IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable
Case no: JA 105/2015

In the matter between:

LIBERTY GROUP LIMITED **Appellant**

And

M. M. **Respondent**

Heard: **21 September 2016**

Delivered: **07 March 2017**

Summary: Claim of unfair discrimination under s 60 of the Employment Equity Act 55 of 1998 (EEA) against employer arising from employee's sexual harassment by manager. Labour Court found appellant liable under s 60 with sexual harassment proved. On appeal: employer found to have failed to consult all relevant parties and take the necessary steps to eliminate the conduct under s 60(2). In addition, employer failed to do all that was reasonably practicable, as required by s 60(4), to ensure no act in contravention of EEA occurred. Appeal against judgment of Labour Court dismissed with costs.

Coram: Waglay JP, Savage *et* Phatshoane AJJA

JUDGMENT

SAVAGE AJA

Introduction

[1] This is an appeal, with the leave of the Court *a quo*, against the judgment of the Labour Court (Sono AJ) in which the appellant, Liberty Group Limited, was found liable as an employer under s60 of the Employment Equity Act 55 of 1998 ('the EEA') for having failed to take reasonable steps to protect the respondent, Ms M. M., on it becoming aware of her sexual harassment at work by her manager, Mr Andrew Mosesi.

Background

[2] On 13 October 2009, the respondent, after more than 10 years employment, resigned from her position as an insurance clerk with the appellant. In her letter of resignation, she stated that her working environment had become intolerable "*due to ongoing and continued sexual harassment*" by her manager, Mr Mosesi and that:

> '…I reported the harassment to management and Liberty Life failed to react thereon. However, I later discover that Andrew [Mosesi] was contacted and

informed of the matter in my absence but nobody came back to me to help me deal with the situation, or to resolve this issue.'

[3] The appellant's sexual harassment policy seeks to "*eliminate all forms of sexual harassment in the workplace*", "*maintain a workplace free of sexual harassment*" while being committed to ensuring "*positive steps to provide a working environment for its employees who are free from all forms of sexual harassment*". Senior management are to be informed of "*offensive behaviour in violation of this policy"*, with "*appropriate action"* taken *"against employees who do not comply with the policy*." The obligation to take appropriate action when *"complaints are identified and/or raised*" permits *"informal or formal remedies"* and *"appropriate support*" to be offered as required. A positive duty is placed on line management and human resources consultants to ensure that employees receive support on a confidential basis and are assisted in clarifying whether offending behaviour constitutes sexual harassment. This involves discussing alternative resolutions and providing advice regardless of the course of action that the employee chooses to take.

[4] Following her resignation, on 26 November 2009, the respondent referred an unfair discrimination dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA), first to conciliation and thereafter arbitration. After the CCMA ruled that it lacked jurisdiction to determine the dispute at arbitration, the respondent referred the matter to the Labour Court for adjudication.

Labour Court

[5] After disputes of fact became apparent from the papers, the Labour Court referred the matter to oral evidence. The respondent testified that Mr Mosesi had sexually harassed her on four occasions. She took the first incident up directly with him, on the basis that she took the view that "*he was just being a man*" and considered that incident resolved. However, in May 2009, Mr Mosesi asked her to attend training, for which he asked her to arrange snacks. When she arrived at 17h00, she found that she was the only staff member attending the training. Mr Mosesi made unwarranted comments to her, touched her body, massaged her shoulders and stood too close to her. She asked him to stop but he did not.

[6] A third incident also occurred in May 2009. Mr Mosesi again asked the respondent to attend training, assuring her that she would not be alone this time. When she arrived she found she was again alone with him. At Mr Mosesi's request she assisted him in carrying boxes containing office supplies back to his car. While loading the boxes into his car Mr Mosesi inappropriately touched her body and rubbed his body against hers so that she could feel he was aroused. She told him to stop but he pushed her against a pillar and forced his tongue into her mouth. The respondent testified that she felt like she was being raped. She refused his offer to take her home and went to the office bathroom to wash her face and mouth.

[7] A further incident occurred when the respondent was working late. Mr Mosesi arrived and sat next to her. He placed his hand on her leg, moving it steadily higher up her leg. When she told him to stop he laughed. He then instructed her to call him every afternoon to give him feedback on branch activities, although she was not the team leader, as he said she had potential and that she was the only person he trusted. The respondent's evidence was that she needed a salary increase to meet her financial obligations, that she was

dissatisfied with what she was earning and had discussed this with Mr Mosesi. However, following his sexual harassment of her, she did not know whom to trust. She feared she may lose her job if she reported the matter, given that Mr Mosesi was not only her senior but responsible for appraising her performance.

[8] On 6 July 2009, she addressed a request for a salary increase to the appellant's divisional manager, Mr Ebrahim Sujee. She stated that she did not report her sexual harassment to him as he was so "*high up*". On 28 July 2009, the respondent wrote to Ms Elaine Soller, a human resources consultant employed by the appellant, stating:

> '*I have tried to call you a few times for your assistance and I have not been successful am hoping you will get this email and hopefully respond.*
>
> *I am caught between a rock and a hard place in my life at this point. I cannot afford to work and live in Pretoria for the salary I am earning. I have tried to change my budget and work a few things out of the budget now there is nothing left for me to take out of it.*
>
> *I have sent a letter to Andrew and Sivenash for money and it was declined*…'.

[9] In her evidence, the respondent stated that she hoped her e-mail would get the attention of the appellant's human resources department in order that she could then report Mr Mosesi's sexual harassment of her. On 31 July 2009, she asked to meet with the respondent and the respondent requested Ms Soller via e-mail "…*to visit our hub*". On 3 August 2009, Ms Soller proposed to do so during the week of 18 August 2009 but on 17 August 2009 Ms Soller emailed the respondent –

> '…*to confirm – we had initially agreed to meet this week, however I have received feedback that you met with Andrew and your concerns were addressed. Do you still want to meet or is everything sorted out?'*

[10] Given that she did not have a very good relationship with her team leader, Ms Sylvia Nyathi, who did not spend much time at the branch, the respondent contacted her former team leader, Ms Sandy Viljoen, who advised her to telephone Mr Nick Haines. The respondent then spoke to Mr Haines after having been told that Ms Soller was not in. It was Mr Haines' evidence that the call took place on 19 August 2009.

[11] During the conversation with Mr Haines the respondent discussed her salary and, in the latter part of the discussion, told him that her immediate manager was sexually harassing her. Mr Haines told her to consult the appellant's sexual harassment policy to determine whether the conduct amounted to sexual harassment and if so, to determine what the requirements were for lodging a complaint. Mr Haines's evidence was that the respondent did not identify the person harassing her and that, while a large part of the phone call was about her salary, she said something about harassment towards the latter part of the discussion. The respondent stated that she found his attitude to her during the call to be dismissive.

[12] Mr Haines informed Ms Soller of the call the following day, since Ms Soller had been away from work the previous day. Ms Soller testified that she then attempted unsuccessfully to contact the respondent telephonically and

although an emailed request for a meeting was sent to the respondent, this meeting did not occur due to scheduling difficulties.

[13] The respondent obtained the necessary forms needed to lodge a sexual harassment complaint but did not submit the complaint. After her call with Mr Haines, Mr Mosesi contacted the respondent and told her that he was aware that she had been in contact with human resources. From this she deduced that Mr Haines had informed Mr Mosesi of her discussion with Mr Haines, which she assumed included her report of sexual harassment.

[14] The respondent testified that she contacted the appellant's employee wellness call centre to ask for information regarding her submission of a sexual harassment complaint but was told to refer the matter to the CCMA. The appellant denied that this call occurred, on the basis that no call centre record of the call existed.

[15] The respondent resigned from her employment on 28 September 2009 in a letter addressed to Mr Sivenash Naidoo. In response, her team leader, Ms Nyathi contacted her. When the respondent told Ms Nyathi about the sexual harassment, Ms Nyathi was sympathetic and asked her not to resign so that the appellant could deal with the matter. Ms Nyathi in evidence stated that she saw it as her first obligation to see to it that the respondent withdrew her resignation. The respondent tore up her first letter of resignation. When Ms Nyathi offered to speak to Mr Mosesi, the respondent declined the offer. In the following two-week period no steps were taken by the appellant to investigate the sexual harassment complaint.

[16] On 13 October 2009, the respondent submitted a second resignation letter to the appellant and a week later referred a dispute to the CCMA. Following her resignation, she did not assist the appellant in its investigation of the matter as she stated that the appellant had not co-operated with her initially, was doing "*too little too late*", she did not trust the appellant and she was "*being overwhelmed*" by the appellant. Although Mr Mosesi was initially suspended from work, his suspension was ultimately uplifted.

[17] During the course of vigorous and lengthy cross-examination, it was put to the respondent by the appellant's counsel that her claim was "*meritless*", that she had known as much all along, that she was only "*in it for the money* [and had] *always been in it for the money*" and that she had "*tried to extort money out of Liberty*" with the hope that she "*would get some sort of settlement and that the whole matter would go away*". The respondent denied this, stating that "…*from the beginning I wanted justice. I still want justice today*". She persisted that she had been sexually harassed by Mr Mosesi and that –

> '…*nobody did anything about it. There is a letter that was written to settle this matter. Yes there was because it had gone on long enough* [and] *Liberty was not willing to hear what was happening. Up until today Liberty is still protecting themselves, because they would rather not know the truth but protect them having to pay something for a matter that happened in that office*.'

[18] The appellant took issue with the respondent's recall, after more than two years, of precise dates and details related to the harassment. This led the appellant's counsel put it to the respondent that she was "*incapable of telling the same story*" and that she had contradicted herself repeatedly, while being chided to "(c)*ome on, tell us the truth*…" She was told she was "*all over the*

place as to what actually happened" and that "(e)*verything that you have described today…in relation to what occurred between you and Mr Mosesi was effectively consensual. It was tolerable. It was not unacceptable. Not so?*"

[19] The Labour Court found that the respondent had proved her sexual harassment by Mr Mosesi during 2009 and that the only reasonable inference was that either Ms Soller or Mr Haines had been in touch with Mr Mosesi after the respondent had spoken to Mr Haines. Although the appellant disputed that sexual harassment had occurred, the Court noted that Mr Sujee in his evidence for the appellant could not dispute that the respondent had been sexually harassed and that the appellant put up no direct evidence to rebut the respondent's version. As a result, the Court stated that:

> '…*it is not clear what the denial is based on. It is one thing for the* [appellant] *to allege that it is not vicariously liable for the conduct of Mosesi but to deny the alleged conduct of Mosesi without him being called to testify, is rather* (sic) *taking the matter too far. Other than that Mosesi is no longer employed by the* [appellant], *no other explanation was proffered as to why he was not called to testify*.'

[20] Although the respondent had sought a salary increase and had raised the issue with Mr Mosesi in a meeting with him and in writing in March 2009, the Labour Court found that this evidence did not support a conclusion that the allegations of sexual harassment had been fabricated due to her financial situation but that her financial situation had "*rendered* [her] v*ulnerable to Mosesi's manipulations by making promises of training to* [her]".

[21] Although inconsistencies were recognised in the respondent's evidence relating to the dates on which the incidents took place and her failure to mention in cross-examination that Mr Mosesi had stuck his tongue in her mouth during one incident, these were found not "*so material as to cast doubt on the credibility and reliability of the* [her] *testimony*" with the core allegations of sexual harassment uncontroverted. The Court found the respondent a reliable and credible witness who *"broke down several times during her testimony evincing the traumatic effect of the harassment on her"*. There was *"no reason to disbelieve* [her] *version. The fact that she was oscillating about the dates of the incidents…is not sufficient to impeach her credibility and reliability.*" Perhaps the Court should have added that the cross-examination to say the least simply added to the harassment that the respondent suffered.

[22] The Court found that three reports regarding the respondent's predicament had been made. Mr Nick Haines "*because of his own prejudices, opted simply to send* [the respondent] *to go and study the policy* [when] …*he was not in a position to assist* [her]". Ms Elaine Soller's efforts to get hold of the respondent were found to be insufficient. While there was no record of the call to the appellant's employee wellness call centre, the respondent was adamant that she had made the call. The Court found that it was not "*unlikely that the call was not recorded given the advice that the* [respondent] *claims she was given*".

[23] It was found that the respondent's resignation was prompted by a call that she works at the appellant's Hatfield offices where Mr Mosesi was based and that "(b)*eing afraid to meet Mosesi or having to deal with him left* [her] *without any option but to tender her resignation*". She did this by emailing Mr Naidoo, who in turn reported the matter to Mr Sujee.

[24] The Court found that the appellant "*was made aware of the sexual harassment before the employee resigned and failed to take the necessary steps then*"; and that it was only after Mr Sujee, who was recognised to have been a candid and impartial witness who conceded that Mr Haines had not dealt with the matter appropriately, became involved that the matter was appropriately dealt with. The Court consequently found that –

> *'70.2 The Respondent had failed to take reasonable steps in terms of Section 60 of the EEA to protect the Applicant upon becoming aware of the complaint at the earliest opportunity when the Applicant brought it to the attention of the Respondent.*
>
> *70.3 The Respondent only took necessary steps after the Applicant's second resignation letter.*
>
> *70.4 Accordingly, the Respondent failed to protect the Applicant as required in terms of section 60 of the EEA.*"

[25] The appellant sought that the Labour Court impose a punitive cost order against the respondent on the basis that her claim was "*frivolous and vexatious …made without merit*" no such order was made. However, having succeeded on the merits the appellant was ordered to pay costs on the ordinary scale with the matter referred for a hearing on quantum. The parties in due course agreed quantum in the amount of R250 000 and the appellant was granted leave to appeal against the finding on the merits only.

Issues in appeal

[26] In issue in this appeal is whether the Labour Court misdirected itself in:

2.1 failing to apply s 60 of the EEA correctly;

2.2 finding that the respondent had proved on a balance of probabilities that the respondent's manager, Mr Andrew Mosesi, contravened a provision of the EEA in committing sexual harassment;

2.3 finding that the respondent brought the alleged conduct to the attention of the appellant in the manner contemplated by s 60(1) of the EEA;

2.4 finding that the appellant failed to consult relevant parties and take the necessary steps to eliminate the misconduct alleged.

2.5 In the alternative, if sexual harassment was proved –

2.5.1 whether the appellant having had such conduct brought to its attention failed to take the necessary steps set out in s 60(2) of the EEA;

2.5.2 whether the Labour Court erred and misdirected itself by failing to find that the appellant did all that was reasonably practicable to ensure that Mr Mosesi as its employee would not act in contravention of the EEA.

[27] Extensive heads of argument spanning some 97 pages were filed on behalf of the appellant in this appeal. During the course of argument, it was contended that the Labour Court had erred in finding the respondent to have been a

credible and reliable witness when her evidence was unsatisfactory, contained inconsistencies and inaccuracies and her behaviour was inconsistent with that of a person with a genuine complaint. Her evidence, it was argued, displayed an "*inherent lack of logic and probability*" and "*hopelessly contradictory and unreliable*". It was submitted that the Labour Court had been patently wrong in making findings favourable to her credibility when the discrepancies in her evidence indicated that the respondent was a witness who was "*at best psychologically disturbed and at worst, a pathological liar*". Issue was also taken with the respondent's "*pre-occupation with and concern…for a salary increase* [as] *an abiding theme in this matter"*.

[28] The appellant contended that the respondent had failed to bring the conduct to the attention of the appellant in the manner required, but that the appellant's employees had nevertheless responded appropriately to the allegations once raised: Mr Haines referred the respondent to the applicable policy and reported the matter to Ms Soller who sought a meeting with the respondent; Ms Nyathi complied with "*her primary and exclusive duty*" to persuade the respondent not to resign; and the respondent's evidence that she expected Ms Nyathi to take the matter further did not accord with her refusal to let Ms Nyathi contact Mr Mosesi. Consequently, it was submitted that the Labour Court had erred in finding the appellant liable under the EEA.

[29] Issue was taken in argument with the "*highhanded and uncooperative*" way the respondent treated the appellant in refusing to assist in the investigation into the matter after her second resignation letter, contending that her approach was inconsistent with the provisions of the EEA and the 2005 Amended Code on the Handling of Sexual Harassment Cases in the Workplace (the Amended Code).[i]

[30] Counsel for the respondent disputed that the Labour Court had erred in finding for the respondent when the appellant had led no evidence to refute the evidence of sexual harassment. It was submitted that when the respondent raised the matter with Mr Haines he failed to deal with the issue appropriately, but only referred the respondent to the appellant's policy and informed Ms Soller of the conversation he had had with the respondent. Ms Soller had made cursory attempts to contact the respondent and the call centre had failed to assist her appropriately. The respondent's alarm at learning from Mr Mosesi that he had been informed that she had contacted human resources was, it was submitted, understandable. It followed that once the complaint had been brought to the appellant's attention, the relevant parties were not consulted, the necessary steps to eliminate the conduct were not taken and the appellant did not do what was required of it under the EEA.

Evaluation

[31] The EEA requires every employer to promote equal opportunity in the workplace and ensure that no person unfairly discriminates, directly or indirectly, against an employee, in any employment policy or practice on one or more grounds, which include harassment.

[32] In treating harassment as a form of unfair discrimination in s 6(3),[ii] the EEA recognises that such conduct poses a barrier to the achievement of substantive equality in the workplace by creating an arbitrary barrier to the full and equal enjoyment of an employee's rights, violating that person's dignity and limiting their right to equality at work.

[33] Sexual harassment is defined in the Amended Code on the Handling of Sexual Harassment in the Workplace as:

> '*…unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:*
>
> *4.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;*
>
> *4.2 whether the sexual conduct was unwelcome;*
>
> *4.3 the nature and extent of the sexual conduct; and*
>
> *4.4 the impact of the sexual conduct on the employee*.'

[34] Section 60 of the EEA provides that:

> *'(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.'*

[35] While it is clear that s 60 imposes liability on an employer where a provision of the EEA has been contravened,[iii] in its construction and wording the provision is not a model of clarity. The result is that confusion has arisen regarding what is required to prove an employer liability under s60, with the requirements of s 60(2) often being conflated with those of s 60(4). As much was evident in the decision of *Matambuye v MEC for Education and Others,*[iv] in which the Labour Court noted that it was not required to decide whether s 60 (2) refers to steps the employer must take immediately following a report of harassment and whether subsection (4) refers to reasonable steps that the employer must take in advance to eliminate and prevent acts of unfair discrimination.

[36] Much of the lack of clarity as to what must be proved under s 60 centres on s 60(4). The debate has often turned on whether the reference to an employer's obligation "*to ensure that the employee <u>would not</u> act in contravention of this Act"* is intended to mean that the employer take steps in advance to eliminate future conduct. The unduly narrow interpretation given to s 60 in *Mokoena and Another v Garden Art (Pty) Ltd and Another*[v] has, correctly in my mind, been criticised for permitting a conclusion that liability arises only where the harassment is repeated after an initial complaint is lodged and then only

where the employer had failed to take reasonable steps to prevent such further harassment.

[37] It seems to me that a preferable interpretation was given to s 60 in *Biggar v City of Johannesburg, Emergency Management Services*[vi] in which the Court found that the employer had failed to take all necessary steps to eliminate racial abuse perpetrated by its employees and to have failed to do everything reasonably practicable to prevent continued harassment. This followed sustained racial harassment of the applicant and his family by co-employees in residential premises provided by the employer.

[38] The Court in *Potgieter v National Commissioner of the SA Police Service and Another (Potgieter*) usefully set out the requirements for employer liability to arise under the EEA where the complaint raised is one of sexual harassment. These are that:

(i) The sexual harassment conduct complained of was committed by another employee.

(ii) It was sexual harassment constituting unfair discrimination.

(iii) The sexual harassment took place at the workplace.

(iv) The alleged sexual harassment was immediately brought to the attention of the employer.

(v) The employer was aware of the incident of sexual harassment.

(vi) The employer failed to consult all relevant parties, or take the necessary steps to eliminate the conduct will otherwise comply with the provisions of the EEA.

(vii) The employer failed to take all reasonable and practical measures to ensure that employees did not act in contravention of the EEA.

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

Existence of sexual harassment

[40] In disputing the veracity of the respondent's claim that Mr Mosesi had sexually harassed her, the appellant takes issue with the Labour Court's credibility and reliability findings favourable to the respondent and with the Court's conclusion that inconsistencies in her evidence were inconsequential.

[41] It is trite that on appeal, the court lacks "*the advantage of judging the credibility of witnesses by observing their deportment in the witness-box"* [vii] and that credibility findings are not to be judged in isolation, but are to be considered in light of proven facts and the probabilities of the matter.[viii] Where credibility findings are made, an appeal court will disturb such findings where these are plainly wrong or the assessment of the probabilities undertaken was inadequate and unsatisfactory such as to amount to a material misdirection on facts.

[42] The Labour Court formed its view as to the veracity and reliability of the respondent's evidence having regard to her demeanour, the calibre of her testimony, contradictions which arose in her evidence considered against that of other witnesses and the probabilities. It did so without the benefit of Mr Mosesi's evidence, as the only other party to the harassment alleged, who was not called by the appellant to testify.

[43] Remarkable about the appellant's approach to the matter is that it denied the allegations of sexual harassment without direct evidence in support of such denial, making suggestions such as that it was "*instructive*" that the respondent continued to refer to Mr Mosesi as "Andrew" notwithstanding the fact that he had allegedly harassed her.

[44] From the record what is apparent is a vicious and sustained attack launched by the appellant, through its counsel, on the respondent's person, her motives and credibility and the reliability of her evidence over some three days of unacceptably harsh, cruel and vicious cross-examination. The result was that she became victim to unwarranted and unjustified secondary harassment at the hands of the appellant, an issue that was taken up by this Court with counsel at the outset of the hearing.

[45] The Labour Court cannot be faulted for the manner in which it assessed the respondent's evidence. The Court had appropriate regard, in weighing up the evidence before it, to factors which impacted on the respondent's recall of specific dates, including the lapse of time between the conduct and her testifying in court. While the respondent had difficulties in recalling precise dates on which the incidents occurred and omitted details which she had previously included in her founding affidavit, the Court placed limited store on these discrepancies given the extended period of time which had elapsed since the harassment and the nature of the discrepancies, accepting that the respondent had nevertheless proved that she had been sexually harassed by Mr Mosesi.

[46] With no evidence put up by the appellant to contradict her version, the Labour Court cannot be faulted for its finding on the probabilities that sexual harassment occurred. The omissions and inconsistencies in the respondent's evidence did not warrant a wholesale rejection of her version as to the existence of sexual harassment.[ix] The Court cannot be faulted for its finding that the appellant did not succeed in showing that the respondent was motivated to raise false accusations against Mr Mosesi as her superior so as to obtain a salary increase given her financial situation or its finding that her financial situation had "*rendered* [her] v*ulnerable to Mosesi's manipulations by making promises of training to* [her]". There was furthermore no evidence before the Labour Court to support the appellant's unfounded contention that the respondent was intent on extorting money from it by raising false allegations of sexual harassment against Mr Mosesi.

[47] In the circumstances, the Court's finding that the respondent had proved her sexual harassment at the hands of Mr Mosesi must stand. It follows that the Labour Court correctly found that the respondent had proved the existence of conduct amounting to unfair discrimination as defined in the EEA.

Report of the conduct

[48] The appellant takes issue with the respondent's failure to report Mr Mosesi's conduct in the manner required by s 60(1), contending not only that she failed to report the matter in the manner required but also that, to the extent that she may be found to have reported the matter, she failed to do immediately.

[49] The respondent testified that she reported her sexual harassment by her immediate manager to Mr Haines telephonically. There is no reason to reject the Labour Court's finding that the respondent informed Mr Haines that the perpetrator was her immediate manager. Mr Haines accepted in his evidence that he was informed in general terms by the respondent of a complaint of sexual harassment, that he referred her to the appellant's sexual harassment policy for her to determine whether the conduct she complained of constituted harassment and that, in spite of the limited information he received, he was able to report the issue in general terms to Ms Soller the following day. The effect of the report to Mr Haines, even in its general terms, was to place him in a position to understand that the respondent had a complaint of sexual harassment against another employee.

[50] Little turns on the Labour Court's erroneous finding that this conversation occurred on 25 August 2009 or that the report was made at the latter end of a conversation in which the respondent also raised concerns as to her salary given that Mr Haines admits the conversation.

[51] Although the appellant contends that the conduct was not reported immediately, as required by s 60(1), with a delay of some weeks having elapsed between the sexual harassment and the report to Mr Haines, I am satisfied that the requirement that conduct be reported "*immediately*" must be given a sensible meaning. This is done through considering the provision within its context and in a manner, which ensures an interpretation that does not lead to a glaring absurdity, even where the interpretation given may involve a departure from the plain meaning of the words, used.

[52] The stated purpose of the EEA is to provide for employment equity through *inter alia* eliminating unfair discrimination in employment, ensuring the implementation of employment equity to redress the effects of discrimination and achieving a broadly representative workforce. The requirement that conduct in contravention of the Act be brought to the attention of the employer "*immediately*" seeks to place the employer in a position to act in the manner required of it in terms of s 60.

[53] A determination as to whether a report has been made in accordance with s 60(1) requires an assessment of the facts unique to each matter. I am satisfied that the respondent's report of the conduct, while not made immediately, was nevertheless made within sufficient time and that an unduly technical approach to the timing of the report is not warranted on the facts of this case. A glaring absurdity would arise, one which does not accord with the purpose of the EEA, were the report to be found to have failed to comply with s 60(1) simply by virtue of the limited delay which arose between the conduct complained of and the report to the employer.

[54] It follows that the respondent's report to Mr Haines of her sexual harassment by her immediate manager constituted a report of the conduct in the manner required by s 60(1) of the EEA.

Appellant's response to report

[55] Having found that a report was made, what is remarkable about Mr Haines' evidence is that he considered it to be for the respondent to determine whether the conduct fell within the ambit of sexual harassment as defined in the policy and lodge a formal complaint. The respondent's evidence that she found Mr Haines to be dismissive of her in their conversation is borne out by his response to the issue in referring her to the policy and leaving it to her to take further steps. In conceding that more could reasonably have been expected of Mr Haines in his response to the respondent, Mr Sujee's evidence for the appellant was correctly accepted by the Court *a quo*. The effect of the report to Mr Haines, even in its general terms, was to place him in a position to understand that the respondent had a complaint of sexual harassment against another employee. For a senior employee, employed with a large institutional employer, more could reasonably have been expected of Mr Haines, not only in his immediate response to the respondent but in ensuring that the matter was investigated appropriately.

[56] While Mr Haines informed Ms Soller of the conversation with the respondent the following day, including that she had raised the issue of sexual harassment with him, it is remarkable that this spurred neither employee to ensure that they met with the respondent to understand or investigate the complaint. Ms Soller did no more than attempt to make contact (unsuccessfully) with the respondent via e-mail and telephone to request a meeting with her. The respondent was not visited at her workplace for further information to be obtained regarding the issue. The appellant's response was at best superficial.

[57] Regarding the veracity of the respondent's call to its call centre, the Labour Court found that given the nature of the advice provided to the respondent, it was likely that a record was not kept of the call. I can take no issue with such conclusion. It is difficult to understand why the respondent, if the call were not made, would have limited a concocted version simply to that she was advised to approach the CCMA. While the existence of the call only further supports the respondent's case regarding the appellant's failure to act on a complaint received in accordance with s 60(2), even if regard were not had to the call, the appellant failed to comply with s 60(2) given the response of Mr Haines and Mr Soller to the complaint raised.

[58] It follows that the Labour Court correctly found that having brought the conduct to the attention of the appellant, the steps required by s 60(2), to "*consult with the relevant parties*" and take to "*take the necessary steps to eliminate the alleged conduct and comply with the provisions of the Act*" were not complied with by the appellant.

Liability under s 60

[59] The appellant contends that the Labour Court erred and misdirected itself in its approach to liability under s 60. An employer is deemed liable under s 60(3) where the conduct in contravention of the EEA has been proved and the employer failed, under s 60(2) to "*consult with the relevant parties*" and fail to

"*take the necessary steps to eliminate the alleged conduct and comply with the provisions of the Act*".

[60] After Mr Haines and Ms Soller had been informed that the respondent had raised a sexual harassment complaint against her immediate manager, Mr Mosesi informed the respondent that he was aware that she had contacted human resources. The respondent's alarm at being told by her superior of her contact with human resources is understandable given the sensitivity of the report. The effect of informing Mr Mosesi of this communication was that the appellant failed to take the positive steps to protect the respondent in the manner contemplated by both its own policy and the EEA to ensure that Mr Mosesi "*would not act in contravention of this Act".*

[61] The absence of any investigation into the issue until after the respondent had resigned was glaring. The focus of the attention of Ms Nyathi, the respondent's team leader, after the respondent's first resignation letter at the end of September 2009 was to seek her withdrawal of the resignation. Following that resignation having been withdrawn by the respondent, no investigation into the sexual harassment complaint ensued until after the respondent's second resignation letter dated 13 October 2009. Mr Mosesi was not suspended from work until 26 October 2009. It followed that no steps were taken by the appellant after the complaint was reported to ensure that the sexual harassment of the respondent did not continue.

[62] It was contended for the appellant that it was difficult to imagine what other steps the appellant could be expected to have taken in advance to avoid a situation as the present, short of not employing Mr Mosesi. In approaching the matter on this basis, the appellant fails to have regard to its failure to adhere to its own sexual harassment policy in taking "*appropriate action"* when *"complaints are identified and/or raised*" or offering *"appropriate support*" on a confidential basis. While much emphasis is placed on the respondent's refusal to participate in the investigation launched subsequent to her second resignation and her lack of cooperation with disciplinary proceedings against Mr Mosesi thereafter, ultimately resulting in his suspension being uplifted, the evidence shows that the respondent no longer trusted that the appellant had or would take the matter up in the appropriate manner. If nothing more, her stance given the manner of her treatment by the appellant is understandable.

[63] In its approach to the interpretation of s 60 and the hostile manner of its defence to the respondent's claim, the appellant not only failed to have regard to the purpose and objects of the EEA but adopted precisely the response that the EEA seeks to prevent: a failure to recognise the seriousness of the conduct complained of; a lack of interest in resolving the issue in the manner required; a failure to consult and take the necessary steps to eliminate the conduct complained of; and a failure to do all that was reasonably practicable to ensure that its employee would not act in a manner contrary to the provisions of the EEA.

[64] For all of these reasons, the appeal must fail. There is no reason in law or fairness as to why costs should not follow the result. As the quantum of the damages as already been agreed upon between the parties, it is only proper that the amount be included in the order.

Order

[65] In the result, the following order is made:

1. The appeal is dismissed with costs.
2. The appellant pays to the respondent the sum of R250 000 as damages within 10 days of the date of this judgment.

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Savage AJA

Waglay JP and Phatshoane AJA agree.

APPEARANCES:

FOR APPELLANT:	Mr P Buirski Instructed by Hlatswayo Du Plessis Van der Merwe Nkaiseng Attorneys
FOR RESPONDENT: T C Hitge Incorporated	Mr W A Boonzaier

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[i] Issued by the Minister of Labour in terms of s54(1)(b) of the EEA. Para 1 of the 1998 Code; para 4 of the Amended Code.

[ii] Section 6(3) reads: 'H*arassment of an employee is a form of unfair discrimination which is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1)*'. Section 6(1) has expanded upon the grounds of unfair discrimination provided in s 9(3) of the Constitution to include family responsibility, HIV status and political opinion.

[iii] *Piliso v Old Mutual Life Assurance Co (SA) Ltd and Others* (2007) 28 ILJ 897 (LC) at para 15; *Ehlers v Bohler Uddeholm Africa (Pty) Ltd* (2010) 31 ILJ 2383 (LC) at para 49.

[iv] *Matambuye v MEC for Education and Others* [2015] ZALCJHB 455 at para 22.

[v] [2008] 5 BLLR 428 (LC); (2008) 29 ILJ 1196 (LC) at paras 42–43.

[vi] [2011] 6 BLLR 577 (LC).

[vii] *R* v *Abel* 1948 (1) SA 654 (AD) at 659; see too *Mutual Holdings (Bermuda) Limited and Others v Diane Hendricks and Others* [2013] UKPC 13 at para 28.

[viii] *Santam Bpk v Biddulph* 2004 (5) SA 586 (A) at 589F-G with reference to *Protea Assurance Co Ltd v Casey* 1970 (2) SA 643 (A) at 648D-E and *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (A) at 623H-624A

[ix] See *SFW Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para 5.