IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JS 334/2021

In the matter between:

SAJEDA MAHOMED **Applicant**

and

SPECTI VISION TRADING CC **Respondent**

Heard: **13, 14 & 20 June 2024**

Closing arguments: **12 July 2024**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date for hand-down is deemed to be on 17 December 2024**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction and background:

[1] In her statement of claim, the applicant alleged that her dismissal by the respondent was automatically unfair within the meaning of section 187(1)(*d*)

and 187(1)(*f*)[1] of the Labour Relations Act[2] (LRA), and further constituted unfair discrimination in terms of section 6(1) of the Employment Equity Act[3] (EEA). She seeks compensation under section 193(1)(*c*) of the LRA, and under section 50(2)(*a*) and 50(2)(*b*) of the EEA. The respondent opposed the applicant's claim and contended that her dismissal resulted from acts of misconduct.

[2] The applicant was employed by the respondent as a Stock Controller/General Administration with effect from June 2013. The parties had entered into a further contract of employment in March 2015. It is common cause that her services were terminated on 13 January 2021 following a disciplinary enquiry into acts of misconduct.

[3] The respondent operates an optical laboratory. It has a relationship with a company called Nancefield Paints ("Nancefield"), which was contracted to carry out certain functions on its behalf such as all human resources and maintenance. According to Mr Rajesh Harilal, the CEO of Nancefield, the latter is an independent entity from the respondent and is owned by his daughter.

[4] The applicant alleged that she was sexually harassed on 5 November 2020, by Messrs Alfred Mashabela (Mashabela) and Musawenkosi Martin Masuku

---

[1] Section 187 provides as follows:

automatically unfair dismissals

1. A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is—
   1. …
   2. …
   3. …
   4. that the employee took action, or indicated an intention to take action, against the employer by-

1. exercising any right conferred by this Act; or
   (ii) participating in any proceedings in terms of this Act
   1. …
   2. that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility

[2] Act 66 of 1995

[3] Act 55 of 1998.

'6. Prohibition of unfair discrimination.

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

(Masuku), who are both employed by Nancefield as maintenance employees. She alleged that upon reporting the matter to the respondent, no action was taken against them.

[5] The respondent's primary contention was that the allegations of sexual harassment were unsubstantiated, and/or that if it did take place. It contends that the complaint was promptly attended to, and that its obligations under the EEA were met. This was so in that Mashabela and Masuku were suspended on 10 October 2020 after the allegations were investigated, and that they were subsequently subjected to a disciplinary enquiry on 13 November 2020, which had resulted with written final warnings issued to them on 16 November 2020.

[6] The applicant denied that the respondent took any action against Mashabela and Masuku. On 10 December 2020, she had referred a dispute to the Commission for Conciliation Mediation and Arbitration (CCMA) pertaining to the alleged sexual harassment and discrimination, and she contends that the respondent had retaliated by issuing her with a section 189(3) of the LRA notice advising her of possible retrenchment on 24 December 2020. The retaliation was also followed by the respondent in fabricating spurious allegations of misconduct against her, resulting in her dismissal.

[7] That dismissal on 13 January 2021 was preceded by a notice of suspension issued on 11 January 2021. The disciplinary hearing was scheduled for 13 January 2021, and for the applicant to answer to allegations of misconduct related to unauthorised use of company property; intent to extort money from the company, and gross dishonesty. It was further submitted that the dismissal was procedurally and substantively fair.

The issues for determination:

[8] The legal issues that the applicant had raised in her statement of claim were that her dismissal was by virtue of her gender (sexual harassment), which constituted an automatically unfair dismissal under sections 187(1)(*f*) and (*d*) of the LRA, and further that she was discriminated against under the provisions of section 6(1) of the EEA. At the commencement of the trial proceedings, and further in the heads of argument, the applicant's reliance on section 187(1)(*f*)

of the LRA appeared to have been abandoned. In the parties' signed pre-trial minutes, the issues that the Court is required to decide are; whether the dismissal of the applicant was automatically unfair in the light of having exercised her rights in relation to her alleged sexual harassment; whether she was unfairly discriminated against; and whether her dismissal was procedurally and substantively unfair.

[9] The respondent was correct in pointing out that if the Court were to find that there was no substance to the allegations of sexual harassment, then the enquiries into whether the applicant was discriminated against based on her sex, and any liability in terms of section 60 of the EEA[4] became moot.

The *alleged sexual harassment:*

[10] The applicant had known Mashabela and Masuku since 2013 as they were responsible for maintenance at the premises. She testified that on 5 November 2020, she was on the upper floor of the building when she went downstairs to answer a door bell and attend to a person making deliveries. On her way towards the main entrance leading to the reception area, she came across Masuku and Mashabela who were performing some maintenance work. She had greeted them by saying '*Hello, good morning boys',* and they had merely looked at her without a response.

[11] She then proceeded to attend to the delivery person and thereafter, as she was going back to her office, she overheard Mashabela complaining to Masuku that she had called them *'boys' and* further saying that *'that they will show her that*

[4] '**60. Liability of employers.**

(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.'

they were not boys'. At that, she then retorted and asked them whether she should have called them *'boys, girls, babies or moffies'*.

[12] She alleged that both Mashabela and Masuku had reacted to her question by blocking the door as she attempted to proceed to her office. She alleged that they had physically pushed her into a corner and proceeded to touch her on her body including her breasts. She eventually pushed them away from her, before retreating to the front entrance in the reception area, still shouting and screaming for help and ringing the doorbell. Mashabela then followed her across the room, intending to touch her again before she pushed him away.

[13] She testified that the incident was interrupted when her colleague, 'Sharon' came from another part of the building. She told the said Sharon that Mashabela and Masuku were acting '*friendly'* with her and asked her to call the respondent's then National Branch Manager at Nancefield, Mr Shuaib Kahn, who happened to be in the building at the time. She contends that she was scared as the two were 'rough' and 'wild' and their behaviour was unusual. One other employee, 'Lerato' allegedly also saw her crying after the incident. Shortly thereafter, she then went upstairs and emailed a complaint of sexual harassment to HR.

[14] She alleged that Hiralal, also came to the premises and that after she told him about the incident, his response was that she was to blame for provoking it. She testified that despite laying a complaint with HR immediately after the incident, no steps were taken against Masuku and Mashabela, and she had subsequently reported the matter at a police station. She further alleged that she went on 10 December 2020 to the Magistrate Court to obtain a protection order. This was after she heard from 'Lerato' in the morning as she was on her way to work, that both Masuku and Mashabela would be at the premises to perform some maintenance duties.

[15] She denied allegations made by Masuku and Mashabela that some days after the incident and after she had laid a criminal charge against them, she had attempted to extort money out of them in return for not pursuing a criminal case

against them. She contended that after the incident she never spoke to them, and that they had fabricated the version on the instructions of the respondent.

[16] She alleged that Mashabela also had a history of sexually harassing female colleagues at the workplace, and no action was taken against him by the alleged 'victim'. She further testified that the respondent failed to protect her, did not take her case seriously, showed no sympathy, and failed to address her complaint.

[17] She testified that when discussing the matter with Harilal at a later stage and informing him of her discomfort with Mashabela and Masuku being around the premises, his response was that she should stay at home without a salary and effectively forced her to work with them despite her discomfort with their presence. She denied that Mashabela and Masuku were suspended after the incident. This was because she saw them between 6 or 13 November 2020, after they were called to repair damages caused by a break-in at the premises. She contended that she was not made aware of any disciplinary steps against them, nor was she called as a witness to their hearing.

[18] Under cross-examination, the applicant testified that he was used to calling Masuku and Mashabela *'boys'*, and that she was surprised when they were upset with her because she had a good relationship with them. She conceded however that it was inappropriate for her to call them *babies, boys, girls,* or *moffies*. She disputed when it was put to her that Masuku and Mashabela's testimony was that they did not have a friendship with her, and that she had referred to them as *'moffies'*. She contended that she had merely asked them whether she should call them '*moffies*' amongst other terms and conceded that this had upset them.

[19] It was further put to her that when Mashabela and Masuku testified, at no stage was it put to them that she had cried, screamed or shouted during the alleged incident, and that in fact when Kahn came to the premises, she only said to him that the two were *'too friendly'* with her, and did not mention anything about being sexually harassed or touched on her body. She conceded that she did not give Kahn the full details of the incident but contended that it was because

she was too emotional at the time. She further conceded that she did not at any stage during the alleged incident press the panic button or immediately call the police.

[20] Upon being asked about any action taken by the respondent against Masuku and Mashabela, the applicant insisted that at no stage were they suspended, and that in fact they had approached her on 20 November 2020 after HR had issued them with a final written warning to apologise to her. She initially contended that she refused to accept their apology because she wanted the respondent to protect her from them. In the same token, she had testified that she was satisfied that they were issued with final written warnings after an investigation was conducted, and further that she had accepted their apology even though it was belated and only came after they were instructed to do so by HR.

[21] The applicant conceded that from November 2020, she was legally assisted. She confirmed that she had opened a criminal case against Masuku and Mashabela on 13 November 2024. She further conceded that the Magistrate Court did not issue her with a protection order she had sought on 10 December 2020 and she was instead told to go to the CCMA as her complaint was a labour issue. She further contended that she was not aware that the SAPS had not pursued the criminal case against Mashabela and Masuku

The evidence on behalf of the respondent:

[22] Mashabela, whose testimony was corroborated by Masuku testified that they knew the applicant having seen her at the premises at which they regularly came to service machines or perform other maintenance functions. On 5 November 2020, he and Masuku were assigned painting duties at the premises. The applicant came from upstairs to attend to a delivery person and as she passed them towards the main entrance, she greeted them by saying *'hello moffies',* to which they had taken offence but did not immediately say anything to her.

[23] After the applicant had attended to the delivery person and was about to go to her office, Mashabela confronted her and asked her why she had referred to

them as *'moffies'*. He conceded that they were upset and that he had blocked her path towards the door. He however denied that they had at any point pushed or touched her on her body.

[24] At some point they were called to the HR office and were asked questions regarding the incident. On 10 October 2020 they were placed on suspension, and he contends that the suspension was for one week without pay. He confirmed that a final written warning was issued to them on 16 October 2020. He further testified that after the final written warnings, members of the SAPS came to the workplace and questioned them about the incident of 5 October 2020. Mashabela contends that at some point after they had served their suspension, the applicant had approached them and said that if they each gave her R10 000.00, she would drop the criminal charges against them. They did not respond to her but had reported the matter to HR. He testified that they never heard from the police again and had not spoken to the applicant since the incident.

[25] Under cross-examination, Mashabela insisted that he only heard the applicant calling them *'moffies'* and did not hear her calling them *'boys'*. He denied having pushed her or touching her on her body. He further denied that he had fabricated their version about the applicant attempting to blackmail them. He further reiterated that he was suspended and that thereafter they were issued with final written warnings.

[26] Masuku's testimony was that he had ignored the applicant when she called them *'moffies'*. He denied having heard any screaming or shouting from the applicant at the time that Mashabela confronted her. He further denied her allegation that both had pushed her towards a corner and touched her on her body. He also testified after their suspension without pay for a week, they came back to work on 16 November 2020 and were issued with final written warnings. On the same day and on their way from lunch, the applicant had approached them and again greeted them by saying *hello boys*. He corroborated Mashabela's version that the applicant told them to give her each give her R10 000.00 and that she will drop the criminal case against them. They did not respond to her.

[27] Harilal's testimony was that he could not recall who had informed him about the alleged sexual harassment of the applicant on the day that it took place. He was however upset upon hearing it and he went to the premises as he viewed the matter as serious. He spoke to the applicant and had thereafter left the matter for HR to investigate.

[28] On 18 November he had a meeting with HR and the applicant to resolve the matter. At the time, he was aware that Mashabela and Masuku had been suspended. He was further aware that during the incident on 5 November 2020, there were allegations that Mashabela had blocked the door as the applicant attempted to pass through. He was aware that the applicant had opened a criminal case against the two. At that meeting, the applicant's contention was that Mashabela and Masuku should be dismissed, but Harilal's view was that their personal circumstances should be considered.

[29] Harilal testified that at a further meeting held on 9 December 2020, the applicant had demanded that Mashabela and Masuku should not come to the premises and had sought additional protection outside of working hours. Harilal held the view that the applicant sought to hold the respondent to ransom by making unreasonable demands despite action having been taken against Mashabela and Masuku.

[30] Under cross-examination, Harilal conceded that at the meeting held on 9 December 2020, he told the applicant that she could stay at home but that the principle of no work no pay would apply. This was after the applicant informed him that she was uncomfortable in coming to work. He further conceded that when he applicant initially told him of the incident, he had informed her that she had provoked the incident by calling Masuku and Mashabela *moffies*. He contends that this was the information he had received prior to speaking to her.

[31] Kahn's testimony was that he was responsible for *inter alia* HR functions at the respondent. He confirmed that he was aware of the incident at the premises on 5 November 2020 and that the applicant called him and complained that Mashabela and Masuku were *'friendly'* with her. She did not mention anything about being sexually harassed or groped, and Kahn contended that if indeed

the incident took place, there were various security measures in place at the respondent including an armed response and a panic button which she could have activated to get assistance at the time.

The claim under section 60 of the EEA:

[32] As a starting point, there can be no dispute that an allegation of sexual harassment is inherently serious[5]. In the Code[6], sexual harassment is defined as 'unwelcome conduct of a sexual nature that violates the rights of an employee, considering all the factors such as; whether the harassment is on the prohibited grounds of sex and /or gender and/or sexual orientation; whether the sexual conduct was unwelcome; the nature and extent of the sexual conduct; and the impact of the sexual conduct on the employee'. There can further be no doubt that where proven, the consequences of such conduct are dire for both the alleged 'victim' and the alleged 'harasser'. The consequences are even more dire for an employer where it is found that it failed to take any action to address or prevent the conduct from occurring again.

[33] It was correctly submitted on behalf of the applicant that for the purposes of liability, the steps of a section 60 of the EEA claim are that; an allegation of a contravention at workplace must have been made and secondly, that it must have been reported immediately. In this case, and regarding the first and second steps, the Court accepts that after the alleged incident on 5 November 2020, the applicant had sent an email to HR, and informed Kahn and Harilal about it.

[34] The third step under section 60 of the EEA is whether the alleged contravention was proven. It needs to be said from the onset that there are worrying features of the applicant's evidence which in my view created doubt as to the credibility, reliability and probabilities of her versions. Against this observation, there can be no doubt that the applicant had on the day of the alleged incident, greeted Mashabela and Masuku in clearly demeaning, belittling and derogatory terms.

[5] See *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others* [2021] ZACC 14; (2021) 42 ILJ 1643 (CC); [2021] 9 BLLR 861 (CC); 2021 (5) SA 425 (CC); 2021 (10) BCLR 1131 (CC) at para 1

[6] Good Practice on the Prevention and Elimination of Harassment in the Workplace

As to how anyone at the workplace can refer to grown men as *'boys', babies, or 'girls'* is beyond me.

[35] Mashabela and Masuku had however insisted that the applicant in greeting them referred to them as *'moffies'.* This is even more shocking coming from the applicant, given the derogatory nature of the term. It is irrelevant whether she had referred to them in any of the terms including '*moffies'* or whether she had merely asked them whether she should greet them in those terms. That type of language has no place in a work environment, let alone in a democracy where the rights of everyone irrespective of their sexual orientation are protected. At the very least, the applicant had conceded that it was neither appropriate nor acceptable to use such terms at the workplace.

[36] Notwithstanding the above, upon a consideration of all the evidence regarding the alleged conduct, the most probable version is that as Mashabela and Masuku testified, the applicant had greeted them by referring them as *'moffies'* and other disrespectful terms, which by all accounts justified them in being upset and confronting her. As to however they had reacted in the manner described by the applicant is doubtful on the overall facts, including her own version.

[37] Mashabela and Masuku had conceded that the latter had blocked the door and her path when confronting her. They had however denied ever pushing or touching her on her body including groping her. The applicant had alleged that she had screamed, shouted and fought them off until Sharon came, who allegedly heard those screams and saw her crying. The said Sharon was not called upon to testify, nor was there any attempt to subpoena her for the purposes of corroborating the applicant's version. Equally so, and as I understood from the evidence, there were other employees in the building who were in their offices and it is curious that none of them could have heard her screaming and shouting or crying. Added to that were other security measures in place including an alarm system which for some reason was not activated by the applicant even after the alleged incident had stopped, combined with surveillance cameras at the premises which I will address shortly.

[38] The applicant when reporting the incident immediately after it took place to Kahn, made no mention of screaming, shouting, pushing and groping. All that she had mentioned was that Mashabela and Masuku were '*friendly'* with her. Whatever *'friendly'* meant was however not explored with her either in her examination in chief or cross-examination, nor is it for the Court to speculate on what that meant. There is however a huge difference between employees being *'friendly'* to each other, and an employee being subjected to sexual harassment/assault in the manner described by the applicant.

[39] Some eight days after the incident, the applicant had reported the matter to the police, and on her version, and after a statement was taken from her, she was allegedly told to get a video footage of the area. Equally so, nothing happened after the criminal case was laid against Mashabela and Masuku even after they were questioned, and there was no discernible evidence to indicate that the applicant had pursued the matter.

[40] It appears that the applicant's primary source of proof of the alleged sexual assault would have been the video footage of the premises where it is alleged to have taken place. The evidence as shall further be demonstrated within the context of the misconduct dismissal, was that the applicant had without authorisation, accessed the Director's office and his computer, and thereafter retrieved the video footage of the area where the alleged incident took place. That video footage, and without the Court having had the benefit of viewing it, did not on the applicant's own version, prove any form of sexual assault on her by Mashabela and Masuku. When asked as to the reason that the footage did not prove anything, her reasoning was that the camera in the premises did not capture everything.

[41] The submissions made on behalf of the applicant that the probabilities supported the occurrence of the incident on her version because she had reported it to the police resulting in an investigation and the taking of statements at the respondent, are in my view meritless. There is a difference between reporting a serious matter such as sexual assault at a police station and not taking any action in ensuring that it is brought to finality. The mere reporting of a crime without more, does not mean that it took place. In this case, no evidence

was tendered to demonstrate what the applicant had done to pursue the matter, more specifically since she had obtained what she considered as proof of the incident.

[42] In the end, the Court accepts that given the inherent serious nature of the offence of sexual harassment/assault, on a consideration of all the facts in this case, the applicant, even on her own version, failed to present a probable, credible or reliable version, for a conclusion to be reached that she was subjected to sexual harassment by Masuku and Mashabela in the manner she had described. At the most, Mashabela had confronted her after she had belittled them in derogatory terms and had blocked the doorway as she attempted to go back to her office. Be that as it may, Mashabela's conduct *albeit* unacceptable, cannot in my view be classified as constituting a contravention of sections 6(1) and (3) of the EEA or as sexual harassment, for the purposes of liability under section 60 of the EEA.

[43] The fourth and final step relates to whether the applicant had proven that the respondent failed to take the necessary steps. Against the improbabilities of the applicant's version that she was sexually harassed or assaulted, ordinarily, it would not even be necessary to demonstrate whether the respondent took any steps against the alleged harassers. The Court however appreciates that any form of complaint at the workplace that may constitute or be construed as sexual harassment, deserves the urgent attention of the employer. This is so in that under Item 8 of the Code, the employer is obliged in terms of Section 60 of the EEA to *inter alia,* to take proactive and remedial steps to prevent all forms of harassment in the workplace. The employer is also obliged to have an attitude of zero-tolerance towards harassment and create and maintain a working environment in which the dignity of employees is respected.

[44] In *Mokoena and Another v Garden Art (Pty) Ltd and Another*[7]*,* it was held that the employer became liable in terms of section 60 of the EEA, where the alleged harassment was brought to its attention, and that it however failed to take proper steps to prevent such harassment in the future. The Court further held

[7] [2007] ZALC 90; [2008] 5 BLLR 428 (LC); (2008) 29 ILJ 1196 (LC)

that where the employer had reacted to employee's report of sexual harassment by issuing a written warning, and where no further incidents had occurred, the employer was not liable in damages to the employees.

[45] Against the obligations imposed in the Code, it is accepted that after the alleged incident, the applicant had laid a complaint with HR. She also reported the matter to the SAPS and subsequently referred a dispute to the CCMA on 10 December 2020 pertaining to the alleged sexual harassment and payment of certain monies allegedly due to her.

[46] From the evidence tendered by Kahn and Harilal, it can be accepted that the steps taken by the respondent in suspending Mashabela and Masuku on 10 October 2020, the hearings held on 13 October 2020, and the final written warnings issued to them on 16 November 2020, were effected without the applicant's involvement.

[47] The submissions made on behalf of the applicant were that to the extent that any meeting of some sort with Mashabela and Masuku occurred, it did not amount to a "hearing" as it did not meet the basic principles of a hearing such as *audi alteram partem* or the principle of open justice, and that the probabilities were that no such hearing occurred at all, and that no steps were taken against them.

[48] Mashabela and Masuku were insistent that they were suspended on 10 October 2020 for a week without pay, on allegations of sexual harassment and had returned to work on 16 October 2020. A hearing is said to have taken place on 13 October 2020. Upon their return to work on 16 October 2020, they were issued with final written warnings for 'assumed sexual harassment complaint', and warned not to speak or approach the applicant.

[49] In the light of the disputes, the first issue is that it was never put to any of the respondent's witnesses that the copies in the bundle of documents in support of the steps taken against Masuku and Mashabela (*i.e*., notices of suspension and of the final written warnings) were manufactured. Inasmuch as it should be accepted that the disciplinary steps against Masuku and Mashabela were procedurally irregular to the extent that they did not involve the applicant as the

complainant, it is my view however that this irregularity did not imply that some steps were not taken against them. This is particularly more pertinent in circumstances where as shall be elaborated below, the applicant had ultimately conceded that indeed steps were taken against Mashabela and Masuku.

[50] It was correctly pointed out on behalf of the respondent in reference to *Mokoena and another v Garden Art Ltd and another*[8], that an objective assessment must be made of all of the steps taken by the respondent as a whole, to ascertain if they were reasonable to the extent of avoiding liability accruing under section 60 of the EEA.

[51] Against the above principles, the applicant under cross-examination had notwithstanding her denials that any steps were taken, reluctantly conceded that Masuku and Mashabela had apologised to her after they were issued with final written warnings. She had however vacillated between denying that she had accepted their apology because she wanted the respondent to protect her, and that she had accepted it even if it came after a period had passed since the incident. She nonetheless conceded that the final written warnings came after an investigation was conducted. It is equally contradictory for the applicant to contend that no steps were taken against Mashabela and Masuku, when in the same token, she conceded that they were issued with final written warnings and had apologised to her, which apology she had or had not accepted. Furthermore, it was not in dispute that because of the incident, other than the steps taken against Masuku and Mashabela, Harilal and Kahn held meetings with the applicant about the incident on 18 November 2020 and on 9 December 2020.

[52] In the light of the above observations, it ought therefore be concluded that since there was no evidence of any contravention on the part of Masuku and Mashabela, and further since notwithstanding, the respondent had demonstrated that it did all that was reasonably practicable to ensure that Mashabela and Masuku would not act in contravention of this Act, it follows that the claim under section 60 of the EEA ought to fail. Further in the light of these

[8]At para 63

conclusions, one cannot therefore speak of any discrimination towards the applicant under section 6(1) and (3) of the EEA.

[53] Equally of no consequence is the allegation by Masuku and Mashabela that upon their return, the applicant had approached them and attempted to extort money out of them in return for withdrawing the criminal case against them. The Court takes the view that this issue does not take the matter any further in the light of the legal issues to be determined.

The alleged automatically unfair dismissal claim:

[54] The answer to the question whether a dismissal in the context of the facts of this case was automatically unfair cannot in my view, be dependent on the merits or lack thereof of the sexual harassment claim. The provisions of section 187(1)(*d*) of the LRA are more concerned with the protection of an exercise of a legal right by an employee against the employer, irrespective of whether there is any merit in the legal right asserted or not. This is so in that under our Bill of Rights everyone is guaranteed a multitude of rights, including the rights to equality and freedom from discrimination; the right to dignity and integrity of body and personality. Above all, under section 23, every employee is guaranteed the right to fair labour practices. The latter rights in particular find expression in the LRA, the EEA and to a large extent, the Code , under which the applicant sought to assert them.

[55] It was common cause that after the alleged incident, the applicant had referred a dispute to the CCMA on 10 December 2020, alleging sexual harassment and other claims. I have already dealt with steps taken against Masuku and Mashabela, and also made reference to two meetings held with the applicant.

[56] The basis of the applicant's automatically unfair dismissal claim was that her dismissal was in retaliation for referring a dispute to the CCMA. She had further sought to place reliance on a notice in terms of section 198(3) of the LRA for the proposition that this was part of the retaliation process. In the end however, it was common cause that the said notices were issued to all employees, and that ultimately, none of them were retrenched.

[57] It was common cause that upon her return to work after the December closure, the applicant was called to the HR office where she was issued with a letter of suspension and subsequently dismissed for misconduct. Kahn was the initiator at the internal disciplinary hearing for the applicant and disputed that the disciplinary enquiry had anything to do with the fact that she had lodged a dispute at the CCMA. A Mr Shiraz was the chairperson of the hearing.

[58] Kahn testified that the applicant was suspended on 11 January 2021 and had appeared before a disciplinary enquiry on 13 January 2021. One of the allegations against her were that she had used company property without authorisation. The charge emanated upon the incident of 5 November 2020. The applicant had without authorisation, accessed the Director's office and computer. The applicant had retrieved footage of the premises where the alleged sexual harassment took place from a DVR (a digital video recording system) and copied it to her private phone. The DVR system is according to Kahn, password protected, and only him and the Director had access to it. It is not known how the applicant could have accessed it. Kahn testified that it was 'Lerato' who informed him of the applicant's conduct, and who was the same 'Lerato' that the applicant had alleged had assisted her in gaining access to the computer.

[59] The applicant according to Kahn, initially denied the incident but subsequently conceded that she had indeed accessed the Director's office and his computer without permission and copied the video material onto her personal phone. Kahn held the view that because of her conduct, the applicant had breached the respondent's security system, which conduct broke any trust relationship between the parties as she was dishonest.

[60] Khan conceded that at some point the applicant had asked for the video footage as she had opened a criminal case against Mashabela and Masuku. Although the applicant had already made a copy of the video material, Khan however contended that he could not give it to her at that time because the footage for the day in question had been overwritten as it was only stored for twenty days to maintain the memory capacity of the system.

[61] Kahn testified that a second charge levelled against the applicant was that she had attempted to extort money out of the respondent and threatened that he will ‘show the respondent who she was’. Kahn testified that previously, the applicant was issued with final written warning on 16 October 2019 for asking for money from the respondent’s suppliers without permission.

[62] The third charge related to gross dishonesty in that on 10 December 2020, she went to the CCMA to lodge her referral. In the morning thereof however, she had called the respondent and alleged that she had overslept and had problems coming to work. She did not take official leave of absence according to Kahn but had simply absconded to attend to her private matters at the CCMA. Kahn testified that the applicant had also testified regarding an incident when she abandoned work and went to report the incident at the police station, and without informing anyone of her absence.

[63] Kahn further testified that the applicant was not dismissed due to any claims of sexual harassment she had lodged at the CCMA, but purely for acts of misconducts he had outlined.

[64] Regarding the charge of unauthorised use of company property, the applicant in her defence testified that after she had lodged a criminal case, an investigating officer from SAPS took a statement from her and told her to get a video recording of the incident. On 18 and again on 20 November 2020, she had asked Kahn for the video footage to take it to the police station in pursuing his case against Mashabela and Masuku. Kahn at the time said that he was busy. On 25 November 2020, she had again asked Kahn, who informed him that the material was deleted after 20 days.

[65] She conceded that she had accessed the office and computer of the Director, and recorded the video footage on her phone, but contended that she was assisted by Lerato. She disputed that she had no access to the office and the computer as she was allowed to work on the system, which according to her did not require a password. She contended that she had no choice but to retrieve the video material in the manner that she did, because she needed it for her criminal case and further since Kahn had refused to make it available.

[66] Under cross-examination, the applicant contended that she accessed the video footage on 24 November 2020 after the SAPS investigating officer had taken a statement from her and told her to get the footage. In the same token, she did not know whether SAPS had formally made a request for the footage, and it was put to her that it was for the first time that she mentioned anything about the SAPS instructing her to obtain the footage. Furthermore, she conceded that she obtained the video footage on her own volition, after Kahn had refused to give it to her. When it was put to her that her conduct of accessing the Director's computer amounted to hacking, she merely responded by saying *'okay!'*.

[67] She conceded that she never requested the footage formally from Kahn other than speaking to him about it, and it was put to her that she did not have permission to access it. When asked about what the contents of the video were, she conceded that that the footage did not prove anything or reveal any form of sexual assault on her by Masuku and Mashabela . She however contended that the surveillance camera failed to capture the entire incident.

[68] Regarding the other charges, she conceded that she was previously issued with a final written warning for asking money from the respondent's clients. She further conceded that because of her conduct in accessing the director's office and computer, investigations were conducted over a period, hence she was only suspended and charged in January 2021

[69] Regarding the charge of gross dishonesty, she testified that on 10 November 2020, she overslept and was dropped off the taxi rank to take her to work. Since the taxi took long to fill up, she then called her husband to fetch her and take her to work. Along the way to work, she received a call from Lerato, who told her that Mashabela and Masuku were at the premises performing some maintenance work. She alleged that she had panicked as she did not want to be near Mashabela and Masuku, and she went to the police station to obtain a protection order. The Magistrate Court had refused to issue the protection order and she was advised to go to the CCMA to lodge a dispute. Once she was done at the CCMA she then went back home. She testified that she did not lie about her absence, and that the reason she did not go to work was that she just did not want to work with Mashabela and Masuku.

[70] She contended between being at the Magistrate Court and the CCMA, she had sent SMSes and emails to the employer explaining her absence. Between 10 December 2020 and 11 January 2021, nothing of significance took place until she went back to work and was issued with a notice of suspension. She denied that she had committed any misconduct to deserve a dismissal and contended that the respondent merely retaliated after she lodged a dispute at the CCMA.

[71] Under section 187(1)(*d*) of the LRA, a dismissal of an employee will be deemed to be automatically unfair if the reason for that dismissal was that the employee *inter alia*, took or intended to take legal action against the employer, *i.e*., by exercising any right conferred by the LRA or participating in any terms of the LRA.

[72] In instances where a dismissal is not disputed, the employer bears the onus to prove that the dismissal was for a fair reason permitted in section 188 of the LRA. However, where an employee alleges that a dismissal was automatically unfair, it is incumbent upon that employee to demonstrate, *prima facie*, the said claim. In *De Bruyn v Metorex Proprietary Limited*[9]*,* the Labour Appeal Court (LAC) reiterated that section 187 imposes an evidential burden on the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place, and that it thereafter behoves the employer to prove the contrary by producing evidence to show that the reason for the dismissal did not fall within the circumstances envisaged in section 187 for constituting an automatically unfair dismissal.

[73] Equally so, it has further been held that an applicant seeking to establish that a dismissal is automatically unfair on any of the grounds listed in section 187(1) of the LRA must meet the requirements of causation[10]. This was restated in *DBT Technologies (Pty) Ltd v Mariela Garnevska*[11] as follows;

[9] [2021] ZALAC 18; [2021] 10 BLLR 979 (LAC) at para 26. See also *Kroukam v SA Airlink (Pty) Ltd* [2005] ZALAC 5; (2005) 26 ILJ 2153 (LAC); [2005] 12 BLLR 1172 (LAC) at para 28, per Davies AJA (As he then was); *Commercial Stevedoring Agricultural & Allied Workers Union on behalf of Dube & others v Robertson Abattoir* (2017) 38 ILJ 121 (LAC) at paras 16-17.
[10] See *Legal Aid South Africa v Jansen* [2020] ZALAC 37; (2020) 41 ILJ 2580 (LAC); [2020] 11 BLLR 1103 (LAC); 2021 (1) SA 245 (LAC) at para 35.
[11] [2020] ZALAC 26; [2020] 9 BLLR 881 (LAC); (2020) 41 ILJ 2078 (LAC).

> 'To reiterate: the respondent's pleaded cause of action is that she was dismissed on the prohibited ground in section 187(1)(d) of the LRA. The appellant says the reason for her dismissal was dishonest misconduct. Whether a dismissal is automatically unfair is essentially an enquiry into its causation and whether the reason for the dismissal was one of the grounds listed in section 187(1) of the LRA. The essential inquiry under section 187(1)(d) of the LRA is whether the reason for the dismissal was "that the employee took action, or indicated an intention to take action, against the employer" by exercising any right conferred by the LRA or participating in any proceedings in terms of the LRA. The test for determining the true reason is that laid down in *SA Chemical Workers Union v Afrox Ltd*. The court must determine factual causation by asking whether the dismissal would have occurred if the employee had not taken action against the employer. If the answer is yes, then the dismissal is not automatically unfair. If the answer is no that does not immediately render the dismissal automatically unfair; the next issue is one of legal causation, namely whether the taking of action against the employer was the main, dominant, proximate or most likely cause of the dismissal.'[12]

[74] The court in arriving at a decision about what the main, dominant, proximate or most likely reason for a dismissal was, must other than having regard to the pleaded case, also consider the evidence presented, based on the credibility and reliability of witnesses, as well as the probabilities**.** This is particularly so in cases such as these, where the facts were highly disputed. This therefore required resolution through the application of the test set out in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others*[13].

[12] At para 14.

[13] [2002] ZASCA 98; 2003 (1) SA 11 (SCA) at para 5 where it was held;

> "On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same

[75] Against the above legal principles, the pleaded cases and the evidence of the parties as summarised above, it is my view that based on the credibility and reliability of the applicant's version, as well as the probabilities thereof, the referral of the alleged sexual harassment claim to the CCMA, cannot by any stretch of imagination be deemed to be the main, dominant, proximate or most likely reason for her dismissal for the following reasons;

[76] The timeline of events since 05 November 2020 demonstrates as already concluded and accepted elsewhere in this judgment, that as of 16 November 2020, the respondent had taken steps against Masuku and Mashabela. The applicant, notwithstanding her vacillation, had ultimately conceded that steps were indeed taken against Mashabela and Masuku, including that she had accepted their apology on or about 20 November 2020, *albeit* the apology was belated.

[77] She had notwithstanding the above, referred a dispute to the CCMA on 10 December 2020, and on her version, nothing of significance took place between that period until the respondent closed for a December break. During the break period, the respondent having received information from Lerato about the conduct of the applicant in the Director's office, had conducted its own investigations and established cause to subject the applicant to a disciplinary process, hence her suspension and dismissal.

[78] It is trite that employees cannot use the provisions of section 187(1) of the LRA as a shield against disciplinary processes related to misconduct against them. The Court has made its conclusions regarding the alleged sexual harassment claim and the issue is whether despite the merits of the referral, there was cause to dismiss the applicant.

---

incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[79] Against the evidence of misconduct and the applicant's defences, the Court holds the view that indeed there was cause for the respondent to take disciplinary action against her, and whether the dismissal was procedurally and substantively fair is not for this Court to determine as shall be discussed below. It follows that the allegation that the applicant was dismissed because she asserted her rights at the CCMA regarding the alleged sexual harassment lacks merit. She has not discharged the evidential burden placed on her by producing evidence which was sufficient to raise a credible possibility that an automatically unfair dismissal took place. On the other hand, from the evidence as produced by the respondent, and further based on the application of the legal causation test, it is concluded that the most proximate reason for the dismissal was the misconduct, and that dismissal did not fall within the circumstances envisaged in section 187(1)(*d*) of the LRA. In the end, there is no causal link between her dismissal for misconduct and her referral of a dispute to the CCMA.

[80] It was common cause that the applicant had referred her unfair dismissal dispute to the CCMA on 14 January 2021 under Case Number GAJB 890-21, and a certificate of outcome was issued in that regard on 4 February 2021. Even though the Court was asked to determine the procedural and substantive fairness of the dismissal, it however lacks jurisdiction to do so based on the provisions of section 158(2) of the LRA, which provide that at any stage after a dispute has been referred to the Court it becomes apparent that the dispute ought to have been referred to arbitration, the Court may *inter alia*, stay the proceedings and refer the dispute to arbitration. The Court was not informed of any basis upon which it should determine that dispute under section 158(2)(*b*) of the LRA.

[81] I have further had regard to the requirements of law regarding costs. Even though I am of the view that the claims under section 187(1)(*d*) of the LRA and that of discrimination under section 6(1) and (3), and further section of the EEA were meritless, I am nonetheless of the view that the requirements of law and fairness militates against an order of costs. The most appropriate order therefore in this regard is that each party must be burdened with its own costs.

[82] In the premises, the following order is made:

Order:

1. The applicant's claims are dismissed.

2. The applicant's claim of substantively and procedurally unfair dismissal is stayed and referred to the CCMA for determination under Case Number GAJB 890-21.

3. There is no order as to costs.

_____

Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Adv. N.A. Moyo, instructed by Africa & Associates Attorneys.
For the Respondent:	Adv. N. Deeplal, instructed by Cuzen Randeree Dyasi Incorporated.