all or any of the conduct referred to above acted in a manner that has the effect of bringing the good name and reputation of the company into disrepute.

[4] Mr. Gaga was subjected to an internal disciplinary hearing. He was found to have committed the acts of misconduct with which he had been charged and the applicant dismissed him. He was not successful in the internal appeal that he lodged. He was aggrieved by his dismissal and a dismissal dispute arose between him and the applicant, which he referred to the first respondent for conciliation and when it could not be resolved, to arbitration. The second respondent was appointed to arbitrate it. He found the dismissal of Mr. Gaga to have been substantively unfair and ordered the applicant to reinstate him with retrospective effect. The applicant has instead, initiated the present application.

**The chief findings by the Commissioner: -**

[5] In the main, the second respondent made the following findings: (reference to complainant is a reference to Ms Makosholo)

- He was required to determine whether the conduct of the third respondent amounted to sexual harassment and if so, whether the sanction of dismissal was appropriate. In determining these issues he relied on the applicant's policy on sexual harassment as unwelcome conduct of a sexual nature that is repeated despite being declined, and such conduct is personally offensive, fails to respect the rights of others, interferes with

work effectiveness and productivity, and creates an intimidating, hostile or offensive work environment.

- The complainant testified about a number of incidents wherein the third respondent made suggestions to her either to book in a hotel, to visit her home, comments like lets do it, and sending of SMS's. The third respondent disputed having made such suggestions. The complainant conceded under cross examination that she dismissed those suggestions and in other instances she frequently used the word 'okay' to whatever remarks made by the third respondent. He did not believe that whatever remarks made by the third respondent were declined by the complainant. At one stage, the complainant asked the third respondent if he really found her attractive. For an individual who was being harassed to have asked such a question seems to suggest that she enjoyed the attention given to her by the third respondent.
- The remarks allegedly made by the third respondent were not personally offensive. He arrived at this conclusion based on the complainant's own admission in terms of how she described the third respondent. She described the third respondent as model gentlemen and this was said when the complainant had a conversation with the third respondent's nephew. The complainant admitted that she had a good relationship with the third respondent. The complainant tried to separate the working relationship with the third respondent and his conduct then described as sexual harassment. He did not agree with her attempt in this regard. His view was that if someone was personally abusing another for a period of two years, he did not believe that such a person could be described in such glowing terms.

- During cross-examination, the complainant mentioned that she felt uncomfortable with the conduct of the third respondent and she felt offended after her meeting with Mrs. Mogaki who informed her that the conduct of the third respondent was in breach of the applicant's policy on sexual harassment. He did not believe that an explanation given by Mrs. Mogaki could have suddenly made the **complainant** (*my correction*) offended by the third respondent's comments. If the complainant was indeed offended by the third respondent's comments, he was of the view she would have sought advice on how best to deal with those comments.
- The complainant acknowledged that her boyfriend was lawyer. She testified that she reported the incidents regarding the conduct of the third respondent to him. The boyfriend apparently did not give her any advice on how to deal with the situation. The Commissioner was skeptical that such a discussion took place. If indeed such a discussing took place, he was of the view that the boyfriend could have advised her accordingly. He did not believe that the boyfriend could have failed to give an advice regarding a situation which the complaint described as being uncomfortable to her.
- The complainant approached Mrs. Mahloko and posed a question on what she should do regarding a man who proposed to sleep with her. According to Mrs. Mahloko, she told the **complainant** (*my correction*) to find an answer. Mrs. Mahloko said the **complainant** (*my correction*) said she ignored such a request. Mrs. Mahloko said the discussion did not go further and she did not get a feeling that there was a problem and that the **complainant** (*my correction*) was complaining to her. Mrs. Mahloko further testified that as a result of the discussion she got a feeling that somebody was thinking about the

**complainant** (*my correction*). Mrs. Mahloko also stated that she felt the complainant was joking with her with regard to the question she asked. It is safe to deduce from Mrs. Mahloko's testimony she got an impression that the **complainant** (*my correction*) was in a dilemma regarding what she had to do. If the **complainant** (*my correction*) was indeed being harassed by the third respondent, she would have informed Mrs. Mahloko of other incidents that made her uncomfortable and seriously sought her advice. She did not do that and she concentrated on one issue which it appears from the testimony of Mrs. Mahloko was not offensive nor made her uncomfortable.

- The interaction between the third respondent and the complainant appears to have been cordial and they respected each other. The complainant used the name "tata" to refer to the third respondent. The third respondent used the complainant's clan name in addressing her. They both shared their dreams. The complainant told the third respondent that she dreamt about him visiting her family and having a discussion with her uncle. The third respondent visited the complainant at her home. The complainant also invited the third respondent to a wedding.
- The conduct of the third respondent did not interfere with work effectiveness and productivity. The complainant was impressed with the third respondent's work ethics and she described him as a good boss. The third respondent also, was impressed with the complainant's level of productivity. The third respondent could not have tried to organise a secretary dinner if the complainant's performance was in question. The complainant conceded that the dinner could not go ahead due to the third respondent's work commitment. The complainant created an impression that she looked forward to the dinner and that she became disappointed when it was called off. There was no

evidence found by the commissioner that suggested that the third respondent was a reluctant party in the arrangement regarding the dinner. If the **complainant** (my correction) was uncomfortable with the third respondent's conduct she could have simply come up with an excuse and she would not have to take all the trouble of having to arrange the dinner.

- The Commissioner further found that the conduct of the third respondent did not create an intimidating, hostile or offensive work environment. The complainant complimented the third respondent on the manner he dressed. The third respondent did the same to the complainant. They both addressed each other using informal names. On the day the **complainant** (my correction) tendered her resignation, she reminded the third respondent of his scheduled meeting in Cape Town. The complainant told the third respondent that when he was in Cape Town, he should give her a call and they would meet. He did not believe she would have asked the third respondent to give her a call when he is in Cape Town if he was indeed harassing her. It is unlikely that a reasonable person could have agreed to meet with a person who caused him or her a lot of grief. The fact that the complainant was prepared to meet the third respondent in Cape Town was an indication that they had a good working relationship. There was no evidence before him that suggested that the work environment was hostile or offensive.
- Clause 7 of the applicant's sexual harassment policy stated that an employee who was being harassed sexually should contact his or her manager or a representative from the Wellness centre. The complainant testified that she told the third respondent that his conduct made her uncomfortable and that he would stop making those remarks. She communicated her displeasure via an SMS. One would have expected the

**complainant** (*my correction*) to have saved at least one of the SMS's she sent to the third respondent, requesting him to stop making advances that made her uncomfortable. The complainant further conceded that she dismissed some of the advances by merely ignoring them or she would say she would say okay each time the remarks were made. If the third respondent persisted after being told to stop one would have expected the **complainant** (*my correction*) to have approached Mrs. Mahloko and her boyfriend and there was no evidence before him that suggested she took further steps in an attempt to have what she described as uncomfortable and distressful situation being resolved.

- The complainant spoke to Mrs. Mahloko after she had tendered her resignation and this gave one an impression that the conversation could not have been linked to the third respondent's unacceptable conduct. He did not accept the applicant's argument that the failure by the complainant to lodge a grievance could be attributed to the fact that she was a junior employee who was being harassed by a senior employee. He was convinced that there were a number of avenues that the complainant could have utilized in an attempt to address the uncomfortable situation. The Commissioner found it therefore safe to conclude that the third respondent's conduct did not make the complainant uncomfortable.
- In most companies, exit interviews were structured and employees were given a questionnaire to complete. The standard questionnaire asked an employee who had resigned to state the reason for the resignation. Such questionnaires were usually given to the employees to complete at their own time and to return them to the company before his or her last day. If there was such a practice within the applicant, the



Commissioner was of the view that the complainant would have indicated in the form that she was resigning because she was relocating to Cape Town.

- The complainant did not lodge a grievance regarding the conduct of the third respondent. Mrs. Mogaki conceded that the complainant indicated to her that she was resigning because she wanted to be close to her family in Cape Town. Mrs. Mogaki said she probed further and the complainant informed her of incidents regarding the conduct of the third respondent which amounted to sexual harassment. He found no evidence that seemed to suggest that when the complainant made those disclosures she was in fact laying a complaint against the third respondent. The complainant was asked to submit a statement about the incidents that she disclosed and a decision was taken to charge the third respondent. He found it strange that the complaint was not requested to make an input on how the incidents she disclosed should be addressed.
- The applicant's policy stated that incidents of sexual harassment could be dealt with also informally. The applicant opted to deal with the incidents formally. Evidence before him seemed to suggest that the complainant did not complain about the third respondent's conduct but she merely disclosed those incidents after Mrs. Mogaki asked her a direct question if the third respondent made any advances to her. The **complainant** (*my correction*) did not voluntarily disclose those incidents. Mrs. Mogaki conceded that she asked the question based on the fact that the third respondent had a history of having been charged previously for a similar offence. The fact that the third respondent was found not guilty should have made the applicant to approach the disclosures with caution. It appeared

to him that caution was not exercised when a decision to charge the third respondent was taken.

- The chairperson of the disciplinary enquiry was quoted as having had doubts on the testimony of the complainant. The chairperson described her as a person who seemed to have enjoyed the attention. This begged the question as to how the chairperson could have found the third respondent guilty of sexual harassment when he expressed doubts on the complainant's testimony. The Commissioner was unable to say with conviction what could have made the chairperson to dismiss the third respondent but got an impression that the chairperson did not agree with the sanction.
- He found in favour of the third respondent. Based on the balance of probability, he was of the view that the conduct of the third respondent could **not** (*my correction*) be classified as amounting to sexual harassment. The applicant was found to have failed to discharge the onus of proving that the dismissal of the third respondent was for a valid and fair reason. The third respondent was found to be entitled to the relief he sought.

### **Grounds for review**

[6] It was submitted that the Second Respondent committed a gross irregularity in the conduct of the arbitration proceedings by excluding or disregarding relevant evidence when arriving at his decision. In this regard it was submitted that:

6.1 There are conflicting versions presented by Ms Makosholo and the Third Respondent during evidence in respect of the sexual suggestions and/or innuendos alleged to have been made by the Third Respondent to Ms Makosholo. In the circumstances the Second Respondent in his Arbitration Award should have

stated what version he found to be more truthful and/or more probable. The Second Respondent failed to do this in his Arbitration Award.

6.2 Ms Makosholo's evidence was that prior to being made aware of the Company's sexual harassment policy and the contents thereof she did not know what sexual harassment was. Despite this, Ms Makosholo testified that the actions of the Third Respondent made her uncomfortable but when she became aware of the sexual harassment policy she became offended. The Second Respondent avoided choosing between Ms Makosholo's and the Third Respondent's version by focusing on whether Ms Makosholo was offended by the Third Respondent's actions.

6.3 The extract of the article found at paragraph 0 and **Error! Reference source not found.** supported the argument made by the Applicant in this regard. Where there are two conflicting versions a decision must ultimately be made to determine the more probable one which the Second Respondent evidently failed to do.

6.4 The Second Respondent incorrectly based his finding on the definition of sexual harassment which focused on whether the complainant was offended by the approaches not whether the approaches were unwelcome.

6.5 In terms of the Applicant's sexual harassment policy sexual harassment is defined as "*unwelcome conduct of a sexual nature that:*

- *Is repeated despite being declined;*
- *Is personally offensive;*
- *Fails to respect the rights of others;*
- *Interferes with work effectiveness and productivity; and*

- *Creates an intimidating, hostile or offensive work environment.”*

6.6 The Second Respondent focused solely on the above definition of sexual harassment in arriving at his decision and found that Ms Makosholo was not offended, that the Third Respondent's conduct did not affect her work effectiveness and productivity and that the work environment was not an intimidating, hostile or offensive one. The Second Respondent however failed to take into consideration that in terms of the Applicant's sexual harassment policy sexual harassment was mostly subjective and it is clearly for each individual to decide what behavior is acceptable to him/her and what he/she regards as offensive. It was submitted that the evidence of Ms Makosholo was that she was made uncomfortable by the Third Respondent's actions and when she became aware of the sexual harassment policy she was offended. Had the Second Respondent considered the evidence in its totality and not simply considered the evidence in a piecemeal fashion he would have found that Ms Makosholo's version was more probable than that of the Third Respondent.

[7] It was submitted that the Second Respondent committed misconduct in relation to the duties of the Commissioner as an arbitrator and exceeded his power by applying an inapplicable and legally incorrect definition of sexual harassment and failing to come to any findings regarding conflicting factual versions that were central to the issues before him. In this regard it was submitted that:

7.1 The Second Respondent stated at paragraph 5.3 of the Arbitration Award that he relied on the Applicant's sexual harassment policy when determining whether the Third Respondent committed sexual harassment and whether the dismissal was fair. However, the Second

Respondent focused solely on the definition of sexual harassment in the policy and ignored the portion of the policy which reads “*Sexual harassment is mostly subjective. It is clearly for each individual to decide what behaviour is acceptable to him and what he regards as offensive. The focus is on how the recipient responds to the conduct or incident than on the intent of the harasser.*”

7.2 The Second Respondent misinterpreted the policy and the legal position in respect of sexual harassment.

7.3 The items listed under sexual harassment above are not prerequisites for conduct to be considered as sexual harassment which was the approach that the Second respondent seemed to have adopted which is legally incorrect.

7.4 In terms of case law errors of law committed by the arbitrator would be reviewable and it was submitted that on this basis the Arbitration Award was reviewable.

[8] It was submitted that the Second Respondent committed misconduct in relation to the duties of the Commissioner as an arbitrator and/or committed a gross irregularity in the conduct of the arbitration proceedings as a Commissioner by failing to accurately record and reflect the evidence before him. This is indicative from the following:

8.1 The Second Respondent recorded in his Arbitration Award that Ms Makosholo testified that she sent an sms to the Third Respondent telling him not to send further sms' to her while her evidence was that she sent an sms

to the Third Respondent to tell him that he should stop his advances to her.

8.2 Ms Mahloko's evidence was that the note read: "What should one do if your boss tells you that he dreams about you;" and not as recorded in the Arbitration Award which reads "What one should do if a man says he wants to sleep with a woman?"

8.3 The Second Respondent incorrectly reflected Ms Makosholo's evidence to be that she had enjoyed the attention given to her because she asked the Third Respondent "do you really find me attractive" while Ms Makosholo's evidence was that she put the question to the Third Respondent with a degree of incredulity. Therefore the manner in which the Second Respondent recorded the evidence was incorrect and was a distortion of the evidence.

8.4 The Second Respondent rejected Ms Makosholo's evidence at paragraph 5.6 of the Arbitration Award that she only became aware that the Third Respondent's actions constituted sexual harassment when she read the sexual harassment policy but did not provide any reasons why. He then went on to consider the evidence of both Ms Makosholo and Ms Mahloko in respect of the conversation that Ms Makosholo had with Ms Mahloko but found that Ms Makosholo did not seriously seek Ms Mahloko's advice.

8.5 The Second Respondent referred to exit interviews which did not form part of the evidence during the arbitration proceedings in his Arbitration Award. This paragraph is

based on speculation and is not linked in any way to the evidence heard at the arbitration and it is therefore irrelevant.

- 8.6 In terms of paragraph 5.16 of the Award the Second Respondent contradicted his findings in that he found that the Third Respondent could have committed sexual harassment but at the same time found that the Applicant failed to discharge the onus of proving that the dismissal of the Third Respondent was for a valid and fair reason.
- 8.7 The Second Respondent contradicted himself again at paragraph 5.8 where he found that Ms Mahloko got the impression that Ms Makosholo was in a dilemma regarding what she had to do in relation to the Third Respondent's conduct towards her and then found that Ms Mahloko stated that she felt the complainant was joking with her with regard to the question she asked. Thereafter the Second Respondent concluded in a speculative fashion that if the complainant was indeed harassed by the Third Respondent she would have informed Ms Mahloko of other incidents that made her uncomfortable and would seriously seek her advice. This latter portion did not form part of the evidence.
- 8.8 The Third Respondent indicated during the arbitration that he challenged the substantive unfairness of his dismissal only and not the procedural aspect. However, the Second Respondent recorded in his Arbitration Award that both procedural and substantial fairness were in dispute.
- 8.9 The Second Respondent ruled against the admissibility of similar fact evidence and stated in his award that the incidents which the applicant wanted to deduce evidence from

Ms Mogaki was dealt with satisfactorily by the applicant prior to this incident. There was no evidence to this effect led during the arbitration and it is unclear how the Respondent would have arrived at this conclusion. It was further submitted that similar fact evidence was relevant to the dispute and would have assisted in determining which version was the most probable. Evidence would have showed a certain pattern of behavior in respect of the Third Respondent in relation to female employees.

8.10 Applying case law to the present set of facts and the fact that the Second Respondent failed to accurately record the evidence before him in so many respects as reflected above, an inference might be drawn that the Second Respondent did not take such evidence into account. It was submitted that this was a reviewable irregularity and accordingly the Arbitration Award was reviewable on this basis.

[9] It was submitted that the Second Respondent, in arriving at his factual and legal conclusions, reached conclusions which were not rationally justifiable and which no reasonable decision maker could have reached in that:

9.1 The Second Respondent had no reason to doubt the evidence of Ms Makosholo as she was a credible witness whose evidence was consistent. The Third Respondent failed to provide an explanation when asked why Ms Makosholo would fabricate such a version against him. For this reason the evidence of Ms Makosholo should have been accepted over that of the Third Respondent.



- 9.2 Second Respondent was irrationally critical of Ms Makosholo's failure to institute action in terms of the sexual harassment policy even though her evidence was always that she only realised that the Third Respondent's conduct amounted to sexual harassment when she became aware of the Company's policy on sexual harassment. Furthermore, the Second Respondent seemed to have ignored Ms Makosholo's evidence that she initially felt very uncomfortable by the Third Respondent's conduct and seemed to have been more influenced by irrelevant considerations such as finding that Ms Makosholo's boyfriend at the time, Mr Mokgobi, should have advised Ms Makosholo accordingly.
- 9.3 The Second Respondent failed to consider that Ms Makosholo sent an sms to the Third Respondent asking him to stop making advances towards her because he was making her uncomfortable.
- 9.4 The Second Respondent rejected the evidence of Ms Makosholo in respect of the sms and stated that "*One would have expected the Applicant to have saved at least one of the sms' she sent to the Third Respondent requesting him to stop making advances that made her uncomfortable.*" It was submitted that this is not sufficient justification for rejecting the evidence of Ms Makosholo.
- 9.5 The fact that Ms Makosholo would send an sms to the Third Respondent asking him to stop making advances towards her indicates that she was offended by his conduct which conclusion, it is submitted that a reasonable decision maker would have reached.

9.6 Respondent's version was that he did not say this and, even if he did, the words did not have a sexual meaning and were used in relation to everyday general activity. Having regard to all of the evidence placed before the Second Respondent it is submitted that a reasonable commissioner in the position of Second Respondent would have found that the words "let's do it" had a sexual meaning in relation to Ms Makosholo.

9.7 The Second Respondent in fact failed to deal with the issue of the words "let's do" it in his analysis of evidence and argument found at paragraph 5 of the Arbitration Award. These words are said to be central to the dispute and it was submitted that a reasonable decision maker in the shoes of the Second Respondent would have recorded and analysed this evidence before deciding whether to accept or reject this portion of Ms Makosholo's evidence.

9.8 Second Respondent made reference to "*tata*" and stated that Ms Makosholo used to use that word when referring to the third respondent. The Second Respondent failed to consider that this version was not put to Ms Makosholo during cross examination but accepted the Third Respondent's version that this was indeed the case. If this version was indeed true then the Second Respondent confused Ms Makosholo's respect for the Third Respondent as a superior and has incorrectly interpreted this to mean that she was not personally offended by the remarks made by the Third Respondent to her.

9.9 Ms Makosholo testified that she did not lodge a formal or informal grievance as she was unaware of the sexual harassment policy but chose to deal with the Third Respondent's advances in her own way.

9.10 Second Respondent did not deal in his analysis of evidence and argument with the use of the Zulu term “*ngiyakugalela*” which Ms Makosholo and Ms Mogaki gave evidence in respect of. The use of this term was not ambiguous and was a clear indication of what the Third Respondent’s intention was in using the word. However the Second Respondent failed to deal with this in his analysis and argument of the Arbitration Award.

9.11 It was submitted that Ms Makosholo and Ms Mogaki would not have created a lie in respect of the use of the word “*ngiyakugalela*” and it was therefore very probable that the Third Respondent did use those words on Ms Makosholo. It is submitted that a reasonable decision maker in the shoes of the Second Respondent would have analysed this evidence in order to determine whether these words were indeed uttered by the Third Respondent to Ms Makosholo.

9.12 The Second Respondent failed to take into account that the Third Respondent by his own admission invited himself to a wedding at which Ms Makosholo was a bridesmaid and furthermore visited her home with his friends which lends itself to the probability that the Third Respondent did make sexual advances towards Ms Makosholo. Furthermore, Ms Makosholo’s evidence that the Third Respondent repeatedly invited himself to her home and made advances towards her was ignored by the Second Respondent.

9.13 The Second Respondent took cognisance of information which was not placed before him in testimony and was not referred to in argument. In particular the content of paragraph 5.15 of the award suggested that the Second Respondent took cognisance of portions of the record of the disciplinary enquiry which reflected a recording erroneously made after the conclusion of the formal

proceedings and came to conclusions regarding it despite the fact that neither party addressed him on the issues or lead any evidence in regard thereto.

9.14 It was submitted that having regard to the above, a reasonable decision maker having regard to the same evidence placed before the Second Respondent in this matter would have found Ms Makosholo's version to have been more probable and accordingly that the dismissal of the Third Respondent was fair in the circumstances.

9.15 It was further submitted that having regard to the evidence in its totality the finding of the Second Respondent seemed to be based on speculation and conjecture as he failed to choose a more probable version. Furthermore, the finding was totally at odds with the evidence and was unjustifiable.

[10] In response to the grounds for review, the third respondent said that the Commissioner found that the requirements to establish sexual harassment on the part of respondent had not been established and that the dismissal was substantively unfair. The finding that the Commissioner arrived at was based on the evidence that was presented to him and on a careful and detailed analysis thereof.

### **The evidence**

[11] A synopsis of the relevant evidence of the parties that has a bearing on this application will be outlined at this stage.

**A report to Ms Mogaki by Ms Makosholo.**

[12] Ms Mogaki called Ms Makosholo to an interview which she usually held for the staff that would have resigned. It was typical of her to hold such interviews. When asked why she had resigned from her employment, Ms Makosholo told her senior, Ms Mogaki that she wanted to relocate to Cape Town and to be closer to her family there as she was not acclimatising well in the Johannesburg environment. Ms Makosholo gave a detailed explanation of why she was not happy to be in Johannesburg. That was the same reason she had tendered in her resignation letter.

[13] However, and as the interview proceeded, the explanation became interposed by remarks that she was uncomfortable with the conduct of her boss, the third respondent. That led to Ms Mogaki probing the matter further as she had her own reservations about the third respondent's exposure towards women. Ms Makosholo explained that the third respondent had made advances towards her. Ms Mogaki asked what she wanted to see happening and Ms Makosholo said that she was confused and afraid as she did not want to get the third respondent into trouble, saying he was a nice guy. That meeting was cut short to enable Ms Makosholo to go home and to think about what she wanted to see happening about the revelations she had made. On the next day Ms Makosholo came back with a made up mind, after she had spoken to her cousins and friends. She elected to have the matter pursued and an action taken against the third respondent and she offered to come back from Cape Town to testify in the enquiry, which she later did. According to Ms Mogaki, action would have still been taken by the applicant against the third respondent had Ms Makosholo declined to pursue the matter.

[14] The further probe revealed the following incidents on which Ms Makosholo reported:

- The Third Respondent during the period of time that she reported to him and on a number of occasions suggested to her that he would like to sleep with her;
- On one particular occasion the Third Respondent indicated that they should book a hotel room after the 2007 Christmas party held in Rustenburg so that they could spend the night together. She sent an sms to the Third Respondent telling him to stop his advances, to which the Third Respondent responded by sms confirming that he would do so but that despite this undertaking he carried on approaching her.
- The Third Respondent often used to say to her "*let's do it*". The Third Respondent used a particular Zulu expression which made his intentions particularly clear namely "*ngiyakugalela*".
- The working relationship with the Third Respondent was always positive and apart from the improper suggestions made by the Third Respondent there was no further difficulty in the working relationship.
- On one occasion she approached a colleague, namely Ms Mahloko seeking advice regarding a dream that the third respondent had told her he had had of being with her. She had only a brief discussion with Ms Mahloko but did not take the issue further as the question she had raised with her, was not resolved.

- Her boyfriend Mr. Mokgobi was fully aware of the situation at work.

[15] Certain portions of the evidence of Ms Makosholo's evidence need to be quoted from the record for their better understanding and significance in this application. These are found on pages 40, 41 and 48 of the arbitration transcript and follow hereunder:

**“Page 40:**

MR MALAN : And then after that did he stop?

MS MAKOSHOLO : No, he did not. He did not stop.

MR MALAN : And I mean when – after that for how long did it then carry on? When you say he did not stop, was it continuous, was it was one incident?

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

**Page41:**

MR MALAN : Did his behaviour towards you play any role in your decision to resign or not really or play some role? What would you say?

MS MAKOSHOLO : I would say maybe a little bit, a little bit. It might have played a role but not that much you know. It might have played a little bit.

**Page 48:**

MR MALAN : Okay and did you ask him for study leave and was there any issue around that?

MS MAKOSHOLO : I recall it was just before I wrote my exams, he suggested that he would come to my place ad we can just do it, you know, and then I would probably have a smooth exam thereafter, you know. I know it sounds very funny that is what he said.

MR MALAN : Okay. What he suggested?

MS MAKOSHOLO : Yes, he suggested that.

MR MALAN : Okay and in terms of these incidents that you are describing to us, I mean did any of these incidents occur after you had by sms told him to stop and he had said he would stop? The study leave incident for instance, when did this occur?

MS MAKOSHOLO : The study leave one?

MR MALAN : Yes

MS MAKOSHOLO : I was writing somewhere in May. I do not remember the date but it was in May when I was writing my exams.

MR MALAN : Okay. So was that before or after?

MR COMMISSIONER : May of which year?

MS MAKOSHOLO : May this year and the sms I sent I think it was before the exams, it was way before the exams. "

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[16] The witnesses who testified for the applicant, Ms Mogaki and Ms Makosholo basically attested to these issues. The Third Respondent gave evidence on his behalf and testified that he had a good working relationship with Ms Makosholo and he could not explain why it is that she would lie or falsely implicate him in sexual harassment. He denied having made any advances towards Ms Makosholo. The following incidents were testified to as indications that negated the truth in the allegations leveled against the third respondent.

- She looked forward to a dinner that would have been taken by her and the third respondent on the occasion of a secretaries' day. When the third respondent could no longer be available for the dinner, she was disappointed.
- She told him about a wedding ceremony in which she was a bride's maid and he attended it with his friends.
- At her invitation, he visited her at her home.
- On the date of her resignation, she complimented him for being smartly dressed.



## **Submission by the parties**

### **Applicant's submissions**

[17] In these submissions, the grounds for review already dealt with were outlined as well as the evidence led by the parties at the arbitration hearing. A history of the review test and case law thereon were dealt with. In the further heads of argument, a number of corrections were made from the extract of the record in the submissions that had been made for the third respondent. When the matter was argued before me, counsel for the third respondent conceded to the corrections contained in the further heads of argument.

### **Third respondent's submissions**

[18] The procedure pertaining to allegations of sexual harassment and the definition thereof was contained in the document entitled "*Group Procedure Human Resources*". It was common cause between the parties that this document represented the applicable definition and procedure of the applicant pertaining to complaints of sexual harassment. The aforesaid document set forth the scope of the procedure and the definition of sexual harassment and in points 2 and 3 thereof on page 66 of the pleadings bundle. The scope of the procedure was wide and included conduct ranging from suggestive comments, remarks or insinuations, unwelcome physical contact, obscene gestures to direct sexual proposition. Under the scope of the procedure:-

*"Sexual harassment does not refer to behaviour or compliments that are acceptable to the recipient, nor to the mutual attraction between people which must be treated as a private concern."*

[19] The document further stated that:-

*“Sexual harassment is mostly subjective; it is clearly for each individual to decide what behaviour is acceptable to him and what he regards as offensive. The focus is on how the recipient responds to the conduct or incident rather than on the intent of the harasser.”*

[20] Ms Makosholo, the only witness on behalf of applicant who could be considered material, testified in a manner that failed to make a good impression. She was evasive in a number of respects and avoided questions when the inconsistencies in her evidence were pointed out to her during cross-examination. The third respondent on the other hand, whose evidence stood undisputed in most material respects, was clear in his answers and willing to respond to questions frankly and intelligently. Wherever there was a dispute or inconsistency between the evidence of Ms Makosholo and that of the third respondent, the evidence of the latter should prevail.

[21] The evidence presented by the respondent should be accepted in preference to that of Ms Makosholo and that the matters should be disposed of on the basis that Applicant has failed to support the allegations of sexual harassment, innuendo, abuse of authority or bringing the company into disrepute. Further, that the applicant having failed to establish that the third respondent had engaged in any conduct (as a fact) which would render him guilty of any of the said misdemeanours, the only conclusion that can be arrived at is that applicant's dismissal was unfair.

[22] Should it be found that the evidence tendered by the applicant should be accepted in preference to that of the third respondent, it was submitted that the finding of the Commissioner that the conduct complained of by Ms Makosholo, seen in the light of the relationship between the parties, did not

amount to sexual harassment having regard to the policy of the applicant on the question of sexual harassment.

### **Evaluation**

[23] Section 145 of the Act, to the extent relevant for purposes of this application, provides as follows:

“Review of Arbitration Awards

(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the Arbitration Award –

(a) .....

(b) .....

(2) A defect referred to in subsection (1), means:

(a) that the commissioner:

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner’s powers; or

(b) that an Award has been improperly obtained”.

[24] In the case of *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) court held, *inter alia*, that section 145 of the Act must be “suffused” with the test of reasonableness in section 33 of the Constitution and accordingly the essential questions one should ask

when deciding whether an Arbitration Award should be reviewed is the following: “Is the award one that a reasonable decision-maker could not reach”

- [25] In support of this application counsel for the applicant referred me to a number of cases outlining the duties of a commissioner in an arbitration hearing. In *Maepe v CCMA & another (2008) 8 BLLR 723 (LAC)* it was held at 729, paragraph 8:

“While it is reasonable to expect a commissioner to leave out of his reasons for the award matters or factors that are of marginal significance or relevance to the issues at hand, his or her omission in his or her reasons of a matter of great significance or relevance to one or more of such issues can give rise to an inference that he or she did not take such matter or factor into account. In the present matter, the appellant’s conduct in giving false evidence under oath was so critical to the issue of relief that, in my view, the only explanation for the commissioner’s failure to mention it in his reasons as one of the factors that he took into account is that he did not take it into account. If the commissioner had considered such a critical factor, he definitely would have mentioned this in his award. In my view, the fact that the commissioner did not mention this very critical factor in his award justifies the drawing of the inference that he did not take it into account. Furthermore, his award is very comprehensive and cannot be said to have been intended to be brief. Accordingly, the matter must be decided on the basis that the commissioner did not take this fact into account in considering what relief, if any, should be granted to the appellant. In the light of the conclusion I have reached above that the commissioner did not take into account the fact that the appellant had given false evidence under oath in the arbitration proceedings in dealing with the matter...”

- [26] In *Smithkline Beecham (Pty) Ltd v CCMA & others (2000) 3 BLLR 344 (LC)* Revelas J looked at inter alia *Purefresh Foods (Pty) Ltd v Dayal & another (1999) 20 ILJ 1590 (LAC)*, *Standard Bank of SA Ltd v CCMA & others (1998) 19 ILJ 903 (LC)* and held at 351, paragraph 31:that:

“In my view, it can be assumed, from the aforesaid cases that in certain instances, errors of law committed by arbitrators would be reviewable under both the common law and the constitutional law principles of review.”

[27] In *Nicholas 'Credibility of Witnesses' (1985) 102 SALJ 32* at 35-41 the following was said:

“Where contradictory statements are made by different witnesses, obviously at least one of them is erroneous, but one cannot, merely from the fact of the contradiction, say which one. It follows that an argument based only on a list of contradictions between witnesses leads nowhere so far as veracity is concerned. The argument must go further, and show that one of the witnesses is lying. It may be that the court is unable to say where the truth lies as between the contradictory statements, and that may affect the question of whether the onus of proof has been discharged: but that has nothing to do with the veracity of the witnesses.”

[28] In *Mabona and another v Minister of Law and Order and others 1988 (2) SA 654 (SE)* at page 662 c –f the following was said:

“The upshot is that I am faced with two conflicting versions, only one of which can be correct. The onus is on each plaintiff to prove on a preponderance of probability that her version is the truth. The onus is discharged if the plaintiff can show by credible evidence that her version is the more probable and acceptable version. The credibility of witnesses and the probability or improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of a plaintiff's version, an investigation where questions of demeanour and impressions are measured against the content of a witness's evidence, where the importance of any discrepancies or contradictions are assessed and where a particular story is tested against facts which cannot be disputed and against the inherent probabilities, so that at the end of the day one can say with conviction that one version is more probable and should be accepted, and that therefore the other version is false and may be rejected with safety. (*National Employers' General Insurance Co Ltd v Jagersn* 1984 (4) SA 437).”

[29] The duties of a commissioner in an arbitration hearing must be seen against the provisions of section 138 of the Act. Subsection (1) thereof provides that the commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with substantial merits of the dispute with the minimum of the legal formalities (my emphasis). Subsection (7) (a) then provides that within 14 days of the conclusion of the arbitration proceedings, the commissioner must issue an arbitration award with brief reasons, (my emphasis) signed by that commissioner.

[30] By its very nature section 138 of the Act leaves enough room for commissioners to be criticised for not giving so much of their reasons as may satisfy the parties appearing before them. That is why it will always be of assistance to see the role of a commissioner in arbitration proceedings against the provisions of section 138. The applicant criticised the commissioner for:

- committing a gross irregularity, (ground one):
- a misconduct in relation to the duties of a commissioner,(ground two):
- a misconduct in relation to the duties of a commissioner, (ground three) and
- reaching conclusions which a reasonable decision maker could not reach.

[31] In determining whether the dismissal of the third respondent by the applicant was fair, it was inevitable that the relationship between the third respondent and Ms Makosholo be examined by the commissioner. It remained common cause between the parties that, up until the date of the interview, Ms Makosholo had not lodged a formal or informal complaint of sexual harassment by the third respondent with the applicant.

- [32] From all evidence in this matter, it is probable that, but for the results of the interview, the third respondent and Ms Makosholo would have parted ways amicably. The evidence suggests overwhelmingly that the two would have, by now, met each other in Cape Town, in amicable circumstances, had the third respondent not been dismissed but instead had an occasion to go and render some work for the applicant in Cape Town.
- [33] There are various episodes in the evidence through which it came to light that Ms Makosholo considered herself able to handle the interaction she had with the third respondent as her immediate superior. The only instance where she called for advice relates to the discussion she had with Ms Mahloko after Ms Makosholo had left her a note. Ms Mahloko left the question by Ms Makosholo unanswered. This is a classical example that Ms Mahloko considered the matter as of privacy between Ms Makosholo and the unnamed boss, which in context, was a reference to the third respondent. Had Ms Mahloko considered that Ms Makosholo was being subjected to sexual abuse or sexual harassment, she would no doubt have advised her to take the matter up in some form or another, such as by lodging a grievance or even by reporting the incident to Ms Mogaki, as Head of their Department and to whom the third respondent reported.
- [34] The fact of the matter is that Ms Makosholo did report serious allegations of sexual harassment against the third respondent and she indicated that she wanted an action taken against him after she had pondered on the matter. I note that the second respondent misconstrued this part of her evidence as he said in paragraph 5.14 of the award that evidence before him seemed to suggest that the complainant did not complain about the third respondent's conduct but she merely disclosed those incidents after

Mrs. Mogaki asked her a direct question if the third respondent made any advances to her. This finding goes against the second respondent's earlier finding in paragraph 4.1.3 of the award where he said that she then lodged a complaint after being interviewed.

- [ 35] The applicant has criticised the second respondent for not evaluating evidential material and then choosing whether to accept the version of the third respondent or that of Ms Makosholo in relation to versions that are self destructive and cannot co-exist on whether the allegations are true or not. Paragraphs 5.4 and 5.5 of the award appear to contain a view that the second respondent accepted as a fact that there are remarks that the third respondent made to and about Ms Makosholo. The second respondent said:

“.....I do not believe that whatever remarks made by the applicant were declined by the complainant. At one stage, the complainant asked the applicant if he really find (sic) her attractive. For an individual who was being harassed to have asked such a question seems to suggest that she enjoyed the attention given to her by the applicant.

The remarks allegedly made by the applicant were not personally offensive. I have arrived at this conclusion based on the complainant's own admission in terms of how she described the applicant...”

- [36] He further found that Ms Makosholo reacted to some such utterances. Again, he proceeded to make a finding on the remarks made by the third respondent by saying that he did not find them offensive, (rightly or wrongly). In relation to these allegations, the second respondent therefore made a credibility finding in favour of Ms Makosholo. There is however a second group of allegations in respect of which he rejected the version of Ms Makosholo, such as in relation to the short message system (sms). The second respondent seemed to have been conscious that the credibility of witnesses and the probability or improbability of what they said should not be regarded as separate enquiries to be considered



- piecemeal. His assessment of evidence was structured to follow the allegations.
- [37] While the complaint against the third respondent stretches over a period of about two years, it was never Ms Makosholo's case that each time he made an utterance as complained of, she made it known to him that she felt she was being offended. On the contrary, her evidence was that she was dismissive of some of them. In relation to those she was dismissive of, it ends up being a private matter between her and the third respondent as sexual harassment necessitates that she must denounce or decline such utterances to obviate their repetition. Her later knowledge of the company policy on sexual harassment cannot change the fact that it lay on her to make the third respondent know how she felt about each incident, that is, that she felt she was being harassed.
- [38] The allegation around the sms now needs to be considered. The second respondent rejected Ms Makosholo's version on the basis that she had cancelled the messages instead of keeping them as evidence. That was the only basis on which her evidence was rejected, as stipulated in the award. The rejection of her evidence had the result that, Ms Makosholo had told a lie in relation to the sending of the cellular telephone message. The second respondent had the benefit of being steeped into the trial and therefore seeing the witnesses and experiencing the actual trial. Against that I have the advantage of the record which he did not have as he would have kept his personal running notes.
- [39] As already indicated, the relationship between the third respondent and Ms Makosholo was sound and healthy in their working environment. For work purposes, none complained about the other. In fact each sang songs

of praises for the other. If it was for each of them, they would keep contact after Ms Makosholo had left her working place for Cape Town. In general, she spoke well about the third respondent and complimented him for his dressing style. She was not responsible for the holding of the interview where beans were spilled. In fact, all the evidence points towards her not to have prepared her self for the interview. The probabilities of this case point towards her having not anticipated the outcome of the interview. She appears to have surprised herself about its outcome.

[40] When Ms Mogaki asked what it was that Ms Makosholo wanted to have done about the revelation she had made about the third respondent, Ms Makosholo was faced with a great difficulty. She described the third respondent as a “nice guy” and indicated she did not wish to cause trouble for him. She had to go home to think about whether or not to file a complaint. She did not take the lodging of the grievance lightly. Her evidence during the arbitration hearing is devoid of any exaggerations and an eagerness to want to crucify him.

[41] Her evidence about whether the third respondent’s behaviour contributed to her resignation is an example of her reluctance to implicate him. She said that his behaviour might have contributed to her resignation, leaving a room that it might not have. The very fact that she did not keep the cellular telephone messages, in my view, should have been held up in her favour than against her. It is if she had been vindictive that she would have saved the messages, assuming for a moment that they were made in the first instance. If it was her intention to falsely incriminate the third respondent, she had ample opportunities of doing so, in her evidence. To say she was dismissive of some of the remarks made to her by the third respondent, including those which the second respondent accepted as having been

- made, is further suggestive that she did not bend over to ensure that he was convicted. By saying she dismissed some of his remarks, she was not making her case stronger. In my view, the probabilities of this case point towards her evidence, on the cellular telephone messages, being the truth.
- [42] Ms Makosholo's evidence was that after she had told the third respondent to stop what he was doing to her, he still continued, notwithstanding his undertaking not to. The single encounter she gave of the continuation of these lured utterances is that of the proposal to have sexual intercourse with her to smoothen her composure in the examination. Her evidence stood firm in that regard. By then he already knew that she did not accept such proposals and had undertaken to desist from it. He must have known that she could be outraged by the request and yet persisted with it. The fact that after that incident she still talked to him amicably, did not detract from the reality that he had already invaded her privacy by persisting with a request she did not entertain. He clearly sexually harassed her.
- [43] The decision I have reached on the cellular telephone message is based on the evidence that was led by parties in the arbitration hearing. This evidence was available to the second respondent. For him to have reached a contrary decision, means simply that he failed to apply his mind appropriately to such evidence and thus committed a gross irregularity. On the basis of this finding alone, the arbitration award he issued in this case cannot stand. I have taken note that the award is replete with mistakes. The view I have of the matter is that there has not been a failure of the full and fair trial of the issues in respect of which most errors were made. It is only on the basis of the finding I have made that the award should not be allowed to stand

[44] This brings me finally to the issue of sanction. At the hearing of the matter parties asked that I should rely on all the evidence to dispose of it and avoid remitting it for a *de novo* hearing. In my view, there rally is no need to remit it. I am alive to the accolades that were given to the third respondent. When a person pleads not guilty and denies the commission of misconduct, there is always the risk that a negative finding will be made against him or her on his or her attitude towards the perpetration of such misconduct. This finding is inevitable in this matter. The problem is that recidivism looms large. Sexual harassment must be discouraged in the workplace. The third respondent occupied a senior position which carried a lot of responsibility. He had to lead an exemplary life style. He was in a trustworthy position. He represented the applicant wherever he worked. He broke the trust accorded to him and can no longer be trusted in the company of junior female members of staff. He made a mistake and decided not to own up to it, but chose to put Ms Makosholo through the pain of having to testify against him, knowing how she felt about him. This incident took place at a time when finding another job is known to be fairly difficult in this country. Yet all things considered, the dismissal of the third respondent is in the circumstances, inevitable. It will not be fair to impose a costs order for the opposition to this application.

[45] Accordingly, the following order will issue:

1. The arbitration award dated 6 January 2009 issued by the second respondent in this matter is reviewed and set aside.
2. The dismissal of the third respondent, Mr. Gaga by the applicant was substantively fair.
3. No costs order is made.

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Cele J.

Date of hearing : 20 November 2009

Date of Judgment : 19 March 2010

**Appearances**

**For the Applicant: Mr F Malan of Edward Nathan Sonnenbergs**

**For the Respondent: Adv. F. Saint**

**Instructed By : Matela Sibanyoni & Associates**